



Case No: C86YX712

IN THE COUNTY COURT
SITTING AT BIRMINGHAM

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6/05/2020

Before :

DISTRICT JUDGE LUMB

Between :

TARA PURCHASE
- and -
DR. MAHMUD AHMED

Claimant

Defendant

Esther Gamble (instructed by **Talbots Law Limited**) for the **Claimant**
Tom Gibson (instructed by **The Medical Protection Society**) for the **Defendant**

Hearing dates: 16 September 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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DISTRICT JUDGE LUMB

District Judge Lumb :

Introduction

1. This application is made by the Defendant in as sensitive a way as it could be, in what is a very tragic case. The application is to strike out and/or be granted summary judgment in the Claimant's claim for damages for psychiatric injury sustained by her as a secondary victim immediately after her discovering her 20-year-old daughter's body following her unexpected death at home caused by alleged, but not admitted, negligence of the Defendant, a GP, operating from an out of hours clinic, in failing to diagnose and treat appropriately, the deceased's pneumonia.
2. Secondary victim psychiatric claims in clinical negligence cases has become a topical subject of discussion amongst legal practitioners. I would not go so far as Mrs Gamble did in her submissions to accept that clinical negligence cases are a special category of case in their own right in this area. A careful consideration of the authorities reveals that the same principles apply but the factual circumstances in clinical negligence cases are often necessarily very different from accident cases.
3. Upon my reading of the authorities I can see no support for the contention that the law in relation to secondary victim claims in clinical negligence matters is a developing jurisprudence that would in itself provide a sufficient reason to dismiss a strike out/summary judgment application (**Farah v British Airways [2000] CA**). Both parties can find passages of obiter dicta to support their submissions in the bundle of authorities produced to me but ultimately it is the **Alcock** principles in relation to control mechanisms that prevail and provide the test that must be applied for actionable secondary victim claims.
4. The more difficult task is applying the particular factual circumstances of the individual case to the **Alcock** control mechanisms to see whether that case falls within the class of actionable claims. What the subsequent authorities provide are really only examples of the application of those principles in the particular circumstances of those cases. Although applying the factual circumstances of any instant case is a far from straightforward exercise, a careful study of the approach of the Court in each of the authorities allows us to glean the parameters of which factual circumstances fall within and out of scope. Those parameters set by the Senior Courts are binding upon this Court.
5. The authorities provide a labyrinthine path. Different cases which appeared to have very similar facts at first blush have resulted in different conclusions and outcomes. However, detailed analysis of each of the binding authorities comes down to consistent decisions based on the application of the particular facts of the case to the principles laid down in **McLoughlin v O'Brien** and then the control mechanisms set out in **Alcock**. This has led to what has been described as "*a patchwork quilt of distinctions which are difficult to justify*".

The application

6. Section 3 of the Defendant's application dated 16 January 2019 -what order are you asking the Court to make and why? - reads as follows;

- *The Claimant does not satisfy the strict "control mechanisms" for secondary victim claims for psychiatric injury and the Claim be struck out pursuant to CPR 3.4 (2) on the basis that there are no reasonable grounds for bringing the claim.*
- *Further, there be summary judgment for the Defendant pursuant to CPR 24.2 on the basis that the Claimant has no real prospect of succeeding on the claim or and (sic) there is no other compelling reason why the case or issue should be disposed of at trial*

7. In support of the application there is a witness statement of the solicitor with conduct on behalf the Defendant, Mr Joseph McCaughley. The statement explains the background to the claim as follows;

"The Claimant, Mrs Tara Purchase, brings a primary claim under the provisions of the Law Reform (Miscellaneous Provisions) Act 1934 in her role as administrator (sic) of the estate of her late daughter, Miss Evelyn Purchase, and in her own right alleging that she is a secondary victim.

