Gaps in Time and Space: Claims for Clinical Negligence by Secondary Victims following Paul v Royal Wolverhampton NHS Trust

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A heavyweight Court of Appeal, comprising the Master of the Rolls, the Vice President of the Court of Appeal (Civil Division) and Nicola Davies LJ has handed down judgment in the conjoined appeals of *Paul v Wolverhampton NHS Trust; Polmear v Royal Cornwall Hospital NHS Trust; Purchase v Ahmed* [2022] EWCA Civ 12 (referred to, together, in this post as "*Paul*"). The appeal has been awaited and closely watched, dealing as it does with claims for psychiatric injury by secondary victims (that category of cases referred to, historically, as "nervous shock claims") in a clinical negligence context. The Master of the Rolls gave the leading judgment, with which the Vice President and Nicola Davies LJ agreed.

The material point to note, at this stage, is that the issue is not going to rest here. Permission to appeal to the Supreme Court has been swiftly granted, both the Master of the Rolls and the Vice-President expressing the view that the issues merited its consideration. The vexed question of who can claim for nervous shock suffered by witnessing an horrific event is thus, once again, to be considered at the highest level.

Since *Bourhill v Young* [1943] AC 92, the question of whether or not a person could claim for psychiatric injury where they were not, themselves, the direct victim of another's negligence has given rise to difficult issues. Underlying the difficulty is a policy consideration – that unrestrained recovery of damages for psychiatric injury simply through the witnessing of trauma is undesirable (the "floodgates" argument to the fore). Thus, over time and a number of leading decisions (*McLoughlin v O'Brian* [1983] AC 410; *Alcock v Chief Constable of the South Yorkshire Police* [1992] 1 AC 310; *Page v Smith* [1996] 1 AC 155) the House of Lords devised and developed "*control mechanisms*" intended to limit the category of person who could recover damages in the situation, by requiring that they demonstrated a sufficient degree of proximity to fall within the contemplation of the relevant tortfeasor.

The judgment of the Master of the Rolls in *Paul* reviewed the five elements which together act as these control mechanisms at the outset of his judgment, citing Lord Oliver's speech in *Alcock*:

> *"First, that in each case there was a marital or parental relationship between the Plaintiff and the primary victim; secondly, that the injury for which damages were claimed arose from the sudden and unexpected shock to the Plaintiff's nervous system; thirdly, that the Plaintiff in each case was either personally present at the scene of the accident or was in the more or less immediate vicinity and witnessed the aftermath shortly afterwards; and, fourthly, that the injuries suffered arose from witnessing the death of, extreme danger to, or injury and discomfort suffered by the primary victim. Lastly, in each case there was not only an element of physical proximity to the event but a close temporal connection between the event and the Plaintiff's perception of it combined with a close relationship of affection between the Plaintiff and the primary victim*".

These control mechanisms were formulated in the context of traumatic accident cases. In such cases, it posed no difficulty to require a close temporal connection between the event and sight of it on the part of the psychologically injured Claimant. Each of the three appeals, *Paul*, *Polmear* and *Purchase*, however, arose in a clinical negligence context. The facts of the cases are set out from [14] of the Master of the Rolls' judgment but, by way of broad summary, each arose from a failure to diagnose a congenital condition on the part of the Defendant which, at a later date, caused the collapse and death, in distressing circumstances, of a close relative of the Claimants (in *Paul*, the children of the deceased; in *Polmear*, the parents; and in *Purchase*, the mother). In each case there was a significant gap between the negligent act and the subsequent collapse, a feature which, although not impossible, is more unusual in accident cases, but arises more commonly in the clinical negligence context.

As the Master of the Rolls put it:

> *"In these circumstances, we have to decide whether a Claimant who sustains psychiatric injury as a result of witnessing the death or other horrific event suffered by a close relative as a result of earlier clinical negligence, can claim damages for that psychiatric injury. The question turns on the relevance of any time intervals between the clinical negligence, the damage caused by it, and the horrific event that ultimately causes the psychiatric injury to the Claimant*".

