**IN THE HIGH COURT OF AUSTRALIA**
**ADELAIDE REGISTRY** **No. A26 of 2014**

BETWEEN:



**GEORGE KING**
Appellant

and

**RYAN PHILCOX**
Respondent

10

## APPELLANT'S SUBMISSIONS

### PART I PUBLICATION

1. This submission is in a form suitable for publication on the Internet.

### PART II CONCISE STATEMENT OF ISSUES PRESENTED BY APPEAL

2. Having regard, *inter alia,* to s 33(1) of the *Civil Liability Act* 1936 (SA) (the **CLA**), did the appellant owe a duty of care not to cause the respondent mental harm?

3. Was the respondent present at the scene of the accident when the accident occurred within the meaning of s 53(1)(a) of the CLA?

### PART III SECTION 78B OF THE JUDICIARY ACT 1903 (Cth)

20 4. The appellant has considered whether a notice should be given pursuant to s 78B of the *Judiciary Act* 1903 (Cth). No such notice is required.

### PART IV CITATION

5. The reasons of the Full Court are reported: *Philcox v King* (2014) 119 SASR 307 (**FC**). The trial judge's reasons are unreported: *Philcox v King* [2013] SADC 60 (**TJ**).

### PART V NARRATIVE STATEMENT OF FACTS FOUND OR ADMITTED

6. The respondent's brother (the victim) was the passenger in a car driven by the appellant which was involved in a collision at an intersection in Campbelltown, Adelaide between 4.50 pm and 4.55 pm on 12 April 2005. The victim sustained serious injuries as a result of the force of the impact and he died at about 5.30 pm while still trapped in the vehicle
30 (TJ [2]-[3], FC [2]).

7. The intersection was one frequently traversed by the respondent. On the afternoon of 12 April 2005, after the collision occurred, he drove through or turned left at the intersection

---

Filed by: Finlaysons
81 Flinders Street
ADELAIDE SA 5000

Telephone: (08) 8235 7400
Facsimile: (08) 8232 2944
Ref: Luke Gray

on five separate occasions, each time unaware that his brother was a passenger in one of the vehicles involved in the collision, or that he had been fatally injured (TJ [43]).

7.1. On the first occasion, the respondent noticed that an accident had occurred but did not think anyone had been seriously injured. Because there were others assisting, he decided to drive on (TJ [10]). The trial judge recorded that the respondent did not assert he was present at the point of impact. The respondent argued at trial that when he went through the intersection, his brother was still alive and trapped in the vehicle (TJ [42]). The trial judge noted that it was the respondent's submission that he went through the intersection "*very shortly after the accident happened*" (TJ [41]).

7.2. On the second occasion, some time between 5.00 pm and 5.30 pm, he was aware of the presence of police and emergency vehicles but did not pay a lot of attention to what was occurring at the scene and his girlfriend Kylie didn't recognise either of the vehicles (TJ [12]-[14], FC [3]).

7.3. On the third occasion, which was likely around 20 or more minutes later, he noticed that things were still going on but he did not take notice of anything specific. The respondent said he would have seen the vehicles involved in the accident as he went past but he didn't take any notice of them (TJ [16]).

7.4. On the fourth occasion, more than 30 minutes later, the scene had "*pretty much cleared*" (TJ [17]), but he noticed a blue or grey wagon on a flat bed tow truck with severe damage to the passenger side, and realised the wagon was far more extensively damaged than he had earlier thought. He said he noticed it had been cut open and that it was apparent from that damage that someone had been, if not quite horrifically hurt, then killed (TJ [19], FC [5]).

7.5. On the fifth occasion, the scene had been cleared (TJ [20]).

8. The respondent did not ever claim to have been distressed by what he saw when driving past the aftermath on any of these five occasions.

9. Later that evening, at or about 10.30 pm to 11.00 pm, the respondent's parents told him his brother had been killed in a motor accident. Making the connection between what he had seen and this news, he was devastated by the thought that he had been there, had not known his brother was involved, and had not stopped. Later, in the early hours of the morning, he returned to the intersection and spent some hours there (FC [6]-[7]). He was angry at himself for being at the intersection and not knowing "*angry, guilty for not knowing, not stopping ...*" (TJ [24]).

10. The respondent gave evidence of the distress and grief he suffered upon being told of his brother's death and in realising that he had been at the intersection and could have helped, and that there had been an ongoing impact on his personal and professional life (TJ [25]).

11. Medical reports were tendered from a psychologist who treated the respondent and a psychiatrist who, at the request of the appellant, examined the respondent and prepared a report (FC [31]). It was accepted that the respondent suffered mental harm and, in particular, a recognised psychiatric illness, namely a major depressive disorder with significant anxiety-related components of a post-trauma related reaction (FC [33]).

**Decision of the trial judge**

Duty of care and s 33 of the CLA

12. Section 33 of the CLA provides:

> (1) A person (the defendant) does not owe a duty to another person (the plaintiff) to take care not to cause the plaintiff mental harm unless a reasonable person in the defendant's position would have foreseen that a person of normal fortitude in the plaintiff's position might, in the circumstances of the case, suffer a psychiatric illness.
>
> (2) For the purposes of this section –
>
> (a) in a case of pure mental harm, the circumstances of the case to which the court is to have regard include the following:
>
> (i) whether or not the mental harm was suffered as the result of a sudden shock;
>
> (ii) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril;
>
> (iii) the nature of the relationship between the plaintiff and any person killed, injured or put in peril;
>
> (iv) whether or not there was a pre-existing relationship between the plaintiff and the defendant;
>
> (b) in the case of a consequential mental harm, the circumstances of the case include the nature of the bodily injury out of which the mental harm arose.
>
> (3) This section does not affect the duty of care of a person (the ***defendant***) to another person (the ***plaintiff***) if the defendant knows, or ought reasonably to know, that the plaintiff is a person of less than normal fortitude.

13. The trial judge found that s 33 codified what would otherwise be a common law duty of care (TJ [27]). Turning to the four circumstances prescribed by s 33(2)(a)(i)-(iv) as relevant to whether a reasonable person in the defendant's position would have foreseen that a person of normal fortitude in the respondent's position might, in the circumstances of case, suffer a psychiatric illness, the trial judge expressed the following conclusions.

