Paul v Royal Wolverhampton NHS Trust
[2024] UKSC 1

Summary

This case concerned three conjoined appeals:

(i) *Paul*. Paul was out shopping with the claimants, his two daughters, when he collapsed in front of them and subsequently died of a heart attack. The defendant hospital had seen Paul 14 months earlier when he was complaining of chest and jaw pain, but failed to diagnose him as suffering from the heart problems that would later kill him. The claimants sued in respect of the psychiatric illnesses they developed as a result of witnessing their father die in front of them.

(ii) *Polmear*. Esmee Polmear was a 7-year-old girl who had been suffering from breathing difficulties. The defendant hospital put these difficulties down to anxiety and failed to diagnose Esmee as suffering from the very rare lung disease (pulmonary veno-occlusive disease) that was the true cause of her difficulties. On the day Esmee died, she went with her fellow classmates on a school trip to a nearby beach. But because she had been complaining of feeling unwell, her father (the first claimant) arranged to meet her at the beach to see how she was getting along. When he did so, Esmee was in a very bad way, and her father carried her back to the school, calling his wife (the second claimant) to meet them at the school. Once at the school, Esmee collapsed and was taken to hospital in an ambulance with her mother and father. It was confirmed at the hospital that Esmee had died. Esmee's mother and father subsequently developed psychiatric illnesses as a result of these events.

(iii) *Purchase*. Evelyn Purchase was a 20-year-old arts student who attended the defendant's walk-in medical centre with her mother, complaining of suffering from chest pains. The defendant failed to diagnose Evelyn as suffering from severe pneumonia, and instead prescribed her a course of antibiotics (overlooking the fact that he had recently prescribed her two courses of antibiotics for the same condition, and that they had done nothing to alleviate Evelyn's condition). Two days later, Evelyn's mother (the claimant) went to London with her other daughter to celebrate her birthday; Evelyn was too unwell to go with them and stayed at home being looked after by her father. When the claimant came back home in the early hours of the following morning, she discovered Evelyn was dead in her bed. She subsequently discovered that Evelyn had rung her mobile and left a message on her answering service: it consisted of Evelyn breathing in and out as she died. The claimant subsequently developed a psychiatric illness.

The question for the courts was – did the defendants in these cases owe the claimants a duty of care when they treated the patients whose deaths had the foreseeable effect of causing the claimants to develop a psychiatric illness? At first instance, the judges in *Paul* and *Polmear* said the answer was 'yes', while the first instance judge in *Purchase* said the answer was 'no'. The *Purchase* judge said the answer was 'no' because of the decision of the Court of Appeal in *Taylor* v *A Novo Ltd* [2014] QB 150. That was a case where the claimant's daughter suffered a head injury at work due to the negligence of the defendant, her employer. The daughter seemed to be making a good recovery from her injury, but then collapsed and died at home three weeks later. The claimant witnessed her daughter collapse and die, and developed a psychiatric illness as a result. The claimant's claim in negligence against the defendant was dismissed by the Court

of Appeal: the relevant 'event' that the claimant needed to have witnessed (or the immediate aftermath thereof) in order to establish that the defendant owed her a duty of care was the daughter's being injured at work, and not the daughter's collapsing and dying at home.

When the Court of Appeal considered all three cases, it held that it was bound by the decision in *Novo* to find that no duty of care had been owed by the defendants to the claimants in any of these cases: '*Novo* is binding authority for the proposition that no claim can be brought in respect of a separate horrific event removed in time from the original negligence, accident or a first horrific event' ([2023] QB 149, [96] (per Sir Geoffrey Vos MR)). But at the same time, the Court of Appeal expressed some doubt whether *Novo* had correctly stated the law: 'it is hard to see why the gap in time (short or long) between the negligence (whether misdiagnosis or door design) and the horrific event caused by it should affect the defendant's liability to a close relative witnessing the primary victim's death or injury that it caused' ([80]; see also [87], [103]). Accordingly, the Court of Appeal granted each of the claimants in the three cases permission to appeal to the UK Supreme Court.

The UK Supreme Court dismissed the claimants' appeals (by a majority of 6:1; Lord Burrows dissented), but on a different basis than that adopted by the Court of Appeal. Lord Leggatt and Lady Rose ('the majority', below) gave the principal judgment, with which Lords Briggs, Sales and Richards agreed. Lord Carloway gave a concurring judgment (with which Lord Sales agreed), principally focussing on the position in Scots law.