The allegations relate to a consultation the Defendant had with the deceased starting at 9:58 PM on 4 April 2013. The Claimant alleges that the Defendant was negligent at this consultation, in that, he did not recognise the severity of the deceased's presentation and discuss admission to hospital. Had the deceased been admitted to hospital, the Claimant says the treatment and monitoring would have been instigated, and as a result the deceased would have made a full recovery. The Claimant returned home at about 4:50 AM on the morning of 7 April 2013 and found the deceased had passed away, as a result of which she now suffers post-traumatic stress disorder (PTSD).

The primary claim was resolved by the parties with no admission of liability by the Defendant on 2 July 2018. The Defendant denies that the Claimant can succeed with the secondary victim claim in law. It is bound to fail because the Claimant cannot satisfy the strict "control mechanisms" for secondary victim claims for psychiatric injury.

The Claimant must be in close proximity in space and time to the relevant event or its immediate aftermath. There are two distinct meanings of proximity, legal proximity (whether there is a duty of care at all) and physical proximity (one of the control mechanisms for determining whether there is legal proximity and therefore a duty of care).

The Claimant's secondary victim claim is set out in paragraph 66 of the Particulars of Claim. In summary, the Claimant avers that:

The event was caused by the negligence of the Defendant; she had a close tie of love and affection to the deceased; she was present at the shocking event; and that she suffered PTSD, severe chronic anxiety as a result.

The Defence denies that even if the entire factual premise of the Claimant's claim as detailed in the Particulars of Claim were to be accepted in full, could the Claimant succeed with the secondary victim claim. The Claimant's case is misconceived as it relies largely on the wrong event, i.e. the Claimant having found the deceased having sadly passed away.

The Defendant's position is that the relevant event cannot be the deceased's death alone because it occurred sometime after the alleged negligence. The relevant event is the consultation beginning at 9:58 PM on 4 April 2013, not the consequences of that consultation early in the morning of 7 April 2013. There is no physical proximity in space and time to the relevant event. The Claimant can only succeed in satisfying this control mechanism if she suffered shock from witnessing the relevant event or its immediate aftermath, which is not the case with the Claimant – she witnessed the consequence of the alleged negligence. On that basis the Defendant contends that the Claimant's claim cannot succeed in law.”

8. There is no witness statement in reply filed on behalf of the Claimant. This is not surprising as for the purposes of this application the Claimant is entitled for the Court to assume that the facts set out in the Particulars of Claim will be found to be proved in her favour including a finding of negligence. The burden of proving that the Claimant has no reasonable claim in law and/or that claim has no real prospects of success is upon the Defendant.
9. Both parties' arguments are then expanded upon in their respective skeleton arguments and in their oral submissions before me. I am very grateful to both counsel for their considerable assistance in helping the Court to pilot its way through a difficult application.

The relevant assumed facts

10. The relevant facts for the purposes of this application were most helpfully summarised in paragraph 8 of the Defence and repeated in Mr Gibson's skeleton argument. They are as follows;
 - a) The Claimant and the deceased attended an out of hours GP consultation with the Defendant at 21:58 on Thursday, 4 April 2013.
 - b) On breach of duty, the Claimant alleges that the Defendant was negligent during the consultation in various ways.
 - c) Following the consultation, the Claimant and the deceased returned home. The deceased stayed at home, without receiving any further medical treatment, on Friday, 5 April 2013 and Saturday, 6 April 2013.

- d) On the evening of Saturday, 6 April 2013 the Claimant went out to London, with her younger daughter, for pre-planned birthday celebrations.
- e) The Claimant returned home at around 4:50 AM on 7 April 2013. She found her daughter unresponsive; a paramedic later pronounced that her daughter had died. She also discovered a voicemail message from her daughter, left shortly before her death (as is described in greater detail in the Particulars of Claim paragraphs 42 – 60).
- f) The Claimant developed psychiatric injury as a result of witnessing the event described in paragraphs 42 – 60 above.
- g) On causation, with a reasonably competent GP consultation on 4 April 2013, the deceased would have received further treatment before her death and would have survived, making a full recovery.

