A DOCTOR’S DUTY OF CARE TOWARD PREGNANT PATIENTS

Introduction

This paper will explore the physician’s duty to the mother in the delivery of a child.

The focus of medical legal cases has traditionally been on examining whether the delivery of the child has been done in a manner that promotes the newborn’s wellbeing.

However, the mother is also involved in the delivery process, and is emotionally vulnerable at this stage of her life.

This paper will explore the medical legal issues arising where the mother perceives that harm has been done to her child before and/or during the delivery process, and she suffers psychiatric consequences.

The Standard of Care with respect to the doctors

1. In ter Neuzen v. Korn, (1995) 127 D.L.R. (4th) 577, the Supreme Court of Canada reviewed the law concerning the standard of care and evidence of standard practice. Sopinka, J. for the Court wrote:

"It is well-settled that physicians have a duty to conduct their practice in accordance with the conduct of a prudent and diligent doctor in the same circumstances. In the case of a specialist, such as a gynaecologist and obstetrician, the doctor's behaviour must be assessed in light of the conduct of other ordinary specialists, who possess a reasonable level of knowledge, competence and skill expected of professionals in Canada, in that field.

Psychiatric illness arising from negligent care of the child during pregnancy and/or delivery

2. In a situation where:

   a. a foetus or newborn suffers injury and/or death around the time of childbirth;

   b. the mother comes to believe that that the harm done to her child was caused by
negligence on the part of her doctors;

c. it can be established that there was some element of negligence in relation to the newborn’s care (either in vitro or during delivery); and

d. the mother subsequently suffers psychiatric illness as a result of that belief

the issue is whether the mother can bring a claim for a psychiatric illness arising from a reasonable belief of harm to her child.

3. It must be noted that the B.C. Family Compensation Act does not recognize or provide compensation for emotional anguish relating to the death of a loved one. Therefore, any claim must be more than, or different from grief arising from the loss of a child (examples would be depression or post traumatic stress disorder).

The law in Canada re: recovery for psychiatric illness

4. The leading Canadian decision on the negligent infliction of psychiatric damage is Vanek et al. v. The Great Atlantic & Pacific Co. of Canada Ltd. et al. (1999) 48 O.R. (3D) 228, [1999] O.J. No. 4599, a decision of the Ontario Court of Appeal (an application for leave to appeal to the Supreme Court of Canada was dismissed with costs October 12, 2000). In that case, MacPherson J.A., for the Court, summarized the law in Canada as follows:

"Tort law permits a person who has been injured by the negligent conduct of another to seek compensation in damages for those injuries from the tortfeasor. The injury need not be physical; modern case law establishes clearly that in some situations a person can recover for psychological or emotional injury." (para. 4)

5. MacPherson J.A. analysed the law further in the decision as follows:

"Appeal Issues

2) Liability for psychiatric damage

The common law of negligence no longer requires a distinction between physical and psychiatric injuries in terms of compensability. Moreover, since the turn of the century, compensation for psychiatric injury has not required proof of physical injury: see Duliu"
The reason for the disappearance of the early distinction between physical and psychiatric injury was well-explained by Lord MacMillan in the leading case Hay (or Bourhill) v. Young, [1943] A.C. 92 at p. 103, [1942] 2 All E.R. 396 (H.L.):

It is no longer necessary to consider whether the infliction of what is called mental shock may constitute an actionable wrong. The crude view that the law should take cognizance only of physical injury resulting from actual impact has been discarded, and it is now well recognized that an action will lie for injury by shock sustained through the medium of the eye or the ear without direct contact. The distinction between mental shock and bodily injury was never a scientific one, for mental shock is presumably in all cases the result of, or at least accompanied by, some physical disturbance in the sufferer's system. And a mental shock may have consequences more serious than those resulting from physical impact.

In Canadian law, a plaintiff can recover for the negligent infliction of psychiatric damage if he or she establishes two propositions - first, that the psychiatric damage suffered was a foreseeable consequence of the negligent conduct; second, that the psychiatric damage was so serious that it resulted in a recognizable psychiatric illness: see Linden, Canadian Tort Law, supra, at pp. 389-92."

Primary Victim issues

6. The next question that arises is whether the mother can be a primary victim of negligence while pregnant and in the context of childbirth. Many early decisions dealing with damages for nervous shock or mental distress do not distinguish between primary victims (individuals who are directly impacted by the tort) and secondary victims (individuals who observe the tortfeasor injuring someone else).

