Neutral Citation Number: [2025] EWCA Civ 177

Appeal No: CA-2021-000475
Case No: HQ17X00521

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
Mr Justice Martin Spencer
[2020] EWHC 3457 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/02/25

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
and
LADY JUSTICE NICOLA DAVIES

- -

Between:

SARAH JANE YOUNG	**Claimant** **Appellant**
- and –	
JOHN ANTHONY DOWNEY	**Defendant** **Respondent**

- -

Anne Studd KC (instructed by **McCue & Partners LLP**) for the **Claimant/Appellant** (Ms Young)

The **Defendant/Respondent** did not appear and was not represented (Mr Downey)

Hearing date: 18 February 2025

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JUDGMENT

SIR GEOFFREY VOS, MASTER OF THE ROLLS :

1. At the time of the notorious Hyde Park bombing on 20 July 1982, the claimant, Ms Young, was 4½ years old. She saw her father, Lance Corporal Jeffrey Young (Corporal Young), leaving Knightsbridge Barracks (the barracks), heard the explosion and saw other soldiers return to the barracks covered with blood and embedded with nails. She told her mother that "Daddy should be coming now", but, as she herself recalls, he never did. Corporal Young tragically died of his injuries on the following day. The question is whether, in these circumstances, Ms Young can demonstrate the necessary proximity in the relationship between the parties to entitle her to recover damages for her resulting psychiatric injury from the defendant perpetrator of the bombing, Mr Downey.

2. Historically, the class of claimants whom the law allows to recover damages for such injuries has been limited by certain established "control mechanisms". Mr Justice Martin Spencer (the judge) dismissed Ms Young's claim in this case because: (i) he held that she could not demonstrate an essential ingredient in her claim, namely that she **appreciated** that her father had been, or might have been involved in the explosion, and (ii) he rejected the written and oral evidence of an expert psychiatrist, Dr Nicholas Cooling (Dr Cooling), to the effect that Ms Young had feared, at the time, that her father (who was her primary carer) was involved in the explosion and sought, but did not obtain, reassurance about his return (see [12]-[13] and [26]-[33] of the judge's judgment).

3. Ms Anne Studd KC, counsel for Ms Young, submits that the judge was wrong on both counts. First, she submits that there is no free-standing requirement that a claimant in Ms Young's position must show that she appreciated that her father was involved in the explosion, and even if there were, such evidence was adduced by Ms Young and supported by Dr Cooling's two reports. Secondly, the judge had been wrong to reject Dr Cooling's evidence and to rely instead (as he did at [13] and [29]) on his own inexpert view that it would never have "occurred to this four-year-old's mind … that her father might have been injured or killed", because a four-year-old's mind works differently to an adult's mind and she would not have appreciated that her father was involved without seeing the trauma herself.

4. Mr Downey has deliberately declined to participate in these proceedings as explained by the judge at [5]-[6], and by Yip J in her judgment on liability at [9]-[17] and [41]-[42] ([2019] EWHC 3508 (QB)). Ms Studd submitted that Mr Downey's non-appearance to challenge the claimant's evidence meant that the judge should not have done so himself, and should certainly not have rejected a critical part of Dr Cooling's expert analysis (relying on Lord Hodge's judgment in *Griffiths v. Tui (UK) Ltd* [2023] UKSC 48, [2023] 3 WLR 1204 (*Tui*) at [2] and [70]-[78]).

5. I have decided that this appeal should be allowed, primarily because the judge ought not, in the circumstances of this case, to have rejected Dr Cooling's evidence on the basis of his own views. I shall explain that decision under the following headings: (i) essential factual background, (ii) the judge's decision, (iii) identifying persons who are sufficiently proximate to recover damages for psychiatric injury resulting from witnessing traumatic incidents or their aftermath, (iv) whether the judge was right to hold that Ms Young needed to show that she appreciated that her father was involved

in the explosion, (v) in any event, was the judge right to reject Dr Cooling's evidence, and (vi) conclusions.