13.1. In respect of s 33(2)(a)(i): the news of his brother's death from his parents on the evening of 12 April 2005 caused a "*sudden and disturbing impression on the mind or feelings*" (TJ [66]). Although the psychologist called by the respondent (Ms Johnson) considered the respondent's psychiatric illness was caused by the fatal accident, the psychiatrist called by the appellant (Dr Ewer) was more specific,

opining that the psychiatric illness came on as a result of the distress caused by him receiving the news of his brother's death, and the evidence of Dr Ewer was preferred (TJ [71]). The respondent suffered mental harm as the result of sudden shock caused by hearing the news of his brother's death (TJ [72]).

13.2. In respect of s 33(2)(a)(ii): the respondent did not witness, at the scene of the accident, his brother being killed, injured or put in peril (TJ [87]). The trial judge noted, by reference to *Wicks v State Rail Authority of New South Wales* (2010) 241 CLR 60, that the respondent's brother was still "*in peril*" at least on the first occasion when the respondent passed through the intersection (TJ [80]), but she considered that "*to witness*" required observation of an event, and since the respondent was unaware that his brother had been in the vehicle let alone killed, injured or put in peril (TJ [82]), nor observed a person being killed, injured or put in peril (TJ [85]), this criterion was not satisfied.

13.3. In respect of s 33(2)(a)(iii): the respondent and the victim were brothers (TJ [88]).

13.4. In respect of s 33(2)(a)(iv): there was no relationship between the respondent and the appellant (TJ [89]).

14. Having regard to those circumstances, the trial judge concluded that a reasonable person in the appellant's position would have foreseen that a person of normal fortitude in the respondent's position might, in the circumstances of the case, suffer a psychiatric illness (TJ [90]). She said that it was reasonably foreseeable that a person of normal fortitude in the respondent's position might suffer a psychiatric illness as a result of the sudden shock upon seeing or hearing of his her brother's death (TJ [91]), notwithstanding that she had found that the respondent did not see his brother's death, and that the sudden shock was caused upon hearing the news of his brother's death. The trial judge then concluded (at TJ [92]):

> I therefore find the defendant owed Mr Philcox a duty of care to take reasonable care not to cause him mental harm.

15. The inquiry into reasonable foreseeability was treated as conclusive on the question of duty.

Section 53(1)(a) of the CLA

16. Section 53 of the CLA provides:

> (1) Damages may only be awarded for mental harm if the injured person-
>
> (a) was physically injured in the accident or was present at the scene of the accident when the accident occurred; or
>
> (b) is a parent, spouse, domestic partner or child of a person killed, injured or endangered in the accident.

(2) Damages may only be awarded for pure mental harm if the harm consists of a recognised psychiatric illness.

17. The trial judge noted that (TJ [42]):

> Mr Philcox does not assert that he was present at the actual point of impact. Rather, it is his case that at the time he went through the intersection, his brother was still alive and trapped in the vehicle. His brother was in the process of dying, he continued to suffer injury and was put in peril as a result of the accident.

18. She also noted that it had been submitted by the respondent that he went through the intersection very shortly *after* the accident happened (TJ [41]) and that presence at the scene was not limited to and extended beyond the point of impact to include the aftermath of the accident (TJ [45](1)).

19. This may explain the way the trial judge expressed her reasons on this topic (TJ [96]):

> As I have found that Mr Philcox did not witness, at the scene of the accident his brother being killed, injured or put in peril, he was not present at the scene of the accident when the accident occurred as required by s 53(1)(a).

20. The trial judge had earlier expressed the view that merely to have traveled through the intersection (without actually witnessing the recovery or rescue) did not suffice for the respondent to be "*present*", even if the recovery and rescue could be characterised as part of the "*accident*" (TJ [83]).

21. Accordingly, despite finding the existence of a duty of care, the trial judge dismissed the respondent's claim. She also found there was no causal link between what the respondent saw on any occasion he drove through the intersection and his mental harm; rather, the injuries that he developed were caused when he received the news (TJ [101]-[102]).

**The Full Court**

22. The Full Court allowed the appeal, overturning the trial judge's findings on s 53(1)(a) and causation, and rejecting the appellant's notice of contention disputing the existence of a duty of care.

Duty of care and s 33 of the CLA

23. On duty, Gray J concluded that the observations in *Wicks* had direct application to s 33 and that, not only was it open for the judge to conclude that a duty was owed, "*plainly a duty was owed*", because it was reasonably foreseeable that a sibling coming upon the scene of this collision, including its aftermath would, on hearing of his brother's death, suffer mental harm (FC [20]). That was the extent of Gray J's reasoning on duty, and Sulan and Parker JJ agreed without specifically addressing duty (FC [46], [70]).

24. Accordingly, like the trial judge, but contrary to *Wicks* (at [22]), the Full Court appears to have treated the test of foreseeability formulated in s 33 as conclusive on the existence of a duty of care.

Section 53(1)(a) of the CLA

25. As for the requirement that the respondent be "*present at the scene of the accident when the accident occurred*", Gray J said (FC [22]):

> The facts constituting a road accident **and its aftermath** are not confined to 'the immediate point of impact'. It **includes the aftermath** of an accident which encompasses events at the scene after its occurrence, including the extraction and removal of persons from damaged vehicles. [Emphasis added]

26. He said that the decision of the Court in *Wicks* in relation to s 30 of the *Civil Liability Act* 2002 (NSW) was of relevance in reaching that conclusion (FC [28]), as was the definition of "*accident*" and "*motor accident*", for the reasons given by Sulan and Parker JJ (FC [29]).

27. Sulan J also referred to *Wicks* (FC [48]-[51]), but acknowledged that s 30(2)(a) of the NSW Act was not cast in identical terms to s 53 of the CLA. Referring to *Jaensch v Coffey* (1984) 155 CLR 549, Sulan J said (FC [55]):

> The common law has recognised the facts constituting a road accident are not confined to the immediate point of impact and include the events at the scene after its occurrence, including the extraction and treatment of the injured.

