Tort Law Awards 2024 Essay Competition

The courts have long been fraught with the idea of opening the floodgates to claims by secondary victims suffering from a psychiatric illness. The narrow set of criteria needed for a successful claim was first established in *Alcock,*[1] and required secondary victims to have been at and witnessed the horrifying incident or its aftermath, have suffered a "nervous shock", and have a "close tie of love and affection" with the primary victim.[2] *Paul* presented the Supreme Court with an opportunity to modify the law in this area; however, the judgment was not the dambuster many hoped it would be.

One such hopeful was Lord Burrows who, having been involved in a Law Commission report into liability for psychiatric illness, was well-acquainted with the area of law in question. In his dissent, Lord Burrows offered a "principled solution" in which the death of the primary victim would be considered the relevant event instead of just the accident. The majority view was that a distinction should be made between the actual accident or its immediate aftermath and the subsequent injury or death at a later time. Lord Burrows took an incrementalist approach in *Paul*, presenting a foreseeability-based solution in which the courts would have had to look at the likelihood of psychiatric damages as opposed to confining claims to the rigid and seemingly arbitrary test established in *Alcock* in which proximity to the accident was necessary. If a negligent act causes physical harm to someone and, as a result, psychiatric harm to a loved one who witnesses their death at a later time, it seems rather unfair to prevent them from compensation just because they were not at the scene where the chain of events leading to the primary victim's death, injury, or imperilment began.

This issue was dealt with in *Novo*,[3] a case heavily relied upon in *Paul*, in which the "relevant event" was considered the accident at work, not the death of the mother from a pulmonary embolism three weeks later. The claimant, who witnessed their mother's horrifying death, suffered PTSD as a result; however, her claim for psychiatric damages was denied on the grounds that allowing secondary victims to claim damages despite not being at the accident would massively extend the scope of liability to an unreasonable point[4] and would contradict the principle in law that a third party is not able to recover for damages against a primary victim.[5] By limiting it in such a way, those affected by negligent acts that eventually harm or kill loved ones often lose out on compensation for the understandable psychiatric damages they suffer as a result.

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[1] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.
[2] Ibid., [411H].
[3] *Taylor v A Novo (UK) Ltd* [2013] EWCA Civ 194, [2014] QB 150.
[4] Ibid., [410E].
[5] *Alcock* [1992], [408-411].

Be that as it may, Lord Burrows' well-reasoned and convincing "principled solution" brings with it a variety of issues making it currently untenable in practice. The most well-worn counterargument is that expanding the scope of liability would open the floodgates to excessive litigation. In the context of medical negligence cases like *Paul*, loosening the tight restrictions would likely have a chilling effect on health service providers and could cause insurance companies to run for the hills. Additionally, Lord Leggatt and Lord Rose rightly argued that extending a doctor or hospital's duty of care from patients to their loved ones would be "beyond what [...] is reasonably regarded as the nature and scope of their role."[6] Such a judgment was perhaps unsurprising given the recent trend of the Supreme Court trying to avoid imposing too great an obligation on medical professionals.[7] Furthermore, the courts have been unwilling to recognise many medical crises as accidents. In *Ronayne,* the Court of Appeal found that although the claimant's wife had undergone a negligent operation, him witnessing her bloated and hooked up to machines did not meet the requirements of a sudden and horrifying event necessary for a successful claim under the *Alcock* test.[8]

To prevent excessive litigation, it was arguably necessary for the Court to perpetuate Lord Steyn's "thus far and no further"[9] approach in *White v Chief Constable of South Yorkshire* to break the chain of consequences leading from the original tortious act. Lord Leggatt and Lord Rose's judgment begins with a rather sympathetic nod to death as an inherently traumatic event. This *memento mori* serves as a compassionate acknowledgment of the harm felt by secondary victims who fall outside the criteria; however, this does not soften the blow that in practice, extending liability would be unreasonable. In doing so, the Court undertook an unenviable balancing task, and ultimately recognised that whilst this approach may seem callous, it is necessary.

It is accepted that Lord Burrows' solution is right in principle, but that does not mean that the Court should have adopted it. Instead, Lord Burrows' dissent is what we should aspire to. We should absolutely take reasonable care not to harm people and, as a result, cause psychiatric harm to their loved ones too; however, it is not convincing that this should mean a legal duty should be imposed. Whilst Lord Burrows is correct in his assertion that the Court's reasoning draws distinctions that are hard to defend *in principle*¸ it is also true that the Court's reluctance to impose a broader duty of care reflects concerns about the law's role and reach. Lord Burrows' foreseeability-based approach promotes fairness for secondary victims, but the Court's prudent judgment demonstrates an understanding of the need to balance compassion with pragmatic limits to liability, thus ensuring that the law is both principled and pragmatic in its application.

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[6] *Paul & Anor v Royal Wolverhampton NHS Trust* [2024] UKSC 1, [138].
[7] See Edward Dove, 'Psychiatric Illness and Clinical Negligence', in *Bioethical inquiry* (2024) 21, 222-3 for further discussion.
[8] *Liverpool Women's Hospital NHS Foundation Trust v Ronayne* [2015] EWCA Civ 588.
[9] *White and others v Chief Constable of South Yorkshire Police and others* [1998] UKHL 5; [1999] 2 AC 455, [500D].

Word count – 1000