The majority took the view that there was a 'general rule that the law does not grant remedies for the effects – whether psychological, physical or financial – of the death or injury of another person' ([48]) to which there were only two exceptions: (i) the ability of dependants to make a claim for loss of support or bereavement under the Fatal Accidents Act 1976 ([3]); and (ii) the case where C 'suffers personal injury (typically, but not limited to psychiatric illness) as a result of witnessing an *accident* [or the immediate aftermath thereof] in which a close relative is killed or injured (or put in peril of death or injury) as a result of the defendant's negligent act or omission [in relation to that close relative]' ([4]). The majority defined an 'accident' as an 'unexpected and unintended event which causes injury (or a risk of injury) to a victim by violent external means' ([24]; see also [52]). The claims made by the claimants in *Paul* and the other conjoined appeals did not fall within either exception. In each of the conjoined appeals, the claimant's psychiatric illness was not the result of witnessing an *accident* in which their loved one was killed; the claimant's psychiatric illness was the result of witnessing their loved one dying (or the immediate aftermath thereof) as a result of a pre-existing injury.

The majority declined to create a further exception to the 'general rule' of no recovery for harms suffered as a result of the death of another, to cover *non-accident* cases where psychiatric 'illness is sustained by a secondary victim as a result of witnessing a death or manifestation of injury which is not caused by an external, traumatic event in the nature of an accident but is the result of a pre-existing injury or disease' ([142]).

Exception (ii) to the general rule – covering cases where the claimant suffered psychiatric illness as a result of witnessing an accident in which a close relative was killed, injured or endangered (or the immediate aftermath thereof) – owed its existence to the facts that accidents are 'discrete' events, happening 'at a particular time, at a particular place, in a particular way' ([108]), witnessing an accident involving a close family member is an 'ordeal' for the person witnessing it ([109]), and no intelligible distinction can 'reasonably be drawn between [psychiatric illness] caused by fear for [the claimant's] safety and by fear for the safety of a close family member' ([110]). Non-accident cases such as those in *Paul* were very different, and so different that no analogy could be drawn between them and exception (ii) type cases: in a non-accident case there is not always a 'discrete event' that triggers the claimant's psychiatric illness ([112]); how traumatic a non-accident case is for the claimant is 'variable' ([113]); and

in a non-accident case there will never be any question of the claimant's fearing for their own safety ([114]). Given this, creating an exception to the 'general rule' in non-accident cases would give rise to 'unacceptable and unfair differences in treatment between different categories of claimant' – for example, it would be difficult to explain why 'a daughter who sees her parent die from a heart attack…which should have been avoided' could recover damages, when a mother who does not witness her child being killed in a road accident, but sees her child's body much later in a mortuary cannot ([116]).

Moreover, in a non-accident case of the type presented by the appeals in *Paul* – where the claimant was killed as a result of the negligence of a *doctor* in treating the claimant's loved one – the basis of the duty of care that the doctor owed the loved one is that the doctor 'assumed a responsibility' to their patient ([132]). It cannot be said that the doctor also assumed a responsibility for the health of members of the patient's family, such as the claimant ([138]): 'the persons whom doctors ought reasonably to have in contemplation when directing their minds to the care of a patient do not include members of the patient's close family who might be psychologically affected by witnessing the effects of a disease which the doctor ought to have diagnosed and treated' ([142]). As a result, to find that a doctor owed a claimant a duty of care to protect the claimant 'from exposure to the traumatic experience of witnessing the death or manifestation of disease or injury in [their loved one]…would go beyond what, in the current state of our society, is reasonably regarded as the nature and scope of their role' ([138]): the sort of harm the claimant might suffer as a result of the loved one's dying from a pre-existing injury or disease 'is not an insult to health from which we expect doctors to take care to protect us but a vicissitude of life which is part of the human condition' ([139]).

