Secondary victim mental harm claims following negligent medical treatment: A change in direction?

Paul & Anor v Royal Wolverhampton NHS Trust [2024] UKSC 1.

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Overview

1. Primary / Secondary victims
2. A sudden shift in UK law – *Paul v Royal Wolverhampton NHS Trust*
3. The Australian common law position
4. Civil liability legislative overlays
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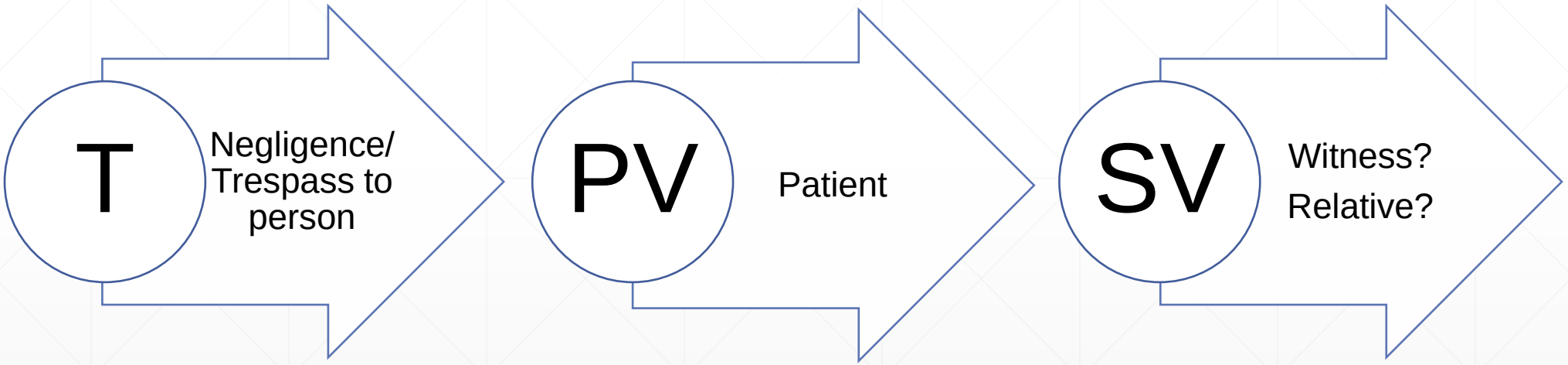
Primary & secondary victims – Mental harm



The *Paul* appeals 2024 (UKSC)

- ***Paul & Anor v Royal Wolverhampton NHS Trust.*** Claims made by daughters (aged 9 and 12) of Mr Paul who suffered a cardiac arrest and died in their presence. A little over a year earlier he had attended a hospital operated by Royal Wolverhampton NHS Trust and was treated for coronary symptoms. The appellants alleged breach of duty in failure to perform angiography and coronary revascularisation, in which case he would not have collapsed and died when he did.

- ***Polmear & Anor v Royal Cornwall Hospital NHS Trust.*** Admission of breach of duty in treatment of child, Esmee Polmear, by paediatricians who failed to diagnose veno-occlusive disease. Claims made by her parents, as she died in their presence having deteriorated while on a school trip.

- ***Purchase v Ahmed.*** Claim made by mother of 20 year old Evelyn Purchase, who died from severe pneumonia. She had consulted her general practitioner on three occasions and a breach of duty of care was alleged in failing to diagnose and treat her. Unlike the *Paul* and *Polmear* matters, the claimant mother was not present at the precise time of death, but arrived perhaps five minutes later.

UKSC majority decision – primary point

- **Review of mental harm claims case law - distinction between an accident and a medical crisis**

- The three key cases examined all involved injuries to a primary victim as a result of an ***accident***: *McLoughlin v O'Brian* [1983] 1 AC 410 ("*McLoughlin*"); *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 ("*Alcock*"); and *Frost v Chief Constable of South Yorkshire* [1999] 2 AC 455 ("*Frost*").
  - "In *McLoughlin* the relevant event was a road accident, which is perhaps the paradigm. In *Alcock* and *Frost* the event was on a scale so large that it is more naturally described as a "disaster", but nothing turns on that linguistic difference. In each case the event was not "accidental" in the sense that no one was to blame for it since it was caused by the defendant's negligence; but it was an "**accident**" in the sense already mentioned that it was an unexpected and unintended event which caused injury (or a risk of injury) by violent external means to one or more primary victims.
  - That is not the usual situation in medical negligence cases such as those under appeal. In these cases, the event (or its aftermath) witnessed by the secondary victim is generally not an accident; it is the suffering or death of their relative from illness. As a shorthand and without intending it to be a term of art, we will refer to such an event as a "**medical crisis**". The question raised by these appeals is whether witnessing a negligently caused medical crisis (or its aftermath) can in principle found a claim for damages by a secondary victim or whether such a claim can lie only where the triggering event is an accident in the sense we have described."
- Held: An accident is an external event which causes, or has the potential to cause, injury: it is not the injury, if there is one caused by that event.
- Necessary to witness an accident; a medical crisis is not sufficient. (Though what if the accident is a medical treatment procedure?)