28. Sulan J also noted that s 53(1)(a) was in effect a re-enactment of an earlier provision introduced in 1986. He recognised that at the time of the Second Reading Speech relevant to the re-enactment, reference was made to Recommendation 34 of the Ipp Committee Report which articulated as distinct concepts the shocking event or events and their aftermath[1], but said that it did not follow from the omission of the words "*the aftermath*" that Parliament had expressed an intention to abrogate the so-called "*aftermath doctrine*" (FC [60]).

29. Sulan J considered that the decision in *Hoinville-Wiggins v Connelly* [1999] NSWCA 263 was distinguishable, notwithstanding it also concerned an almost identically worded

---

1 Recommendation 34 of the Ipp Committee Report, Australia, "*Review of the Law of Negligence: Final Report*" (September 2002) provided that the Proposed Act should embody, *inter alia*, the following principles:

(a) A person (the defendant) does not owe another (the plaintiff) a duty of care not to cause the plaintiff pure mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness if reasonable care was not taken.

(b) For the purposes of (b), the circumstances of the case include matters such as: (i) whether or not the mental harm was suffered as the result of sudden shock; (ii) whether the plaintiff was at the scene of shocking events, or witnessed them or their aftermath; (iii) whether the plaintiff witnessed the events or their aftermath with his or her own unaided senses; (iv) whether or not there was a pre-existing relationship between the plaintiff and the defendant; and (v) the nature of the relationship between the plaintiff and any person killed, injured or put in peril.

provision[2] which precluded recovery to a claimant unless they were "*when the accident occurred, present at the scene of the accident*" (FC [64]).

30. One reason given for distinguishing that decision was said to be the definition in s 3(1) of the CLA of "*accident*", which included a reference to an "*incident*". Citing *Roget's International Thesaurus,* Sulan J said (FC [65]) that:

> An incident is synonymous with an event, eventuality or aftermath.

31. He concluded (FC [66], [68]):

> In my view, the definition of a motor accident being defined as an "incident" is broad enough to encompass the events directly related to and following on from the actual impact. ...
>
> ... Presence at the aftermath of an aftermath of an accident, as that phrase is understood by the common law, is sufficient to satisfy s 53(1)(a).

32. Parker J agreed generally with Gray and Sulan JJ and considered that, by defining an accident by reference to an incident, the ordinary meaning of motor accident had been extended to encompass events directly related to and following on from the actual impact (FC [70]).

## PART VI SUCCINCT STATEMENT OF ARGUMENT

### Overview

33. Duty of care

33.1. Having regard to the factors set out in s 33(2)(a)(i)-(iv), a reasonable person in the appellant's position would not have foreseen that a person of normal fortitude in the position of the respondent might suffer a psychiatric illness in the way that he did, that is, as a result of learning about his brother's death and without actually having witnessed anything that shocked or distressed him.

33.2. Even if the s 33 test was satisfied, it remained to consider whether it was reasonable to require the appellant to have in contemplation injury of the kind that was suffered by the respondent and to take reasonable care to guard against that kind of injury.

33.3. To recognise a duty to a person whose shock or illness is precipitated by the receipt of distressing news and in the absence of any pre-existing relationship or undertaking with or towards the plaintiff, would involve an unjustifiable extension in the scope of the liability hitherto recognised.

---

2 Section 77 of the *Motor Accidents Act* 1988 (NSW).

34. Presence at the scene of the accident when the accident occurred

34.1. The Full Court's assertion that there was a common law definition of "*accident*" which included "*aftermath*" is incorrect. Although in *Jaensch v Coffey* it was recognised that liability was not necessarily confined to those who witnessed the "*accident*" and could extend to a person who attended the "*aftermath*", a distinction between these concepts was recognised.

34.2. For claimants apart from a parent, spouse, domestic partner or child of a person killed, injured or endangered in the accident, the legislature clearly intended to limit liability in favour of those who were present, at the scene of the accident, when the accident occurred. That language cannot be understood as extending to a person who is present at any point during the aftermath, irrespective whether they see any person injured or killed as a result of the accident.

**The existence of a duty of care**

The legislative context and the approach to duty of care

35. Subject to minor, apparently stylistic, alterations, s 33 of the CLA is in the same terms as s 32 of the *Civil Liability Act* 2002 (NSW), a provision referred to in *Wicks*. There are also similar provisions in other jurisdictions[3].

36. These provisions appear to have been influenced by, but do not precisely reflect, Recommendations 34(b) and (c) made in the Ipp Committee Report[4].

37. In *Wicks*, the Court observed that:

37.1. section 32(1) is cast in negative terms and prescribes a necessary (not necessarily sufficient) condition for the establishment of a duty of care (*Wicks* at [22]);

37.2. although s 32 provides that the determination whether the defendant ought to have foreseen mental harm to a person of normal fortitude with regard to the circumstances of the case, including the four enumerated circumstances, the section does not prescribe any particular consequence as following from the presence or absence of any or all of those circumstances (*Wicks* at [23]);

37.3. section 32 had to be understood against the background provided by the common law of negligence in relation to psychiatric injury as stated in *Tame v New South Wales; Annetts v Australia Stations Pty Ltd* (2002) 211 CLR 317 (*Wicks* at [24]);

---

3 Victoria: *Wrongs Act* 1958 (Vic), s 72; Western Australia: *Civil Liability Act* 2002 (WA), s 5S; ACT: *Civil Law (Wrongs) Act* 2002 (ACT), s 34; Tasmania: *Civil Liability Act* 2002 (Tas), s 34, although the circumstances of the case expressly mentioned by the provision are limited to equivalents of s 33(2)(a)(i) and (iv) of the CLA. There does not appear to be an equivalent in Queensland.

4 See footnote 1 above.

37.4. it was held in *Tame* that in deciding whether a defendant owed a duty to take reasonable care to avoid recognisable psychiatric injury, the central question is whether, in all the circumstances, the risk of the plaintiff sustaining such an injury was reasonably foreseeable, and a majority rejected the propositions that concepts of "*reasonable or ordinary fortitude*", "*shocking event*" or "*directness of connection*" were additional pre-conditions to liability (*Wicks* at [25]);

37.5. in part, s 32 reflected the state of the common law identified in *Tame* but, contrary to what was there decided[5], a duty of care was not to be found unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness (*Wicks* at [26]).