Lord Burrows dissented on the ground ([248]) that drawing a distinction between 'accident' and 'non-accident' cases took the law further away from the only principled position it could adopt when a secondary victim suffered a psychiatric illness as a result of the defendant's breach of a duty of care owed to a primary victim – which is that the defendant should be held to have owed the claimant a duty of care if the claimant's psychiatric illness was a foreseeable consequence of the defendant's negligence, and the claimant had a 'close tie of love and affection' to the defendant ([145]). Instead, in each of the conjoined appeals in *Paul*, the defendant should have been found to have owed the claimant(s) a duty of care on the basis that (1) the claimant(s) suffered a psychiatric illness as a result of the 'event' of their loved one's dying; (2) that 'event' occurred as a result of the defendant's breach of a duty of care in relation to the deceased; (3) it was reasonably foreseeable that the claimant(s) would suffer a psychiatric illness as a result of that event; (4) there was 'a close tie of love and affection' between the claimant(s) and the deceased; and (5) the claimant's/claimants' psychiatric illness was triggered by witnessing that 'event' or the immediate aftermath thereof.

Comments

The majority's general rule

The majority decision in *Paul* stands or falls on the 'general rule' that provided the basis of their decision. That general rule says that 'the law does not grant remedies for the effects – whether psychological, physical or financial – of the death or injury of another person' ([48]) and has (and after *Paul* still only has) two exceptions: (i) the case where a dependant is able to bring a wrongful death claim under the Fatal Accidents Act 1976; and (ii) the case where the claimant suffered a psychiatric illness as a result of witnessing an accident in which someone they were in a close and loving relationship was killed, injured or endangered (or the immediate aftermath thereof).

The majority held that this general rule (and its exceptions) applies *regardless* of whether (a) the defendant's negligence (or other wrongful act) amounted to an act or an omission ([22]); and (b) the defendant's negligence (or other wrongful act) resulted in the claimant suffering a psychiatric illness or a physical injury ([48]). This is very bold, and some would say too bold. This is because applying the majority's general rule (and its exceptions) across the board, regardless of (a) and (b), has a couple of startling implications.

The first is that it might suggest that a defendant *can* be held liable in negligence for failing to save a claimant from suffering a psychiatric illness *even in the absence* of the sort of special circumstances that would normally give rise to a duty of care on the part of the defendant to take steps to save the claimant from suffering harm. Consider first the **Bored Teen Problem**:

Mother and her daughter *Teen* were out shopping. *Mother* popped into a cake shop run by *Gourmet* while *Teen* – fed up and wanting to go home – stayed outside on the pavement. *Teen* was then startled by an almighty crash: part of the roof of the bakery collapsed, crushing *Mother* to death. *Teen* suffered a psychiatric illness seeing her mother's body in the rubble. *Gourmet* should have been aware, from visible cracks that had developed in the roof of the bakery, that there was a problem with the roof that needed to be investigated.

This is an 'accident' case and so *Teen*'s claim that *Gourmet* owed her a duty of care cannot be disposed of in the same way as the appeals in *Paul*. How would the majority in *Paul* have decided this case? *Gourmet* owed *Mother* a duty of care to see that she would be safe from the roof caving in under the Occupiers' Liability Act 1957 – but did he also owe *Teen*, who never entered his shop, a duty of care to see that she would be safe from suffering a psychiatric illness as a result of see her mother die in *Gourmet*'s shop? There is every reason to think that the majority would have said that he did.

Their doing so could be reconciled with basic principle by viewing this case as an 'act' rather than 'omission' case. That is, it could be argued that *Gourmet* owed *Teen* a duty of care *not to open his shop to customers that morning*, given that it was foreseeable that doing so might result in someone like *Mother* being killed and *Teen* suffering a psychiatric illness as a result (with all the other requirements for *Gourmet*'s owing *Teen* a duty of care – a close and loving relationship between *Teen* and *Mother*, and *Teen's* witnessing the accident that caused *Mother*'s death – being satisfied here). But then what about the **Tragic Tyke Problem**?

Father took his young boy *Tyke* for a walk in the park, accompanied by *Tyke*'s *Grandmother*. *Grandmother* wandered off to buy an ice cream for *Tyke*, and while she was away, *Tyke* accidentally fell in a lake, and started to drown. *Father* – who had never 'taken' to *Tyke* – allowed *Tyke* to drown. When *Grandmother* returned proudly bearing an ice cream, she was horrified to see *Tyke* floating face down in the lake. She subsequently suffered a psychiatric illness.

This seems to be a pure omission case (one which is impossible to recast as an 'act' case), where *Father* undoubtedly owed *Tyke* a duty of care to rescue him from drowning – but the basis on which we could find that he *also* owed *Grandmother* a duty of care to save her from suffering psychiatric illness as a result of *Tyke*'s drowning remains mysterious. And yet, this being an 'accident' case, it fulfils all of the majority's criteria for finding that *Father* owed *Grandmother* a duty of care.