UKSC majority decision – Secondary point.

- **Duties owed by doctors - general principles**

- *Meadows v Khan* [2022] AC 852 - Supreme Court held that where the purpose for which a doctor was consulted concerned a particular risk in a pregnancy (of giving birth to a child with haemophilia), the doctor was not liable for the consequence of an unrelated risk (that the child would suffer from autism).

- In *Paul* the majority held that consideration of the **purpose for which services are provided** (such as in *Meadows*) is equally important in determining whether or when a duty of care is owed by a doctor to someone other than their patient.
  - "Common to all cases of this kind, however, is a fundamental question about the nature of the doctor's role and the purposes for which medical care is provided to a patient. We are not able to accept that the responsibilities of a medical practitioner, and the purposes for which care is provided, extend to protecting members of the patient's close family from exposure to the traumatic experience of witnessing the death or manifestation of disease or injury in their relative. To impose such a responsibility on hospitals and doctors would go beyond what, in the current state of our society, is reasonably regarded as the nature and scope of their role."

UKSC dissent – Lord Burrows.

- Lord Burrows would have dismissed the appeals, commenting at the outset:
  - "It is arguable that the only truly principled solution, which would avoid any arbitrary line drawing, would be to impose a duty of care where, in general terms, it was reasonably foreseeable that psychiatric illness would be caused to the secondary victim (as a person of reasonable fortitude). But policy concerns, in particular the fear of opening the floodgates of litigation, mean that adoption of that principled solution would constitute a radical and giant leap forward for the common law. For that reason, at the present stage of development, that solution is not a realistic option open to the courts."
  - Does this sound familiar?

UKSC dissent – Lord Burrows.

- The correct approach was to reject the focus on accidents or events external to the primary victim and instead to focus in these three cases on the death of the primary victim as the relevant event.
- Once one treats the event as the death, all the established proximity or control factors are satisfied.
  - Close tie of love and affection
  - Present at death/aftermath
  - Psychiatric injury brought about by own unaided senses
  - Death shocking and horrific.

The Australian common law.

- In relation to secondary victim claims Peter Handford (writing in 2016) said:

> In the latest and greatest extension, the Australian High Court in *Tame v New South Wales* finally rejected any question of limits in terms of proximity or direct perception: the duty of care depended only on reasonable foreseeability of psychiatric injury and the existence of a sufficient relationship.

- Query though "circumstances of the case".
  - *Tame v New South Wales* (2002) 211 CLR 317. Heard with *Annetts v Australian Stations Pty Limited.*
  - Peter Handford, *Tort liability for mental harm*, 3rd edition 2017 (Thomson Reuters) [22.10].

Tame – Gleeson CJ

- Leaving aside cases of physical injury to persons or property, the law has not yet developed to the point where it is possible to identify precisely the relationships that serve to identify persons who should be in another's contemplation as persons closely and directly affected by his or her acts or the features of those relationships. Unfortunately, the notion of "proximity" has not served as a unifying doctrine in this regard. However, that is not to say that those relationships or their special features cannot be identified when new cases present themselves for decision. ([53])

Tame – Gaudron J

- I agree with Gummow and Kirby JJ that the common law of Australia should not, and does not, limit liability for damages for psychiatric injury to cases where the injury is caused by a sudden shock, or to cases where a plaintiff has directly perceived a distressing phenomenon or its immediate aftermath. It does not follow, however, that such factual considerations are never relevant to the question whether it is reasonable to require one person to have in contemplation injury of the kind that has been suffered by another and to take reasonable care to guard against such injury. In particular, they may be relevant to the nature of the relationship between plaintiff and defendant, and to the making of a judgment as to whether the relationship is such as to import such a requirement. ([18])

Tame – Gummow & Kirby JJ

- A rule that renders liability in negligence for psychiatric harm conditional on the geographic or temporal distance of the plaintiff from the distressing phenomenon, or on the means by which the plaintiff acquires knowledge of that phenomenon, is apt to produce arbitrary outcomes and to exclude meritorious claims. ([221])

Secondary victim claim following medical negligence An Australian appellant precedent – Pre CLA.

- ***Panagiotopoulos v Rajendram*** **[2007] NSWCA 265.**

- Mrs Panagiotopoulos was a patient of Dr Rajendram. It was argued that the doctor delayed the diagnosis and treatment of her colorectal cancer, from which she ultimately died. Her husband, Mr Panagiotopoulos claimed for a psychiatric injury arising from the alleged negligent treatment, but his claim was unsuccessful at trial. The claimant had failed to prove that his wife's death was hastened by any breach of duty of the defendant, and had failed to prove his psychiatric illness.