7. This distinction, however, is significant in terms of the limits that the law has placed on recovery for psychiatric illness where the plaintiff is a secondary victim. With secondary victims, the courts have imposed restrictions on the class of plaintiffs who are entitled to recover on the basis of the concepts of foreseeability and proximity. Secondary victims must be proximate to the primary event in time, place and relationship (between the tort victim and the plaintiff).


9. In that case, the plaintiff was involved in a motor vehicle accident but sustained no bodily
injury. However, the plaintiff had for a long time been suffering from a condition described as chronic fatigue syndrome. Prior to the accident, the plaintiff’s symptoms had abated. The evidence at trial was that as a result of the accident, this illness became chronic and permanent, in all probability preventing him from ever working again.

10. Lord Browne-Wilkinson examined the status of a primary victim as follows:

"The law has therefore been established both in England and Scotland for many years that a plaintiff who is a participant in an accident is entitled to recover damages for shock even though he or she has not suffered any tangible physical injury. I can see no good reason to modify this law. The analogy drawn with the more recent development in the law permitting a plaintiff, not a participant in an accident, to recover damages for nervous shock flowing from fear for the safety of others or from. The trauma of witnessing the event does not seem to me to touch on the case. A nonparticipant plaintiff is outside the ordinary area within which the defendant can foresee causing damage. The only method whereby a nonparticipant plaintiff can establish that the defendant should have foreseen damage to the plaintiff is by showing that he ought to have foreseen nervous shock. As Lord Lloyd of Berwick has demonstrated, the law as laid down in relation to these nonparticipant claims for nervous shock damages has not been applied to claims for such damages made by a plaintiff who was himself involved in the accident. " (para. 52, p. 13)

11. The primary issue in was one of foreseeability - whether it was necessary to in a primary victim claim for the defendant to foresee the possibility of psychiatric illness. It was framed by Lord Keith of Kinkel as follows:

"The question primarily at issue is whether in claims of damages due to nervous shock it is in all cases incumbent upon the plaintiff to prove that injury by nervous shock was reasonably foreseeable by the defendant or whether it suffices, where the plaintiff was himself involved in an accident, for him to prove that personal injury of some kind was reasonably foreseeable as a result of it. " (p. 1)

12. In a 3/2 decision, the majority held that with primary victims, the test is whether the tortfeasor can reasonably foresee that his conduct will expose the plaintiff to the risk of personal injury, whether physical or psychiatric.

13. The analysis of the majority is reflected in the following observation of Lord Lloyd of Berwick:

"In an age when medical knowledge is expanding fast, and psychiatric knowledge with it, it would not be sensible to commit the law to a distinction between physical and
psychiatric injury, which may already seem somewhat artificial, and may soon be altogether outmoded. Nothing will be gained by treating them as different "kinds" of personal injury, so as to require the application of different tests of law." (p. 17)

14. In summarizing the legal principles applicable to this area, Lord Lloyd of Berwick wrote:

"In conclusion, the following propositions can be supported:

3) In cases involving nervous shock, it is essential to distinguish between the primary victim and secondary victims;

4) In claims by secondary victims the law insists on certain control mechanisms, in order as a matter of policy to limit the number of potential claimants. Thus, the defendant will not be liable unless psychiatric injury is foreseeable in a person of normal fortitude. These control mechanisms have no place where the plaintiff is the primary victim.

5) In claims by secondary victims, it may be legitimate to use hindsight in order to be able to apply the test of reasonable foreseeability at all. Hindsight, however, has no part to play where the plaintiff is the primary victim.

6) Subject to the above qualifications, the approach in all cases should be the same, namely, whether the defendant can reasonably foresee that his conduct will expose the plaintiff to the risk of personal injury, whether physical or psychiatric. If the answer is yes, then the duty of care is established, even though physical injury does not, in fact, occur. There is no justification for regarding physical and psychiatric injury as different "kinds of damage ".