The second – even more startling implication – is that if the majority's general rule applies regardless of whether the claimant has suffered a *physical injury* or a psychiatric illness as a result of 'the death or injury of another person', that would suggest that in a non-accident

case where a defendant's *act* has foreseeably resulted in X's being killed or injured, and the claimant has equally foreseeably been physically injured as a result of X's being killed or injured, the claimant will *not* be able to argue that the defendant owed her a duty of care not to act in the way he did. This is really startling because it makes a significant inroad on the principle established in *Donoghue* v *Stevenson* – not the neighbour principle (which was always nonsense) but the much more limited principle that if D's doing *x* creates a foreseeable and unreasonable risk of C's being killed or injured, then absent very special circumstances (such as exist in 'combat immunity' cases), D will owe C a duty of care not to do *x*. For example, consider the **Dangerous Doctor Problem**:

Doctor has started injecting his patients with a vaccine that, as *Doctor* should know, carries with it an unreasonable risk of his patients' hearts becoming dangerously enlarged (or in medical parlance, of the patients suffering from myocarditis). *Patient* receives one of these injections (without being informed of the risk of myocarditis) and two years later collapses and dies of a heart attack while driving a car, where the heart attack was brought on by the *Patient*'s (unknown to him) suffering from myocarditis. In the ensuing crash, *Patient*'s two daughters (who were in the back of the car) were injured, as were some pedestrians waiting at a bus stop who were hit by *Patient*'s car as it careened out of control.

Before *Paul*, no one would have really doubted that a court would find that *Doctor* owed the daughters and the pedestrians a duty of care not to inject *Patient* with such a dangerous vaccine, as it was reasonably foreseeable that doing so would result in physical injury to people like the daughters (people in the car when *Patient* suffered a heart attack while driving it) and the pedestrians (people in the vicinity of the car when *Patient* suffered a heart attack while driving it). But after *Paul* we can't be so sure. When the daughters and the pedestrians sue, what it is to stop counsel for *Doctor* arguing that under the majority's general rule, *no* duty of care was owed by *Doctor* to the daughters or the pedestrians because that rule applies regardless of whether *Doctor* was guilty of an act or an omission vis-à-vis *Patient* and regardless of whether the daughters or the pedestrians suffered a physical injury or a psychiatric illness as a result of what *Doctor* did?

Two things might stand in the way. First, it might be argued that the second exception to the majority's rule applies here because this is an *accident* case. The thought would be that the fact that *Doctor* injected *Patient* with a vaccine that brought on myocarditis distinguishes that case from the facts of *Paul*, where Paul collapsed because of a purely internal condition that had no external trigger. This argument might work (the question of whether this sort of case is an accident case is raised, but not resolved, in *Paul* at [123] (the majority) and [205] (Lord Burrows)) – but it is striking how much depends, for this argument to work, on how you define what an 'accident' is when before *Paul* it would have been thought that it was *obvious* that *Doctor* owed the daughters and the pedestrians a duty of care. Note also that even if we classify what happened in the Dangerous Doctor Problem as being an 'accident', counsel for *Doctor* could still argue that while *Patient*'s daughters can bring themselves under the second exception to the majority's general rule, the pedestrians *cannot* as they are not 'close relatives' of *Patient*. For the pedestrians' claims to succeed, they would have to rely on a second argument against applying the majority's general rule in this case.

The second argument is the majority's general rule does not have any application to a case like the Dangerous Doctor Problem because in that case, the daughters and pedestrians are not seeking 'remedies for the effects…of the death or injury of another person'. While they would not have been injured had *Patient* not collapsed at the wheel as a result of a heart attack brought on by *Doctor*'s negligence, what they are really complaining of is that they were injured as a result of *Patient*'s car careening out of control, and that *Doctor* is liable for the

injuries resulting from *that* event because it was reasonably foreseeable that if he injected *Patient* with his dangerous vaccine, something like that event would occur, and people like the daughters and the pedestrians would be injured as a result. This seems like a good argument and might well ensure that cases like the Dangerous Doctor Problem will continue to be decided by reference to good old *Donoghue* v *Stevenson*, without any interference from the majority in *Paul*'s 'general rule'. But, again, notice how odd it is that we have to resort to what most people would think is a pretty subtle argument in order to ensure *Donoghue* v *Stevenson* is unaffected by *Paul* in its application to the Dangerous Doctor Problem when before *Paul* was decided it would have been regarded as *obvious* and *beyond any dispute* that *Donoghue* v *Stevenson* would apply to find that a duty of care was owed by *Doctor* to the daughters and the pedestrians in the Dangerous Doctor Problem.

