Event witnessed by father was not objectively shocking and horrifying

By Susan Jones
3PB Barristers

High Court in *King v Royal United Hospital Bath NHS Foundation Trust* [2021] EWHC 1576, finds event witnessed by father was not objectively shocking and horrifying.

This case reminds practitioners that in secondary victim claims the threshold for a shocking event is strictly objective. Additionally, despite dismissing the claim, Philip Mott QC, sitting as a Deputy High Court Judge, went on to provide helpful insight into how damages would have been assessed for an actor who it was claimed was on the verge of a "big break".

Background

On 5th May 2016 Benjamin was born by emergency caesarean section. He died on 10th May 2016. The Trust accepted that had Benjamin been delivered before 5th May, he would have avoided injury and survived.

Mr Jamie King brought a secondary victim claim for psychiatric injury, treatment costs (agreed subject to liability) and approximately £10 million for past and future loss of earnings as an actor on the basis that he had had been on the verge of a big break. Claims on behalf of the estate, for bereavement and psychiatric injury to Tamara Podemi (Benjamin's mother) on the basis that she was a primary victim, had already been dealt with.

Legal Principles

It was common ground that for Mr King's secondary victim claim to succeed he needed to satisfy the 4 control mechanisms laid down in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310. The control mechanisms, summarised in *Women's NHS Foundation Trust v Ronayne* [2015] EWCA Civ 588 are:

1. The Claimant must have a close tie of love and affection with the person killed, injured or imperilled;
2. The Claimant must have been close to the incident in time and space;
3. The Claimant must have directly perceived the incident rather than, for example, hearing about it from a third person; and
4. The Claimant's illness must have been induced by a sudden shocking event.

It was also common ground that Mr King satisfied all the control mechanisms, save for the last one i.e. that the illness must have been induced by a sudden shocking event. The medical evidence was that the sight did cause PTSD and therefore the question was whether the facts amounted to a sudden shocking event?

The claim was based solely on what Mr King saw and heard on his first visit to see Benjamin in the Neonatal Intensive Care Unit (NICU) on 5th May 2016. Philip Mott QC, reminds readers that because of the requirement in the control mechanism for a single shocking event, the stress of the next few days and Benjamin's death on 10th May could form no part of the claim.

What happened on 5th May 2016?

There was a factual dispute as to what occurred. The Claimant undoubtedly had the sympathy of the Court with the Judge on preferring the factual evidence of Clinicians over that of the Claimant expressing that: "*it must have been an exhausting and harrowing morning for the Claimant. I do not consider it at all surprising that his recollection of discussions and his visits to see Benjamin had become a little confused*".

The Judge found there was a discussion with the Claimant and Clinicians before Mr King first visited NICU, during which Clinicians fully prepared the Claimant for all the interventions and machinery he would see. The Court also accepted the Clinicians' description that Benjamin would have appeared as though he were sleeping.

Was this a sudden and unexpected shock amounting to a horrifying event?

Considering whether the factual findings satisfied the legal test of a "*sudden and unexpected shock*" amounting to "*a horrifying event, which violently agitates the mind*", Philip Mott QC stated:

> "*What is clear from the authorities is that "shock" in the Alcock sense requires something more than what might be described as "shocking" or "horrifying" in ordinary speech"* [38].

Despite describing that the birth of a child should be a joyous event and being told that that child is seriously unwell and might die would be a nightmare for any parent, the Judge, nevertheless concluded that Mr King's first attendance on NICU brought home the seriousness of the condition as explained by the consultant paediatrician and was not objectively shocking in the *Alcock* sense. Further the expression that Benjamin may die did not take the matter over the required threshold. Finally, taking what the Claimant saw and heard together, was not objectively shocking and horrifying in the *Alcock* sense. On that basis the claim failed.

In reaching this conclusion the Judge clearly distinguished between what Mr King, subjectively, as an actor and someone the Judge recognised as a person especially affected by visual triggers and with a capacity to imagine and empathise, against what was objectively shocking.

Quantum if the Claimant had succeeded on liability

If the claim had succeeded, damages would have been assessed based on Mr King's actual history compared to that had he not suffered PTSD but Benjamin had still died and therefore all the effects that that would have had on the Claimant and his wife. This required distinguishing pain and suffering and consequential loss arising from PTSD (which it was agreed may give rise to a secondary victim claim) as opposed to pathological grief (which it was agreed may not give rise to a secondary victim claim).

The Court would have awarded £17,500 for a psychiatric injury with the most intrusive and full PTSD lasting for approximately 12 months.

There was major disagreement as to loss of earnings. The Claimant's acting career highlights included playing Thomas Wyatt in "the Tudors", Kaspar in "Tinker Tailor Soldier Spy" and David Roberts in "Mr Turner". He had also had parts in "CSI: Miami", "Mad Men" and "Air Force One is Down". The Schedule of Loss asserted that the Claimant was on the verge of his big break following an audition for the epic film "Dunkirk" and therefore lost earnings should be substantially higher than they were prior to May 2016. The Claimant valued past and future loss of earnings at close to £10 million. The Defendant did not accept that the Claimant had any continuing loss nor loss of chance of a big break.

Rather than the just shy of the £10 million contended for the Court would have awarded £124,168 for past loss of earnings, comprising:

a. £58,465 loss of earnings due inability to work at all for 12 months due to PTSD. After 12 months issues related to grief reactions of the Claimant and his wife, and not his PTSD, prevented his moving to Los Angeles for work.
b. £65,703 for loss of chance. Assessing loss of chance the Court considered the numerous uncertainties in the acting profession, including landing a sufficiently significant part in "Dunkirk", giving a sufficiently strong performance to improve career chances, whether better parts would be subsequently offered on the back of "Dunkirk", and maintaining career growth thereafter. The Court considered there was a substantial and significant chance of a big break if the Claimant had not suffered PTSD but this was far from certain. On that basis the Court would have allowed a one third pay increase to reflect this loss until the end of 2019 on the basis of evidence that in the absence of matters other than PTSD ,the Claimant would have been able to get his career back on track "*within a year or two*" and take advantage of another big break.

Conclusion

This judgment maintains the stringent objective threshold required for an event to be considered shocking. The Court of Appeal are due to consider the *Alcock* criteria in the clinical negligence sphere in the cases of *Paul v The Royal Wolverhampton NHS Trust* [2020] EWHC *and Polmear and Another v Royal Cornwall Hospitals NHS Trust* [2021] EWHC 196 (QB). We eagerly await these judgments.

23 June 2021

The information and any commentary within this document are provided for information purposes only. Every reasonable effort is made to ensure the information and commentary is accurate and up to date, but no responsibility for its accuracy, or for any consequences of relying on it, is assumed by the author or 3PB. The information and commentary does not, and are not intended to, amount to legal advice. If you seek further information, please contact the 3PB clerking team.

Susan Jones

Barrister
3PB Barristers

0330 332 2633
Susan.jones@3pb.co.uk

3pb.co.uk