Essential factual background

6. I shall not recite all the facts recorded by the judge at [2]-[21] of his judgment. What follows is a heavily abbreviated summary of those paragraphs.

7. Corporal Young was 19 years old when he was killed in the bombing, for which the Irish Republican Army (the IRA) claimed responsibility. The bomb had been concealed in a car boot and was detonated as members of the Household Cavalry rode past. Three other soldiers were killed, 31 people were injured and 7 horses were destroyed.

8. Yip J found that it was reasonable to infer that Mr Downey was knowingly involved in the concerted plan to detonate the bomb, which was specifically targeted at killing or maiming the soldiers. Mr Downey was accordingly responsible for the unlawful killing of Corporal Young as a joint tortfeasor.

9. Mr Downey was arrested at Gatwick airport in connection with the explosion in May 2013. He was charged with murder. On 21 February 2014, Sweeney J stayed the indictment as an abuse of process, because Mr Downey had been provided with an assurance that he was not under investigation, in circumstances that are beyond the scope of this judgment. The judge recorded that part of the motivation for this claim was to achieve vindication in circumstances where a prosecution had not been concluded.

10. In this action, Ms Young has claimed personal injury, aggravated and exemplary damages for her own psychiatric injury and under the Fatal Accidents Act 1976 for loss of dependency and on behalf of Corporal Young's estate. The written evidence before the judge comprised two witness statements from Ms Young and reports from experts including Dr Cooling. The only oral evidence was from Dr Cooling. The judge accepted Ms Young's evidence in her witness statement dated 22 February 2019 as follows:

> 8. On the morning of 20 July 1982, I was in the nursery in the barracks. The nursery windows looked out over the courtyard of the barracks. Before my father and the other soldiers left for ceremonial duties on their procession down South Carriage Drive, I went to the windows of the nursery, to wave my father off. I pressed my nose up against the glass as they trooped out. I remember they looked so smart in their uniforms and when they got to the gates, Dad turned to look up and smile at me before he left.
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> 9. When the bomb exploded, I was still in the nursery in the barracks. I knew that my father had left on horseback. There was this huge noise. I heard the explosion and I felt the building shake. From the window, I saw soldiers rushing out of the barracks to see what was happening.
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> 10. I then saw soldiers returning to the barracks covered with blood and embedded with nails. One man had nails sticking out of his hand.

> 11. I felt frightened, and then Lulu, my nursery teacher took me away from the window and put me in a different room. **I remember telling my Mum afterwards "Daddy should be coming now" but he never did**.
>
> 12. I remember that day as clear as if it was today. The memories of it hit me at unexpected moments, and especially when I hear fireworks or I hear loud bangs.
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> 13. I have suffered severe psychiatric illness since my father's death. As a result of hearing the bomb explode and then seeing soldiers returning to the barracks covered in blood and embedded with nails, any one of which could have been my father, I suffered nervous shock which has resulted in my suffering from a number of recognised psychiatric illnesses since 1982, which have continued into my adult life and are likely to continue. This has had a devastating impact on all aspects of my life [Emphasis added].

11. The judge suggested that Dr Cooling, who had examined Ms Young twice in 2017 (when she was 39 years old) and 2020, should be called "to see if he could elucidate on what might have been in the mind of a four-year-old". Dr Cooling was not a specialist child psychiatrist, but he stood in for a colleague intermittently between 1989 and 1992 to run the child psychiatry service. Dr Cooling's evidence was recorded by the judge as follows:

> He said that he would have expected a child of 4½ to make an association between what she was watching and her father. He referred to the fact that she had seen him off in uniform and then, a short time later, saw men wearing the same uniform covered in blood, one of whom had a nail sticking out of his hand. It didn't surprise him that she did not express concern at the time as, in his opinion, she wouldn't have appreciated that it was a terrorist act which had occurred. He said:
>
> > "What she would have appreciated was an interruption, a problem with how things had gone and she was frightened by what she saw. **She would have appreciated she was seeing something unusual, frightening and challenging**."
>
> As for the Claimant saying to her mother: "Daddy should be coming now", **Dr Cooling did not interpret this as indicating that she had no fear or inkling that her father had been involved in the events which she had experienced earlier that day. He thought that this was the child seeking reassurance about her father, reassurance which was not forthcoming** [emphasis added].

