**IN THE COURT OF APPEAL (CIVIL DIVISION)**

**B E T W E E N:-**

*NHS FRIMLEY HEALTH FOUNDATION TRUST*

**Appellant**

**- and -**

*LOLA GIORDANO*

**Respondent**

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**SKELETON ARGUMENT FOR THE APPELLANT**

Samuel Glanville - Senior Counsel

Elliott Malik - Junior Counsel

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Introduction

1. The Appellant submits that:

    a. Russell J erred in law by failing to consider whether the facts in this case constituted a sudden shocking event which violently agitated the mind (*Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310). On the facts, there was no relevant element that met the requirements of a shocking event which violently agitated the mind. (GROUND 1)

    b. Russell J erred in law by failing to appropriately consider the categories in which a person must be to have a 'close tie of love and affection' with the primary victim (*Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310). On the facts, the Claimant's relationship to the victim was not sufficient. (GROUND 2)

GROUND 1

2. When directing himself as to whether Lola was a secondary victim Russell J was required to consider the *Alcock* criteria, as summarised by Tomlinson J in *Liverpool Women's Hospital NHS Foundation Trust v Ronayne* [2015] EWCA Civ 588 at [10]:

    a. The Claimant must have a close tie of love and affection with the person killed, injured or imperilled (Ground 2);

    b. The Claimant must have been close to the incident in time and space;

    c. The Claimant must have directly perceived the incident rather than, for example, hearing about it from a third person;

    d. The Claimant's illness must have been induced by a sudden shocking event; and

    e. That the Claimant must have suffered a frank psychiatric illness.

3. Russell J considered the first, second, third and fifth control mechanisms (*Moot Problem* at [8]). The Appellant submits that Russell J did not consider the fourth mechanism.

4. Though the *Alcock* criteria are pragmatic and arbitrary the High Court judge was bound by precedent to apply each of the control mechanisms, (*Ronayne* at 11).

5. It is further submitted that, if Russell J considered childbirth to meet the *Alcock* criteria, the events the Respondent witnessed cannot be described as a sudden shocking event.

<u>Shocking event</u>

6. In *Alcock*, Lord Ackner said at page 401F (as quoted in *Ronayne* at [12]):

    > *""Shock" in the context of this cause of action, involves the appreciation by sight or sound of a horrifying event, which violently agitates the mind. It has yet to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system."*

7. In *Shorter v Surrey & Sussex HC NHS Trust* [2015] EWHC 614 QB Swift J confirmed that whether an event is to be considered "horrifying" is to be judged to objective standards and by reference to the person of ordinary susceptibility (*Ronayne* at [13]).

Shocking event in a hospital setting

8. It is rare for a claim of this type to succeed where the events being considered occurred in a hospital.

9. In *Ronayne* Tomlinson J cited at [14], with apparent approval, the comment of His Honour Judge Hawksworth QC in *Ward v Leeds Teaching Hospital NHS Trust* [2004] EWHC 2106 (QB) that:

> *"An event outside the range of human experience, sadly, does not it seems to me encompass the death of a loved one in hospital unless accompanied by circumstances which were wholly exceptional in some way as to shock or horrify.*

Tomlinson J added, at [17]:

> *"A visitor at hospital is necessarily to a certain degree conditioned as to what to expect, and in the ordinary way it is also likely that due warning will be given by medical staff of an impending encounter likely to prove more than ordinarily distressing."*

10. As Tomlinson J observed at [41]: "*What is required in order to found liability is something which is exceptional in nature.*"

11. It is submitted that the reason this type of claim is rarely successful is partly due to the *Alcock* controls being necessary on policy grounds to limit the scope of the duty, this view was expressed by Lord Wilberforce in *Mcloughlin v O'Brian* [1983] and endorsed by the House of Lords in *Alcock*, per Lord Keith at 395C-E.

