Insurance & Personal Injury

Nervous Shock: Would the Secondary Victim Need to be an Eye-witness to the Accident?

Introduction

A primary victim is a victim who is directly involved in an accident and suffers injuries as a result of the fault of a tortfeasor. A secondary victim is one who suffers nervous shock without himself/herself being directly exposed to any physical danger in the accident to the primary victim. The nervous shock suffered by the secondary victim must be a medically recognized psychiatric illness.

To avoid the flood of litigation, the court would consider 3 factors before deciding whether liability for secondary victim is established: (1) does the claimant has close ties of love and affection with the person killed or injured; (2) the proximity of the claimant to the accident, and (3) the means by which the shock was caused.

For the first factor, immediate family member, such as parent and child, or husband and wife, is more likely to be accepted as a secondary victim than an ordinary bystander of the accident. For the third factor, the "shock" caused to the claimant must involve sudden appreciation by sight or sound or knowledge of a horrifying event which violently agitates the mind of the claimant. It does not include psychiatric illness caused by the accumulation over a period of time or more gradual assaults on the nervous system.

For the second factor, “proximity” means close in time and space, that is, the claimant is either at the scene of the accident or is in the more or less immediate vicinity and witnesses the aftermath shortly afterwards. Therefore, direct and immediate sight or hearing of the accident is not required to establish liability for nervous shock. This article aims to briefly discuss the case laws where the claimants did not actually witness the accident and “shock” was caused by the accident’s immediate aftermath.

Cases on “immediate aftermath”

In *Alcock & Ors v Chief Constable of South Yorkshire Police* [1992] 1AC 397, the claims were brought by Alcock and several other claimants after the Hillsborough disaster in 1989 where 96 Liverpool Football Club fans died in a massive crush during the FA Cup Semi Final at Hillsborough Stadium in Sheffield. It was found that the accident was caused by the police negligently allowing too many supporters to crowd in one part of the stadium. Many alleged to have seen their friends and relatives die in the crush and suffered psychiatric harm or nervous shock after the incident. The Court held that for immediate aftermath, it covers the
scene at the hospital which was experienced by the Plaintiff some two hours after the accident.

In *Galli-Atkinson v Sudhaker Seghal* [2003] EWCA Civ 697, apart from the cordonning tapes, there was no evidence that the Plaintiff’s mother saw anything of the consequence of the accident to her 16-year-old daughter. The news of the accident had a profound effect on the mother who screamed hysterically and collapsed to the ground. She had to be controlled by her husband and police. At the mortuary, the mother saw her daughter’s disfigured face and head. The scene was devastating. The court held that the immediate aftermath extended from the moment of the accident until the moment that the mother left the mortuary.

In the recent HK case of *Lee Wah v Lok Wai Wa* HCPI 476/2010, the Plaintiff’s 12-year son died after he was knocked down by a vehicle driven by the Defendant. The Plaintiff claims as the administratrix of the estate of her son and in her personal capacity as the secondary victim. For the latter claim, it was found that at the time of the accident, the Plaintiff was on her way back home from Shanghai. When she arrived home, she saw a note posted on the door informing her that her son was admitted to a hospital. She had no idea who posted it but she rushed to the hospital. Upon arrival, the Plaintiff was not allowed to see her son who was receiving emergency treatment of resuscitation. The hospital’s attempt to rescue the son failed. Since then, the Plaintiff developed psychiatric symptoms. The diagnosis was major depressive episode and prolonged or abnormal grief reaction. The experts agreed that the major depressive episode was wholly caused by the accident.

The Court held that from the moment when the Plaintiff saw the note on the door of their home to the hours she finally saw her son’s body contributed to her psychiatric illness. As a matter of causation, it matters not whether such experience during the immediate aftermath of the accident was a major or minor contributing factor to the development of her psychiatric illness. The Plaintiff succeeded on her claim as the secondary victim.

In the following 3 cases, the claimants’ claims were dismissed as “immediate aftermath” of the accident cannot be shown.

In *Taylor v Somerset Health Authority* [1993] 4 Med LR 34, the Plaintiff arrived at the hospital within an hour and was informed of the passing of her husband 20 minutes later. She was shocked and distressed. The Court found that the Defendant, which had been treating the Plaintiff’s husband for months, had been negligently failed to diagnose or to treat the heart disease. However, the Court dismissed the Plaintiff’s claim because the death of the Plaintiff’s husband was the progressive deteriorating heart condition caused by the Defendant’s negligence many months before and the Defendant had failed to arrest. There
was no external, traumatic event caused by the Defendant’s breach of duty which resulted in the husband’s immediate death.

In *Sion v Hampstead Health Authority* [1994] 5 Med LR 170, the father suffered psychiatric illness after seeing his son's condition deteriorate to coma and eventual death in the course of 14 days after his admission following a traffic accident. The father claimed against the hospital for negligence in diagnosing internal bleeding in his son, and for his suffering as a secondary victim. The father's claim was dismissed for the lack of medical evidence of shock.

In *Crystal Taylor v A Novo (UK) Ltd* [2013] EWCA Civ 95, a woman was injured in an industrial accident caused by the negligence of her employer. She made an apparently good recovery but suddenly collapsed and died at home 21 days later. Her daughter did not witness the industrial accident but the sudden death of her mother. She claimed against her mother’s employer for nervous shock. In dismissing the daughter’s claim, the Court considered that the accident to the mother and her death, separated by 3 weeks in time, were not part of a single event. The death was a distinctive event and a later consequence of the accident and thus not the immediate aftermath.

**Conclusion**

The case laws on whether the claimant was present in the “immediate aftermath” show that the decisions are fact-sensitive. The court would consider the number of hours since the accident and what the claimant sees during this time. Whilst one to two hours from the accident appears acceptable, the period of time from the moment of the accident until the moment that the claimant left the mortuary can be held as a “shocking event” if during that time there is an inexorable progression. In other words, the Court would consider the cumulative effect of all the events the claimant is subjected to, and how these impact on the Claimant’s mental status.

In the event that the claimant’s mental injuries were not caused by a sudden external traumatic event happened to the primary victim but a gradual assault on the claimant’s nervous system, there would be no damages. There must be medical evidence of the “shock”. Further, to qualify as “immediate aftermath”, the accident and the death must be one single event and not separate distinctive events.
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Important: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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