12. The judge gave a detailed history of the psychiatric evidence concerning Ms Young that I need not repeat here. Suffice it to say that he recorded that Dr Cooling had opined that Ms Young had developed post-traumatic stress disorder, enduring personality change, recurrent depressive disorder and childhood attachment issues, as a result of witnessing the circumstances and direct aftermath of the Hyde Park bombing.

The judge's decision

13. As I have said, the judge rejected Ms Young's claim for damages for psychiatric injury. He did, however, at [34] assess those damages at £121,500, including aggravated damages. He accepted that the post-traumatic stress disorder had blighted her life. He

would have awarded £75,000 plus £37,000 by way of aggravated damages plus future treatment costs of £9,500. He rejected the claim for exemplary damages. Under the Fatal Accidents Act 1976, the judge awarded a total sum of £713,457 apportioned between Ms Young and her mother. He awarded £1,750 under the Law Reform (Miscellaneous Provisions) Act 1934.

14. The judge's findings on the evidence, so far as relevant to this appeal, were at [11]-[13]. He noted that Ms Young had not said that she "remembered associating what she saw and heard with her father or appreciating that her father was or might be involved". The judge said he did "not find that surprising in a four-year-old who would not, as it seems to me, necessarily have had the understanding or development of mind to associate what she had witnessed with danger to her father" He noted that: "[a]s far as she was concerned, she had waved him off, he had smiled at her and he would be coming home later". He rejected Dr Cooling's interpretation of the words Ms Young had used to her mother "Daddy should be coming now". He suggested that it would have been different if she had said: "Daddy is coming soon now, isn't he?". That, the judge thought, might well have betrayed some anxiety. The words "Daddy should be coming now" indicated to the judge that Ms Young was expecting her father, as her main carer, to come home soon, and that she would have been looking forward to seeing him. The judge also rejected Dr Cooling's evidence that Ms Young could be expected to have associated the noise of the explosion and the sight of soldiers wearing the same uniform as her father covered in blood with danger to, or fear for, her father. The judge commented that "a four-year-old's mind works very differently to an adult's, and I do not think that a four-year-old would have appreciated that her father was in danger without witnessing herself a trauma being inflicted on him". He said he was "not prepared to assume that she made the connection in the absence of some evidence to that effect from what she said at the time". The judge interpreted what she did say later, contrary to Dr Cooling's evidence, "as indicating that she had not made the association". She was, therefore, "arguably in no different position to, for example, any other child in the nursery that day who heard the explosion and saw the aftermath".

15. Having dealt with the leading cases of *McLoughlin v. O'Brian* [1983] 1 AC 410 (*McLoughlin*) and *Alcock v. Chief Constable of South Yorkshire* [1992] 1 AC 310 (*Alcock*), the judge reached his legal conclusions at [26]-[33]. He concluded that "the identification of the loved one as the primary victim is an important, indeed in my judgment, an essential element", and that "in the present case there was never, at the relevant time, any recognition by [Ms Young] of her father as the primary victim".

16. His reasoning started by saying that Ms Studd's submission that sight of the accident once the victim has been removed from the scene might be sufficient, led him to conclude that "appreciation that a loved one has been, or may have been involved, is a necessary ingredient".

17. A comparison with the position of the mother in the same position as Ms Young was instructive: "[a] woman, having seen off her husband on horseback and then hearing an explosion and seen the aftermath, would naturally be terrified that her husband was involved. She would instinctively run to the scene to check that her husband was all right. The potential for her husband to be involved would be at the forefront of her mind". The judge said that the same was "not true, necessarily, of a four-year-old". On his interpretation of the evidence: "it never occurred to this four-year-old's mind at all

that her father might have been injured, or killed, or involved at all in what she had heard and seen".

