The Supreme Court and the Ability to Reason
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A doctor fails to diagnose a life-threatening medical condition. The patient subsequently dies because of the lack of treatment. Relatives who witness the death suffer psychiatric injury as a result. Do doctors owe relatives a duty of care to protect them? A majority of the United Kingdom Supreme Court in a joint judgment given by Lord Leggatt and Lady Rose (with whom Lords Briggs, Sales and Richards agreed, Lord Burrows dissenting) rightly concluded in *Paul v Royal Wolverhampton NHS Trust* [2024] UKS 1, in three conjoined appeals, that they do not.

Unfortunately, the court's principal reason for this result is stated as being (at [48], see also [4] and [140]):

'the 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.'

This is expressed too broadly, indeed loosely, and has the potential to mislead future courts unless read in the context of these facts. It conflates or ignores the distinction between the violation of a right (*iniuria*) and the causation of loss (*damnum*) that is central to understanding the law of torts.

If I negligently injure you, and as a result you lose your job, you may recover for your consequential economic loss. However, your dependants will have no claim against me if they are left economically worse off as a result. We do not have rights against others that we are not made economically worse off. Your dependants have not, in law, been wronged. They have merely suffered economic loss as a result of an injury to someone else. The legislature has created a statutory exception, allowing the dependants of those who are wrongfully killed a claim to recover for their consequential loss (Fatal Accidents Act 1976), but the general position is that third parties cannot recover for the loss they suffer as a result of a wrong done to someone else.

By contrast, if I negligently infect you with a disease, and that then leads to others developing that disease as a result from you, they potentially have a claim against me. It does not matter so far as our rights to our bodies are concerned how the injury occurs. The rule is the same regardless of whether the mechanism of injury is a gun, a carriage, a snail in a ginger beer bottle, damage to another's property or a prior injury to someone else. I have a right that others do not foreseeably injure me through their negligence. A wrong done to me does not cease to be actionable because the negligent conduct also constituted a wrong done to someone else. This is generally taken to have been authoritatively settled in *Donoghue v Stevenson* [1932] AC 562. There is not, or was not hitherto thought to be, any special exclusionary rule where the physical injury to me resulted from an injury to another.

A key question, therefore, is whether we have a right to our mental health or whether damaging the ability to reason is merely a form of loss, only recoverable where consequent upon the violation of some other right we have.

In England, this question was answered by drawing a sharp distinction between mere distress and recognised psychiatric illness. Distress is a form of loss. It is only actionable as special damages consequent upon the violation of another right (for example, the foreseeable misery consequent upon a private nuisance: *Bone v Seale* [1975] 1 WLR 797 (CA)).

At one time there was doubt as to whether recognised psychiatric illness that was neither consequent upon nor resulted in physical injury to the claimant was actionable. At the latest, by the decision of the Court of Appeal in *Boardman v Sanderson* [1964] 1 WLR 1317, subsequently adopted by the House of Lords in *McLoughlin v O'Brian* [1983] 1 AC 410, it had been accepted that it was. The courts were right to do so. Our ability to reason is essential to

enable each of us to lead independent lives. For most of us, its loss would be more profoundly important than the loss of a limb.

However, where that right is infringed through the physical injury of others (as with the psychiatric injury suffered by many in the aftermath of the Hillsborough stadium disaster) there are special rules limiting the class of people who can recover for consequent psychiatric injury, and the law does not adopt the position of allowing anyone who is reasonably foreseeably injured to recover (*Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310). This was not, as the majority in *Paul* state ([4]), a generous expansion of liability to allow loss suffered as a result of a wrong to another to be recovered. Rather it was, as Lord Hoffmann had earlier stated (*Frost v Chief Constable of South Yorkshire* [1999] AC 455, 502), a restriction upon the scope of liability for injury of mental health. This may be thought justified by the need to have clear rules for determining who has an action, rather than reliance upon the usual open textured "reasonable foreseeability" test. The majority endorsed a clarification of the restrictions upon the recovery of psychiatric injury by such a secondary victim, that the claimant must have been a witness to an accident, a traumatic event, or its immediate aftermath ([90]), approving *Taylor v A Novo (UK) Ltd* [2013] EWCA Civ 194, [2014] QB 150 and disapproving *North Glamorgan NHS Trust v Walters* [2002] EWCA Civ 1792, [2003] PIQR P16).

If therefore the reasoning of the Supreme Court is too widely stated, was the dissentient correct in thinking that a duty of care should have been found?

We do not owe duties to take care to protect other people from being injured, whether physically or otherwise. If I see you fall down ill, in law I can walk on by on the other side. *A fortiori* I do not owe third parties who would be adversely impacted by your illness a duty to protect them either.

However, hospitals that accept patients are in a different position. Hospitals assume a duty that care will be taken of patients that they admit. This non-delegable duty that care will be taken requires the hospital to take positive steps to ensure that patients receive adequate treatment. If a patient dies, when care would ensure that they lived, a wrong has been committed to them.

The duty the hospital assumes however is to the patient, and not to third parties. If a third party suffers an adverse consequence as a result of the failure to adequately treat the patient (whether it is economic loss or an adverse physical consequence) this should not be actionable. The hospital did not assume a duty to assist or protect anyone other than the patient that it admitted. In *Paul* itself, therefore, the relatives should have no claim for any injury they suffer as a result of the failure to provide adequate treatment to the patient. The majority correctly state this (at [138]) but it is potentially lost sight of in the wider reasoning that they adopt.

It follows that the position of the hospital with respect to third parties should not be the same as it is with respect to its patients. With respect to patients, it is potentially liable regardless of whether its negligence is constituted by making their position worse (for example, removing a healthy kidney) or a failure to treat. With respect to third parties it should only be actions that place others in a worse position that are potentially actionable, not mere failure to protect from harm.

The appeal in *Paul* did not therefore raise the same issue as had arisen in earlier cases where the defendant had through their negligent conduct injured someone, and the claimant had suffered psychiatric injury as a result. Although the court endorsed the correctness of those cases that had restricted liability in such circumstances, such restrictions do not simply flow, as the majority claimed, from ordinary principles. They must be justified, if they can be, by some policy choice that is made. *Paul* itself was, straightforwardly, a failure to prevent others to whom no duty had been voluntarily assumed from suffering injury.