What events may be considered exceptional

12. As Philip Mott QC considered in *Jamie King v Royal United Hospitals Bath NHS Trust* [2021] EWHC 1576 (QB) at [37], there have been a number of cases which are illustrations of the application of the *Alcock* controls to different sets of facts.

13. In *Ronayne* Tomlinson J at [17-18] observed that *North Glamorgan NHS Trust v Walters* [2003] PIQR P16 was the only reported case in which a claimant had succeeded at trial in a claim of this type (i.e. a claim for psychiatric shock as a secondary victim) in consequence of observing in a hospital setting the consequences of clinical negligence.

14. *Walters* concerned an inexorable progression of events from the moment when the fit occurred as a result of the hospital's negligence to the inevitable termination of the child's life in their mother's arms 36 hours later. It is submitted that the facts in *Walters* are exceptional in nature and the facts at hand must be distinguished.

15. Since *Ronayne* there have been successful claims where the judge has found the facts to be exceptional in nature, for example *Re & Ors v Calderdale & Huddersfield NHS Foundation Trust* [2017]. However, the facts in this case are not exceptional in nature.

Application to the facts of this case

16. It is accepted that the facts in this case are distressing. The epidural failed three times, the child required resuscitation after birth and due to negligence in the performance of the instrumental delivery the mother had to be rushed to theatre for emergency life-saving surgery.

17. However, the childbirth and aftermath was not an inexorable progression of events due to the hospital's negligence. Events in the hospital were necessary to try and ensure that the mother had a safe birth, including the use of the epidural and the attempts to complete an instrumental delivery.

18. Further, the attempt at instrumental delivery was due to the baby being in distress and was not due to the negligence of the hospital. It is likely that the baby would have been in distress during a home delivery.

19. Though these things may be described as 'horrifying' in ordinary language, there is nothing exceptional in the nature of events in this case that distinguish this case from other ordinarily distressing events occurring in hospitals.

20. In 2019-20 NHS statistics show that:

    a. The NHS completed 591,759 deliveries during 2019-20;

    b. Of those deliveries 60% used anaesthetic or analgesic before or during delivery; 12% were instrumental; 22% featured postpartum haemorrhage; and 26% were complicated by fetal stress (distress).

21. Characterising this childbirth as a sudden shocking event is likely to open the floodgates to further claims and will ensure that hospital trusts are wary of allowing visitors and family members to provide comfort to those in childbirth.

Conclusion

22. The *Alcock* criteria are pragmatic controls that limit the class of persons who can recover for psychiatric shock. The facts of this case are not so exceptional in nature as to meet the fourth *Alcock* criteria. If this appeal is unsuccessful, it is likely that the floodgates of liability will open upon maternity units across the NHS.

23. The Appellant invites the court to allow the appeal on the basis that the childbirth does not constitute a sudden shocking event.

GROUND 2

24. The pertinent *Alcock* criteria consider the requirement for there to be a proximity of relationship, or, the existence of close ties of love and affection with the person killed, injured, or imperilled [Lord Oliver in *Alcock* at 412-F]. Without this, a person cannot be considered a secondary victim.

25. Per Lord Oliver [*Alcock* at 412-F], only three classes of relationship are presumed to provide sufficient proximity: parent-child, spousal, and child-parent. Claimants in other categories must prove that they have sufficiently close ties of love and affection. [Lord Jauncey at 422-F]

26. Russell J concluded that the Claimant being a neighbour of the primary victim provided a sufficiently close tie of love and affection [*Moot problem* 8]. However, the Appellant submits that this conclusion is both an error of law and in conflict with judicial policymaking.

The error of law

27. As previously mentioned, in *Alcock*, the only relationships with a presumption in favour of a proximity of relationship are spousal, parent-child, and child-parent. The closeness of the present relationship must therefore be proven.

28. There have been differing opinions about the ability of friends and wider family members to demonstrate close ties of love and affection. The Law Commission, in it's 1998 Report (*Liability for Psychiatric Illness*), opined that the current regime was too narrow [at 6.24]. Equally, Lords Ackner, Oliver, and Jauncey [*Alcock* at, 403-F, 415-G-416-D, 422-F] mused that it could be possible for other relationships to have the required depth.