Put another way the Court of Appeal was concerned, firstly, with the nature of the event necessary to trigger psychiatric injury and, further, what was then meant by "a close temporal connection" between the event and the Claimant's perception of it.

A number of features present themselves in the judgment but in essence we are now involved in a waiting game, until the Supreme Court addresses the issue. To that extent, the Court of Appeal Judgement in reality resolves very little but is of interest for its reasoning.

The Master of the Rolls undertook a review of the relevant authorities. Of particular note was the judgment of Lord Dyson in *Taylor v A Novo (UK) Ltd* [2014] QB 150. *Novo* was also an accident case, where the Claimant's mother had suffered minor injury when a stack of racking boards fell on her at work. Despite an initial good recovery, the Claimant's mother collapsed and died 3 weeks later in the presence of the Claimant, due to a deep vein thrombosis and pulmonary emboli. The Claimant suffered significant post-traumatic stress disorder and succeeded at first instance, but the Court of Appeal overturned the decision. Lord Dyson found that, because the Claimant was not present when the accident occurred, only at collapse and death, the necessary element of temporal proximity was lacking. In circumstances where the existing authorities had stressed that further development of the law in this area was to be left to Parliament, the requirement of temporal proximity could not be fulfilled. Further, if the claim for damages had succeeded it would open the prospect that a death, possibly years later, might still give rise to a claim for damages and that the same would extend the scope of liability to secondary victims well beyond anything that had gone before (floodgates again). In reaching this conclusion, Lord Dyson approved an earlier decision of Auld J in *Taylor v Somerset Health Authority* [1993] PIQR 262. In that case, Auld J made clear that the five elements did not allow recovery for anything which occurred beyond the aftermath of an accident. In a clinical negligence case, which *Taylor* was, there was no qualifying horrific event where death followed months after the Health Authority's negligence.

Novo looms large over the Court of Appeals decision in *Paul*. The Master of the Rolls was sympathetic to the situation which presented itself and particularly to the judgment of Chamberlain J in *Paul's* case (Chamberlain J had distinguished *Novo* and found for the Claimant; in his view nothing in the authorities suggested that a claim for psychiatric injury suffered as a result of witnessing a person's death should be denied by a time lapse from the date of the negligence itself).

The Master of the Rolls had little difficulty in concluding that claims for psychiatric injury suffered by secondary victims could be made in clinical negligence cases, as in any other. Whilst the five control mechanisms had been laid down in an accident case, they were universally applicable.

The difficulty arose where a gap ensued between the negligence and a subsequent "*horrific event*", which was something more likely to arise in a case of misdiagnosis or faulty design. Overall, and analysing Lord Oliver's speech in *Alcock*, the Master of the Rolls was clear in saying that he would have concluded temporal proximity was made out in each of the cases. The fact and consequence of the Defendant's negligence was close in time and space to the moment when psychiatric harm was caused, and each secondary victim had been present at that point. He would have found for each of the Claimants unrestrained by other authority. Nonetheless, the decision in *Novo* was binding authority for the conclusion that the control mechanisms could not be extended in order to allow a secondary victim to recover damages where the horrific event occurred months or years after the accident.

The Court of Appeal was thus bound by *Novo*, which was determined after full argument reviewing all the preceding cases and could not be said to have misinterpreted the existing House of Lords authorities. Since the Court of Appeal was bound by its own decision, the claims had to fail. The Defendants' appeals in *Paul* and *Polmear* were thus allowed and the Claimant's appeal in *Purchase* dismissed. Both the Master of the Rolls and the Vice President felt that the issues raised merited consideration by the Supreme Court. The Master of the Rolls concluded:

> "*Subject to hearing further argument, therefore, I would be prepared to grant permission to the Claimants to appeal to the Supreme Court, if sought, so that it can consider the important issues that arise in this case*".

Permission has been duly granted and the claim is bound for the Supreme Court accordingly, where it can safely be said another chapter will be added to the long history of jurisprudence historically styled "*nervous shock*". As previously we will report back on developments.