The Law

- 11. The relevant power to strike out a statement of case is found in CPR 3.4 (2) (a): *“the Court may strike out a statement of case if it appears to the Court (a) that the statement of case discloses no reasonable grounds for bringing the claim...*
- 12. The notes in the White Book make it clear that an application for strike out should not be granted unless the Court is certain that the claim is bound to fail. Mr Gibson submits that the Court can be certain of this. Mrs Gamble submits that there is a lack of clarity in the law concerning secondary victims and clinical negligence claims and therefore the Court cannot be certain that the claim is bound to fail.
- 13. She also prays in aid ECHR article 6 – the right to a fair trial – in exercising the power to strike out the Court would be applying the rules in such a way as to exclude an entire category of claims from the Courts or confer blanket immunities from civil liability on particular groups. She submits that the Defendant’s argument – that it is only if the active clinical breach of duty itself is so shocking as to cause psychiatric injury that the secondary victim claim can succeed – would exclude the overwhelming majority of clinical negligence from the realm of secondary victim claims, as clinical actions and decisions by medical professionals are very rarely shocking in themselves (often consisting of a decision, or an omission to act), in sharp contrast to breaches of duty in personal injury claims.
- 14. The power to give summary judgment is found in CPR 24.2:
The Court may give summary judgment against the Claimant or Defendant on the whole or part of the claim or on a particular issue if (a) it considers that the Claimant has no real prospect of succeeding on the claim or issue... and (b) there is no other compelling reason why the case or issue should be disposed of at trial.

15. The prospect of succeeding is real if the case is better than merely arguable: it is not necessary to show that the case will probably succeed at trial. The hearing of an application for summary judgment is not a summary trial: the Court should consider the merits of the case only to the extent necessary to determine whether it has sufficient merit to proceed to trial.
16. Application for summary judgment is not appropriate to resolve a complex question of law and fact, the determination of which necessitates a trial of the issue having regard to all of the evidence. Mrs Gamble submits that the law in this area is complex and arguably unclear and it is therefore wholly inappropriate for it to be determined on a summary basis rather than following a full trial. She further submits that the complexity and lack of clarity of the applicable law means both that it would be wrong to conclude that the Claimant has no real prospect of succeeding in the claim, but also that there is a compelling reason why the case should be disposed of at trial.

The authorities and what they tell us

17. The following authorities were referred to me in an agreed bundle during the hearing:
McLoughlin v O'Brien [1983] 1 AC 410,
Alcock & Ors v Chief Constable South Yorkshire Police [1992] 1 AC 310,
Walters v North Glamorgan NHS Trust [2002] EWCA Civ 1792,
Taylor & Anr v A Novo (UK) Ltd [2013] EWCA Civ 194,
Liverpool Women's Hospital NHS Foundation Trust v Ronayne [2015] EWCA Civ 588,
Wild v Southend University Hospital NHS Trust [2014] EWHC 4053 (QB),
Shorter v Surrey & Sussex Healthcare NHS Trust [2015] EWHC 614 (QB),
Werb v Solent NHS Trust, Priory Hospital Southampton (unreported) (Master Roberts 15 March 2017)
18. I do not consider that it would be beneficial for me to set out in detail the facts or considerations in each of the authorities that were referred to me. I have, however, during the course of the preparation of this reserved judgment read each of those authorities a number of times and considered them very carefully.
19. **McLoughlin** sets out 3 key elements that had to be satisfied in order to establish a right to pursue damages for what was then called nervous shock but which is now commonly referred to as secondary victim claims.