18. The judge found support for his approach in *Taylor v. A Novo (UK) Ltd* [2013] EWCA Civ 194, [2014] QB 150 (*Novo*). He thought that *Novo* demonstrated that the Court of Appeal supported the proposition that the requirement for a claimant's close bond with the primary victim incorporated an appreciation that the loved one had been injured or imperilled. The judge at first instance had set out 7 requirements to be fulfilled for a secondary victim to recover. One of those requirements was that "the injury was caused by "shock" as a result of a sudden **perception** of the death of, or risk to or injury to the primary victim" (emphasis added). Dyson LJ had not disapproved of that requirement.

Identifying persons who are sufficiently proximate to recover damages for psychiatric injury resulting from witnessing traumatic incidents or their aftermath

19. A series of cases have established the proper approach to the identification of persons who are sufficiently proximate to recover damages for psychiatric injury resulting from witnessing an incident or its aftermath. These cases have all been recently summarised by Lord Leggatt and Lady Rose in *Paul v. Royal Wolverhampton NHS Trust* [2024] UKSC 1, [2024] 2 WLR 417 (*Paul*) at [36]-[50]. The five factors or "control mechanisms" adumbrated by Lord Oliver in *Alcock* remain the touchstone. In *Paul*, Lord Leggatt and Lady Rose explained at [41] and [57] that Lord Oliver had been "identifying the [five] common features of all the reported cases in which such claims had previously succeeded" as follows:

> first, that in each case there was a marital or parental relationship between the plaintiff and the primary victim; secondly, that the injury for which damages were claimed arose from the sudden and unexpected shock to the plaintiff's nervous system; thirdly, that the plaintiff in each case was either personally present at the scene of the accident or was in the more or less immediate vicinity and witnessed the aftermath shortly afterwards; and, fourthly, that the injury suffered arose from witnessing the death of, extreme danger to, or injury and discomfort suffered by the primary victim. Lastly, in each case there was not only an element of physical proximity to the event but a close temporal connection between the event and the plaintiff's perception of it combined with a close relationship of affection between the plaintiff and the primary victim.

20. Lord Leggatt and Lady Rose in *Paul* explained in detail why the claimant's presence at the scene of an accident or its immediate aftermath was essential to liability [104], and why there was no read across from accident cases to cases where a person witnessed physical injury or illness resulting from medical negligence ([105]-[117] and [138]). After reaching that conclusion, Lord Leggatt and Lady Rose returned to the question of proximity at [129]-[133]. In those paragraphs, they reminded us that Lord Oliver had emphasised in *Alcock* that reasonable foreseeability of harm was necessary but not sufficient. There needed also to be the necessary proximity in the relationship between the parties to make it just to impose such a duty (see Lord Atkin in *Donoghue v. Stevenson* [1932] AC 562 at 580, and Lord Nicholls in *Stovin v. Wise* [1996] AC 923 at 932). At [140]-[141], Lord Leggatt and Lady Rose concluded by explaining that 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 had a close tie of love and affection with the primary victim. The general policy of the law was opposed to

granting remedies to third parties for the effects of injuries to other people. So, it was the fact that such exceptions existed at all that needed to be justified, rather than the narrowness of the category of cases in which a secondary victim can claim (see Lord Oliver in *Alcock* at 410H).

Was the judge right to hold that Ms Young needed to show that she appreciated that her father was involved in the explosion?

21. In these circumstances, I would be inherently resistant to introducing some new requirement as to proximity beyond what has been explained at length in *Alcock*, *McLoughlin*, *Frost v. Chief Constable of Yorkshire* [1999] 2 AC 495 (*Frost*) and *Paul*. Two matters are important to recall. First, Lord Oliver in *Alcock* was actually only identifying the common features of previous cases in which liability had been held to arise. Secondly, the proximity that is required to be established is between the defendant and the secondary victim. It follows that what is important is whatever makes it just that, exceptionally, the defendant should owe a duty to the secondary victim. The injury to the secondary victim must arise from witnessing the harm or danger to the primary victim, so if the secondary victim did not witness that harm or danger, in the sense that they had no understanding of what was going on, the duty cannot arise.

