"A medical crisis is not an accident"

Paul v Royal Wolverhampton NHS Trust (and 2 conjoined cases) [2024] UKSC 1

Judgment handed down by Supreme Court on 11 January 2024

The three claims considered by the Supreme Court

The Supreme Court considered three cases arising from alleged clinical negligence.

In each case the claimants claimed to have suffered as "secondary victims" of the relevant defendant clinician(s). None had been injured by the defendant, but each had suffered psychiatric injury as a result of witnessing first-hand the horrifying sight of either the death of a parent or child (Paul and Polmear) or its immediate aftermath (Purchase). In each case the death was said to be attributable to clinical negligence in treatment given to the deceased some time earlier. The time gaps in each case between allegedly negligent treatment[1] and fatal collapse varied significantly: in Paul it was 14 months, in Polmear approximately 6 months but in Purchase only 3 days.

The decision

The Supreme Court held, by a majority of 6 to 1 that, notwithstanding the profound sympathy anyone would have for the claimants in such circumstances, the relevant clinicians could not be held liable in law and thus the claims must fail. The Supreme Court[2] held that *Walters*[3], the one case in which damages had been recovered by a "secondary victim" in a claim from clinical negligence, had been wrongly decided (see [121]).

The leading judgment is that of Lord Leggatt and Lady Rose. Four other justices[4] expressly agreed with that judgment, and it is the judgment of those six which is analysed below. Where I refer to the "Court's view" and so on I am referring to the judgment of those six.

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[1] Negligence was admitted in Polmear
[2] ie the 6-1 majority
[3] *North Glamorgan NHS Trust v Walters* [2002] EWCA Civ 1792, [2003] PIQR P16
[4] Lord Briggs, Lord Sales, Lord Richards and Lord Carloway who adds his own short judgment to the effect that the same result should apply in Scotland

The sole dissenting judgment is from Lord Burrows, who would have allowed the claims to proceed either by analogy with existing common law rules or by moderate extension of the law. With absolutely no disrespect to Lord Burrows, while his approach will no doubt prove a fruitful source of material for academics debating whether the law as now pronounced is right or wrong, it will have little if any effect to practitioners – at least for the foreseeable future. Lord Burrows generously accepts as much implicitly at [250].

Importantly the claims did **not** fail because of the distance in time between the alleged negligence and the fatal collapse. That had been an important part of the defendants' argument at the earlier stages but the point was rightly not pursued in the Supreme Court. By then it had been acknowledged that there are plenty of cases where the causative negligence occurs long before the injury suffered: see the discussion at [94] – [96], and the passage of time between negligence and injury is not of itself seen as a bar to recovery of damages[5].

The Supreme Court dismissed the claims essentially for 2 reasons:

(a) Under the law as it stands claims by secondary victims for psychiatric injury are only valid where the claimant witnesses "an accident" or its immediate aftermath - that is distinct from a medical crisis

(b) In order for a secondary victim to succeed in a case arising from witnessing a medical crisis (as distinct from an accident) the court would have to hold that the clinician whose negligent act or omission caused the medical crisis owed a duty of care to the secondary victim - i.e. someone who was not the clinician's patient. There was no justification for holding that a clinician should owe a duty of care to such a person, even if it was the patient's near relative.

The essence of that latter point is set out at [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,

[5] The Supreme Court said at [91] that the Court of Appeal in these cases had been wrong to see the negligence/injury time gap as one of the reasons for the decision in *Novo*.

> 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".

and pithily summarised at [142]:

> "…there does not exist the proximity in the relationship between the parties necessary to give rise to a duty of care"

One thing is clear - policy was in the mind of the majority of the court: see at [49]:

> "A point of general importance, which was critical to the decision in *Frost*, is the need in defining the limits on the recovery of damages by secondary victims to avoid distinctions which would offend most people's sense of justice".

The Court was also awake to the wider implications of allowing claims by secondary victims in clinical negligence cases: see [117] where there is reference to the potential for compromise of decisions as to end-of-life care arising from concerns of exposure to claims from near relatives.

The Supreme Court recognised that in this field the line as to which claims are or are not valid can seem arbitrary, but did not shrink from applying a restriction – see at [141]:

> "But 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."

