Paul and Another v Royal Wolverhampton NHS Trust [2024] UKSC 1: A Case Summary

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3PB

Introduction

The avenues of claim open to secondary victims for psychiatric injury arising from witnessing accidents have been subject to a long line of jurisprudence; the well-known starting point being the decision in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 ('Alcock'). Those arising from clinical negligence have been considered for the first time more recently. On 11 January 2024, the Supreme Court handed down judgment in the conjoined appeals of *Paul, Polmear, and Purchase.* It is a significant judgment; it provides a clear exposition of the relevant principles in secondary victim claims. The cases were taken on their material facts as alleged in the respective particulars of claim, as was required to assess whether the claims were capable of succeeding in law. This article provides a summary of the majority judgment, along with reference to the dissenting judgment given by Lord Burrows.

Factual Background

Paul

This claim arises out of the claimant's allegation that in 2012 the defendant had been negligent in failing to arrange a coronary angiography (the contention being that if it had done so then clinicians would have identified Mr Paul's significant coronary artery disease.) In 2014, Mr Paul suffered a cardiac arrest, and collapsed in the street. He had two daughters, aged 9 and 12, who witnessed him fall backwards and hit his head on the pavement. The daughters attempted to obtain assistance. They observed their mother's distress upon arrival and observed the ambulance crew performing chest compressions. They brought claims for damages for the psychiatric injury that they suffered from witnessing those events.

Polmear

Polmear concerned a failure by the defendant to diagnose Esmee Polmear, a six-year-old girl, with pulmonary veno-occlusive disease. Esmee's parents brought claims for psychiatric injury:

Esmee was observed by her father as being pale, tired, and breathless at school after returning from a school trip. She lost consciousness, and her father attempted mouth-to-mouth resuscitation. This then escalated to attempts at further resuscitation by school staff and paramedics, which were observed by her mother. Paramedics were unsuccessful are resuscitating Esmee, and she was declared dead in hospital.

Purchase

Evelyn Purchase died on 7th April 2023 from severe pneumonia. She had visited the GP days before, but was not diagnosed, and instead sent home with antibiotics and an antidepressant. Evelyn's mother found Evelyn lying motionless on her bed, with a telephone in hand, staring at the ceiling. The family called an ambulance, and started resuscitation. Evelyn was declared dead upon the arrival of paramedics. Evelyn's mother brought a claim as a secondary victim owing to the post-traumatic stress disorder that she had developed from witnessing Evelyn in such state, and following her listening to a voice message, left on her phone, where she could hear Evelyn's dying breaths for 4 minutes and 37 seconds.

The Court of Appeal Decision

These three conjoined appeals were heard by the Court of Appeal, which found itself bound by the decision in *Taylor v A Novo (UK) Ltd* [2013] EWCA Civ 194 ('Novo'). It found in favour of the Appellants in *Paul* and *Polmear,* and for the Respondent in *Purchase*. Given the reservations as to whether *Novo* correctly interpreted the limitations on secondary liability, permission was granted to allow the Supreme Court to consider the important issues raised in the appeals.

The decision in Novo

Before considering the outcome in *Paul* & Ors, it is observant to briefly consider the decision in *Novo*, as it was a decision which had a central focus throughout the litigation. Whilst not a medical negligence case, it considered the requirement laid down in *Alcock*, of the secondary victim needing to be present at the scene of the accident, which caused the death or must have been involved in its immediate aftermath. This requirement required careful consideration given the fact that the defendant's negligence (allowing a stack of racking boards to fall on top of the victim), was some months prior to the death of the victim from pulmonary emboli, which was a consequence of the defendant's negligence. The victim's daughter brought a claim, as she witnessed her mother's death (although not the index accident).

At first instance, the judge ruled that the daughter was entitled to bring a claim as a secondary victim; he held that the event which caused damage to the daughter was witnessing the death of her mother, an event which would not have occurred but for the defendant's negligence. In that conclusion, the necessary proximity was established. The learned judge said [19]:

"However, taking a commonsense view, this was not a gradual decline leading to death, it was a sudden collapse. It was on any practicable view a new "event" and a very traumatic one for CT. In reality, to argue that it was not a separate event is an artificial construct. It is an attempt to establish a defence based on the ALCOCK (sic) "control mechanisms" in a situation where they really do not apply. The operative "event" which traumatised the Claimant was sudden and horrifying. She was present at the scene and witnessed it with her own senses. The fact that there was an earlier incident caused by the same negligent act is irrelevant. The fact that the second event would not have occurred but for the first adds nothing."