- On appeal (Basten JA, with Tobias & McColl JJA agreeing): first step was to identify the nature of the duty owed by the respondent, as a general practitioner, to his patient's husband. In a broad sense, **the existence of a duty of care in such circumstances may readily be assumed**.

- Clearly this is a contrary position to that which would have followed on application of the view of the majority in *Paul*. The balance of the appeal focused on matters other than the question of duty.

Section 32

- (1) A person ("the defendant") **does not owe a duty** of care to another person ("the plaintiff") to take care not to cause the plaintiff mental harm unless the defendant ought to have **foreseen** that **a person of normal fortitude** might, in the circumstances of the case, suffer a **recognised psychiatric illness** if reasonable care were not taken.

- (2) For the purposes of the application of this section in respect of pure mental harm, the circumstances of the case include the following—

- (a) whether or not the mental harm was suffered as the result of a **sudden shock**,

- (b) whether the plaintiff **witnessed**, at the scene, a person being killed, injured or put in peril,

- (c) the **nature of the relationship** between the plaintiff and any person killed, injured or put in peril,

- (d) whether or not there was a **pre-existing relationship between the plaintiff and the defendant**.

Civil liability overlays

Civil Liability Act 2002 (NSW)

Section 32

- (3) For the purposes of the application of this section in respect of consequential mental harm, the circumstances of the case include the personal injury suffered by the plaintiff.

- (4) This section does not require the court to disregard what the defendant knew or ought to have known about the fortitude of the plaintiff.

Civil liability overlays

Civil Liability Act 2002 (NSW)

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Section 30

- (1) This section applies to the liability of a person ("the defendant") for pure mental harm to a person ("the plaintiff") arising wholly or partly from mental or nervous shock in connection with **another person** ("the victim") being killed, injured or put in peril by the act or omission of the defendant.

- (2) The plaintiff is **not entitled** to recover damages for pure mental harm **unless**--(a) the plaintiff **witnessed,** at the scene, the victim being killed, injured or put in peril, or (b) the plaintiff is a **close member of the family of the victim**.

- **Close family member** is defined in s 30(5) as meaning: (a) a parent of the victim or other person with parental responsibility for the victim, or (b) the spouse or partner of the victim, or (c) a child or stepchild of the victim or any other person for whom the victim has parental responsibility, or (d) a brother, sister, half-brother or half-sister, or stepbrother or stepsister of the victim.

- "**spouse or partner**" means-- (a) the person to whom the victim is legally married (including the husband or wife of the victim), or (b) a de facto partner, but where more than one person would so qualify as a spouse or partner, means only the last person to so qualify.

Section 72

- A person (the defendant) does not owe a duty to another person (the plaintiff) to take care not to cause the plaintiff pure mental harm unless the defendant foresaw or ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.

- (2) For the purposes of the application of this section, the circumstances of the case include the following— (a) whether or not the mental harm was suffered as the result of a sudden shock; (b) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in danger; (c) the nature of the relationship between the plaintiff and any person killed, injured or put in danger; (d) whether or not there was a pre-existing relationship between the plaintiff and the defendant.

- (3) This section does not affect the duty of care of a person (the defendant) to another (the plaintiff) if the defendant knows, or ought to know, that the plaintiff is a person of less than normal fortitude.

Civil liability overlays

Wrongs Act 1958 (Vic)

Secondary victim claim following medical negligence Australian precedents – Post CLA.

- ***Frangie v South Western Sydney Local Health District trading as Liverpool Hospital* [2019] NSWDC 42**

- Claim for mental harm by four close family members of the late Mr Frangie, who had suffered a heart attack and died. He had previously attended the hospital for treatment, which was alleged to be negligent. On the duty question, it was undisputed that the Hospital owed Mr Frangie (the victim) a duty of care, however the trial judge noted that arguably any duty of care to the victim's family members to prevent psychiatric illness is not completely synonymous with the duty to the victim to prevent personal injury.

- Nothing further was said on that point, with the trial judge proceeding to assess the requirements of the *Civil Liability Act 2002* (NSW) that the defendant should have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness if reasonable care was not taken (s 32(1)) and that the plaintiffs suffered a 'recognised psychiatric illness' (s 31).

Discussion scenarios

Claimant	Circumstances	
Parent	Minor has been recently abused and suffered physical injury and consequential mental harm; parent claimant alleges mental harm as a result of the person's abuse.	
Spouse	Person who was abused as a minor, before the spouse knew the person, and developed a PTSD condition; spouse claimant alleges mental harm as a result of the PTSD harm to the person.	
Child	Person who was abused as a minor, before the child claimant was born, and later commits suicide said to be caused by the earlier abuse. Child claimant alleges mental harm as a result of the person's suicide.	

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