Secondary claims survive in principle – though apparently with fewer requirements than was previously understood (see below) – but only where the psychiatric condition results from

witnessing "an accident" – see the specific endorsement of the decision in *Taylor v A. Novo (UK) Ltd* [2013 EWCA Civ 194 [2014] QB 150 ("*Novo*") at [104], holding that the Court of Appeal was right to dismiss that claimant's claim because "the event she witnessed was not an accident".

The decisions in the lower courts

The claims had all been the subject of strike out applications. Allegations of negligence in two of the cases remain to be decided but for the purposes of this adjudication were assumed by the court – literally for argument's sake - to be well founded.

The strike out applications were based on the contention that:

(a) for good reasons the law closely prescribes the ambit of the duty owed to claims in negligence by <u>secondary</u> victims and thus to succeed such claims must come within prescribed rules[6] - which have come to be known as "control mechanisms"

(b) crucial among those rules is the requirement that the injuries should be suffered in the vicinity of and at the time of the relevant event – the requirement of "physical and temporal propinquity (or proximity)"[7] - and the relevant event in each of these claims was the alleged clinical negligence some time previously and so not proximate.

The point at (b) was founded in particular upon a conclusion to that effect by the Court of Appeal in *Novo* where, in a judgment given by the then Master of the Rolls Lord Dyson, it struck out a claim for psychiatric injury by the daughter of woman who witnessed her mother's death 3 weeks after the negligently caused accident at work which was the cause of the fatal collapse. In broad terms the Court of Appeal held that the relevant "event" to which the claimant had to establish physical and temporal proximity was the original

[6] Which have become known as "control mechanisms". The classification of "secondary victim" and the shaping of the rules in such claims is from the House of Lords decision in *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310 ("Alcock"), arising from the Hillsborough disaster of April 1989 – and the rules as then understood were summarised in *Novo* at [2].

[7] The requirement for physical and temporal proximity can be traced back to *McLoughlin v O'Brian* [1983] 1 AC 410 - where family members succeeded in claims for psychiatric injury based upon witnessing the distressing state of near relatives on their admission to hospital after a serious road accident.

accident, not the subsequent fatal collapse. Importantly, Dyson MR said (at [31]) that for the claimant to succeed in *Taylor* would be to go beyond the existing boundaries set for secondary victims and he was following earlier House of Lords decision applying the control mechanisms which had stated "thus far and no further".[8]

The cases had had varying procedural histories. The claim in Paul was struck out at first instance by Master Cook only to be restored on appeal by Chamberlain J. Polmear came before Master Cook after his decision in Paul had been overturned by Chamberlain J and this time he did not strike out the claim. The claim in Purchase was struck out by District Judge Lumb before Chamberlain J had overturned Master Cook's decision in Paul. All three cases were then heard together in the Court of Appeal (Vos MR, Underhill LJ and Nicola Davies LJ). The defendant's appeals in Paul and Polmear were allowed and the claimant's appeal in purchase was dismissed. Thus all three claims were held bound to fail and liable to be struck out.

<u>However,</u> crucially Vos MR said that "if starting with a clean sheet" he could see the force in the claims and was only holding that they should be dismissed because the Court of Appeal was bound by its earlier decision in *Novo*. Unusually the Court of Appeal gave permission for appeal to the Supreme Court. Thus it can be said that the cases arrived at the Supreme Court with something of a "following wind".

Given the importance to the law of tort of the definition of the ambit of a duty owed to secondary victims - or put another way the importance of the definition of who is a <u>compensatable</u> secondary victim of the original negligence - the Supreme Court convened an extended panel of 7 justices to hear the case. Having heard argument in mid-May 2023, the Court therefore took plenty of time to reach its conclusion.

The Supreme Court's analysis

Although there have been a number of claims by secondary victims arising from clinical negligence which have reached the higher courts (reviewed by the Court at [59] to [70]), this

[8] See *Novo* at [8] citing Lord Steyn in *Frost v Chief Constable of South Yorkshire* [1999] 2 AC 455, another case arising from the Hillsborough disaster

was the first time that the highest court had considered the question of a claim by a secondary victim in the clinical negligence context. Nor was there felt to be any relevant Commonwealth authority to guide – see [118].