7) A defendant who is under a duty of care to the plaintiff, whether as primary or secondary victim, is not liable for damages for nervous shock unless the shock results in some recognized psychiatric illness. It is no answer that the plaintiff was predisposed to psychiatric illness. Nor is it relevant that the illness takes a rare form or is of unusual severity. The defendant must take his victim as he finds him." (p. 24)

15. The Page v. Smith decision was referred to in B.C. Supreme Court decision, Falbo v. Coutts [2000] B.C.J. No. 504, in which the plaintiff was struck by a motorcyclist and sustained moderate physical injury together with significant psychiatric injuries. Warren, J. acknowledged that the distinction between primary and secondary victims applied in British Columbia. His Lordship wrote:
"The distinction between these two types of cases has been recognized in this province. In Devji v. Burnaby [District 00, [1999] B.C.J. No. 2320, 1999 BCCA 599, a "secondary victim" case (although not referred to in those terms), McEachern C.J.B. C. at paragraphs 2 and 77 wrote as follows:

Because (in "secondary victim" cases) the plaintiff is not physically injured, and may not even come into contact with the defendant, the psychiatric injury alleged is an extra step removed from the negligence of the defendant, and difficult questions of proximity and duty of care arise.

I am constrained by authorities binding upon me to decide that the experience the plaintiffs endured, grievous as it must have been for them, was not one that falls within the requirements of the law relating to the circumstances in which persons who are not physically injured are entitled to damages for nervous shock."

16. There are very few Canadian cases where a primary victim advances a claim for damages which is based primarily on negligent infliction of psychiatric harm. One of the earliest cases, relied on in Vanek, is Duwyn et al. v. Kaprielian (1978), 94 D.L.R. (3d) 424 (Ont. C.A.). There, a four month baby, Brent, was in his grandmother's lap on the passenger side of the family car when the defendant backed his car into the driver's door of the Duwyn vehicle, denting and breaking the window, and scattering glass throughout the inside of the car. It is important to note that no one inside the car was physically injured. However, after impact, the baby Brent started screaming and could not, for the balance of the afternoon and late into the evening, be calmed. It was established at trial that following the accident, Brent's personality changed and he became very bizarre and destructive.

17. The trial judge dismissed the action, holding that, on the evidence, he could not conclude that the defendant "could possibly have foreseen that, as a result of the very minor collision he caused, the plaintiff [mother] and the infant plaintiff... would sustain severe emotional trauma, or in fact, any mental shock whatever."

18. On the appeal of that judgment, regarding the issue of foreseeability, Morden J.A. wrote:

"Obviously, this initial shock [of the accident) developed into a mental disorder of a very serious nature. It is not a requirement of the foreseeability test that the defendant foresee the precise kind or severity of shock "so long as some shock sufficiently substantial to qualify for redress actually was foreseeable:" Fleming, op. cit., at p. 155" (p. 11)

who gave birth to a stillborn child as a result of the defendant doctor's negligence was awarded damages for a recognized psychological disorder arising from the attending doctor's negligence. Without determining whether the claim was brought as a primary or secondary victim, Rowbotham J. wrote:

"This injury is historically described as nervous shock although more recently courts have described it as psychiatric damage.

It is a type of damage to which the normal principles of foreseeability apply. Courts attempt to control these claims by inquiring into the temporal and spatial proximity between the claimant and the tragedy...

Cindy Martin meets all of the requirements. The proximity is unquestioned... " (paras. 33-35)

20. In Sant v. Jack Andrews Kirkfield Pharmacy [2002] M.J. No. 30, a female plaintiff sued the defendant for damages sustained as a result of inhalation or absorption of a toxic chemical, phenol, which originated from the defendant's pharmacy. The plaintiff was the sister of Kenny Sant, a courier, who was given a package containing phenol to deliver for the defendant pharmacy. The Court found that the phenol exposure had not affected the plaintiff physically in any significant way, but accepted that, as a result of this exposure, the plaintiff experienced post-traumatic stress disorder. At paragraph 86, Jewers J. wrote: "In my view, her problems are largely - if not entirely -- psychological". On the issue of foreseeability, Jewers J. wrote:

"In my opinion the psychological damage was a recognized illness and reasonably foreseeable. The defendant might not have been able to forecast the precise series of events which followed the spill but should have been reasonably able to foresee that a person such as the plaintiff who was in close association with Kenny Sant as a sister and co-tenant, could have somehow come into contact with the phenol vapours. " (para. 88)

21. The scope of what constitutes a primary victim was recently analysed by the House of Lords in W v. Essex County Council [2000] H.L.J. No. 16. In that case, the parents of four children had agreed with a social agency to take in a foster child with the express proviso that they were not willing to accept any child who was known or suspected to be a sexual abuser. The parents subsequently discovered that the boy placed by the defendant social worker had committed serious acts of sexual abuse against their children. The parents sued for psychiatric illness arising
from this discovery. The issue before the court was whether the pleadings disclosed a cause of action. The Court considered whether the parents were primary or secondary victims, as the latter category is narrower.

