

The Impact of *Paul v Royal
Wolverhampton NHS Trust*
[2024] UKSC 1

Charlie Cory-Wright KC
Emily Formby KC
Scarlett Milligan

39 Essex Chambers
15 January 2024

Outline

- Set out the cases and the judgment in the Supreme Court
- Short reminder of the law before Thursday 11 January 2024 and how we got there
- Discussion about the main changes
- Reflection on what this might mean in practice going forward
- Slight “crystal ball” on what might happen next
- This is a reflection and interactive discussion we hope you will join either in real time or later – so please grab a coffee, draw up your chair and let’s begin!

Introduction

- 4 questions by way of introduction – these are essentially as a trailer for what follows
- Brief answers now – the questions with which we deal more fully in due course
 - What are Secondary Victim Claims?
 - Why has the law found them so difficult to deal with?
 - What did *Taylor v Novo* decide and why was it controversial?
 - What has *Paul* now decided, and why is it controversial?

Recovery for psychiatric illness

- Primary victims
 - C's own physical injury;
 - C's own psychiatric injury where physical injury was reasonably foreseeable;
 - Whether for fear of their own safety, or that of another
 - C's own psychiatric injury where physical injury not reasonably foreseeable, but psychiatric injury reasonably foreseeable
- Secondary victims – psychiatric injury as a result of injury to/endangerment of another, subject to policy restrictions.
- Law Commission report no 249 in 1998 recommended wholesale reform

The Supreme Court's Judgment [2024] UKSC 1

- Leading judgment given by Lord Leggatt and Lady Rose, with whom Lords Briggs, Sales and Richards agreed: all claims dismissed
- Dissenting judgment of Lord Burrows
- Additional judgment of Lord Carloway (with whom Lord Sales agreed) re impact on Scottish law – not something we will cover in this webinar
- The leading judgment contains two main strands of analysis and reasoning:
 - (1) The case law in relation to secondary victims
 - (2) How these claims fit in with broader case law on negligence and the scope of duties of care

Paul v The Royal Wolverhampton NHS Trust

- Facts of all the cases assumed to be true because all strike out claims
- Mr Paul's two young daughters witnessed their father suffer a cardiac arrest and collapse in the street in January 2014.
- Mr Paul's heart attack and death were caused by an occlusion of his coronary artery. This arose from underlying atherosclerosis that the claimants say the defendant negligently failed to diagnose and treat in November 2012.
- His fatal heart attack was the first sign of illness.
- It was witnessed by the young girls, who thereafter suffered psychiatric illness

Polmear v Royal Cornwall Hospital NHS Trust

- Claimants are the parents of Esmee who died aged 6 in July 2015
- From August 2014 her parents sought help from the GP and referral to a paediatrician which should have led, by January 2015, to diagnosis of pulmonary veno-occlusive disease. Treatment would have prevented her death.
- Her father tried to help her when she fell ill at school, carried her when she was breathless and tried to give her mouth-to-mouth resuscitation following her collapse.
- Her mother also witnessed unsuccessful life-saving attempts of paramedics. Both claim for PTSD and depression.

Purchase v Ahmed

- April 2013, Evelyn Purchase died of pneumonia aged 20.
- Mother accompanied her to the defendant GP where her illness was not recognised.
- Two days later, Evelyn developed heart palpitations.
- Having left her for the evening, Evelyn's mother returned to find her motionless holding a phone, she had tried to call for help and her dying breath was recorded on her mother's mobile.
- Attempts to give mouth-to-mouth resuscitation failed and Evelyn's mother claimed for PTSD and severe chronic anxiety and depression.

The Progress of the Cases

- *Paul* struck out at first instance by Master Cook [2019] EWHC 2893 (QB), overturned on appeal by Chamberlain J: [2020] EWHC 1415 (QB)
- *Polmear* came before Master Cook who refused to strike out the claim in light of Chamberlain J's judgment: [2021] EWHC 196 (QB)
- *Purchase* struck out at first instance in the County Court [2020] 5 WLUK 249
- Appeals to all three decisions were joined in the Court of Appeal and all three claims were dismissed

A Brief Background

- §2 - *“Essentially, the common law does not recognise one person as having any legally compensable interest in the physical well-being of another. The law affords compensation to the victim but not to others who suffer harm in consequence of the victim’s injuries or death, however severely affected they may be”*
- Recognised exceptions are fatal accident claims within the Fatal Accident Acts 1976 legislation – it is only this which makes the claim
- These appeals look at secondary victims and whether this second exceptional category of claims should include harm suffered by witnessing the death or injury of the close relative caused by a medical condition which the defendant has negligently failed to diagnose and treat.

