Should English law adopt Lord Burrows' "principled solution"?

Lord Burrows' dissenting judgment in *Paul v Royal Wolverhampton NHS Trust [2024] UKSC 1* invites us to reconsider a fundamental question in tort law: what principles should govern recovery for psychiatric harm by secondary victims? This essay argues that the current framework rests on a logically indefensible distinction between psychiatric and physical harm, and that Lord Burrows' proposed solution represents a return to principled negligence liability.

The law's differential treatment of psychiatric harm is largely derived from its spurious conceptual distinction with physical harm, which has historically engendered scepticism towards psychiatric conditions due to perceived diagnostic uncertainty and fears of fraudulent claims.[1] However, contemporary medical advancements have established that psychiatric injuries are just as real as, if not a subcategory of, physical injuries; post-traumatic-stress-disorder (the most claimed psychiatric harm in English law) can be observed as structural and functional brain changes on fMRI scans.[2][3] Crucially, standardised diagnostic criteria can accurately identify and substantiate psychiatric conditions – often with far greater precision than many physical injuries. Indeed, the interrater reliability (quantifying consistency/reproducibility between clinicians as a marker of objectivity) of psychiatrists diagnosing conditions including major depression and panic disorder significantly exceeds specialised neurologists diagnosing strokes and pathologists diagnosing cytological malignancies.[4] These insights expose the unjustifiability of using evidential limitations as a basis to justify restricting liability for psychiatric harm.

Not only is the medical basis for this archaic mind-body dualism flawed, but this argument (perhaps aside from policy considerations, which are not the only basis upon which it is made) conflates the epistemological challenge of proving harm with the ontological question of whether such harm warrants compensation in principle. This becomes apparent through a simple thought experiment: if orthopaedic medicine lacked X-ray technology, would we deny recovery for broken bones merely because diagnosis relied on clinical examination? The absurdity of this proposition underscores that limitations in diagnostic precision cannot logically justify categorical restrictions on recovery.

Nonetheless, secondary victims with clinically verified psychiatric conditions face unqualified barriers to recovery – despite their harm being equally direct and verifiable. The control mechanisms arising from *Alcock v Chief Constable of South Yorkshire [1992] 1 AC 310* place rigid proximity requirements on defendants' liability to secondary victims suffering pure psychiatric harm: in relationship, time and space, and perception ("*dearness, nearness, and hear-ness*").[5] These unique restrictions construct an artificial hierarchy of victims, privileging physical over psychiatric harm despite both being equally capable of devastating lives. Because of their intransigence, a daughter who witnesses her mother's death from injuries sustained three weeks earlier cannot recover (*Taylor v A.Novo (UK) Ltd [2013] EWCA Civ 194)* whilst a mother who witnesses her child's death over 36 hours may (*North Glamorgan NHS Trust v Walters [2002] EWCA Civ 1792*). Such stark arbitrary discrepancies are irreconcilable with Lord Atkin's foundational "*neighbour principle*" of tort law (mandating that individuals owe a duty of care to reasonably foreseeable victims of their negligence).

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[1]NJ Mullany and PR Handford, *Tort Liability for Psychiatric Damage* (3rd edn, Law Book Co 2006) 10–12.
[2]PA Resick, TJ Kaczka and MW Kaloupka, 'The Neurobiology of Posttraumatic Stress Disorder: A Focus on Biology and Brain Changes' (2012) 5 *Annual Review of Psychology*, 3–8.
[3]D Nolan, 'The Distinctiveness of Psychiatric Injury Claims' (2021) 137 *LQR* 420, 422–425.
[4]R Pies, 'How "Objective" Are Psychiatric Diagnoses?' (2007) 4(10) *Psychiatry* 18–22.
[5] M Lunney, D Nolan and K Oliphant, *Tort Law-Text and Materials* (6th edn, OUP 2017) ch 7.

Despite broad recognition of its flawed theoretical basis, the key justification (and the consequent preservation) of the current framework lies in a conception of the Alcock control mechanisms as a judicial equivalent to the mythological titan Atlas – seemingly condemned to forever shoulder the weight of preventing a deluge of claims. However, rather than accepting these mechanisms as inexorably necessary evils, we should question the assumed inevitability of a 'flood' of litigation following any expansion of liability and consider the fundamental premise of preventing such a flood.


6

Addressing the former question, well-established elements of negligence law already contain robust inherent limitations: causation principles naturally exclude cases where the chain between breach and harm becomes too attenuated; remoteness doctrine prevents recovery for unforeseeable consequences; the requirement of a clinically diagnosed recognised psychiatric illness provides a threshold that eliminates trivial claims; and the Caparo tests provide scope for courts to prevent unfair, unjust, and/or unreasonable impositions of liability in a nuanced and coherent manner. Are we to believe our courts incapable of applying these established principles – together with the reasonable fortitude standard that aligns with tort law's objective approach – to maintain appropriate and principled boundaries without resorting to artificial arbitrary restrictions? Lord Wilberforce, despite upholding the Alcock control mechanisms in *McLoughlin v O'Brian [1983] 1 AC 410,* did not. In fact, his judgement asserted not only that the courts can contain fraudulent claims and handle evidentiary difficulties but further that:

> The scarcity of cases which have occurred in the past, and the modest sums recovered, give some indication that fears of a flood of litigation may be exaggerated: experience in other fields suggests that such fears usually are. If some increase does occur, that may only reveal the existence of genuine social need.

Indeed, if a litigation flood – or, less histrionically, a notable increase in claims – occurs despite the aforementioned legal checks, this would more likely reflect new recognition of a hitherto-ignored societal harm rather than a deluge of spurious litigation. Accordingly, if the claims are – as modern psychiatry can increasingly confirm – genuine, defendants should be liable based on the fundamental principles of tort law and such litigation should be welcomed notwithstanding practical inconveniences. Lord Burrows' proposed principled solution offers a path toward realigning psychiatric harm with these key first principles.

Lord Burrows' dissent offers an opportunity to reaffirm the law's commitment to treating like cases alike – a fundamental aspect of justice. His focus on reasonable foreseeability aligns with the incremental development of the common law while eliminating artificial distinctions that serve neither principle nor pragmatism.

Word count: 999

[6]Avi Kapach, 'Atlas' (mytholopedia.com, 11 March 2023) accessed 10 October 2024.