22. Lord Slynn of Hadley, for a five member panel, wrote:

"Is it clear beyond reasonable doubt that the parents cannot satisfy the necessary criteria as "primary" or "secondary" victims? As to being primary victims it is beyond doubt that they were not physically injured by the abuse and on the present allegations it does not seem reasonably foreseeable that there was a risk of sexual abuse of the parents. But the categorization of those claiming to be included as primary or secondary victims is not as I read the cases finally closed. It is a concept still to be developed in different factual situations... (para. 21)

"I do not consider that any of the cases to which your Lordships have been referred conclusively shows that, if the psychiatric injury suffered by the parents flows from a feeling that they brought the abuser and the abused together or that they have a feeling of responsibility that they did not detect earlier what was happening, prevents them from being primary victims. Indeed, in Alcock [1992] A.C. 310, 408F, Lord Oliver said: "The fact that the defendant's negligent conduct has foreseeably put the plaintiff in the position of being an unwilling participant in the event establishes of itself a sufficiently proximate relationship between them and the principal question is whether, in the circumstances, injury of that type to that plaintiff was or was not reasonably foreseeable." (para. 22)

23. An issue may arise as to whether, where physical injury is not foreseeable, the foreseeability test for psychiatric damage is different. In McLoughlin v. Grovers [2001] E.W.J. No. 5310, the England and Wales Court of Appeal reviewed the state of the law on foreseeability with respect to primary and secondary victims. In that case, the plaintiff, a self-made man in his 40's had been wrongly criminally charged of assault and had retained a law firm to defend him. The plaintiff had urged his lawyer to advertise to try to identify a witness to the assault and the lawyer had failed to take the required action. The plaintiff was then wrongly imprisoned and suffered severe psychiatric damage. The trial judge held that the plaintiff's psychiatric illness was not a reasonably foreseeable consequence of the particular breaches of duty of which he made complaint. The Court of Appeal allowed the appeal. Lady Justice Hale stated the foreseeability test on the terms:

"There is no reason to apply any of the additional control mechanisms applicable to secondary victims. But if we cannot go so far as to hold that Page v. Smith [1996]...
AC155, rather than Cook v. Swinfen [1967] 1 WLR 457, covers this case, then the ordinary principle in The Wagon Mound [1961] AC 388 should apply: psychiatric injury to this claimant should be the reasonable result of the defendant's negligence." (para. 59, p. 13)

24. While a mother is pregnant, doctors are responsible for the wellbeing of both the mother and her foetus, until its birth. This responsibility is owed directly to the mother, and is a necessary result of the statements made by the Supreme Court of Canada in Winnipeg Child and Family Services (Northwest Area) v. DFG [1997] 3 S.C.R. 925, in which the Court held that a foetus has no legal status until it is born. In that decision, McLachlin, J. wrote:

"Before birth the mother and unborn child are one in the sense that "[t]he life of the foetus is intimately connected with, and cannot be regarded in isolation from, the life of the pregnant woman....................... Accordingly, the law has always treated the mother and unborn child as one. To sue a pregnant woman on behalf of her unborn fetus therefore posits the anomaly of one part of a legal and physical entity suing itself." (para. 27)

25. Given this analysis, if there is a breach of a doctor’s duty in caring for the foetus, the logical implication is that this also constitutes a breach of the doctor’s duty to the mother.

26. The existence of a duty of care owed directly to a pregnant mother has been explicitly analysed and acknowledged in a number of U.S. decisions. In Anisodon v. Superior Court (1991) 285 Cal. App. 3d 539, the mother of a child who sustained birth injuries that left her spastic quadriplegic sought to recover for negligent infliction of emotional distress upon her as a direct object of care during delivery. Huffman, Associate Justice wrote on behalf of California Court of Appeal:

"The negligent causing of emotional distress is not an independent tort but the tort of negligence... The traditional elements of duty, breach of duty, causation, and damages apply. Whether a defendant owes a duty of care is a question of law. Its existence depends upon the foreseeability of the risk and upon a weighing of policy considerations for and against imposition of liability." (p. 542).

