Secondary Victim Claims: is the search for principle back on?

Is the law relating to secondary victim claims finally heading for reform? Following the Court of Appeal's recent decision in the combined appeals of *Paul v The Royal Wolverhampton NHS Trust, Polmear v Royal Cornwall Hospital NHS Trust and Purchase v Ahmed* [2022] EWCA Civ 12, it seems that the stage is set for the law to be considered by the Supreme Court and many will be hoping for some long-awaited large-scale reform and rationalisation.

The law as it exists is controversial. Lord Oliver in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 identified factors which he opined must apply in secondary victim cases to allow recovery by the claimant. These have come to be known as the 'control mechanisms' imposed by the common law to define the limits of liability in such cases. In summary, to succeed a secondary victim must establish:

1. the proximity of relationship between them and the primary victim
2. that their injury must arise from a sudden and unexpected shock
3. that they were personally present at the scene or immediate aftermath
4. that their injury arose from the death, extreme danger to, or injury of the primary victim
5. that there must be *"a close temporal connection between the event and the* [secondary victim's] *perception of it, combined with a close relationship of affection between the plaintiff and the primary victim"*.

The law has variously been described as a *"patchwork quilt of distinctions which are difficult to justify"*[1]. Certainly, it appeared in *Paul*, Sir Geoffrey Vos MR, Lord Justice Underhill VP and Lady Justice Nichola Davies were sufficiently concerned by their conclusion that, whilst they considered the Court of Appeal bound by the fifth of Lord Oliver's control mechanisms, that they pre-emptively considered the case should be considered by the Supreme Court.

Perhaps therefore soon will be the time for the common law to find the principle for which some considered the search for which had long been *"called off"*.[2]

At the heart of each appeal in *Paul* was a secondary victim, who had sustained psychiatric injury following their witnessing of the death of a loved one. In each case, the shocking event which caused the psychiatric injury occurred after the allegedly negligent act which caused it. In all three cases, the deaths witnessed by the secondary victims occurred many months after alleged failures to diagnose the condition which eventually killed the primary victim.

In *Paul* and *Polmear*, the Courts below found that such a scenario could give rise to an actionable claim by secondary victims, and the defendant NHS Trusts appealed. In *Purchase*, the Court below applied *Taylor v A Novo (UK) Ltd* [2013] EWCA Civ 194, holding that this was authority for the proposition that no claim could be brought in respect of psychiatric injury

[1] Lord Steyn in *White v Chief Constable of South Yorkshire* [1999] 2 A.C. 455 at 500 B

[2] Lord Hoffmann in *White* (ibid.) at 511 B

caused by a separate horrific event which was removed in time from the original negligence, and the claimant appealed.

In *Novo*, Lord Dyson MR firmly rejected the argument that the control mechanism of temporal proximity should be more liberally interpreted and in contrast to the reluctant tenor of the Court of Appeal's judgment in *Paul*, opined that this was a feature of the common law's definition of the sometimes difficult and elusive 'neighbour' principle. He opined:

"… in secondary victim cases, the word "proximity" is also used in a different sense to mean physical proximity in time and space to an event. Used in this sense, it serves the purpose of being one of the control mechanisms which, as a matter of policy, the law has introduced in order to limit the number of persons who can claim damages for psychiatric injury as secondary victims or to put it in legal terms, to denote whether there is a relationship of proximity between the parties. In a secondary victim case, physical proximity to the event is a necessary, but not sufficient, condition of legal proximity.

… Lord Oliver said, the concept of proximity depends more on the court's perception of what is the reasonable area for the imposition of liability than any process of logic. In the context of claims by secondary victims, the control mechanisms are the judicial response to how this area should be defined. This has involved the drawing of boundaries which have been criticised as arbitrary and unfair. But this is what the courts have done in an area where they have had to fix the ambit of liability without any guiding principle except Lord Atkin's famous, but elusive, test."[3]

Sir Geoffrey Vos MR's lead judgment (with which both other Lord Justices agreed) was far less emphatic than that of the previous (but one) Master of the Rolls. Whilst he accepted that the Court of Appeal was bound by *Novo*, this was not without considerable reluctance and obvious heaviness of heart. He considered that there must be doubt as to whether the law applying to secondary victims in accident cases should apply to those in fatal clinical negligence cases where there is very frequently a delay between the index negligent act or omission and the death of the victim, particularly in misdiagnosis cases. This, it was posited, may also apply in a case where a negligent architectural design for a door may not cause its collapse and injury of a primary victim for years later.[4]

In terms, it was doubted why the fifth control mechanism requiring temporal proximity existed at all. Indeed, Sir Geoffrey opined:

"Looking at the matter without regard to the authorities, it is hard to see why the gap in time (short or long) between the negligence (whether misdiagnosis or poor design) and the horrific event caused by it should affect the defendant's liability to a close relative witnessing the primary victim's death or injury that it caused."[5]

[3] At 26 – 28. Lord Atkin's 'neighbour principle' is of course taken from *Donoghue v Stevenson* [1932] AC 562, at 580

[4] Paragraphs 76-79

[5] Paragraph 80

Rejecting the arguments that other authorities, including *North Glamorgan NHS Trust v Walters* [2002] EWCA Civ 1792, should be understood to have liberalised and led to a more pragmatic and benign interpretation of this issue, Sir Geoffrey concluded that the Court was bound by *Novo*, notwithstanding his *"reservations"* as to whether it *"correctly interprets the limitations on liability to secondary victims contained in the five elements emerging from the House of Lords authorities"*.[6]

Whilst Lord Justice Underhill's added that *"if the point were free from authority I would be minded to hold that on the pleaded facts the Claimants in all three cases should be entitled to recover"*[7], he too considered the Court bound by *Novo*, the precise ratio of which he opined he did not find it easy to identify.[8]

Both the Master of the Rolls and Underhill LJ (with whom Nichola Davies LJ agreed) gave the clearest of indications that this was a matter which would benefit from consideration from the Supreme Court[9] and it seems very likely that this is where these appeals will end up.

Open to the Supreme Court will be the option of upholding the law, roundly derided by some as being constituted of *"the silliest rules"* in tort, [10] and/or as out of kilter with the modern world of 24-hour news cycles, increasingly accessible social media, and news and videos available to anyone with a mobile telephone from any number of citizen journalists, and as concerned the Court in *Paul*, societal perceptions of the arbitrariness that those suffering psychiatric illness by witnessing the horrific death of a family member cannot recover damages from the tortfeasor who caused that death in cases where the index negligent act/omission was not temporally synchronous to it.

As suggested in a recent article by the author and David Pittaway QC on secondary victim claims for the *Journal of the Malaysian Judiciary*,[11] the stakes will be high for all litigants in this appeal: victim, medical provider and insurer alike. Restatement of the law would likely to mean that secondary victim claims in very many cases, including in a great deal of claims where the originating tort is one of clinical negligence, will be continued to be extremely difficult for claimants, but the cutting of the Gordian Knot and the doing away of any 'control mechanisms' is liable to increase the volume of claims, and give rise to potentially far increased liabilities in cases where harm to third parties is a foreseeable consequence of harm to a primary victim.

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January 2022

[6] Paragraph 99

[7] Paragraph 103

[8] Paragraph 104

[9] Paragraphs 99 and 106

[10] J. Stapelton. *In Restraint of Tort*, in P. Binks. *The Frontiers of Liability* (Vol. II) (Oxford, OUP. 1994) p. 95

[11] July [2021] JMJ, available, pp145-158. Available at: julai2021.pdf (jac.gov.my)