29. However, the Law Commission only wished to expand the presumption of proximity to other family members, not to friends. Friends would have to prove their connection. Equally, the aforementioned Law Lords in their speeches also opined that it would be increasingly difficult to foresee a successful case the further one moves from the nuclear family [*Alcock* at, 403-F, 415-G-416-D, 422-F].

30. It could therefore be said that case law has limited 'close ties of love and affection' to those relationships which have encompassed one party's developmental states (as either parent or child), or through marital or marital-equivalent relationships.

31. This can be distinguished from the present case, which sees an informal relationship between an elder and a young adult develop after she has reached maturity [*moot problem* at 2].

32. The Appellant submits that without a bond of blood or through law, there is only proof of a relationship which may be stronger than a normal friendship, but lacks the same depth as a relationship between close family members.

<u>Policy concerns regarding a judicial expansion of classes entitled to proximity of relationship</u>

33. Russell J, in finding that the neighbourly relationship between the Claimant and the primary victim provided a close tie of love and affection, enabled a court-based expansion of the categories considered under the proximity of relationship further than the Courts have previously accepted due to policy concerns.

34. Whilst the Law Commission has stated a reticence to legislate for all eventualities [Law Commission at 6.26], preferring to allow the courts leeway outside of a core group of relationships, the courts have moved towards only accepting incremental change whilst calling for legislative reform.

35. Per Lord Oliver [*Alcock*, at 419-A], it would be better to enshrine the categories in legislation. This would be similar to the Australian legislation mentioned by Lord Ackner [*Alcock*, at 404-D].

36. The Courts have expressed these views because of the ramifications of the Courts engaging in more than minor examples of flexibility. Per Lord Steyn [in *Frost*, quoted in *Novo* at 158-C], the Courts would be either taking over from the legislature or breaking with precedent if they make more than incremental change. This is in the

face of the courts admitting that the current settlement is like an imperfect patchwork quilt [*Novo* at 157-H].

37. Per the Master of the Rolls, '...the courts should not seek to make any substantial development of these principles. That should be left to Parliament, although the case law shows that some modest development by the courts may be possible.' [*Novo*, at 10]

38. An acceptance of the Claimant's case would increase the complexity of the patchwork by forcing the court to consider the question of what is a parent?

39. The Appellant submits that there is a tangible difference between familial- or intimate relationship-based ties and a very close friendship. In the present case, this would be the lack of a relationship during the developmental stages of the primary victim.

40. Furthermore, whilst the Law Commission left open the opportunity for the courts to become more flexible, and the judgements in *Alcock* mused that there may be cases where friends are considered to have close ties, the law has remained settled, even becoming more entrenched. Lord Jauncey noted that no remote relative has successfully claimed in the United Kingdom [*Alcock* 420-C]. It is still the case that no friend has successfully claimed in the United Kingdom.

41. The law must operate with clarity, even if this leads to outcomes which may seem unjust. The Appellant therefore submits that, in agreement with Lord Steyn [in *Frost*, quoted in *Novo* at 157-C] until the Government intervenes to change the law, the Courts should view a widening of the *Alcock* criteria with suspicion, and endeavour to replace the current patchwork with clearer delineations.

42. The Appellant proposes that one such delineation can be created in this case: between actual familial-based and quasi-spousal relationships with 'close ties of love and affection', and relationships which are strong enough that they may be described by a layman as being akin to familial bonds, but are simply particularly strong relationships.

<u>Conclusion</u>

43. An expansion to include neighbours will not simply be an incremental change, but would be a leap which would fundamentally transform this area of law, disregarding

settled jurisprudence. The Appellant therefore submits that Ms Giordano's relationship with the primary victim was such that she did not have a close tie of love and affection such that she could recover for psychiatric injury.

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