27. The court analysed prior decisions and concluded:

"We believe a principled reading of the authority... requires us to conclude that Mother, under these circumstances of labor and delivery, was part of a family unit which received joint treatment, such that medical negligence directed at herself and her infant during the birth process may be pled to have caused harm to the mother's individual interests. The
purpose of this joint treatment, it may be said, was to accomplish the birth process to
deliver the child in whatever condition she was created and nurtured, leaving both
mother and child unimpaired by outside intervention or negligence. In this case, Mother
has alleged that she, as well as her child, was a victim of medical malpractice... She
has alleged the physicians failed to properly care for and treat her, which negligent
treatment, along with the condition of her daughter, caused her severe emotional and
mental stress. (emphasis of the court)

It is thus evident that Mother has pled facts supporting her individual right to recover as
a "direct victim" for severe emotional distress resulting from the alleged malpractice of
the physicians, and that not all of her damages flow from empathy with her damaged
child....

We should not allow the unique nature of childbirth, the initial unity and eventual
separation of mother and child, to distract us from a recognition of the separate legal
interests held by mother and baby. The medical malpractice, as alleged, violated
separate primary rights of both mother and child, and should be actionable by both. (p.
546) (emphasis added)

28. The nature of the duty owed to a pregnant mother was revisited in Burgess v. Superior Court
(1992) 831 P.2d 1197. In that case, the Court of Appeal, In Bank identified and answered the
issue as follows:

"Can a mother recover damages for negligently inflicted emotional distress against a
physician who entered into a physician-patient relationship with her for care during
labor and delivery if her child is injured during the course of the delivery? Because the
professional malpractice alleged in this case breached a duty owed to the mother as well
as the child, we hold that the mother can be compensated for emotional distress resulting
from the breach of the duty." (p. 1198)

29. In Burgess, the defendant doctor argued that the scope of the duty of care owed to the mother
"was limited to avoiding physical injury to her during her prenatal care and labor; it did not
extend to avoiding injury to her fetus and the emotional distress that would result from such an
injury." In addressing this issue, the Court held:

"To accept [the defendant's) argument would require us to ignore the realities of
pregnancy and childbirth. Burgess established a physician patient relationship with
Gupta for medical care which was directed not only to her, but also to her fetus. The end
purpose of this medical care may fairly be said to have been to provide treatment
consistent with the applicable standard of care in order to maximize the possibility that
Burgess's baby would be delivered in the condition in which he had been created and
nurtured without avoidable injury to the baby or Burgess. Moreover, during pregnancy
and delivery it is axiomatic that any treatment for Joseph necessarily implicated
Burgess's participation since access to Joseph could only be accomplished with Burgess' consent and with impact to her body.

In addition to the physical connection between a woman and her fetus, there is an emotional relationship as well... It is apparent to us, as it must be to an obstetrician, that for these reasons, the mother's emotional wellbeing and the health of the child are inextricably intertwined.

It is in light of both these physical and emotional realities that the obstetrician and the pregnant woman enter into a physician-patient relationship. Any negligence during delivery which causes injury to the fetus and resultant emotional anguish to the mother, therefore, breaches a duty owed directly to the mother." (emphasis added)

30. Addressing public policy considerations and issues of foreseeability argued by the defendant, the Court noted:

"During pregnancy, the mother and child are a unique physical unit. The welfare of each is "intertwined and inseparable". (Nocon, Physicians and Maternal-Fetal Conflicts: Duties, Rights and Responsibilities (1990-1991) 5 J. Law and Health 1, 15). Under such circumstances, it cannot be denied that a mother, who carries her fetus to term and begins labor, has formed a sufficiently close bond with her fetus that injury to the fetus during labor and delivery will cause her severe emotional distress. Nor can it be denied that this distress is foreseeable to her obstetrician."