Secondary Victims

- Secondary victim claims were defined as follows in *Paul* at §4:
“...limited category of cases, recognised by common law, in which damage may be recovered for personal injury consequent on the death or injury to another person. In these cases it is not the death or injury of that person itself or the defendant’s responsibility for it which gives rise to the claim but the fact that the claimant has witnessed the wrongful death or injury (or threat of such death or injury) to someone they love.... It certainly includes cases where the claimant suffered personal injury (typically but not limited to psychiatric illness) as a result ... of the defendant’s negligent act or omission”

Underpinning HofL Judgments

- *Alcock*: first definition of secondary victims as a concept: “no more than the passive and unwilling witness of injury caused to others”
- Lord Oliver defined common features of 2V cases leading to “the essential requirement of proximity” being (1) *marital or parental relationship* (2) 2V injury arose from “*sudden and unexpected shock to plaintiff’s nervous system*” (3) 2V was either “*personally present at the scene of the accident or ..in more or less immediate vicinity*” and (4) injury to 2V arose from “*witnessing the death of, extreme danger to, or injury and discomfort suffered by primary victim*”
- Proximity is both physical and temporal to the primary victim event

Frost

- Lord Oliver did not suggest his *Alcock* analysis gave fixed tramlines but urged caution against pragmatic extension of “proximity” concept
- In *Frost* their Lordships agreed the *Alcock* requirements needed to be met. Lord Steyn stated them as:
 - C had close tie of love and affection with person killed, injured or imperilled
 - C was close to the incident in time and space
 - C directly perceived the incident
- Lord Steyn also gave some policy reasons which were not considered by Supreme Court to be of particular relevance save avoiding imposing a burden of liability disproportionate to the D’s fault

The Court of Appeal's Judgment [2022] EWCA Civ 12

- Sir Geoffrey Vos gave the leading judgment, concurring judgments given by Lord Justice Underhill and Lady Justice Davies
- The Court of Appeal held that it was bound by previous CoA and HoL authority (particularly *Taylor v A Novo (UK) Ltd* [2013] EWCA Civ 194), such that the claimants could not recover for psychiatric injury caused by witnessing an event removed in time from the original negligence/accident/horrific event
- Decision of Chamberlain J at first instance in *Paul* overturned
- Sir Geoffrey Vos: “*If I were starting with a clean sheet, I can quite see why secondary victims in these cases ought to be seen to be sufficiently proximate to the defendants to be allowed to recover damages for their psychiatric injury...*”

Key Issue for Supreme Court

- §5 *“The key issue raised by these appeals is whether this exceptional category of case includes - or can and should be extended to include - cases where the claimant’s injury is caused by witnessing the death or injury of a close relative, not in an accident, but from a medical condition which the defendant has negligently failed to diagnose and treat.”*
- Do need to remember that the Supreme Court (despite this paragraph) accept that the primary victim does not actually need to suffer death or injury for a secondary victim claim to arise

Strand 1: Where are we now - accident, event, or consequence?

- The leading judgment contains a comprehensive analysis of the relevant case law in this area which is worth reading
- There is a particular focus on *Novo* with the SC disagreeing with how the lower courts had interpreted that case (§90)
- In upholding the reasoning of Lord Dyson MR in *Novo*, Leggatt and Rose LLJ held (§§104—105) that a claimant must be present at the scene of an accident or its immediate aftermath.
- It is the accident that is the pivotal event, not any consequence thereof, no matter how horrifying or shocking

Strand 1: Where are we now - accident, event, or consequence? (cont'd)

- §105: “...*the occurrence or manifestation of injury is not part of what defines an accident. An accident is an external event which causes, or has the potential to cause, injury: it is not the injury, if there is one, caused by that event... witnessing injury caused by the accident has not been treated as either necessary or sufficient...*”
- §71: earlier secondary victim cases in the medical negligence context did not decide “*whether in principle the rules developed in accident cases ought to be applied*”, and “*simply assumed that the same rules applied*” and focused on the application of the ‘sudden shock’ *Alcock* criterion

Why is witnessing an accident legally significant?