The three previous decisions of the House of Lords on claims by secondary victims, *McLoughlin*[9], *Alcock*[10] and *Frost*[11], had all concerned catastrophic events (a fatal road accident and the Hillsborough disaster). These cases were described as "accident cases", defined by the court at [52] as "an unexpected and unintended event which caused injury (or a risk of injury) by violent external means to one or more primary victims" (my emphasis).

Interestingly in Paul both sides took the existing law as set out by those cases as unassailable and not requiring revision – see [50].

Unsurprisingly the Supreme Court went back to basics - and first principles.

The context for this analysis was the emphasis by the Court that secondary victim claims are "an exceptional category of case"– in the sense of being an exception to the general rule of common law prohibiting claims based upon injury to another: - see [4] and [5]. This is echoed at the very end of the leading judgment at [140]:

> "We return to the point with which we began this judgment, that the general policy of the law is opposed to granting remedies to third parties for the effects of injuries to other people."

The additional context (relevant to the three claims in question) was that claims arising from death of another were also prohibited by the common law, with claims only existing today because of the statutory exception currently embodied in the Fatal Accidents Act 1976 (see [3]).

First and foremost, notwithstanding how the cases had been argued below, the Court said the "critical question" was whether a duty of care was owed: see [22].

In that sense there was a slight mismatch of approach.

[9] *McLoughlin v O'Brian* [1983] 1 AC 410
[10] *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310
[11] *Frost v Chief Constable of South Yorkshire* [1999] 2 AC 455 (also known as *White*)

The claimants' argument had essentially been:

(a) the secondary victim exception is now well established – applying the *Alcock* test

(b) these claims

  i. meet the *Alcock* test and thus already come within the secondary victim exception or

  ii. if not are sufficiently analogous to justify a moderate extension

It is clear that the thrust of the argument from the claimants was (a) plus (b)(ii) – see [23] and [24], [50] and [126]. To be fair the Supreme Court recognised that previous consideration of secondary victim claims in clinical negligence cases had taken as read the applicability of the *Alcock* test, with the issue being whether the test was met on the facts of the case: see [71]. Having said that, the court appears to have sidestepped the point that the one successful secondary victim clinical negligence case *Walters*, had been referred to in the House of Lords without disapproval in *D v. East Berkshire*[12] (see [126]).

However the Court instead saw the issue as more fundamental - requiring consideration of the general principles that would determine whether a doctor could owe a duty of care to someone other than the patient: see [24] and [125] – [139]. The claimant's approach was given short shrift at [127]:

> "…to assert, as counsel for the claimants have, that the question whether the defendants owed a duty directly to the claimants in the present cases is governed by the rules established by the *Alcock* line of authority begs the central question raised on these appeals by assuming an answer to the very point in dispute".

Is the witnessing of "an accident" crucial to the exception allowing secondary victim claims?

The court first approached the case by analysing whether the *Alcock* of authority could be applied in a case that did not involve "an accident" (as defined). The court considered this an important first question and expressed itself "unimpressed" by the claimants' argument that occasional references by Lord Oliver in *Alcock* to the relevant "event" meant that the

[12] *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 AC 373

entitlement to bring a secondary victim claim established in *McLoughlin* already included cases not involving "accidents" (see [54]).

The Court's analysis of *McLoughlin*, *Alcock* and *Frost* was to the effect that they applied **only** to psychiatric injury arising from witnessing "an accident" or its immediate aftermath – see [52] – [58].

In its construction of what had been decided in *Novo* (where they said at [90] that both Chamberlain J and the Court of Appeal had got it wrong in these cases), they concluded that *Novo* had been decided correctly on the ground that what the claimant had witnessed was not "the accident". See at [90]:

> "The reason why the claim in *Novo* failed was that, although there was an external, traumatic, event (ie "an accident") which immediately caused injury to Mrs Taylor, the claimant did not witness that event and the event which she did witness and which caused her psychiatric illness was not an accident. The proximity (or lack of it) of the claimant to an accident was therefore critical to the court's reasoning".

The point is repeated at [104].

Should the Alcock exception apply if there is no "accident"?

The question then was whether the *Alcock* principles should apply in the absence of "an accident". The answer was **No**, expressed at [115]:

> "…we do not consider that an analogy can reasonably be drawn between the situation with which *McLoughlin, Alcock* and *Frost* were concerned where illness is caused by witnessing an accident (or its immediate aftermath) involving a victim with whom the claimant has a close tie of love and affection and situations where the claimant does not witness an accident but suffers illness as a result of witnessing such a person suffering a medical crisis[13]."