31. The right of a pregnant mother to bring a direct claim for emotional loss arising from labour and delivery was also examined by the Supreme Court of Texas in Krishnan v. Sepulveda (1995) 916 S.W. 2d 478. Here, the mother and father sued the defendant doctor for negligence in prenatal supervision, which caused their child to be delivered stillborn. As in B.C., the law in Texas did not recognize a wrongful death or survival cause of action for the death of a fetus. The court noted that in the instant case, "The Sepulvedas alleged something entirely different as the basis for their claim -that Dr. Krishnan was negligent in caring for and treating Olga, not the fetus." (pp. 479-480) (emphasis of the court)

32. The Court noted that in the instant case, the stillbirth "resulted directly from Dr. Krishnan's allegedly negligent diagnosis, prenatal supervision and negligent treatment of [the mother]". (p. 480) The Court further noted that "Texas has authorized recovery of mental anguish damages in virtually all personal injury actions." On that basis, the Court held:

"We see no rational basis for excluding recovery of mental anguish damages in personal injury actions which have as one element the loss of a fetus. Consequently, we hold that
Olga may recover mental anguish damages suffered as a result of her injury which was proximately caused by Dr. Krishnan's allegedly negligent diagnosis, prenatal supervision and treatment of Olga and which includes the loss of her fetus."

33. Krishnan was followed by the Court of Appeals of Texas in Edinburg Hospital Authority v. Trevino (1995) 904 S.W. 2d 831 in which the Court held:

"Mental anguish is a recognized element of damage caused by breach of some duty, in this case the duty of a hospital to treat a patient in conformity with the recognized standards for obstetrical care. (p. 835)

In this case, negligence during the delivery of a child which results in death of that child foreseeably causes mental anguish to the mother." (p. 836)

Secondary Victim issues

34. Doctors treating a pregnant woman also owe a duty of care to the foetus. This duty crystallizes when the infant is born. The duty owed to a foetus is the same as the duty owed to the mother, with the exception that the doctor has an additional duty to the mother to attend to her psychological health.

35. There are a number of cases in which the courts have awarded damages to infants who have been born with severe disabilities as a result of medical negligence occurring before the infant's birth.

36. In the secondary victim claim, the same acts of negligence towards the foetus will ground an action by the mother. However, causation issues involve an assessment of the harm to the foetus/infant, as perceived by the mother.

37. It is possible that the consequences of the tort may cause less injury to the infant than what the mother perceives to have occurred. In that case, the question arises as to whether the doctor can be held responsible for the consequences perceived by the mother, as opposed to the consequences actually caused to the infant. One consideration here is that there is no authority for the proposition that an injury caused directly by a tortfeasor must attain a specified threshold of seriousness before its secondary consequences can be recognized at law.

38. The leading decision with respect to secondary victim claims is Vanek, supra. MacPherson J.A. noted that the criteria applicable to secondary victim cases was the following:
"In these three cases, and in the many other cases dealing with psychiatric damage caused to a bystander it is clear that the courts focus their analysis on two factors - the actual event, or its aftermath, witnessed by the bystander and the reaction this event and its aftermath might engender in the reasonable person." (para. 45)

39. An early case in B.C. on the recovery of damages for mental distress is *Beecham v. Hughes* [1988] B.C.J. No. 825. Here, the B.C. Court of Appeal exhaustively analysed the law concerning damages for reactive depression suffered by the plaintiff as a result of coping with the severity of his wife's injuries. Taggart J.A. agreed with the following distinction drawn by Deane J. in *Jaensch v. Coffey* [1984] 54 AL.R. 417 (a decision of the High Court of Australia) for the imposition of liability:

"[the preferred rationale] lies in considerations of causal proximity in that in the one class of case the psychiatric injury results from the impact of matters which themselves formed part of the accident and its aftermath, such as the actual occurrence of death or injury in the course of it, whereas, in the other class of case (which was not compensable), the psychiatric injury has resulted from contact with more remote consequences such as the subsequent effect of the accident upon an injured person." (p. 29)

40. A five member panel of the B.C. Court of Appeal revisited the law on damages for psychiatric illness in *Rhodes Estate v. C.N.R.* (1990) 50 B.C.L.R. (2d) 273. In that case, the plaintiff had become severely depressed upon learning that her 23 year old son had been killed in a train wreck. The Court rendered four separate judgments, all recognizing that in this type of secondary victim case, restrictions of proximity in time and space had to be imposed, and that those criteria had not been met. MacFarlane J.A. wrote:

"The requisite proximity relationship is made up of a combination of various relational elements or factors. These include, inter alia, relational proximity (the closeness of the relationship between the claimant and the victim of the defendant's conduct); locational proximity (being at the scene and observing the shocking event); temporal proximity (the relation between the time of the event and the onset of the psychiatric illness).