38. The Court did not decide the question of duty in *Wicks*. It was said that that question of law would require consideration of whether it was reasonably foreseeable that a rescuer attending a train accident of the kind that might result from the defendant's negligence (in which there might be many serious casualties and much destruction of property) might suffer recognisable psychiatric injury as a result of experiences at the scene. The Court said (at [33]):

> Or to put the same question another way, was it reasonably foreseeable that sights of the kind a rescuer might see, sounds of the kind a rescuer might hear, tasks of the kind a rescuer might have to undertake to try to ease the suffering of others and take them to safety, would be, in combination, such as might cause a person of normal fortitude to develop a recognised psychiatric illness? **The question of foreseeability is to be posed in these terms because it must be judged before[6] the accident happened.** [Emphasis added]

39. A court considering a question of duty in a case like the present is therefore called upon to consider the circumstances of the case, which include matters that may not be known or knowable to the defendant before the accident happened, but with a view to ultimately determining the question of duty in a prospective way.

40. It is submitted that this is done by extracting from those subsequent facts the essential features of the class or category of persons of which the plaintiff forms a part[7]. On the facts of *Wicks*, this meant that rather than inquire whether a duty was owed to Messrs Wicks and Sheehan, the inquiry was at a higher level of generality. It was whether a duty was owed to a rescuer who might see the carnage of an accident.

---

5 With respect, the summary of the effect of *Tame* at [9.13] of the Ipp Committee Report, Australia, "*Review of the Law of Negligence: Final Report*" (September 2002) p 138, appears to be in error, perhaps explicable by the short period of time between the publication of reasons in *Tame* and the Report.

6 *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 461-463 [126]-[129]; *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at 438 [31].

7 In *Jaensch v Coffey* (1984) 155 CLR 549 at 610, Deane J said that in many, if not most cases, of mere psychiatric injury, the major difficulty is the plaintiff is that of showing there was, as a matter of law, a reasonable foreseeability of injury in that form to a **class of persons of which he or she was a member**.

41. In the circumstances of the present case, a question arises whether to pose the question by reference to the circumstances of a sibling who passes by the scene (of the aftermath, or even the accident) or whether it is to be posed by reference to the circumstances of a sibling who is later told about the death of the victim.

42. It is submitted that the latter approach is correct, because whatever part rumination upon earlier presence at the scene may have subsequently played in the respondent's psychiatric illness, the precipitating cause was the receipt of distressing news[8].

43. If this approach is taken, even allowing for the rejection in *Tame* of any immutable rules or rigid categories, and for reasons to be developed, this Court should find that the recognition of a duty of care to the recipient of distressing news in the absence of a pre-existing relationship or undertaking of the kind seen on the facts in *Annetts* is not warranted.

44. Part of the policy which dictates a limit on liability, apart from foreseeability, is to keep liability within reasonable bounds in order to balance legitimate social interests and claims[9]. In the absence of some additional pre-existing factor, to recognise liability in respect of a class the defining feature of which is the receipt of distressing news would distort that balance. It would expose defendants to a liability which has never previously been recognised by this Court, and which would not necessarily be limited to claims by siblings, for the consequences of distressing news following public liability accidents and a range of medical misadventures.

45. Alternatively, if the duty analysis is to be undertaken by reference to a class as specific as persons who attend the scene and see nothing which they find shocking but receive later distressing news, it is submitted that a reasonable person would not foresee that a person of normal fortitude in that class would suffer any mental harm.

*Tame* and the rejection of inflexible control factors

46. The principles applicable to the recognition of a duty to take care to avoid mental harm under the common law of Australia are stated in *Tame*.

47. In *Tame*, a majority of the Court held that it was not a separate pre-condition to any duty to avoid psychiatric injury that, in the absence of knowledge of a particular susceptibility, a person of "*normal fortitude*" might have suffered psychiatric injury; the central (but not determinative) question is whether, in all the circumstances, the risk of the plaintiff sustaining a recognisable psychiatric injury was reasonably foreseeable ([16], [18], [61]-[62], [188], [199]). In *Annetts*, a majority held that where there was a pre-existing relationship between the employer defendant and the plaintiffs, the plaintiffs having made inquiries about the arrangements to be made for the care of their son and the employer

---

8 In *Jaensch v Coffey* (1984) 155 CLR 549 at 607 Deane J referred to "*causal proximity*".

9 *Jaensch v Coffey* (1984) 155 CLR 549 at 607 per Deane J.

having given assurances that he would be supervised, there was a duty of care notwithstanding that such injury did not involve a "*sudden shock*" and was not caused by any direct perception of their son's death ([18], [37], [51], [188]).

48. In these circumstances it is not necessary to trace at length the course of previous authority in relation to the requirements of direct perception or sudden shock[10], but in the appellant's respectful submission, that does not render the previous course of authority on the requirement of direct perception or sudden shock irrelevant, for at least two reasons.

49. First, as elaborated upon below, the Court did not reject the ongoing relevance and significance of the considerations which underlay those limiting rules.

10 50. Secondly, whatever the methodology by which previous decisions were reached, the body of authority represents and informs the current scope of the common law duty of care, and even if part of the methodology is no longer appropriate, the common law should proceed by a process of induction and deduction[11] from decided cases, and novel cases should be dealt with by adopting an incremental approach[12].

51. Likewise, the position in other jurisdictions, while obviously not decisive, is useful in illustrating the concerns which to a greater or lesser extent have informed the caution long exercised in this area. Briefly, the position in the United Kingdom[13] remains that

---

10 To briefly summarise; while the House of Lords required that the plaintiff have suffered nervous shock by reason of a sudden sensory perception of the thing or event (*Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310) (and see earlier decisions such as *Hambrook v Stokes Bros* [1925] 1 KB 141 and *King v Phillips* [1953] 1 QB 429); as Clarke JA observed in *Coates v General Insurance Office (NSW)* (1995) 36 NSWLR 1 at 23, by the mid-1990's, the Australian cases had not taken a firm stand of denying recovery where the plaintiff did not see the accident or its immediate aftermath but suffered shock as a result of being informed of the death; and in *Jaensch v Coffey* (1984) 155 CLR 549, the question was adverted to by Gibbs CJ and Deane J but left open.