[13] Hence the title of this article

The reasons for this conclusion are set out at [107] – [114]. In summary

For accident cases:

(a) an accident is a discrete identifiable event occurring at a particular time at a particular place and in a particular way – thus identifiable as a matter of relative legal certainty [108]
(b) restricting secondary victim claims to those who actually witnessed an accident is a distinction that "most people would, we think, accept…[as] intelligible" [109]
(c) allowing secondary victim claims by those witnessing accidents avoids the difficulty/impossibility of distinguishing whether a psychiatric injury was from fear of safety for the claimant themselves or from fear for the safety of others [110]

Whereas for non-accident cases

(a) there is more difficulty in identifying the relevant event with any certainty - a particular difficulty in clinical negligence cases where severe illness can endure for days or weeks [112]
(b) there is an infinite variability to the experience of close relatives from the illness of another - it would be impossible to identify what would constitute a sufficiently serious experience to merit a claim [113]
(c) there is no need to avoid the difficult distinguishing test between fear for one's own safety and fear for others [114].

Two further points are made. Firstly at [116] that the Court thought it would be difficult to justify allowing secondary victim claims as contemplated here when they would still be denied for a close relative seeing a very traumatic sight significantly after an accident (i.e. not within the "immediate aftermath"). [My comment – That might be so but it is fundamental that an arbitrary line has to be set somewhere and not everyone will agree with this decision].

The second point is the policy point at [117] referred to above, namely the risk of compromise of end-of-life care if there is a fear that exposing close relatives to distressing dying moments may lead to a claim.

Hence the Court concluded that, in terms, it would be extending the law to allow these secondary victim claims to proceed.

The decision as to whether it should do so rested not on whether *Alcock* should be extended but on the more fundamental point of whether a duty of care was owed – see [125] – [128].

A duty of care owed by a clinician to a patient's close relative?

The context was that it is well established that reasonable foreseeability of harm is necessary but not of itself enough – see [129].

The court held that there was **no such duty**. The reasoning on this covers 10 paragraphs [129] – [138] over 4 pages of A4 and effectively amounts to a blunt "No".

There is reference at [133] to *Meadows v Khan*[14] and its finding of the limit of the scope of the duty of care owed by a doctor to a patient, and the Court held that the focus upon the purpose of the provision of medical treatment was equally relevant in this case.

There is acknowledgement at [134] at least of the potential for a doctor to owe a duty to a non-patient, for instance in the context of an infected patient, but that is qualified at [135] and put to one side.

From there it is simply a statement of principle that this particular constitution of the Court does not consider it right that a clinician should owe a duty of care to a patient's family member. With respect although the conclusion is clearly expressed the reasoning is not detailed. At [137] it is said that

> "It cannot be said that a doctor who treats a patient thereby enters into a doctorpatient relationship with any member of the patient's family and thereby assumes responsibility for their health.

However no one is suggesting that the imposition of a duty of care would depend upon the existence of a "doctor – patient relationship" - no relationship at all is required if there is sufficient proximity in law (as for car drivers whose vehicles collide).

[14] *Meadows v Khan* [2021] UKSC 21 [2022] AC 852

It comes to the statement at [138] which for ease of reference I repeat:

> "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".

I am not being critical of the Supreme Court. It can be said that it has done exactly what is expected of it – it has declared the common law in a clear way. However I am sure many will say that this part of the judgment should have been underpinned by more detailed reasoning.

I do find it surprising that there is no mention of the Court of Appeal's decision in *ABC v St George's Healthcare NHS Trust*[15] where it was held that it was at least arguable that hospital clinicians owed a duty of care to a patient's daughter to inform her of the results of genetic tests upon her father for Huntington's disease.

Be that as it may, the court has ruled on this question and as Lord Burrows puts it in his dissenting judgment at [250]:

> "In future, and subject to possible rare exceptions, the approach of Lord Leggatt and Lady Rose will mean that recovery for negligently caused psychiatric illness by secondary victims will be closed off in medical negligence cases."

Claims by secondary victims under Alcock following accidents – a retrospective change in the law?