41. The law on secondary victim nervous shock cases has most recently been reviewed by our Court of Appeal in *Devji v. Burnaby (City of)* (1999) 180 D.L.R. (4th) 502, (application for leave to appeal to the Supreme Court of Canada dismissed without reasons August 3, 2000)

42. In *Devji*, the plaintiffs were the father, mother and two sisters of Yasrin Devji, who was killed
in a motor vehicle accident. The plaintiffs were notified of Yasmin Devji's death by a police officer and requested to attend at the hospital to identify her body. The viewing of the body was alleged to have caused the plaintiffs psychiatric illness. McEachern C.J.B.C. reviewed the evolution of the law relating to psychiatric or psychological injury cases and noted the imposition of "control mechanisms" limiting liability. He noted that some authorities relied on the concept of foreseeability and other authorities relied on the concept of proximity and ultimately concluded:

"At the end of all this, I find that we are thrown back to the conventional approach approved by the Supreme Court of Canada in City of Kamloops v. Nielsen... that, assuming reasonable foreseeability, the tests to be applied are whether there is a sufficiently close relationship between plaintiff and defendant to establish a duty of care, and, if so, whether any public policy negates such duty. (para. 65)"

43. Applying the above principles to the facts before the Court, McEachern C.J.B.C. noted:

The real question, however, is whether the plaintiff's experience in viewing Yasmin's body in these circumstances - particularly considering the fact that they had been informed that she had died - is the kind of experience that can give rise to a claim for damages for nervous shock. (para. 73)

The law in this province, as formulated by Rhodes, requires that the plaintiffs, in order to succeed, must experience something more than the surprise and other emotional responses that naturally follow from learning of the death of a friend or relative. Instead, there must be something more... In Rhodes, Taylor and Wood JJA. described the requisite experience as alarming and startling (and therefore sudden and unexpected), horrifying, shocking and frightening, and Southin JA. referred to a "fright, terror or horror". (para. 75)

It seems to me that the principle shock suffered by the plaintiffs was in learning of Yasmin's death;" (para. 76)

44. In Yu v. Yu [1999] B.C.J. No. 2801, Clancy J. granted damages for psychological injury where the plaintiff emerged from a period of unconsciousness to learn that her daughter had been killed in the accident which had also injured the plaintiff.

45. In Graham v. MacMillan [2003] B.C.J. No. 334, the issue before the Court of Appeal was whether the plaintiff had to suffer from a recognizable psychiatric illness in order to recover. The
female plaintiff had witnessed her husband being assaulted by a neighbour and had suffered panic attacks. No psychiatric evidence had been tendered at trial MacKenzie J.A. wrote:

"In my view, the weight of authority supports a recognized psychiatric illness as a condition for liability but in any event I do not think that the anxiety experienced by the appellant, distressing as it was, meets the degree of intensity and permanence indicated as a threshold for recovery in McDermott and Cox." (para. 8)

46. There are a number of cases from other jurisdictions in which mothers have recovered for "nervous shock" in relation to harm which they perceived to have occurred to their children.

47. The first significant case of nervous shock in the U.K. is Dulieu v. White & Sons, [1901] 2 K.B. 660, in which the plaintiff, a pregnant woman, was behind the bar of her husband's public-house when the defendants drove a pair-horse van into the house. The plaintiff sustained severe shock and later gave birth prematurely to a disabled child. The issue was whether an action in negligence lay when there was no immediate physical injury to the plaintiff. Phillimore J. wrote:

_I think there may be cases in which A. owes a duty to B. not to inflict a mental shock on him or her, and that in such a case, if A. does inflict such a shock upon B. - as by terrifying B. - and physical damage thereby ensures, B. may have an action for the physical damage, though the medium through which it has been inflicted is the mind" (pp. 682-683)_