Although ultimately not necessary for decision, in *Pham v Lawson* (1997) 68 SASR 124 at 148, Lander J (with whom Bollen J agreed, Cox J preferring not to comment) held that there was no reason to deny the recipient of news a claim for nervous shock. In *Hancock v Wallace* [2001] QCA 227 the Court of Appeal, while recognising there was no decisive Australian authority on the point, was prepared to recognise liability in circumstances where the relevant psychiatric injury was caused other than at the scene of the accident or its immediate aftermath, at least on the facts of that case.

In both *Annetts v Australian Stations Pty Ltd* (2002) 23 WAR 35, Ipp J at 60-61 (with whom Malcolm CJ and Pidgeon J agreed) and *Gifford v Strang Patrick Stevedoring Pty Ltd* [2001] NSWCA 175, Hodgson JA at [44] (with whom Handley JA and Ipp JA agreed), considered that mental harm induced by mere knowledge of a distressing fact, without perception thereof, was not compensable. Reference was made to the observations of Windeyer J in *Mt Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 407 and Brennan J in *Jaensch v Coffey* (1984) 155 CLR 549 at 567 denying liability for distressing news.

11 *Jaensch v Coffey* (1984) 155 CLR 549 at 585 per Deane J.

12 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 482 per Brennan J.

13 As summarised in *Mullany & Handford's Tort Liability for Psychiatric Damage* (2006, 2nd ed) at [9.420]-[9.470], despite two earlier first instance decisions allowing liability (*Hevican v Ruane* [1991] 3 All ER 65 and *Ravenscroft v Rederiaktiebølaget Tansatlantic* [1991] 3 All ER 73, following *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, the position

communication-induced shock will not found a duty of care, and a similar position obtains in Canada[14], the United States[15], Ireland and Hong Kong[16], whereas South Africa has rejected any absolute restriction[17]. The position in New Zealand appears to be open[18].

52. This Court has not previously recognised liability for psychiatric injury caused to family members by distressing news where there is no prior assumption of responsibility (*Annetts*) or employment relationship (*Gifford*), and in *Mt Isa Mines Ltd v Pusey* (1970) 125 CLR 383, Windeyer J (at 407), and in *Jaensch v Coffey*, Brennan J (at 567) accepted that that there could be no liability for distressing news.

Ongoing significance of direct perception and need for caution

10 53. Each of the majority judgments in *Tame* recognised the ongoing potential significance of the control factors that were rejected as being both necessary and decisive in every case. For example, Gleeson CJ said (at [18]):

> It does not follow, however, that such factual considerations [that is, whether there was a sudden shock, or whether the plaintiff directly perceived a distressing phenomenon or its immediate aftermath] are never relevant to the question whether it is reasonable to require one to have in contemplation injury of the kind that has been suffered by another and to take reasonable care to guard against such injury. In particular, they may be relevant to the nature of the relationship between plaintiff and defendant, and to the making of a judgment as to whether the relationship is such as to import such a requirement.

---

precluding claims not based on direct sensory perception of the relevant accident or event or its aftermath has been reaffirmed: see, eg, *Palmer v Tees Health Authority* [1999] Lloyd's Rep Med 351. Although some cases recognise some flexibility in the characterisation of "primary" and "secondary" victims, and in the characterisation of the relevant "event" or "aftermath", the essential requirement that a secondary victim must have been present at the scene of the accident which caused the death or must have been involved in its immediate aftermath, as discussed by Lord Justice Moore-Bick MR (with whom Kitchen LJ agreed) in the recent decision in *Taylor v A Novo (UK) Ltd* [2014] QB 150.

14 See especially *Talibi v Seabrook* (1995) 177 ALR 299, where the plaintiff was advised by telephone of the accident involving her elderly mother. He travelled from Athabasca to Edmonton to the hospital, but his mother had died. Later, he went to the scene to try to reconstruct the accident. His claim for damages for a reactive depression caused by these events was refused because he was not present at the immediate aftermath.

15 It is stated in the *Restatement (3rd) of the Law, Torts: Liability for Physical and Emotional Harm §48*: "*An actor who negligently causes sudden serious bodily injury to a third person is subject to a liability for serious emotional harm caused thereby to a person who: (a) perceives the event contemporaneously; and (b) is a close family member of the person suffering the bodily injury*". See also *Mullany & Handford's Tort Liability for Psychiatric Damage* (2006, 2nd ed) at [9.480] fn 168.

16 See *Mullany & Handford's Tort Liability for Psychiatric Damage* (2006, 2nd ed) at [9.490].

17 *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA), cf. the earlier position in *Waring & Gillow Ltd v Sherborne* 1904 TS 340.

18 In *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179, Thomas J expressed criticisms of the traditional control devices, and Blanchard J indicated that in due course the restrictions based on physical and temporal proximity to the accident or misadventure should be removed or relaxed.

54. Gaudron J observed that although not necessary, where there has been no direct perception, a person would be able to recover for psychiatric injury only if there was some special feature of the relationship between that person and the person whose acts or omissions are in question such that it can be said that the latter should have the former in contemplation as a person closely and directly affected by his or her acts (at [52]). Gummow and Kirby JJ said that distance in time and space from a distressing phenomenon and the means of communication or acquisition of knowledge concerning that phenomenon may be relevant to assessing reasonable foreseeability (at [225]).

55. Although various pre-conditions to liability were discarded by the majority in *Tame*, the considerations which informed those pre-conditions remain relevant. A survey of the considerations, and the "*limiting techniques*" or control mechanisms, is found in the judgment of Hayne J, who favoured preserving the "*normal fortitude*" criterion, in *Tame* (at [247]-[296]). One of the concerns of the law which explains the caution shown in relation to mental harm caused by the receipt of news was expressed by Hayne J at [260]:

> Death, disaster, shock and disappointment are an inevitable part of life. Everyone encounters such events throughout life. Each will have its effect on the individual. Should a defendant bear entire responsibility, then, for a psychiatric injury of which the defendant's negligent conduct may have been only one cause among many others encountered by the plaintiff in life? Should the defendant bear entire responsibility for all the consequences of which a negligent act was a cause, but which have seen many subsequent disturbing events of a kind to which all in society are exposed all too often in life? It is in these difficulties that the explanation for the law's focus on a singular "shocking" event to which the plaintiff was close in space or time are to be found.

