The validity of claiming damages as a ‘secondary victim’ under UK law

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Personal Injury analysis: After the Real Madrid captain, Sergio Ramos, injured Liverpool’s Mo Salah in a cynical challenge during the Champions League final, an Egyptian lawyer by the name of Mr Bassem Wahba filed a lawsuit, suing Mr Ramos and Real Madrid for $1bn. Mr Wahba argued that he—and the Egyptian people— were secondary victims to the incident, suffering genuine psychological harm upon witnessing Salah traipsing off the pitch in tears. Although this scenario is far-fetched, UK law does allow individuals to claim damages if they have witnessed a threat or injury to a loved one or someone they know and they have, in turn, suffered psychiatric illness. Amber Lawler, solicitor at Bolt Burdon Kemp, closely examines the concept of claiming damages as a ‘secondary victim’ under UK law.

Where did the concept of claiming damages as a ‘secondary victim’ arise?

The concept of claiming damages as a ‘secondary victim’ first arose after the Hillsborough disaster in 1989. During the FA cup semi-final between Liverpool and Nottingham Forest, South Yorkshire Police were negligent in directing an excessively large number of spectators to one end of the stadium. This caused a fatal crush in which 96 people were killed and over 400 were physically injured.

The shocking scenes were broadcast on live television. Many friends and family members of the victims witnessed this and suffered nervous shock, resulting in psychiatric harm. Joint proceedings were brought by these claimants against the Chief Constable of South Yorkshire.

The House of Lords were called upon to determine whether, for the purposes of establishing liability in negligence, those who suffer purely psychiatric harm from witnessing an event at which they are not physically present are sufficiently proximate for a duty to be owed.

The decision was heard in the case of *Alcock v The Chief Constable of South Yorkshire* [1992] 1 AC 310, [1991] 4 All ER 907.

Lord Oliver discussed two classes of claimants

- those actually involved as participants in the events ie the victim
- those who witnessed the event, otherwise known as the bystander

He distinguished the first class as the primary victims, those who will always have a valid claim. The second class were identified as secondary victims who would need to satisfy strict eligibility criteria to claim.

An Egyptian Lawyer, Mr Bassem Wahba, recently filed a law suit against footballer Sergio Ramos, after he tackled the Egyptian player, Mo Salah during the Champions League final. This tackle resulted in Mo Salah suffering an injury and he was forced to leave the pitch. Mr Wahba claimed that he and the Egyptian people suffered psychological harm after witnessing this. In this instance—and putting merits aside for a moment—the Egyptian lawyer and the Egyptian people would be classed as secondary victims.

What are the criteria for claiming damages as a secondary victim?

It was decided in *Alcock* that in order to succeed in bringing a claim as a secondary victim, you must show that you:

- have a close tie of love and affection to a primary victim
- witnessed the event with your own unaided senses (eg not on TV)
- had 'proximity' to the event or its immediate aftermath
- suffered psychiatric injury by a shocking event

The claimant has to see or hear the horrific event or its immediate aftermath to succeed in his claim. Therefore events witnessed on television, for example, will not succeed.

They will also need to persuade the court that there is a shock element, rather than a gradual distressing chain of events which continues over a long time eg witnessing a relative die from a disease over days or weeks.

Since 1992, there has been only modest development within this area of law and this criterion still stands. In fact, recent authority has been anything but flexible for claimants.

This was demonstrated in the case of *Taylor v Novo (UK) Ltd* [2013] EWCA Civ 194, [2013], All ER (D) 167 (Mar), in which the claimant's mother suffered an accident at work. Seemingly she recovered but three weeks later she collapsed and died. The cause of death was established as deep vein thrombosis, brought about by the original injury.

The claimant did not witness the accident at work but did witness her mother's death. She developed PTSD. She pursued a claim as a secondary victim but failed because she was not present at the scene of the accident or its immediate aftermath and therefore lacked proximity to the negligent 'event'.

A further example of the court's strict approach can be seen in the case *Ronayne v Liverpool Women's Hospital NHS Foundation Trust* [2015] EWCA Civ 588, All ER (D) 195 (Jun). Here, the Trust admitted negligence in the performance of the claimant's wife's hysterectomy leading to septicaemia and peritonitis, which caused her to swell up such that she resembled 'the Michelin Man'.

The claimant's wife was admitted to A&E with a high temperature, thirst and shallow breathing. Later that day, the claimant saw her connected to various machines. The next day, he observed her in the post-operative condition. She was unconscious, connected to a ventilator and was grossly swollen.

He claimed witnessing these distressing events caused him to suffer psychological harm. Unfortunately his claim also failed on the basis that there had been a gradual realisation by the claimant that his wife's life was in danger. At each stage in this sequence of events the claimant was conditioned for what he was about to perceive. There was no 'shocking' element.

Are the criteria too stringent? If so, in what ways could they be reformed?

Some have argued that the criteria are too stringent. Even Lord Justice Tomlinson in *Ronanyne* considered it 'telling' that there is only one reported case in which a claimant was successful in bringing a claim as a consequence of observing a shocking event in a hospital setting as a result of clinical negligence (ie *North Glamorgan NHS Trust v Walters* [2002] EWCA Civ 1792, All ER (D) 87 (Dec)).

Many are campaigning for reform of the 1992 criteria arguing that the threshold is too high and that it unfairly prohibits legitimate secondary victim claims. For example, relationships such as siblings were, at this stage, not presumed to fulfil the close ties requirement.

The Negligence and Damages Bill 2015/16 sought to address these issues. It aims to extend the current list of statutory relationships recognised by law and to ensure that every case gets evaluated purely on its own merits.

By extending the list of statutory relationships to include friends and colleagues as the bill suggests, could arguably open the flood gates. What would a claimant have to prove in order to show the court that they are a ‘friend’ to the primary victim, in order to satisfy the close ties requirement? The courts could be faced with a huge number of potential claims.

What does all this mean for lawyers and their clients?

As seen in the above, it is notoriously difficult to satisfy the *Alcock* criteria. For lawyers, it is paramount to take very clear and detailed instructions from their clients as to the circumstances of the incident. When investigating claims, particularly medical negligence claims, look carefully at the sequence of events and whether the events happened suddenly and unexpectedly. While difficult, do not shy away from taking a very detailed summary from your clients as to the events they witnessed.

Finally, it is also vital to ensure that the psychiatric expert you are instructing is familiar with the legal framework on secondary victims so prepare detailed instructions covering the applicable criteria.

Interviewed by Max Aitchison.

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