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Baby Loss, Neuroscience and Damages

Recovering for the loss of a baby: the English law perspective

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What We Will Cover

- The legal starting point: mother and foetus as one legal person
- The mother as a primary victim
- The father as a secondary victim — and the control mechanisms
- The neuroscience of grief and the law's dividing line
- Heads of damage and quantum
- Born alive vs stillbirth: two different legal worlds
- Statutory bereavement damages and the APIL campaign for reform

The Legal Starting Point

- **Mother and foetus are ONE legal person until birth**
- A foetus has no separate legal personality in English law
- A foetus cannot sue, and cannot “suffer death” in law
- A child injured in utero but born alive acquires a cause of action
 - Burton v Islington Health Authority [1993] QB 204
 - Congenital Disabilities (Civil Liability) Act 1976

The Mother as Primary Victim

- The mother does **NOT** need to satisfy secondary victim tests
- **What is a primary victim?**
- She is directly harmed: the foetus is part of her
- She can recover for psychiatric injury and for pain, suffering and loss of amenity

Key authorities:

- Wild v Southend University Hospital NHS FT [2014]
- YAH v Medway NHS FT [2018]
- RE (A Child) v Calderdale & Huddersfield NHS FT [2017]
- Zeromska-Smith v United Lincolnshire Hospitals NHS Trust [2019]

The Partner as Secondary Victim: The “Black Hole”

- **Partner must satisfy the Alcock control mechanisms:**
 - Close tie of love and affection (presumed for parents)
 - Sudden and unexpected shock
 - Proximity in time and space to the event
 - Direct perception — by own sight or sound
- **In stillbirth cases, partners routinely fail**
- Wild v Southend: father’s claim dismissed — shock from realisation, not from witnessing an external event
- Kitchen v Hillingdon [2022]: father told during scan a twin had died — claim dismissed
- **The judge in Wild called this result “illogical”**

Neuroscience of Grief: The Law's Dividing Line

- **English law does NOT compensate “normal” grief or bereavement**
- Only a recognised psychiatric injury is recoverable

The Zeromska-Smith framework:

- Significant overlap between grief and depression initially
- Normal grief: trajectory of recovery over approximately one year
- Complete recovery from loss of a child is never expected

Compensable injury arises where:

- Grief symptoms fail to ameliorate — pathological grief disorder
- Avoidance: mother functions normally until trigger re-emerges
- Stillbirth creates vulnerability to further injury (e.g. post-natal depression)
- **Expert psychiatric evidence is decisive**

What is Recoverable: Heads of Damage

For the mother as primary victim:

- Pain, suffering and loss of amenity (PSLA) for recognised psychiatric injury
- Loss of the satisfaction of bringing the pregnancy to a successful conclusion

NOT recoverable:

- **“Normal” grief, sorrow, or distress — no damages at common law**
- Lord Bridge in *McLoughlin v O’Brian* [1983] 1 AC 410

Worked example — *Zeromska-Smith*:

- £36,000 for PSLA (pathological grief disorder, likely to resolve within ~2 years)
- £6,000 for loss of the satisfaction of a successful pregnancy

Quantum: A Cautionary Line of Cases

Bagley v North Herts HA (1986):

- Mother; stillbirth due to negligence
- Global award of £18,000 including loss of satisfaction of pregnancy, physical illness, and loss associated with loss of the child
- Equivalent now to approx. £78,000

Kerby v Redbridge HA [1994]:

- Twin died 3 days after birth
- Ognall J declined to follow Bagley on “dashed hopes”
- Award: £10,000 PSLA; £1,500 for rigours of additional pregnancy; statutory bereavement (£3,500); £750 to child’s estate
- Equivalent now to approx. £31,000 PSLA, £4,600 rigours of pregnancy; £10,881 statutory bereavement and £2,300 to child’s estate
- **English law resists compensating grief as such — restrictive and principle-driven**

Born Alive vs Stillbirth: Two Different Worlds

Child born alive then dies:

- Fatal Accidents Act 1976 applies
- Relatives claim for losses flowing from the death
- Statutory bereavement damages available
- Child / estate has own claim
- Congenital Disabilities Act 1976 if born alive with disability

Stillbirth:

- Fatal Accidents Act does NOT apply
- The baby never became a legal person
- Parents' route: mother's own primary-victim claim only
- **This boundary is stark and, for many, arbitrary**

Bereavement Damages Under the Fatal Accidents Act 1976

- **A fixed, statutory sum — not compensation for the loss**
- A nominal sum pre-set by Parliament solely to acknowledge the loss
- Current sum: £15,120 (s.1A(3) Fatal Accidents Act 1976)
- Eligibility is narrow and set by statute

The reality:

- Bereaved families regard this as insultingly low
- Most lawyers share that view
- The sum has risen only modestly over decades (e.g. £3,500 in 1994)
- **Reform is expected in time, but not in the short to medium term**

The APIL Campaign: “Fairness for Bereaved Families”

- **Association of Personal Injury Lawyers (APIL)**
- Campaign: “Fairness for Bereaved Families”

Core criticisms:

- The fixed award is set too low — does not reflect the gravity of the loss
- The categories of who can claim are too restrictive
- Many bereaved family members are left with nothing at all
- A single fixed sum is a blunt instrument

The wider picture:

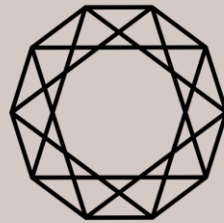
- The legal profession broadly supports reform
- This is a live debate in England and Wales
- **apil.org.uk/fairness-for-bereaved-families**

Key Takeaways

- The unborn child has no separate legal personality in English law
- The mother is a primary victim and recovers for psychiatric injury
- Fathers/partners usually fail as secondary victims — a recognised anomaly and gender bias
- English law compensates recognised psychiatric injury, NOT ordinary grief
- Psychiatric and neuroscientific evidence is decisive
- Statutory bereavement damages: a fixed, nominal £15,120 — widely regarded as inadequate
- Available only where the child is born alive then dies
- Reform is sought by APIL and others, but is not imminent

Thank You

Questions and Discussion



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