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PAUL v Royal Wolverhampton NHS Trust [2024] UKSC 1, [2024] 2 W.L.R. 417 is a leading case that never was. The scene had been set with care. *Paul* was the first major tort case on psychiatric injury to reach Supreme Court level for a quarter-century. The Court of Appeal had itself (unusually) granted permission to appeal, indicating disquiet with the law: [2022] EWCA Civ 12, [2023] Q.B. 149 (noted [2022] C.L.J. 452). Seven judges were listed to hear the appeal. But none of the parties invited the Supreme Court to reconsider the governing precedents, centrally *Alcock v Chief Constable of South Yorkshire* [1992] 1 A.C. 310. Prudently so, as the majority judgment, delivered by Lady Rose and Lord Leggatt, thought it improper "to contemplate such a radical departure from settled law" (at [116]). The court (with Lord Burrows dissenting) dismissed all three claimants' appeals.

The outcome was conservative, although conservative with a fresh twist. First, the court sought to characterise liability for "secondary victim" psychiatric injury as anomalous. Accordingly, the strict limits on liability were *consistent with principle*, rather than contrary to it. Second, and following on, the court laid down a further restriction. The secondary victim's psychiatric injury must occur by witnessing an *accident* (i.e. an injury to the primary victim by "violent external means", at [24]). This precluded liability in the appeals heard together in *Paul*. Their common fact pattern involved medical defendants' negligent failure to diagnose and treat an illness, the patients consequently dying from their underlying untreated conditions, with their deaths being witnessed by the claimants (close family members).

Since Lord Scarman's influential speech in *McLoughlin v O'Brian* [1983] 1 A.C. 410, the *principled* approach to psychiatric injury has been thought to require a duty of care whenever such injury would be reasonably foreseeable. (Lord Burrows maintains this in dissent at [144]: foreseeability is "the only truly principled solution"). Courts have, however, rejected this principled solution for "*policy*" reasons, the decisive case being *Alcock* (*supra*) emphatically affirmed in *Frost v Chief Constable of South Yorkshire* [1999] 2 A.C. 455 (the two Hillsborough disaster cases). But in *Paul* the Supreme Court has questioned this orthodoxy, in the standard case of claimants traumatised by witnessing another's death or injury (which includes *McLoughlin*, *Alcock*, *Frost* and *Paul* itself).

The court emphasised at [2]–[4] that a claim cannot be based on another person's death at common law (*Baker v Bolton* (1808) 170 E.R. 1033); albeit Lord Campbell's Act 1846 (now Fatal Accidents Act 1976) is a statutory exception to the rule, and "secondary" psychiatric injury claims "a further limited" exception at common law. From this starting point, the

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court concluded (at [140]) that what principally needs justification is not *limits* on such liability, but allowing "secondary" claims at all. (No positive justification was advanced; it was simply "too well established to be called in question" – *Alcock*, p. 410 (Lord Oliver)). There are no special rules restricting recovery;

> "[r]ather, the inability of bystanders to recover damages even where they suffer foreseeable harm (of any kind) is a consequence of the rule that the law does not grant remedies for the effects – whether psychological, physical or financial – of the death or injury of another person" (at [48]).

It was necessary to draw a line somewhere, to keep this liability "within reasonable bounds" – or the exception would supplant the rule (at [141]).

The court (at [58]) therefore rejected Lord Hoffmann's "lament" that "the search for principle was called off in *Alcock*" (*Frost*, p. 511). However, the Supreme Court contradicted its rehabilitation of *Alcock* as "principled" by accepting (also at [58]) that the *Alcock* limits were "influenced by practical and policy considerations rather than purely analogical development of the law". (Quite *what* policy considerations is unclear when, at [48], the court was unimpressed by most of those identified by Lord Steyn in *Frost*, pp. 493–94, and summarised at [47]). We have passed through the looking-glass, and it is Lord Scarman's broad approach to liability in *McLoughlin v O'Brian* that must now be seen as anomalous, and contrary to principle. The painful, consciously artificial line-drawing in *Alcock* (see e.g. Lord Oliver, p. 410, on the illogicality of the *Alcock* rules) was not as unprincipled as the Law Lords themselves had thought. Not only was Lord Hoffmann mistaken about *Alcock* in *Frost*, but also Lord Goff (who at p. 487 thought *Alcock* "arbitrary" and "artificial") and Lord Steyn (*Alcock* produced "a patchwork quilt of distinctions which are difficult to justify": p. 500).