- The SC held that witnessing an accident was legally significant because:
 - (1) that category of victims is legal certain (§108)
 - (2) witnessing an accident involving a close family member is an intelligible place to draw the line on recovery of damages for illness consequent on bereavement (§109) and
 - (3) it can be difficult or arbitrary in accident cases to distinguish between primary and secondary victims, and no reasonable distinction could be drawn between injury caused by fear for one's own safety versus for the safety of a close family member (§110)

Defining the Accident

- The majority judgment has clarified that the following are not requirements for a secondary victim claim:
 - (1) The need for an event to be “*horrifying by objective standards*”. There is no justification for imposing what is, “...*in truth unavoidably subjective. There is no available Richter scale of horror...*” (§§75-76).
 - (2) A sudden and unexpected shock to the nervous system (as opposed to gradual assaults on the nervous system), which was “*tied to an outdated theory of the aetiology of psychiatric illness*”. It is sufficient to show a causal connection between witnessing the accident and developing psychiatric illness (§§72-74).
 - (3) Considering whether an accident is one event or several separate events is neither helpful nor a formal requirement, and risks expanding recoverability far beyond the immediate aftermath contemplated in McLoughlin (§§79-82)

What about the time between a defendant's negligence and the accident?

- Clarifying and affirming the reasoning of the CoA in *Novo* as well as the CoA in *Paul*, the SC “*could see no good reason why the gap in time (short or long) between the negligence and the horrific event caused by it should affect the defendant's liability*” (§94)
- Typically the accident and negligence causing it will occur “*at much the same time*”, but the *Alcock* requirements do not include any requirement of closeness in space and time to the defendant's breach of duty.

First Manifestation of Damage

- The majority agreed with the CoA that a test of the “*first manifestation of damage*” would be illogical (§§97-103)
- First manifestation was test proposed in *Paul* but would be fatal for *Polmear* and *Purchase*: seek to distinguish ordinary effects of untreated illness and damage to be avoided...
- Inherently difficult to define “first manifestation”
 - Really serious harm?
 - Any symptoms at all?
 - Symptoms noticed by primary victim?
 - Something “internal to the primary victim” per *Novo*?
- Creates layer of factual complexity

Strand 2: Where does this analysis fit within the broader law of negligence?

- The general principles of negligence cannot be ignored or bypassed: legal proximity between the secondary victim and the defendant is important “*The question is one of interpersonal justice*” (§§128-129).
- The scope of the defendant’s duty is important. There must be a sufficient nexus between the harm claimed for and the defendant’s duty of care: see the recent case of *Meadows v Khan* [2021] UKSC 21.

Strand 2: Where does this analysis fit within the broader law of negligence? (cont'd)

“...there is a rough and ready logic in limiting recovery by secondary victims to individuals who were present at the scene, witnessed the accident and have a close tie of love and affection with the primary victim. These limitations are justified, not by any theory that illness induced by direct perception is more inherently worthy of compensation than illness induced by other means; but rather by the need to restrict the class of eligible claimants to those who are most closely and directly connected to the accident which the defendant has negligently caused and to apply restrictions which are reasonably straightforward, certain and comprehensible to the ordinary person.”

(§141, emphasis added)

Strand 2: Where does this analysis fit within the broader law of negligence? (cont'd)

“138. Common to all cases of this kind, however, is a fundamental question about the nature of the doctor’s role and the purposes for which medical care is provided to a patient. We are not able to accept that the responsibilities of a medical practitioner, and the purposes for which care is provided, extend to protecting members of the patient’s close family from exposure to the traumatic experience of witnessing the death or manifestation of disease or injury in their relative. To impose such a responsibility on hospitals and doctors would go beyond what, in the current state of our society, is reasonably regarded as the nature and scope of their role...”