The Court of Appeal observed that proximity between the primary and secondary victim has two distinct interpretations: 1) as a legal term in the common law of negligence generally which provides the requirement to establish a duty of care between parties, and 2) physical proximity in space and time. The latter is relevant in that it provides a control mechanism to limit the number of secondary victim claims, per Moore-Bick LJ [27]: *"it is a necessary, but not sufficient, condition, of legal proximity"*.

The appeal was allowed. It was decided that the first instance judge was wrong to hold that the relevant event for determining proximity was the death of Ms Taylor, but rather the accident that she initially was subjected to. It was said that [32]:

"…A paradigm example of the kind of case in which a claimant can recover damages as a secondary victim is one involving an accident which (i) more or less immediately causes injury or death to a primary victim and (ii) is witnessed by the claimant. In such a case, the relevant event is the accident. It is not a later consequence of the accident… Ms Taylor would have been able to recover damages as a secondary victim if she had suffered shock and psychiatric illness as a result of seeing her mother's accident. She cannot recover damages for the shock and illness that she suffered as a result of seeing her mother's death three weeks after the accident."

The Supreme Court Decision and Jurisprudential Analysis

The Supreme Court, in a judgment written by Lord Leggatt and Lady Rose (with whom Lord Briggs, Lord Sales and Lord Richards agreed), explored the issues of secondary victim claims

from many different angles, and analysed a significant number of previous decisions whilst doing so some of which are detailed below.

The criteria (vis-à-vis control mechanisms) for secondary victim claims were provided in *Alcock*, and later affirmed in the case of *Frost v Chief Constable of South Yorkshire* [1999] 2 AC 455 ('Frost'), as follows:

1) The Claimant must have had a close tie of love and affection with the person killed, injured, or imperilled;
2) The Claimant must have been present at the accident or its immediate aftermath; and
3) The psychiatric injury must have been caused by the direct perception of the accident, or its immediate aftermath and not upon hearing about it from somebody else.

The Supreme Court dismissed the three appeals. It considered several important questions, which were:

Must the Claimant experience a sudden shock? The term 'nervous shock' was described as a 'crude mechanical model'. It is a term which is now outdated. The *Alcock* criteria did not envisage such a requirement of nervous shock which was causative of the psychiatric injury. Therefore, causatively, a Claimant doesn't need to demonstrate the mechanism by which their psychiatric illness was induced.

Must there be a horrifying event? No. The Supreme Court decided that the law had taken a wrong turn in this respect. As with the sudden shock requirement, the Alcock criteria did not provide for an additional requirement that the event complained of must be horrifying. The interpretation of what can constitute a horrifying event is difficult to do in an objective sense; it turns on the individual event and individual experience. Lord Leggatt and Lady Rose used the expression that there is no "Richter scale of horror', and the questions which a judge must investigate when deciding whether an event is horrifying are likely invidious.

What constitutes an 'event'? There have been varying interpretations of whether or not what a secondary victim has witnessed is part of one, or a series of events. In NHS Trust v *Walters* [2002] EWCA Civ 1792 ('Walters') the Court concluded that a 36-hour period, starting with a baby's epileptic seizure, and ending with their death was one event, which was justified, as it was an 'inexplorable progression' and 'seamless tale with an obvious beginning and equally obvious end'. The Supreme Court considered that such an analysis causes a separate problem, where the court has to consider when the initial event occurs, and when the aftermath of that event ends. This is where the decision in *Novo* becomes relevant, in summary:

a) The gap in time between the defendant's negligent action and the consequential horrific event should not affect the defendant's liability;
b) *Alcock* did not require the defendant's breach of duty to be close in space and time to the witnessed event;
c) It is illogical to impose any legal test which requires the event to be the first manifestation of damage to the primary victim. To do so *"would create unprincipled and complex factual disputes"*, per Vos LJ [82] of *Novo.*

Accident cases: is there a claim if there was no accident? There may be cases where there is no primary victim, yet the psychiatric injury suffered by the secondary victim from observing a near-accident may be significant. The Supreme Court provided three examples of ways in which the occurrence of an accident is integral to secondary victim claims arising from accidents:

a) An accident is a discrete event, and it can be clearly established whether a secondary victim observed it. It provides legal certainty, albeit it has been compromised by the utilisation of determining whether a secondary victim has observed the immediate aftermath of an accident, rather than the accident itself;
b) Witnessing the accident itself is an ordeal, and if a line is to be drawn for policy reasons, then it is likely to be accepted that it would be the those who observed the accident, rather than the illnesses consequent on bereavement that it should favour;
c) In cases where the secondary victim has not only feared for the primary victim's safety, but also theirs, it would be unjust to limit the recoverability of damages to only when the latter could be established;