Does the rule in *Baker v Bolton* bear the weight placed on it here? It seems questionable. First, not all psychiatric injury claims are "secondary". There may be no primary victim at all. The claimant may (inaccurately) *fear* that their child or spouse has apparently been killed when they remain happily unscathed. Or the claimant may be shocked by destruction of their *own* property, such as their home or a scholar's life's-work (cf. *Attia v British Gas* [1988] Q.B. 304). Cases involving stress at work, or communication of upsetting information (e.g. incorrect medical diagnoses), cannot engage the "rule" either. But even in archetypal "witnessing" cases, a psychiatric injury claim is not wholly derivative or parasitic, unlike claims under the Fatal Accidents Act. It has hybrid elements (as Lord Burrows explains in the fullest analysis of the question at [212]–[223]). Centrally, for example, psychiatric injury *to the secondary victim* must be foreseeable. Lord Burrows briefly concludes at [224]–[225] that even if tort law generally denies liability arising from another's injury, "the need for a separate duty of care to be owed to the secondary victim may be

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said to restore the general rule". Also, as Lord Carloway explains in his concurring judgment, *Scotland* never recognised the (English) rule in *Baker v Bolton*. But that did not prevent Lord Carloway's agreement with the majority ("Nothing turns on this [Scots] speciality", at [253]). Lord Burrows records (at [212]–[213]) that submissions on this "conceptual" point had been requested by the court itself, but no party (including the defendants) "appeared to regard this issue as being of central importance".

The defendants' central argument, rather, was that there must be an "accident" external to the primary victim. As seen, the majority accepted this submission and dismissed the claims accordingly. As Lord Burrows noted in his dissent, this precludes virtually any claims involving deaths from medical errors. Although only one authority was formally overruled (*North Glamorgan NHS Trust v Walters* [2003] P.I.Q.R. P16) *Paul* was "a departure from the reasoning in almost all of the reported medical negligence cases in this area" (at [250]). Lord Burrows suggested the "accident" requirement "turned the clock back" (apparently, that is, to discredited medical theories postulating a "shock" to the nerves). The majority, however, defended "accident's" legal significance. It postulates a clear, discrete event providing straightforward answers to the time and place at which the claimant must be present as a witness in order to claim (see [108]), in contrast with ongoing or deteriorating ill-health (see [112]–[113]). Lord Burrows, by contrast, thought that the *death* of the primary victim was the relevant event in the three claims in *Paul*, to which it was straightforward to apply the *Alcock* rules (putting aside "variant" cases of serious, non-fatal illness) (at [198]–[200]). (His Lordship queried at [211] why medical negligence was anyway not an "accident" as defined by the majority, being external *to the secondary victim*).

Medical liability was deliberately restricted. The court based a doctor's (etc) duty on his or her assumption of responsibility exclusively to the patient (here "primary victim"), only exceptionally extending to the patient's family (contrast *ABC v St. George's NHS Trust* [2020] EWHC 455 (Q.B.), noted [2020] C.L.J. 214). Thus, apparently, precluding Lord Burrows's "separate duty of care … owed to the secondary victim". The court reasoned it would go far beyond the scope of the responsibility assumed if doctors had to protect patients' friends and relations against the patient's upsetting illness. Witnessing a relative's death was 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" (at [139]). Yet must watching one's child or father die *as a result of medical negligence* be shrugged off as mere "vicissitude"? The court itself accepted at [143] that "[t]he thought that these tragic events could have been avoided if the hospital or doctor had exercised due care must, as in every case of wrongful death, add further to the agony and

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perhaps anger that [the claimants] feel". It dismissed their claims despite the usual profession of sympathy.

The common law normally develops incrementally. *Frost* curtailed that process. The House of Lords there realised that *Alcock*'s arbitrary lines would inevitably be eroded if logic and principle governed liability for psychiatric injury. Hence (for Lord Steyn in *Frost*, p. 500) "thus far and no further". Lord Burrows, dissenting in *Paul*, thought *Frost* a "counsel of despair" (at [204]). In 1998 the Law Commission had recommended radical reform (Law Com No 249). The Government had declined to implement this report, thinking it "preferable for the courts to have the flexibility to continue to develop the law rather than attempt to impose a statutory solution" (quoted at [146]). Thus, Lord Burrows reasoned, the Government had explicitly "passed the baton back to the courts" (at [237]). He did not think his proposed solution in *Paul* involved any change in the law, but if it did it was "well within the traditional judicial role … [of] incremental development" (at [201]–[202]). By contrast the majority reaffirmed *Alcock*, doubting the propriety of compensating secondary victims of psychiatric injury in *any* situation. Not only was the Supreme Court (in consequence) unwilling to consider modest relaxation of the limits on liability, but it announced a novel restriction in medical negligence cases (a distinction which Lord Burrows seemed to think "superficial and unprincipled" (at [241])). In their essentials, the *Alcock* rules survive. Little has changed for litigants after *Paul*, albeit scholars will continue to debate what would be the best "principled" solution.

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