These oddities bring into question whether the majority's 'general rule' is actually a rule of English law at all. Certainly, no one would have suggested that such a rule existed before *Paul* came along. The majority's general rule seems like a stroke of intellectual brilliance that might have attracted an alpha double minus (in old money) in an Oxford Finals Tort paper, but when pressed, starts falling apart and showing its deficiencies. A bit like Lord Atkin's neighbour principle in *Donoghue* v *Stevenson*.

Were these omission cases?

In his preliminary note on *Paul* (which he has kindly given me permission to reproduce on this website), Robert Stevens argues that there was absolutely no need for the majority to rely on its dubious 'general rule' in order to find in favour of the defendants in this case. The essence of the claimants' claims in *Paul* was that the defendants in that case had *failed to save them* from suffering a psychiatric illness when witnessing what happened to their loved one (or the immediate aftermath thereof), and in such failure to save cases – and absent any other special circumstances that would have established that the defendants owed the claimants a duty of care to save them from harm – the only basis for finding that the defendants owed the claimants a duty of care is that they *assumed a responsibility* to the claimants. And the defendants did not assume a responsibility to the claimants to treat their loved ones properly (and thereby save the claimants from the psychiatric illnesses that ensued from their seeing their loved ones collapse and die) – they only assumed a responsibility to those loved ones.

This argument only works if the claims in *Paul* were claims arising out of a failure by the defendants to save the claimants from harm. In other words, this argument only works if the cases dealt with in *Paul* were cases where it was sought to hold the defendant liable for an omission. It is part of the essence of *Donoghue* v *Stevenson* is that this argument does not work in an act case – in a case where a defendant has done something positive to cause harm to the claimant, it is neither here nor there to say that the defendant only assumed a responsibility to a third party to take care in whatever he was doing. To think that that is relevant is to commit the 'privity fallacy' – of thinking that the defendant in a negligence can only owe a duty of care to someone that they are directly dealing with and to whom they are assuming a responsibility to take care. But if the claimants in *Paul* were suing the defendants for an omission – a failure to save them from suffering harm – then Stevens' argument seems perfectly sound.

So did the claims in *Paul* involve the claimants in suing the defendant for an omission? It is fair to say that this question, when it was raised in argument by the UK Supreme Court, came as a complete surprise to counsel on both sides. Neither side had really taken on board the possibility that the case might be disposed of on the basis that all the defendant had done was failure to save the claimant – a complete stranger – from harm and as a result could not have owed the claimant a duty of care. This is because argument in the lower courts had

focussed so much on how the *Novo* case applied to the claims in *Paul*. The fact that the counsel in *Paul* were not really properly prepared to argue *Paul* on the basis of whether *Paul* was an act or an omission may account for why the majority sought to dispose of the case via their general rule rather than basing themselves on the act/omission distinction (and made the incautious move of saying that their general rule operated independently of whether the defendant's negligence amounted to an act or an omission). But Lord Burrows had no such luxury. He wanted to find in favour of the claimants. So – through gritted teeth (observing at [213] that 'none of the counsel' involved in *Paul* 'appeared to regard this issue as being of central importance to what the court had to decide') – Lord Burrows *had* to address the question of whether the claims in *Paul* fell foul of the general rule that absent special circumstances there will be no liability in negligence for failing to save someone from harm, especially that someone is a complete stranger to you. Lord Burrows (unsurprisingly) said that they did not. He argued (at [220]) that while the claimant who had suffered a psychiatric illness as a result of the defendant's negligence in relation to a loved one had to establish that the defendant owed her an independent duty of care (independent, that is, of the duty of care that the defendant owed the loved one), in an omissions case, the claimant could trade on the fact that the defendant had assumed a responsibility *to the loved one* to surmount the normally insurmountable hurdle that the defendant could not have owed the claimant a duty of care if all he had done was failed to save her from harm and they were complete strangers to each other. The defendant's assumption of responsibility to the loved one would allow the claimant to overcome the objection that he could not have owed the claimant a duty of care to save her from harm.

