

Case Law update

The Supreme Court hands down the 'Paul' case: Clinical Negligence secondary victims



by Amy Rollings and Beth Caunce

These three conjoined appeals each relate to a claim brought by a close relative (a “secondary victim”) for psychiatric injury caused by witnessing the death or immediate aftermath of a loved one (the “primary victim”), where the primary victim’s death was allegedly caused by the defendant’s earlier clinical negligence.

Each of the three Claimants claimed compensation for psychiatric illness caused by witnessing the tragic death of a close family member. In Paul, a father collapsed and died from a heart attack whilst with his young daughters. In Polmear, the parents of a 7 year old girl witnessed her untimely death and the attempts to revive her. In Purchase, 20 year old Evelyn Purchase was discovered in bed by her mother who attempted CPR. In each case, it was alleged that the death was caused by clinical negligence. The time periods between the alleged negligence and the deaths spanned from 14 months to 3 days.

Previous caselaw

Alcock v Chief Constable of South Yorkshire Police [1992] 1 AC 310 is the leading authority on psychiatric injury and secondary victims which established five “control mechanisms”, limiting liability for psychiatric injury:

1. A close tie of love and affection between the primary and secondary victim;
2. The psychiatric injury must arise from a sudden shock to the nervous system;
3. The secondary victim must be personally present at the time of death or in the immediate aftermath;
4. The injury to the secondary victim must arise from the death of, injury or extreme danger to the primary victim;
5. An element of physical proximity to the event and a close temporal connection between the event and the secondary victim’s perception of it.

In *Taylor v Novo (UK) Ltd* [2013] EWCA Civ 194, Lord Dyson MR gave the lead judgment in a unanimous decision of the Court of Appeal. In this case, the Claimant’s mother had been injured at work. Unexpectedly, three weeks later she died in the presence of her daughter. Her daughter suffered PTSD and brought the claim as a secondary victim. The Court of Appeal found in favour of the defendant, concluding that proximity was lacking because the Claimant was not present at the scene of the workplace accident or its immediate aftermath.

Court of Appeal Judgment in Paul v Royal Wolverhampton NHS Trust [2022] EWCA Civ 12.

The Court of Appeal found for the Defendants in each of the three cases, on the basis that they were bound by *Novo*. Sir Geoffrey Vos, Master of the Rolls, giving the leading judgment identified that the crux of the matter turned on the relevance of any time intervals between the clinical negligence and the ‘horrific’ event that caused the psychiatric injury to the Claimant. In light of those authorities, he determined:



“For a secondary victim to be sufficiently proximate to claim for psychiatric injury against the defendant whose clinical negligence caused the primary victim injury, the horrific event cannot be a separate event removed in time from the negligence. If the negligence and the horrific event are part of a continuum as they were in Walters, there is sufficient proximity. Novo is binding authority for the proposition that no claim can be brought in respect of psychiatric injury caused by a separate horrific event removed in time from the original negligence, accident or a first horrific event.”

Sir Vos MR went on to express reservations about that position, finding “no logical reason for these rules” and expressing that “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 defendant to be allowed to recover damages for their psychiatric injury”. He concluded that it was for the Supreme Court to decide whether to depart from the decision in *Novo*. Lord Justice Underhill and Lady Justice Davies concurred.

Supreme Court Judgment

By a majority of six to one, the Supreme Court dismissed the appeals, on two grounds:

1. A Claimant must witness an accident, as opposed to the occurrence of a medical emergency or death; and
2. Doctors do not owe a duty to protect family members

Timelines: “An uninterrupted sequence of events”?

At paragraph 79–80, the Court criticised the emergence of a legal test in previous case law, noting a case should not try to “fit the dramatic pattern of a Greek tragedy”. Instead, the Court noted that there is nothing in the HL authorities that there must be close proximity between the negligent act or omission and the accident.

Witnessing Accidents v Witnessing Death and/or a Medical Emergency

The Court distinguished three ways in which witnessing an accident versus an illness causing death is “legally significant”¹. It determined that witnessing an accident involving a close family member is itself likely to be disturbing and upsetting even if the person is unharmed [109]. In contrast, it was noted that there is no event in a medical context which is analogous to the fear for safety of witnessing, for example, your loved one being hit by a vehicle.

What if a person suddenly collapses and dies after a heart attack? (As occurred in *Paul* and *Novo*)

It is conceivable that witnessing such an event is likely to be equally as distressing as witnessing a road traffic accident. However, the Court determined that the length of time for which symptoms of injury or disease last can vary greatly, which gives rise to uncertainty [112]. For example, the illness may last “minutes, hours, days or weeks” before the patient dies. There are therefore intractable difficulties in trying to answer that question in a reasonably certain way.

Proximity: Duty owed by the doctor to the family member

The Court highlighted the need to establish an independent duty owed by the defendant to the claimant to justify a claim. It is not sufficient to establish a breach of duty owed by the defendant to the primary victim (who may not, in fact, exist), and an appropriate relationship between that primary victim and the Claimant. There must exist the necessary proximity in the relationship between the Claimant and Defendant.

¹ See paragraphs 107–110 for full reasoning.



The Court went on to consider the duties owed by doctors to non-patients. Whilst doctors are considered to have a wider responsibility to protect public health, the Court expressed caution with extending the scope too far. Fundamentally, the Court found that imposing a responsibility on hospitals and Doctors to protect family members from the trauma of witnessing medical emergencies or death would go beyond the nature and scope of their role. Society has not reached a point where the experience of witnessing the death of family member from disease is something from which a person can reasonably expect to be shielded by the medical profession [138].

Dissenting judgment

Interestingly, Lord Burrows begins his dissent by highlighting that over 25 years earlier, he was the Law Commissioner in charge of the project which explored liability for psychiatric illness² and recommended legislative reform. Accordingly, he would allow the appeals. In his view the relevant event should be viewed as the death of the primary victim, in which case there is no need for an accident. [198–199]

Conclusions

The Judgment begins with the quotation, “We all die and when we do the fact or manner of our deaths may cause harm to other people”. It represents an attempt to avoid opening the floodgates of litigation to claims by close relatives of primary victims of clinical negligence. Ultimately, to impose such a responsibility would go beyond the scope of the role of the medical profession. The Judgment therefore provides much needed clarity in respect of the extent of the duty of a doctor to their patient in the context of secondary victim claims.

² *Liability for Psychiatric Illness*, Law Com No 249 (1998). The report recommended that in addition to reasonable foreseeability of psychiatric illness (to a person of reasonable fortitude), the requirement would be retained that the secondary victim must have a close tie of love and affection to the primary victim (which would avoid ‘opening the floodgates of litigation’).