These are;

- i. The class of persons whose claim should be recognised: the Claimant must have a close tie to the injured person, and the closer the tie, the greater the claim for consideration
 - ii. The proximity of such persons to the accident: the Claimant must have close proximity, in both time and space, to the accident with the Court noting that it is after all the fact and consequences of the Defendant's negligence that must be proved to cause the nervous shock. Further one who comes very soon upon the scene should not be excluded (the aftermath doctrine)
 - iii. The means by which the shock is caused: the shock suffered must come through the site or hearing of the event or of its immediate aftermath
20. The Claimant is the mother of the deceased and obviously falls within the class of persons whose claim should be recognised. The central issue in this case relates to the requirement for proximity. There is also a dispute as to what is the relevant event or its immediate aftermath. Is it the allegedly negligent consultation with the Defendant on 4th April or the discovery of the recently deceased daughters body and did that come within the definition of immediate aftermath?
21. In **Alcock** Lord Oliver stated that *"it has to be accepted that the concept of proximity is an artificial one which depends more upon the Court's perception of what is the reasonable area for the imposition of liability than upon any logical process of analogical deduction"* he went on *"no case... has countenanced an award of damages for injuries suffered where there was not at the time of the event a degree of physical propinquity between the plaintiff and the event caused by the Defendant's breach of duty to the primary victim nor where the shock sustained by the plaintiff was not either contemporaneous with the event or separated from it by a relatively short interval of time. The necessary element of proximity between Plaintiff and Defendant is furnished, at least in part, by both physical and temporal propinquity and also by the sudden and direct visual impression on the Plaintiff's mind of actually witnessing the event or its immediate aftermath"*
22. The focus in argument during the course of the hearing before me applied to 3 issues;
- (i) the meaning of and identification of "the event",
 - (ii) the meaning of the word "proximity" and

(iii) when considering the *Walters* case identifying whether the facts of this case could properly be argued as “a seamless continuous tale with an obvious beginning and an equally obvious end” which was “undoubtedly one drawn-out experience”

23. In determining those issues, in my judgment, the Court has to consider how the control mechanisms in **Alcock** have been applied in the decided cases in the Senior Courts, which are binding upon this Court, as demonstrating the parameters of circumstances where public policy will allow a secondary victim claim to succeed. It is a matter of judgment from case to case depending on the facts and circumstances of each case.

That said, just because the precise factual circumstances are not illustrated or considered in any of the authorities does not mean that this leaves a perceived gap which requires a determination by the Court. Were that the case, that would be enough, in itself, to defeat the Defendant’s application.

24. It would undoubtedly be helpful for the Senior Courts to try and provide greater clarity of the application of the **Alcock** control principles in the context of clinical negligence cases but it is not for this Court to suggest that they do so by allowing what could be perceived as an incremental development of the existing principles. In **Frost v Chief Constable of South Yorkshire [1999] 2AC 455**, the second of the Hillsborough cases, Lord Hoffmann expressed his clear view that the categories of the **Alcock** control mechanisms were closed and that any further changes were a matter for Parliament. Clarke LJ in **Walters** indicated that in clinical negligence cases he would be prepared to effect incremental changes although in that case he didn’t do so and he found that the careful findings of fact in the judgment of Thomas J (as he then was) was within the ambit of the **Alcock** control mechanisms. There is no reported and binding case where there has been an incremental change to the **Alcock** control mechanisms although on a number of occasions Judges at first instance have attempted to do so only to be overturned on appeal and some of the Senior Judiciary have expressed, albeit only obiter, a willingness to reconsider the tests in clinical negligence cases.
25. What it comes down to - and the test that I must apply is this: are the facts of this case – which for present purposes have to be assumed are what the Claimant says they are and the finding of negligence would be made even though presently denied - properly arguable as being capable of coming within the existing principles for actionable secondary victim claims as explained in the post **Alcock** cases?

Discussion of the cases

26. The easiest example to understand is that of the case of **Taylor** which is described as being “the paradigm example”. The most difficult case is **Walters** but the nearest factual matrix is probably **Ronayne**.