I have already referred to the comment by the court at [116] that it did not want to depart from "settled law", but I draw attention to a number of points.

[15] ABC v St George's Healthcare NHS Trust [2017] EWCA Civ 336

In argument both sides took the existing law as set out by those cases as unassailable and not requiring revision – see [50]. But there is perhaps a hint in paragraph [50] that this specifically enlarged Supreme Court panel might have been willing to reconsider the limits of secondary victim claims afresh. In particular I sense an unease about the inclusion of claims arising from witnessing "the immediate aftermath" of an accident. There is a reference at [108] to the clarity and certainty of the test being "compromised" by the inclusion of "immediate aftermath", and they refer to confusion arising from the application of the "immediate aftermath" qualification in the accident case of *Galli-Atkinson*[16], which they say was wrongly decided (see [122]).

But with the court having declared that it would not alter "settled law" many will be surprised to read the analysis that for a claim by secondary victim to succeed there is no need for witnessing the accident or its aftermath to cause "a sudden shock to the nervous system", which then precipitates the illness – see [73] and [74].

Nor is there apparently a requirement for the sight or sound to constitute a "horrifying event". One can understand why the court would point out the difficulty of defining a "horrifying event" – engagingly it is observed at [76] that "there is no available Richter scale of horror" - but the exposure to a truly horrifying sight or sound has generally been taken to be a fundamental requirement for success in a secondary victim claim under *Alcock* principles.

On the above analysis it will suffice for a near relative merely to be a witness to the accident causing or threatening serious injury to their loved one.

In the usual way the Supreme Court has declared the law "as it always has been" but others may share my surprise. This might be said to be opening the door much wider for secondary victim claims in accident cases. However see also what follows.

Also within this part of analysis by the Court is the following observation at [75]:

> "It is of course necessary for a claimant to show that it was reasonably foreseeable that the defendant's negligence might cause her injury. If, for example, a claimant with a history of psychiatric illness develops such an illness after witnessing a minor

[16] *Galli-Atkinson v Seghal* [2003] EWCA Civ 697, [2003] Lloyd's Rep Med 285

> accident in which his wife sustains some cuts and bruises, his claim might fail that test."

Even though that is a passing observation and clearly *obiter* that looks to me inconsistent with the "eggshell skull" principle. It is also at first blush inconsistent with the decision of the House of Lords in the primary victim case of *Page v Smith*[17], all the more surprising since *Page v Smith* is cited in the leading judgment at [31].

Conclusions and comment

I expect reactions to the result from practitioners will reflect the nature of their work – i.e. whether they generally act for the claimant or the defendant.

Those who are unhappy with the result will no doubt attack the reasoning but in the end is this not just the sort of question where litigants simply require the definitive view of a properly constituted court? The conclusion is certainly definitive.

I say that because to decide the other way would undoubtedly have created immense complications. Once the Supreme Court had decided that there did not have to be a shock to the nervous system or a horrifying event, merely being present at a death prematurely caused by negligence would have entitled a claim by a bereaved close relative suffering psychiatric illness. Would it matter if death had merely been hastened by a few months (misdiagnosed cancer) or many years (cardiac circulatory problem that could have been stented). Then there would be the problem of what constituted a sufficient "psychiatric injury". Would a short lived adjustment disorder suffice? How easily is that distinguishable from what is euphemistically termed "ordinary grief"?

In general I see this as part of a measured retreat by the Supreme Court from somewhat more aggressive pathfinding in the law of tortiously caused personal injury, as exemplified by *Fairchild* for example, and the creation of a special causation rule to allow the claimant to succeed in *Chester v Afshar*. This case is declaratory of a limit to liability, with specific recognition of the need to avoid wider consequences. Other recent decisions of the

[17] *Page v Smith* [1996] AC 155

Supreme Court hemming in the ambit of vicarious liability[18] and the ambit of the doctor's duty of care[19] are also examples.

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Disclaimer: this article is not to be relied on as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.

[18] Trustees of the Barry Congregation of Jehovah's Witnesses v BXB [2023] UKSC 15 following Various Claimants v Wm Morrison Supermarkets plc ("Morrison") [2020] UKSC 12, [2020] AC 989 and Various Claimants v Barclays Bank plc ("Barclays Bank") [2020] UKSC 13, [2020] AC 973

[19] Meadows v Khan cited above