22. The second critical feature of the proximity of a defendant to a secondary victim is the close tie of love and affection that they have to the primary victim. That is what allows the relative to recover when other bystanders cannot. That relationship must bring with it some sentience, in the sense that someone without an understanding of their relationship with a loved one is in no different position to an ordinary bystander.

23. We heard oral argument about the stage at which a child might acquire sufficient appreciation or understanding of the situation to be adequately proximate. On reflection, I think these arguments miss the point. The question of proximity would all depend on the circumstances. I would not want to define the circumstances in which liability might arise in the future. If, however, the judge were right as to the facts he found, I completely agree that no sufficient proximity would be established. The judge found, in effect, that: (i) Ms Young did not appreciate that her father was in danger, (ii) Ms Young had not made the association between the noise of the bomb and the wounded returning soldiers, on the one hand, and fear for her father, on the other hand, and (iii) Ms Young was in no different position to any other child in the nursery that day who heard the explosion and saw the aftermath. If those facts were correctly found, Ms Young's injury would not have arisen from witnessing the harm or danger to Corporal Young. It might have arisen from something that occurred later, but that would not be a sufficient part of the immediate aftermath. As Lord Leggatt and Lady Rose said at [141] in *Paul*, the mother who learns in a telephone call of an accident in which her child dies, cannot claim for her psychiatric injuries, however severe they may be.

24. Accordingly, I would hold that the judge was wrong to introduce a new and separate requirement of appreciation beyond what has been explained in the *Alcock*, *McLoughlin*, *Frost* and *Paul*. The well-known factors described by Lord Oliver are sufficient. They may well lead to a non-sentient child being unable to recover where a sentient one would recover, but that is because the non-sentient child would not have suffered injury as a result of witnessing the incident causing harm or danger to their loved one. To put the matter in the terms of the question I posed above, the judge would have been right to hold that proximity between Ms Young and Mr Downey had not

been established if, in fact, Ms Young had no appreciation, when she heard the explosion and saw the wounded soldiers returning, that her father might be involved. So, the question in this appeal resolves itself into a factual, rather than a legal, one.

Was the judge right to reject Dr Cooling's evidence?

25. It was suggested, perhaps half-heartedly in oral argument, that the judge should not even have asked to hear Dr Cooling's oral testimony, because Mr Downey did not appear to challenge his evidence. As *Tui* emphasises, the objective of any trial is to achieve fairness and justice. If a judge harbours doubts about his understanding of written evidence, or any other material matter arising from it, he is certainly entitled to ask for the witness to be called. That may not always be possible, but here it was, and I see nothing objectionable in the way the judge approached the matter. He had obviously not decided anything before he asked for the witness to attend.

26. I have, however, looked carefully at both Dr Cooling's written evidence and at the way the judge recorded what he had said to him (see [11]-[12] above). In his first written report dated 23 June 2017, Dr Cooling said this at [57]-[58]:

> [A]t interview [she] told me that on the day of the bombing her father took her to the nursery. He then said goodbye. She remembers standing at the window watching her father and she could see the horses were playing up as they went through the gates. Her father looked up and smiled. She stayed by the window and not long afterwards she heard a bang and the window shook, although it did not actually break. She remembers that the ground shook beneath her. She [stared] at the window and she then saw the soldiers coming back. She remembers seeing that the men were covered in blood and she could see a man with a nail sticking out of his hand. …
>
> At interview she told me she remembers seeing [a Major] running out of the barracks. She remembers feeling frightened and [a nurse] then took her away from the window and she was placed in a different room. At interview [she] told me that at the time she was living with her parents in a flat on floor 11 of the building. After the bombing event she remembers talking to her mother and she kept on saying "dad should be home now". She was puzzled and worried about what had happened to her father and she wanted to talk about him but the adults were busy with other things. …

27. At [81] of his first report, Dr Cooling clearly opines that Ms Young's post-traumatic stress disorder was caused by witnessing the circumstances and direct aftermath of the bombing.