56. Likewise, in *Jaensch v Coffey*, in explaining the justification for a distinction between a recognition that a plaintiff who suffered psychiatric injury as a result of what he or she saw or heard at the accident or at its aftermath at the scene and the rejection of claims where psychiatric injury resulted from subsequent contact, "*away from the scene of the accident and its aftermath*", Deane J spoke of "*causal proximity*" and said that this was less arbitrary and better attuned both to legal principle and considerations of public policy which were informed by the general underlying notion of liability in negligence as being "*a general public sentiment of moral wrongdoing for which the offender must pay*". He went on to say (at 607):

> A requirement based upon logical or causal proximity between the act of carelessness and the resulting injury is plainly better adapted to reflect notions of fairness and common sense in the context of the need to balance competing and legitimate social interest and claims than is a requirement based merely upon mechanical considerations of geographical or temporal proximity.

57. Deane J spoke at various points of "*observation*" of matters involved in the accident or its aftermath (at 607) and of the question whether the plaintiff "*encountered*" the aftermath (at 608). Although the requirement of perception of the accident or its aftermath performed a function of limiting and containing liability with a view to preserving a fair balance of social interests and claims, it also reflected the inherently greater likelihood that an illness would be caused by the actual witnessing of disturbing events as opposed to

the mere appreciation of the fact that such events have occurred. Accordingly, while *Tame* has removed any strict requirement of direct perception, that requirement was not without a rational or meaningful basis.

58. In *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, Gleeson CJ observed that while the decision of the Court of Appeal in that case, that there could be no liability for damages for mental injury to a person who was told about a horrific workplace accident or injury to a loved one but did not actually perceive the incident or its aftermath, could not stand with *Tame,* it did not follow that the appellants' absence when their father suffered his fatal injury and did not observe its aftermath was irrelevant to the question whether a duty was owed to them (at [7]).

59. He went on to say that the central issue was whether it was *reasonable* to require the respondent to have in contemplation the risk of psychiatric injury to the appellants and to take reasonable care to guard against such injury, and that relevant to that issue was the burden that would be placed upon those in the position of the respondent by requiring them to anticipate and guard against harm of the kind in question (at [8]). He continued (at [9]):

> [J]ust as it would place an unreasonable burden upon human activity to require people to anticipate and guard against all kinds of foreseeable financial harm to others that might be a consequence of their acts or omissions, so also it would be unreasonable to require people to anticipate and guard against all kinds of foreseeable psychiatric injury to others that might be a consequence of their acts or omissions. ... The limiting consideration is reasonableness, which requires that account be taken both of interests of plaintiffs and of burdens on defendants. Rejection of a "control mechanism", such as the need for direct perception of an incident or its aftermath, originally devised as a means of giving practical content to that consideration, does not involve rejection of the consideration itself.

60. Ultimately, Gleeson CJ was of the view that the fact that children, as a class, were so obviously at risk of a psychiatric injury when hearing of a parent, and because it was reasonable to require an employer to have in contemplation the risk of psychiatric injury to the children of an employee, a duty of care was owed (at [10]-[12]).

61. Similarly, McHugh J was prepared to find that the employer owed a duty to take care to protect from psychiatric harm all those persons that it knows or ought to know are in a close and loving relationship with its employee, and it was not a condition of that duty that the persons should be present when the employee suffered harm or that they should see the injury to the employee (at [27]).

62. Gummow and Kirby JJ noted that the lack of direct perception was not of itself fatal to the claim (at [65], [67]) but cautioned that it did not follow that a duty arose in all circumstances in which the direct perception control mechanism previously had been said to deny liability. They emphasised (at [67]) that:

> Indeed, it would be quite wrong to take it from *Tame* and *Annetts* that reasonable foreseeability of mental harm is the only condition of the existence of a duty of care[19].

63. Their Honours regarded the children of an employee as relevantly within the Atkinian neighbourhood of the employer (at [86]). They placed emphasis on the advancement of labour for capital and the likelihood of children suffering psychiatric injury in the event of their parent's death (at [87]) and concluded (at [90]):

> Although the appellants here did not claim to have relied upon any specific assurances by the respondent as to their father's safety from harm, the relationship between the parties to this litigation otherwise shares important characteristics with the relationship at issue in *Annetts*. [Reference omitted]

64. Hayne J also emphasised that reasonable foreseeability was not itself sufficient (at [98]) but considered that a duty was owed by analogy with *Annetts* and because of the pre-existing relationships between the three parties – employee, employer and children (at [101]).

65. Notwithstanding the rejection of pre-conditions in *Tame*, the approaches of Gummow and Kirby JJ and Hayne J in *Gifford* show that an incremental and cautious approach remains appropriate.

66. Moreover, and as this Court has emphasised, recognition of a new sphere of liability must be coherent, and not inconsistent, with existing rights and obligations[20]. There is already recognition of this kind of liability for intentional wrongdoing[21], and, at least in South Australia, a wrongdoer is exposed to a claim for *solatium* following the negligently caused death of a spouse or child[22]. That claim is expressly intended to compensate for the anguish and distress associated with the consequences of death[23]. By contrast, it has long been recognised that grief is not compensable at common law[24], even if grief causes psychiatric illness[25]. Whether or not this can be traced to *Baker v Bolton* (1808) 1 Camp 493; 170 ER 1033[26], recognition of this new area of liability will, at the least, likely create confusion and uncertainty because it will be practically difficult to distinguish between any compensable effects of distressing news and non-compensable grief.

---

19 Cf. *Review of the Law of Negligence,* Final Report, September 2002, [9.13].

20 *Sullivan v Moody* (2001) 207 CLR 562 at 581 [55] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ; *CAL No 14 Pty Ltd v Motor Accidents Insurance Board; CAL No 14 Pty Ltd v Scott* (2009) 239 CLR 390 at [39]-[42].