In **Ronayne** the husband returned home from work on Thursday evening to find that his wife was still ill, a week after she been discharged from hospital following a

hysterectomy. He took his wife to the accident and emergency department of the hospital in the early hours of Friday morning. The husband returned home for some sleep but returned to hospital late on Friday afternoon as his wife needed an emergency operation. He was in complete shock at seeing her due to the extent of deterioration. The husband then returned on Saturday to see his wife in the critical care unit, following surgery. The Court of Appeal decided that “the judge was wrong to regard the events of this period of probably about 36 hours as, for present purposes, one event”. The control mechanisms required the Claimant’s illness to have been induced by a single shocking event. Their analysis here was that this was a series of separate events that ultimately led to the Claimant’s illness and could not properly be described as a single shocking event.

In **Walters** the Court of Appeal decided that an event could last for 36 hours, in circumstances where there was an inexorable progression from the moment when the fit occurred as a result of the failure of the hospital properly to diagnose and then to treat the baby, the fit causing the brain damage which shortly thereafter made termination of this child’s life inevitable and the dreadful climax when the child died in her arms. It was a seamless tale with an obvious beginning and an equally obvious end which was undoubtedly one drawn-out experience.

27. In **Taylor**, the Claimant daughter witnessed her mother’s sudden collapse and death at home from a pulmonary embolism. This was 3 weeks after her mother’s head and foot had been injured in an accident at work (when daughter was not present). The Court of Appeal overturned the Judge’s decision that the Claimant’s daughter qualified as a secondary victim, because the Judge was wrong to hold that the death of Mrs Taylor was the relevant event for the purposes of deciding the proximity question.
28. **Taylor** is the authority of the law as it presently stands that means that Mrs Purchase’s claim is doomed to failure. The death of Evelyn and the aftermath of the discovery of her body cannot be the relevant event for the purposes of deciding the proximity question. It does not make any difference that Mrs Purchase was present at the consultation with the Defendant on the 4 April as that was not the start of a shocking event as defined as “*a sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind*”. It also does not even come within the hitherto excluded category of an accumulation over a period of time of more gradual assaults on the nervous system.
29. **Ronayne** is the authority that demonstrates that a similar factual matrix will not be regarded as a single seamless event.
30. The difficult case of **Walters** was decided very much on its own facts where the mother was present throughout the entire 36 hour period witnessing the deterioration of her baby’s health following the start of the shocking event of the severe fit. As has been made clear by the Court of Appeal in the subsequent cases of **Taylor** and **Ronayne** a relatively short time period of somewhere between 36 and 54 hours is not in itself sufficient to establish proximity in time. The additional special facts in the case of **Walters** were a requirement to found a seamless tale which was one drawn out experience.
31. Some commentators have suggested that the **Taylor** case was wrongly decided and has imposed an unnecessary level of stricture upon the Courts ability to construe

circumstances in what they consider to be deserving cases as being within the ambit of permissible claims. Given that these issues have been considered by the Court of Appeal on a number of occasions the only way that **Taylor** can be overturned as a binding authority on this Court is by a different conclusion being reached by the Supreme Court or by Parliament changing the law. Neither of those appear realistic prospects in the foreseeable future.

Conclusion

32. In conclusion therefore, and not without some considerable regret, I am bound to conclude that as the law stands at present, the circumstances of Mrs Purchase's case do not come within the parameters of a permissible and actionable secondary victim claim. It follows that her Statement of Case and Reply do not disclose a case that has reasonable grounds under CPR 3.4 (2) (a) to bring a claim or a real prospect of success under CPR 24.2 (a) (i) nor is there any other compelling reason why the case or any issue should be disposed of at trial.
33. Her claim for damages as a secondary victim is therefore struck out but even if I was wrong to conclude that, I would be satisfied that the Defendant had discharged the burden of proof upon him to show that the claim had no real as opposed to fanciful prospects of success and therefore summary judgment would be entered and there is no other compelling reason why the case or any issue should be disposed of at trial.