28. In his judgment recording Dr Cooling's evidence, the judge notes that he (Dr Cooling) would have "expected a child of 4½ to make an association between what she was watching and her father". Dr Cooling's evidence was that Ms Young "would have appreciated she was seeing something unusual, frightening and challenging". The judge obviously asked him specifically about the meaning of the words "Daddy should be coming now" taken from Ms Young's statement (though the words in Dr Cooling's report of his interview with Ms Young were actually "dad should be home now"). Dr Cooling told the judge that he "did not interpret this as indicating that she had no fear or inkling that her father had been involved in the events which she had experienced

earlier that day. He thought that this was the child seeking reassurance about her father, reassurance which was not forthcoming". It will be recalled that Ms Young told Dr Cooling that she "kept on" saying "dad should be home now".

29. It was against that background that the judge reasoned that Ms Young had not connected the events she witnessed with her father being involved (see [14] above). His logic seems to have been as follows:

i) Ms Young had **not actually said** that she remembered associating what she had witnessed with her father's involvement;

ii) He did not find that surprising in a four-year-old, who would not necessarily have had the mental understanding to make that association;

iii) He (the judge) thought that, as far as Ms Young was concerned: "she had waved him off, he had smiled at her and he would be coming home later";

iv) Dr Cooling had misinterpreted the words "Daddy should be coming now" (though the same would presumably apply to "dad should be home now"). The words: "Daddy is coming soon now, isn't he?" would have betrayed anxiety;

v) Dr Cooling had been wrong to opine that Ms Young had associated the noise of the explosion and the sight of soldiers wearing the same uniform as her father covered in blood with danger to, or fear for, her father;

vi) Since a four-year-old mind works very differently to an adult mind, the judge's opinion was that a four-year-old would **not** have appreciated that her father was in danger without witnessing the trauma herself;

vii) The judge's own interpretation of the words that Ms Young used were that she had not made the association.

30. It seems to me that the judge was impermissibly allowing his own inexpert opinions about the mental capabilities of a 4½ year child to influence his evaluation of Dr Cooling's evidence. It is not even clear from the judgment that he put those opinions to Dr Cooling to elicit his comments. The judge's crucial opinions revealed by the judgment are that: (a) a four-year-old would not necessarily have had the mental understanding to make the association between the events she witnessed and her father, and (b) a four-year-old mind works very differently to an adult mind. These opinions were of an expert nature and contradicted the expert evidence without any proper foundation to do so.

31. In my judgment, in the circumstances of this case, the judge should not have allowed his own opinions, perhaps born of his personal experiences, to override Dr Cooling's clearly reasoned expert evidence. The judge ought to have accepted Dr Cooling's evidence and held that Ms Young had associated what she witnessed with danger to her father, and that her psychiatric injuries were caused by the events that she witnessed.

32. I take the view that the judge's decision on the facts was clearly wrong and should be reversed. Had the judge accepted Dr Cooling's evidence, he would have concluded that Ms Young (i) had made an association between what she had seen and her father, (ii) would have appreciated that she was seeing something unusual, frightening and

challenging, and (iii) had some fear that her father had been involved in the events which she had experienced. Accordingly, the judge ought to have held that Ms Young had established a relationship of proximity with Mr Downey, because her psychiatric injury arose from witnessing events which she feared might have put her father in danger.

Conclusions

33. I would, therefore, allow the appeal for the reasons I have given. I would award Ms Young damages of £121,500, including aggravated damages, as assessed by the judge, in respect of her psychiatric injuries.

LORD JUSTICE UNDERHILL:

34. I agree.

LADY JUSTICE NICOLA DAVIES:

35. I also agree.