This seems pretty desperate stuff, invented out of thin air. It's also dangerous stuff – if in a psychiatric illness case C can trade on the fact that D assumed a responsibility to X in order to overcome the normal rule that there is no liability in negligence for a failure to save someone from harm, why can't C do this in other cases? Why can't C say in a *Michael*-type case of a public employee: you owed me a duty of care to save me from harm because you assumed a responsibility to your employer to save me from harm? Lord Burrows would respond, 'C can't say this because the duty of care in that sort of case is not derivative of the duty of care owed by the public employee to their employer.' But it's not so clear that this is the case. Presumably, the standard of care the public employee would be expected to meet in protecting C from harm would be heavily influenced by what the employee was required to do under their contract with their employer. And the primary reason that employee is being sued for failing to save C from harm is that they were *employed* to save C from harm – it was *their job*.

Rather than engaging in these dangerous experiments in crossing the divide between acts and omissions cases, Lord Burrows might have done better to argue that the appeals in *Paul* did *not* involve the claimants suing the defendants for *failing* to save them from harm. Rather, he could have argued, the claimants were suing the defendants for positively making them worse off. Recall that the distinction between an act and an omission is that (i) in an omission case the defendant makes the claimant no worse off than they would have been had the defendant done nothing at all, while (ii) in an act case the defendant makes the claimant worse off than they would have been had the defendant done nothing at all. It could be argued that all three of the cases decided in *Paul* were more like (ii) rather than (i). The claimants in each case could have said to the defendants, 'Had you not provided your reassuring diagnosis and done nothing at all instead, then our loved ones would have sought care elsewhere and either they would have gotten better with proper treatment or (if no treatment would have helped) they would have died under less traumatic and shocking circumstances than occurred in this case.' The weakness in this argument is the idea that if (say) in *Purchase*, Evelyn Purchase had been unable to see the defendant at their walk-in centre, she would have been able to seek care elsewhere. Those who live in the UK know that for the vast majority of people, there is not a

huge range of different sources of medical care and diagnosis that they can take advantage of. The walk-in centre may have been the only source of help available to Evelyn Purchase.

Accident and non-accident cases

The decision in *Paul* cements into the law a distinction that the authors of McBride & Bagshaw on Tort Law can fairly claim to have originated – which is that how psychiatric illness claims in negligence are decided turns crucially on whether we are talking about an accident case or a non-accident case. But those authors made that distinction in order to argue that it was *easier* to establish a duty of care in a non-accident case than an accident case, whereas the majority in *Paul* seems to say that a duty of care can *only* be established in an accident case. However, this would be a misreading of the case.

What the majority in *Paul* has held is that in what we might call *three party cases*, where the claimant suffers a psychiatric illness as a result of the defendant's negligently killing, injuring or endangering a third party, the defendant's negligence has to have caused an *accident* in which the third party was killed, injured or endangered (and the claimant needs to have witnessed that accident (or the immediate aftermath thereof), and been in a close and loving relationship with the third party). There is nothing in the majority judgment in *Paul* to bring into doubt the possibility of a claimant's establishing that a defendant owed her a duty of care in a *two party case* where the defendant's treatment of the claimant has resulted in her suffering a psychiatric illness.

Finding a duty of care in accident cases

The majority took the opportunity of deciding *Paul* to 'clean up' certain aspects of the law on when a duty of care will be owed in this kind of case.

It ruled that where C develops a psychiatric illness as a result of witnessing P's being killed, injured or endangered in an *accident* caused by D's negligence in relation to P, *and there is a close and loving relationship between C and P*: (i) C does not need to have experienced a 'sudden shock' in order to establish that D owed her a duty of care ([74]); (ii) nor does what happened to P have to have amounted to a 'horrifying event' ([78]); and (iii) it does not matter either if D's breach of duty in relation to P long pre-dated the accident that killed, injured or endangered Z ([91], [96]). The majority also made clear that *Taylor* v *A Novo Ltd* was rightly decided. The true basis of the decision in *Novo*, the majority held, was that although there was an accident 'which immediately caused injury to' P in that case, C 'did not witness that event and the event which she did witness and which caused her psychiatric illness was not an accident' ([90]).

But what if there was no close and loving relationship between C and P? The UK Supreme Court united in finding that no duty of care would be owed to C in this sort of case.