21 *Wilkinson v Downton* [1897] 2 QB 57 and *Bunyan v Jordan* (1937) 57 CLR 1. In *Wilkinson v Downton,* Wright J was at pains (at 60) to emphasize the significance of wilful wrongdoing.

22 See ss 28, 29 and 30 CLA.

23 *Public Trustee v Zoanetti* (1945) 70 CLR 266 at 279-282 per Dixon J.

24 *Mt Isa Mines Ltd v Pusey* (1970) 124 CLR 383 at 394 per Windeyer J.

25 *Pham v Lawson* (1997) 68 SASR 124 at 150 per Lander J (with whom Bollen J agreed).

26 *See also Admiralty Commissioners v SS Amerika* [1917] AC 38 and *Woolworths Ltd v Crotty* (1942) 66 CLR 603 and *Swan v Williams (Demolition) Pty. Ltd.* (1987) 9 NSWLR 172, at 175-184, 190-191 and *Barclay v Penberthy* (2012) 246 CLR 258.

The present case

67. It is respectfully submitted that in a motor accident case it cannot be assumed that a familial relationship (or a close and loving relationship) necessarily suffices to justify the existence of a duty of care to a class of persons who do not suffer mental harm by virtue of what they have witnessed at the accident or its aftermath[27].

68. The consequences of a finding that any familial relationship suffices to establish a duty in the present case would have far-reaching consequences in motor accident cases but in many other cases where an activity which carries a risk of physical harm is involved.

69. It is one thing to recognise liability in cases where a family member comes to the scene of the accident or aftermath and is shocked by what they see or hear there, or to recognise a duty to rescuers who can be expected to attend the scene of a potentially gruesome or traumatic accident. It is quite another thing to find that the existence of a familial relationship suffices in a case of negligent driving, which, after all, involves 'mere' carelessness rather than intentional harm[28].

70. In the present case, the Full Court did not engage in any weighing of the relevant considerations, either within the rubric of the "*normal fortitude*" negative criterion of foreseeability within s 33 of the CLA, or more generally, in light of this Court's clear statements that, whilst foreseeability is the central question, it is not a sufficient criterion of the existence of duty.

71. The additional factor that, in the present case, the respondent did drive by the scene of the accident after it occurred, is either irrelevant to the duty inquiry or, if relevant, does not militate in favour of liability given that the respondent did not ever witness anything distressing.

72. In the appellant's submission, if the matter is approached at the appropriate level of generality, there is simply not enough to warrant a finding that the s 33 criterion was met, and in any case not enough to justify a finding that it is reasonable to recognise a duty of care to a class of persons so characterized.

73. And if the matter is approached at a more specific level, the circumstances become even less likely to have been foreseen by a reasonable person in the appellant's position.

---

27 Cf. *Cubbon v Roads and Traffic Authority of New South Wales* (2004) Aust Torts Reports 81-761; [2004] NSWCA 326 at [22]-[23], which appears to assume that liability follows. The point was apparently conceded on appeal.

28 Cf. *Wilkinson v Downton* [1897] 2 QB 57 and *Bunyan v Jordan* (1937) 57 CLR 1.

**The restriction in s 53(1)(a)**

74. Because the respondent was not a parent, spouse, domestic partner or child of the victim, he could not recover damages unless he was "*present at the scene of the accident when the accident occurred*": s 53(1)(a).

75. Section 3(1) provided that in the CLA, unless the contrary intention appeared, "*accident means an incident out of which personal injury arises and includes a motor accident*" and "*motor accident means an incident in which personal injury is caused by or arises out of the use of a motor vehicle*".

76. In *Hoinville-Wiggins,* the Court of Appeal considered the meaning of the restriction in s 77(a)(ii) of the *Motor Accidents Act* 1988 (NSW) to a person who "*was, when the accident occurred, present at the scene of the accident*". Giles JA (with whom Mason P and Stein JA agreed) held that:

> Close connection in space and time is required. The words "when the accident occurred" mean that it is not enough that she came to the scene of the accident after the accident had occurred, as might have happened in "rescuer" cases at common law. The claimant argued that the accident included what she described as its aftermath, and extended to her attendance to minister to the pedestrian. ... [However, the cases relied on by the claimant] distinguished between the accident and its aftermath. Section 77 limits this common law position, because the plaintiff must have been present at the scene of the accident and must have been present at the scene of the accident when the accident occurred; the additional requirement that the plaintiff suffer injury in the accident underlines these spatial and temporal requirements. The aftermath was never part of the accident and (at least for the purposes of s 77(a)) seeing or hearing the aftermath no longer founds recovery of damages.
>
> On the clear wording of the section, I do not think it can be said that any nervous shock suffered by the claimant from her attending to assist the pedestrian can be said to have been suffered in the accident, and in particular I do not think that it can be said that she was present at the scene of the accident when the accident occurred. The claimant's case in this respect is not assisted, as was argued, if the pedestrian was alive (as shown by the pulse the claimant thought she detected) at an early part of the period of administration of CPR. The accident occurred when the opponent's motor vehicle struck the pedestrian, whether or not the pedestrian's death was immediate, and the claimant's presence in the classroom, unaware of the accident until Ms Kelly told her of it, was not presence at the scene of the accident at that time.

77. A similar approach was adopted in *Spence v Biscotti* [1999] ACTSC 70[29].

---

[29] Miles CJ said "*there can be no doubt that by the term "accident" a finite event is contemplated. It may occur over a period of time, however short, for instance at and during the time of an explosion. In the case of an accident involving the impact of a motor vehicle with a person, it will occur at the moment of impact and, I would think, further, at the time of events so immediately preceding and following (for instance, during the skidding of the vehicle before and until impact and during the hurtling of the person's body after impact) that they cannot be separated from the impact in any sensible way. An accident is an event in space as well as time: hence the term in s 77 "scene of the accident". The plaintiff must satisfy a spatial and temporal test, present at that place, the scene, when that event, the accident, occurred. In my view, there is nothing to require the term "accident" to include the immediate consequences of the accident or its immediate aftermath. ...*".

78. The Full Court did not follow that approach with s 53(1)(a), despite the similar language. Instead, Gray J erroneously held that the observations in *Wicks* about s 30 of the *Civil Liability Act* 2002 (NSW) had "*obvious relevance*" to the construction of s 53.