Strand 2: Where does this analysis fit within the broader law of negligence? (cont'd)

- *“142. ...this court is asked to recognise as analogous a category of cases in which illness is sustained by a secondary victim as a result of witnessing a death or manifestation of injury which is not caused by an external, traumatic event in the nature of an accident but is the result of a pre-existing injury or disease. For the reasons given, we do not consider that such cases are analogous. That conclusion is reinforced by our opinion that the persons whom doctors ought reasonably to have in contemplation when directing their minds to the care of a patient do not include members of the patient’s close family who might be psychologically affected by witnessing the effects of a disease which the doctor ought to have diagnosed and treated. Hence there does not exist the proximity in the relationship between the parties necessary to give rise to a duty of care.”*

Need an Independent Duty

- While the nature of a secondary victim claim means there is an attachment to the harm suffered by the primary victim (or anticipation of harm) it is essential to establish a duty owed by the defendant tortfeasor directly to the secondary victim
- This duty depends on reasonable foreseeability of damage of the type which has occurred to the 2V
- And for there to be the proximity of relationship and temporal proximity to the primary accident
- The service provider owes a duty of care to the person to whom the service is provided – principle of all professional services
- In the medical context, this does not extend beyond the patient (save for specified rare exceptions). How will this apply to other professionals, for example, architects and builders?

Lord Burrows' Dissenting Judgment

- Lord Burrows was the Law Commissioner in 1998 when the Law Commission produced its report 'Liability for Psychiatric Illness', recommending legislative wholesale reform of this area of law so that secondary victims would recover if (a) they had close ties of love and affection and (b) their psychiatric illness was reasonably foreseeable
- The Government responded in 2009 to say that it was preferable for the courts to have the flexibility to develop the law, rather than a statutory solution
- Lord Burrows is of the view that the SC should take the opportunity to develop the law in this area



Lord Burrows' Eight Reasons for Allowing the Appeals

- (1) The primary victim's death should be the relevant event in these three cases, not any events which are external to the primary victim. Had the primary victim been seriously ill or injured, that would have been the relevant event.
- (2) Treating the death as the relevant event is a justified incremental step in the common law to move to a more satisfactory position.
- (3) Insistence upon an accident external to the primary victim needlessly denies recovery in almost all medical negligence cases in circumstances where the Government has entrusted flexible development of the law to the courts in this area.



Lord Burrows' Eight Reasons for Allowing the Appeals

- (4) The rule against liability for omissions does not apply as a secondary victim can “derivatively rely” on the defendant’s assumption of responsibility for the primary victim.
- (5) A secondary victim could also recover for physical injury rather than psychiatric injury, though such cases are rare. The law would not be treating cases of psychiatric illness more favourably than cases of physical injury.
- (6) A time lag between negligence and death of the primary victim is not a valid objection to treating death as the relevant event.



Lord Burrows' Eight Reasons for Allowing the Appeals

- (7) A time lag between the accrual of the primary victim's cause of action and the death of the primary victim is not a valid objection to treating the death as the relevant event, in the same way as the law permits the primary victim to make a claim for latent injury.
- (8) *Novo* was incorrectly decided and should be overruled: it was based on the 'thus far and no further' approach; Lord Dyson should have treated the accident and death as separate events, both of which could be relevant events.

Thus far and no further?

- Leggatt, Rose and Burrows LLJ did agree in that they disagreed with Lord Hoffman in *Frost* that “*the search for principle was called off in Alcock*” (§58, §204)
- However, the effect of the majority judgment in *Paul* is that secondary victim claims are unlikely to succeed in a medical negligence context.
- Although the judgment at §123 left open the possibility that an accident in the relevant sense could occur in a medical scenario (for example, a wrong dose causing an acute adverse reaction), it is difficult to see how the court’s emphasis on the restricted scope of a doctor’s duty could be overcome.

The Impact on Other Personal Injury Claims

- Simplifies secondary victim claims by focusing on, in particular:
 - the accident
 - whether its perception by the claimant caused psychiatric injury
 - whether psychiatric injury was reasonably foreseeable
- In addition to clinical negligence, secondary victim claims seem unlikely to succeed in the context of historic abuse, asbestosis and other forms of latent damage
 - There remains a need for an accident

Thank You!

Charlie.Cory-WrightKC@39essex.com

Emily.FormbyKC@39essex.com

Scarlett.Milligan@39essex.com

© 39 Essex Chambers

15 January 2024

The information contained herein is made available on the basis that no liability is accepted for any errors of fact or opinion. The opinions expressed are those of the individual authors and does not constitute legal advice. Legal advice should always be sought on the particular circumstances of any individual case. Remember these slides will become less reliable as time passes and the law continues to develop.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 39 Essex Street, London WC2R 3AT. 39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services. 39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 39 Essex Street, London WC2R 3AT