The need for proximity? It is necessary to show both a reasonable foreseeability of harm, along with sufficient proximity to establish a duty of care. It gives rise to the consideration, in medical negligence cases, of when a doctor's duty extends to those who are not their patients. The commentary in *Clerk and Lindsell*, and *Jones on Medical Negligence*, was referenced by the Supreme Court when considering infectious disease cases. For example, where a doctor negligently allows infectious patients to be discharged, and then others become subsequently infected, or where a sexually transmitted disease is not diagnosed and is subsequently contracted. A concrete decision on these sorts of scenarios was not given by the Supreme Court, and understandably so given that they are highly fact-specific, but it was highlighted, in respect of infectious disease cases that the duty of doctors extends to protect public health is reflected in statutory obligations.

How about those that witness another's medical crisis? It was decided that to impose a duty on doctors to protect family members from the traumatic experiences of witnessing the death or disease of another would be to go too far, and impose an unreasonable duty upon medical professionals. As Lord Leggatt and Lady Rose said at [139]:

"…although social attitudes and expectations may be changing, we would not accept that our society has yet reached a point where the experience of witnessing the death of a close family member from disease is something from which a person can reasonably expect to be shielded by the medical profession. That is so whether the death is slow or sudden, occurs in a hospital, at home or somewhere else, and whether it be peaceful or painful for the dying person. We do not mean in any way to minimise the psychological effects which such an experience may have on the person's parent, child, or partner when we express our view that, in the perception of the ordinary reasonable person, such an experience is not an insult to health from which we expect doctors to take care to protect us but a vicissitude of life which is part of the human condition."

The Dissenting Judgment

Lord Burrows dissented from the majority, and considered that the appeals should have been allowed for the following primary reasons:

a) He considered that the relevant event should be the death of the primary victim, and not the external events of the accident. The justification being that the psychiatric injury suffered in the three cases on appeal was as a result of witnessing the death itself.
b) Treating death as the relevant event would be a justified incremental step in the development of the common law; the restriction imposed by Lord Steyn in *Frost* of "thus far and no further" is not justified;
c) Medical negligence cases rarely present an external accident, but rather a failure to diagnose, advise or treat – requiring an external accident, and blocking off this area of recoverability is not attractive, when the law should be flexibly developed;
d) Even though an independent duty of care may be established by a secondary victim, the second stage to establish a breach of duty is derivative on the primary victim. An exception could therefore be introduced in medical negligence cases where the secondary victim can rely upon an assumption of responsibility to the primary victim, but this would still be dependent on the primary victim establishing a breach of duty for public policy reasons;
e) Allowing recovery in the three appeals would not be treating those secondary victims who suffer from physical injury, and those few who may suffer from physical injury any

less or more favourably, as the physical injury victim would have a claim at common law even upon the application of the proximity principle;

f) The time lag between the breach of duty and death of the primary victim, along with any time lag between a primary victim's accrual of a cause of action and their death are not valid objections to treating death as the relevant event.

As to *Novo*, Lord Burrows considered that the decision should have been overruled. As indicated above, the observations made by Lord Steyn on limiting the incremental approach of the common law should be considered along with the Law Commission's recommendation that the courts were best placed to develop this area of law. In addition, he considered that it is not unreasonable for secondary victim claims to be restricted, for example, where they arrive too late to the scene of the accident, compared to witnessing the death of the primary victim days later. There would be nothing unacceptable in treating the two scenarios in any different way, as when one applies the *Alcock* control mechanisms, the individual who can recover is the same in both scenarios. Finally, he considered that, by following Auld J's approach in *Taylor v Somerset Health Authority* [1993] PIQR P262 (which followed the requirements of needing an external traumatic event, along with a determination as to whether the qualifying event fell within the aftermath of accident), it would then be incorrect to rely upon *Walters* as the principles are in conflict.

Conclusion

The Supreme Court's decision is significant; it retains the *Alcock* criteria but provides a reset to the additional requirements that were developed over the years of needing a sudden shock and horrifying event to establish a secondary victim claim. It must be recognised that cases will always turn on their own facts, but it will no doubt be a welcomed decision for defendants when considering the scope of a medical practitioner's duty to non-patients, but on the other hand limits the scope to claimants who are those non-patients that suffer psychiatric harm.

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