In his summary of the law in this area, Lord Burrows observed that for a duty of care to be owed to a secondary victim who had developed a psychiatric illness as a result of the defendant's breach of a duty of care owed to the primary victim, the secondary victim must have 'had a close tie of love and affection with the primary victim' ([179](iv)).

The majority held that the second exception to the 'general rule' against being able to sue for compensation because of the death or injury to another had to be limited in some way in order to 'keep the liability of negligent actors for such secondary harm within reasonable bounds' ([141]; see also [48]). And given the need to 'restrict the class of eligible claimants [under this second exception] to those who are most closely and directly connected to the

accident which the defendant has negligently caused and to apply restrictions which are reasonably straightforward, certain and comprehensible to the ordinary person' there was 'a rough and ready logic in limiting recovery by secondary victims to *individuals who were present at the scene, witnessed the accident and have a close tie of love and affection with the primary victim*' ([141], emphasis added).

This, the majority explained, is why 'bystanders at tragic events, even if they suffer foreseeable psychiatric harm, are not entitled to recover damages' ([48], quoting Lord Steyn in *White (or Frost)* v *Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 493). It is not that there is any special rule restricting recovery by bystanders: they cannot sue because of the general rule against being allowed to sue for harm suffered as a result of another's death or injury, and the fact that they do not come within any of the exceptions to that rule ([48]). Given this, it is hard to see that *Dooley* v *Cammell Laird & Co Ltd* (1951) is good law any longer. In that case, D was found to have owed C a duty of care in a case where C developed a psychiatric illness as a result of thinking that he might have been responsible for killing a number of his co-workers when (due to D's fault) a rope connecting C's crane with a heavy load snapped and the load fell into a hold where C's co-workers might have been working (but fortunately were not). As C was a secondary victim of D's negligence in relation to C's co-workers, and was not (we presume!) in a close and loving relationship with those co-workers, the judgments in *Paul* indicate that D did *not* owe C a duty of care in this case (at least in relation to C's suffering a psychiatric illness by being made to think that he had killed his co-workers). (Unless we can reinvent *Dooley* as a two party non-accident case, which may be unlikely.)

So *Dooley* disappears under the waves. If the majority is to be believed, *Dooley* was wrongly decided because the *only* exceptions that the law makes to its 'general rule' is for the benefit of dependants of a P who has been wrongfully killed by the defendant and those in a close and loving relationship with a P who was killed, injured or endangered by the defendant's breach of a duty of care owed to P. But readers of McBride & Bagshaw will know the truth is much more sordid, and goes all the way back to the House of Lords' decision in *Alcock* v *Chief Constable of South Yorkshire* (1992). In that case, the House of Lords sought to save the police from embarrassment in *Alcock* by applying in a restrictive way requirements as to when someone who was in a close and loving relationship with a 'primary victim' could establish that the defendant (who had wrongfully killed or injured that primary victim) owed them a duty of care. The result was that all the claims of family members who had lost loved ones in the Hillsborough disaster and subsequently developed psychiatric illnesses were dismissed. Then, seven years later, the House of Lords was faced with the unpalatable prospect of allowing claims by members of the *police* for psychiatric illnesses that they had suffered in the aftermath of the Hillsborough disaster: *Frost/White* v *Chief Constable of South Yorkshire Police* (1999). In order to save their blushes, and spare themselves from the outrage of the family members whose claims had been dismissed in *Alcock*, their Lordships engaged in a blatant misreading of *Alcock*. They held that *Alcock* had ruled (what it never did) that the *only* secondary victims of a defendant's negligent killing or injuring a primary victim who can argue that the defendant owed them a duty of care not to do what they did are those who were in a 'close and loving relationship' with the primary victim – with the result that the police in *Frost/White* could only sue if they were *primary* victims of the negligence of their commanders on the day of the Hillsborough disaster; in other words, if they had been physically endangered (or at least, thought they had been physically endangered) by that negligence. So the House of Lords got themselves off the hook in *Frost/White* but at the expense of claimants like the claimant in *Dooley*, or a mere bystander who foreseeably suffers a psychiatric illness as a result of witnessing a horrific accident unfold. As *Paul* shows, the rewriting of *Alcock* in *Frost/White* has now become orthodoxy in the hands of a subsequent generation of judges. The majority's

‘general rule’ may provide an elegant rationalisation of the law in this area, but reality – as is so often the case – is much more messy and unprincipled.

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