79. Section 30(2)(a) of the NSW legislation provided that a plaintiff was not entitled to recover damages in respect of pure mental harm arising wholly or partly from mental or nervous shock in connection with another person (the victim) being killed, injured or put in peril unless the plaintiff "*witnessed, at the scene, the victim being killed, injured or put in peril*". The Court observed in *Wicks* (at [44]):

> It would not be right, however, to read s 30, or s 30(2)(a) in particular, as assuming that all cases of death, injury or being put in peril are events that begin and end in an instant, or even that they are events that necessarily occupy only a time that is measured in minutes. No doubt there are such cases. But there are cases where death, or injury, or being put in peril takes place over an extended period. This was such a case, at least in so far as reference is made to victims being injured or put in peril.

80. The temporal and spatial connection required by the legislation considered in *Wicks* was between the plaintiff and the witnessing of the harm which befell or was befalling the victim.

81. The different temporal and spatial connection required by s 53(1)(a) of the CLA was between the plaintiff and presence at the scene of the accident when the accident occurred. In other words an accident occurs within a period of time and a region of space. In both respects, it has a beginning and an end. The accident was the incident out of which the victim's personal injury arose. That is, the connection required by the CLA is with the incident that caused the harm, and not with the harm itself. By purporting to apply *Wicks*, Gray J failed to appreciate the difference.

82. The bases on which Sulan J distinguished *Hoinville-Wiggins* were erroneous. The reference, in the s 3(1) definition of "*accident*", to an "*incident*", did not suggest any broader meaning than the physical event which caused the personal injury of the victim, namely, the collision. Sulan J's reference to *Roget's Thesaurus*, as a basis for considering an incident was synonymous with an "*event, eventuality or aftermath*" (FC [65]), was unconventional. The dictionary definition of "*incident*" is simply "*an event or occurrence*"[30]. Additionally, the usage of the expression "*accident*" elsewhere in the CLA tends to confirm a concept confined in time and space and not extending to the "*aftermath*"[31].

83. The fact that the legislation considered in *Hoinville-Wiggins* did not contain any equivalent to s 33 (which only concerns duty) was not an "*important distinction*" (FC [67]). Sulan J did not explore what flowed from the distinction. Although it may be

---

30 Concise Oxford Dictionary, Fifth Edition, 1964 and Macquarie Dictionary, Second Edition.

31 See, eg, the presumption of intoxication provision in ss 46-48, and the seatbelt provision in s 49, the definition of "*prescribed maximum*" in s 3, the territorial provision in s 4(1).

accepted, as was observed in *Wicks*, that it is usually appropriate to construe a limitation by reference to the general provision prescribing liability, it is far from clear why any different result is dictated in the present provision, given that s 33 only effects a marginal alteration of the common law position that governed *Hoinville-Wiggins*.

84. Ultimately, the language of s 53(1)(a) resolves the question of interpretation, and there was no basis to depart from the ordinary meaning of the qualification: *Wicks* at [50]. The requirement is not merely that the plaintiff be present at the scene of the accident, but **present** at that scene **when the accident occurred.**

85. That additional requirement invites attention to a moment in time, or a discrete period of time, and does not suggest any broad meaning of accident. It is entirely artificial (and an inapt use of language) to say that the scene of an accident extends to any place from which the result may be viewed, or that it is still happening after the collision has occurred by the time emergency vehicles are in attendance.

86. Indeed, in *Jaensch v Coffey*, Deane J clearly distinguished between the "*occurrence*" of an accident and the aftermath. For example (at 597) he said:

> The plaintiff had not seen the accident but went to the scene immediately **after its occurrence** and became involved in its immediate aftermath. [Emphasis added]

87. And he later concluded (at 607):

> The facts constituting a road accident and its aftermath are not, however, necessarily confined to the immediate point of impact. They may extend to wherever sound may carry and to wherever flying debris may land. The aftermath of an accident encompasses events at the scene **after its occurrence,** including the extraction and treatment of the injured. ... [Emphasis added]

88. In these circumstances, when the predecessor provision (s 35A(1)(c) of the *Wrongs Amendment Act* 1986 (SA)) was enacted, the use of the words "*when the accident occurred*" confirmed the distinction between accident and aftermath. The reference in the Second Reading Speech to the effect that the purpose of the amendment was not to significantly alter the law as it presently stood and to recognise the result in *Jaensch v Coffey*[32] is explicable on the basis that, as the victim's wife, Mrs Coffey succeeded because of the view taken by this Court that observations made at the hospital formed part of the aftermath.

89. The restriction presently under consideration did not and does not apply to a parent, spouse or child of a person killed, injured or endangered in the accident. And, contrary to the view taken by Sulan J, the decision in 2004 to adhere to the 1986 formula despite the reference in Ipp Recommendation 34 to the "*aftermath*" demonstrates that it remained Parliament's intention to narrowly confine the concept of "*accident*".

---

32 South Australia, *Parliamentary Debates,* Legislative Council, 27 November 1986, p 2410.

## PART VII APPLICABLE STATUTORY PROVISIONS

90. The relevant provisions are set out in paragraphs 12, 16 and 72 above.

## PART VIII THE ORDERS SOUGHT

91. The appellant seeks the following orders.

1. That the appeal be allowed.

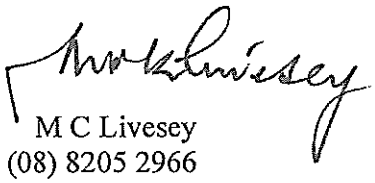
2. The orders of the Full Court be set aside, and in lieu thereof, it be ordered that the respondent's appeal to that Court be dismissed.

## PART IX ESTIMATE OF THE HOURS REQUIRED TO PRESENT ARGUMENT

92. The appellant estimates that the presentation of his oral argument will require two hours.

10 Dated:

19 December 2014




| | M C Livesey | B J Doyle |
|---|---|---|
| Phone | (08) 8205 2966 | (08) 8212 6022 |
| Fax | (08) 8212 6590 | (08) 8231 3640 |
| Email | mlivesey@barchambers.com.au | bdoyle@hansonchambers.com.au |

Counsel for the appellant


20