Nervous shock claims in medical negligence cases

Are those who suffer 'nervous shock' following the death of a family member/loved one as a result of an adverse event entitled to compensation? Dee Duffy looks at secondary victims in these cases

IT IS WELL established that claims can be brought in Ireland for 'nervous shock' (emotional distress or psychiatric injury) caused by the negligent or intentional acts of another party. In order to succeed, a plaintiff must prove that the defendant owed a duty of care, breached that duty and as a result, they suffered psychological harm.

Claims for psychiatric injury can often factor into medical negligence claims, particularly in the aftermath of a patient suffering a traumatic event or an unanticipated outcome. In claims for wrongful death as a result of medical negligence brought by family members following the death of a patient, family members often seek damages for psychiatric injuries/nervous shock suffered by them as a result of the patient's death.

Interestingly, the law in the UK on nervous shock differentiates between primary victims (those individuals who are involved in, and directly affected by, the incident in question, ie. the patient in medical negligence actions) and secondary victims (those who come upon the scene after an incident has occurred, ie. family members/loved ones in medical negligence actions).

UK landmark decision

A recent judgment delivered by the UK Supreme Court in three medical negligence actions will have significant implications for English medical negligence claims. While not binding on Irish courts, it may be considered persuasive or informative.

The judgment, known as *Paul and Another v Royal Wolverhamptom NHS Trust*[1] decided three separate appeals involving similar legal issues.[2] The *Paul* decision means that secondary victims of medical negligence are left with little, if any remedy. It distinguished between secondary victims of clinical negligence cases and those of 'traditional' accidents, the latter of which face fewer obstacles in succeeding with their claims.

Prior to the *Paul* case, the leading UK decision[3] arose out of the Hillsborough disaster in 1989, when almost 100 people died as a result of a crush at a soccer match, which was broadcast live on TV and radio. That judgment held that there must be close physical proximity to the shocking event for a plaintiff to successfully claim nervous shock and that a secondary victim must perceive an event with their own unaided senses or view the immediate aftermath.

The three claims in the Paul case arose out of the tragic deaths of three (unrelated) patients and the Supreme Court had to consider whether the secondary victims (family members) should be able to recover damages. The ruling did not include any decision on whether the defendants had been negligent, which was deemed a separate issue. In each case, the patient's family members had witnessed their death or the immediate aftermath.

Facts of the claims

Mr Paul, who suffered from type 2 diabetes, was admitted to hospital with chest and jaw pain, treated for acute coronary symptoms and discharged a few days later. Approximately 14 months later, he suffered a heart attack while shopping with his family and died shortly afterwards.

The second patient, Esmee Polmear (aged seven) collapsed on a school trip and her parents attended when resuscitation attempts were made to revive her. The Trust had admitted negligence by failing to diagnose an underlying condition.

The third patient, Ms Purchase, was found dead at home by her family members who unsuccessfully attempted resuscitation. She had been seen by an out-of-hours GP three days previously and prescribed antibiotics and antidepressants.

Decision

The UK Supreme Court held that the patients' family members were not entitled to compensation as their loved ones had not died in an accident and that doctors did not assume responsibility for their patients' family members. The court considered the death of a close family member from disease to be a vicissitude of life which is part of the human condition. The court clarified the requirements for entitlement to compensation as a secondary victim in the UK are now:

- Presence at the scene of an accident (immediate aftermath)
- Witnessing the accident (or the immediate aftermath)
- A close tie of love and affection with the primary victim.

The court distinguished accidents from the circumstances of these cases, which were described as 'medical crises'; ie. the suffering or death of a relative from illness. There will now be limited scope in the UK for medical incidents or alleged delayed diagnosis, alleged lack of consent etc to be characterised as 'accidents' – unexpected and unintended events causing injury by violent external means.

In hospital or primary care settings, procedures potentially witnessed by family members such as injections, cannula insertions, etc. if carried out negligently, could cause trauma to family members. In this circumstance, it is unlikely the event would be deemed an accident in the UK courts.

Irish position

In 2022, the Irish Court of Appeal in *Sheehan v Bus Éireann and Vincent Dower*[4] restated the criteria here for plaintiffs bringing claims for nervous shock. The plaintiff in this claim came upon a road traffic accident. She did not witness the

accident but her vehicle was hit by some debris. She saw the aftermath of the accident including a badly damaged car and the body of a deceased driver.

The Court of Appeal acknowledged that at least to date, the primary/secondary victim distinction had not been adopted into Irish Law.

It found that the imposition of liability is to be approached from a standpoint of reasonable foreseeability, proximity and reasonableness of the imposition of a duty of care on the facts of the case. It concluded that the principles set out in a 1995 case *(Kelly v Hennessy)* [5] remain, ie.:

- A recognised psychiatric illness was suffered
- The injury was shock-induced
- The injury was caused by the defendant's negligence
- There was an actual or apprehended physical injury to the plaintiff or another person
- There was a duty of care not to cause a reasonably foreseeable psychiatric injury.

In relation to proximity, the Supreme Court in Kelly v Hennessy referred to several features that may be relevant to a decision:

- Proximity of relationships
- Spatial proximity
- Temporal proximity.

More recently, in the context of CervicalCheck cases, the Irish courts have confirmed that no duty of care is owed by screening service providers to patients' relatives and that even if such a duty did exist on the basis of proximity and reasonable foreseeability, it would not be imposed on public policy grounds.[6]

In *Mitchell v HSE*, the Irish High Court recognised the validity of separate nervous shock claims by family members, even if they have already received compensation under relevant legislation for mental distress resulting from wrongful death.

Summary

The evolving case law surrounding nervous shock claims in medical negligence proceedings for wrongful death in Ireland and the UK reflects a complex interaction of legal principles, policy considerations, and also societal expectations.

The majority judgment in *Paul and Another v Royal Wolverhamptom NHS Trust* included a paragraph that referred to changing social attitudes and expectations. It expressly said that while it did not mean to in any way minimise the psychological effects, it would not be accepted that society has yet reached a point where the experience of witnessing the death of a close family member from disease is something from which a person can reasonably expect to be shielded by the medical profession, whether the death is slow or sudden, peaceful or painful.

It remains to be seen if the Irish courts will follow the UK courts' reasoning.

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References
1. [2024] UKSC 1
2. Polmear & Anor v Royal Cornwall Hospitals NHS Trust and Purchase v Ahmed
3. Alcock v Chief Constable of South Yorkshire Police [1992] 1 AC 310
4. [2022] IECA 28
5. [1995] 2 IR 253
6. Morrissey & Anor v Health Service Executive & Ors [2020] IESC 6 and Mitchell v HSE[2023] IEHC 394