48. In McLoughlin v. O'Brian [1983] A.C. 409, a decision of the House of Lords, the plaintiff's husband and three children were involved in a car accident. The plaintiff was taken to the hospital to see her family and there learned that her youngest daughter had been killed and saw the injuries of her husband and other children. The primary issue was fact that the plaintiff had not observed the accident. Lord Wilberforce reviewed various policy considerations and noted that "it is obvious that this must be close in both time and space." (p. 422) Lord Russell of Killowen wrote: "But if the effect on this wife and mother of the results of the negligence is considered to have been reasonably foreseeable, I do not see the justification for not finding the defendants liable in damages therefore." (p.429) Lord Bridge of Harwich wrote:

_The leading judgment of Bankes L.J. sought to demonstrate the absurdity of maintaining the boundary of a defendant's liability for "nervous shock" on the line drawn by Kennedy J. saying, at p. 151:_

_Assume two mothers crossing this street at the same time when this lorry comes_
thundering down, each holding a small child by the hand. One mother is courageous and devoted to her child. She is terrified, but thinks only of the damage to the child, and not at all about herself. The other woman is timid and lacking in the motherly instinct. She also is terrified, but thinks only of the damage to herself and not at all about the child. The health of both mothers is seriously affected by the mental shock occasioned by the fright. Can any real distinction be drawn between the two cases? Will the law recognize a cause of action in the case of the less deserving mother, and none in the case of the more deserving one? Does the law say that the defendant ought reasonably to have anticipated the non-natural feeling of the timid mother, and not the natural feeling of the courageous mother? I think not."

49. In *W. v. Essex County Council*, supra, the House of Lords not only looked at whether the parents might be primary victims, it also considered whether they might be secondary victims. On this issue, Lord Slynn of Hadley wrote:

"Whilst I accept that there has to be some temporal and spatial limitation on the persons who can claim to be secondary victims ... it seems to me that the concept of the "immediate aftermath" of the incident has to be assessed in the particular factual situation. I am not persuaded that in a situation like the present the parents must come across the abuser or the abused "immediately" after the sexual incident has terminated. All the incidents here happened in the period of four weeks before the parents learned of them."

50. Most recently, one finds the case *Walters v. North Glamorgan NHS Trust* decision, a 2002 decision of the England and Wales Court of Appeal. In this case, the issue was whether a mother could recover damages for the pathological grief reaction which she suffered after waking at her young baby's bedside when the child was having a fit, and died 36 hours later after life-support was withdrawn. The primary issue was whether the plaintiff had witnessed an "event" necessary to ground her claim and whether that "event" met the requirements of being horrifying.

51. For the three member appeal panel, Lord Justice Ward wrote:

"In my judgment the law as presently formulated does not permit a realistic view being taken from case to case of what constitutes the necessary "event". Our task is not to construe the word as if it had appeared in legislation but to gather the sense of the word in order to inform the principle to be drawn from the various authorities. As a word, it has a wide meaning as shown by its definition in the Concise Dictionary as "An item in a sports programme, or the programme as a whole ". It is a useful metaphor or at least a convenient description for the "fact and consequence of the defendant's negligence" per Lord Wilberforce, or the series of events which make up the entire event beginning with
the negligent infliction of damage through to the conclusion of the immediate aftermath whenever that may be. It is a matter of judgment from case to case depending on the facts and circumstance of each case. In my judgment on the facts of this case 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 is a seamless tail with an obvious beginning and an equally obvious end. It was played out over a period of 36 hours, which for her both at the time and as she subsequently recollected was undoubtedly one drawn-out experience.

Mr. Miller submits that the court cannot take account of what the mother was told about her son's condition from time to time. I do not agree. The distinction in the authorities is between the case where the claim is founded upon "merely being informed of, or reading, or hearing about the accident" and directly perceiving by sight or sound the relevant event. Information given as the events unfold before one's eyes is part of the circumstances of the case to which the court is entitled to have regard.

The question then is whether this entire event was "horrifying". For my part the facts only have to be stated for the test to be satisfied. " (paras. 34-36)

The issue here is whether her psychiatric condition was caused by shock. The medical evidence was clear that it was. (para. 39)

She was there witnessing the effect of that damage on her child. The necessary proximity in space and time is satisfied. The assault on her nervous system had begun and she reeled under successive blows as each was delivered. It comes as no surprise to me that when her new baby was ill she should suffer the flashbacks of 36 horrendous hours which wreaked havoc upon her mind." (para. 40)