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

BETWEEN:

GEORGE KING
Appellant

and

RYAN PHILCOX
Respondent

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APPELLANT'S REPLY

PART I PUBLICATION

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

PART II REPLY

Duty of care

2. The respondent's submissions (**RS**) advance the following propositions.

   2.1. By reference to the conduct of the case at trial (RS [11]-[13]) or before the Full Court (RS [18]-[21]) it is submitted "there was no real contest as to the existence of a duty" (RS [28]) and that the question of reasonable foreseeability under s 33(1) of the CLA is the subject of concurrent factual findings (RS [59]-[60]).

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   2.2. The question of duty involves an established category (RS [28]), the existence of a familial relationship forecloses further inquiry (RS [47]), and the case turns on the legislation and does not involve "re-visiting" the common law (RS [2]).

   2.3. Reliance is placed on the Full Court's unchallenged causation conclusion (RS [8]).

   2.4. It is contended that there are no policy or other reasons to restrict liability (RS [35], [65]), such as a background of insurance practice (RS [35]) and the ease of differentiating between grief and compensable mental harm (RS [65]).

The treatment of duty below

3. Although the respondent submits variously that "duty was not argued by the appellant at trial" (RS [11]), that there was "no real contest as to the existence of a duty" at trial (RS [28]), and that the notice of contention in the Full Court raised duty "in a limited way" (RS [13], and [19]-[20]), the purpose of these submissions is unclear. The appellant rejects any submission that the inquiry into duty was relevantly foreclosed by the conduct of the case.

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3.1. The existence of a duty of care was dealt with in the reasons of the trial judge and in the Full Court. There is no suggestion by the respondent that the existence of a duty of care was admitted on the pleadings or elsewhere at trial. The judge evidently dealt with the issue because it had not been agreed or admitted. She decided the matter adversely to the appellant who, in his capacity as a respondent before the Full Court, disputed the existence of a duty of care by a Notice of Alternative Contention.

3.2. The appeal to the Full Court was an appeal by way of rehearing. The question of the existence of a duty of care was a question of law which it was duty bound to reconsider afresh, and in so far as it turned on any intermediate factual conclusions drawn below, the Full Court was to conduct its own independent review.

3.3. Further, it is not correct to suggest that the reasonable foreseeability inquiry mandated by s 33(1) was not in issue before the Full Court. One of the primary submissions to the Full Court was that the learned trial judge had erred by considering the s 33(1) inquiry by reference to whether it was reasonably foreseeable that a person of normal fortitude in the respondent's position might suffer psychiatric illness as a result of the sudden shock upon *seeing* or hearing of his or her brother's death (TJ [91]), when in fact he had not seen his brother's death. The Full Court was asked to reconsider that issue in terms referable to a person of normal fortitude who suffered sudden shock on later being *told* of a sibling's death. In so far as the Full Court dealt with this issue, the conclusion is expressed in terms not directed to that specific issue (FC [20], where no reference is made to normal fortitude).

4. Despite a tentative suggestion to the contrary, it is (rightly) accepted by the respondent that the existence of a duty of care is a question of law (RS [59]). It is not necessary for the appellant to point to the existence of an "irrelevant circumstance taken into account nor a failure to take into account a relevant circumstances that may lead to the rejection of a duty" (cf. RS [60]). Special leave to appeal has been granted on the question of the proper application of s 33(1) to the facts of this case. In so far as that may involve a factual inquiry, because the trial judge and the Full Court in terms directed themselves differently, these are not relevantly concurrent factual findings. And, more importantly, this Court is in as good a position as the courts below to answer the question mandated by s 33(1) as the Full Court or the trial judge.

No need to "re-visit" the common law?

5. The respondent submits (RS [2]), purportedly by way of agreement with the appellant's statement of issues (AS [2], [3]), that "[t]he issues are confined to interpretation of the South Australian legislation and the case does not call for the High Court to re-visit the common law as it addresses damages for 'nervous shock'".

6. The meaning of, and basis for, that contention, is unclear[1]. The appellant submitted that, concisely stated, the first issue on appeal is whether, having regard, *inter alia*, to s 33(1) of the CLA, the appellant owed a duty of care not to cause the respondent mental harm (AS [2]). That statement is consistent with the observations in *Wicks* (at [22], [24]) that the (equivalent provision to) s 33(1) does not resolve the existence of a duty of care, which remains to be determined according to common law concepts. (It is also inconsistent with the submission made by the respondent at RS [37].)

7. In so far as the respondent's submission is intended to be that the existence of a duty of care in a case such as the present is already the subject of binding authority, that contention is wrong. The case cannot be said to fall within the binding *ratio* of *Jaensch v Coffey*, and in any event, the existence of a duty falls to be considered in light of the methodological approach explained in the subsequent decisions in *Tame, Annetts* and *Gifford.*

8. Those authorities make clear that direct perception is not an invariable or inflexible requirement for the existence of a duty of care. But they also decide that the absence of direct perception is a relevant consideration. In *Annetts* and *Gifford* the absence of perception did not defeat the claims, but the Court placed reliance on antecedent relationships and undertakings of responsibility. *Annetts* involved a claim by parents, and *Gifford* a claim by children. No decision of this Court dictates the answer to the present case, where there was no direct perception of anything at the scene which distressed the respondent, and where the familial relationship was that of sibling.

9. As to the existence of a duty to siblings, the observations of McHugh J in *Gifford* at [50] (extracted by the respondent at RS [50]) were not essential to his Honour's disposition of the case, and, more importantly, the other members of the Court confined their conclusions to, and focused upon, the special status and dependency of children (see in particular the observations of Gummow and Kirby JJ at [86]-[92], and see also Gleeson CJ and [12], Hayne J at [101]).

10. Accordingly, whatever is meant by "re-visiting" the common law, this appeal must be decided by reference to the common law principles articulated in the authorities. It cannot be disposed of by an assertion that this is an "established category" (RS [28]). Of course the duty owed by a motorist to other road users is an established category, and, furthermore, the existence of a duty owed to persons suffering mental harm by witnessing distressing events at the scene of the accident or the aftermath is not "novel", but the question remains whether a duty was owed in the circumstances of this case, where nothing distressing was seen by the respondent and where what caused his injury was learning about the death of his brother in an accident.

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1 It is said at RS [39] that aspects of the appellant's submissions invite a reconsideration of the common law as it addresses "nervous shock", rather than considering how s 33 impacts on the determination of duty, and it is asserted that the legislature has moved away from describing harm from "nervous shock" to "mental harm" (RS [40]).

Reliance on causation findings

11. The respondent submits that the consideration of duty by the Full Court needs to be considered in conjunction with the findings on causation at FC [31]-[44]. While it is not entirely clear what is intended by this submission, the appellant makes the following observations about causation.

    11.1. The trial judge found, as an additional basis for rejecting the respondent's claim, that there was no causal link between what he saw on any occasion he passed the intersection and the injuries that he developed (TJ [101]), but she accepted that the respondent suffered a recognised psychiatric illness as a result of being told of the news of his brother's death (TJ [102]).

    11.2. The Full Court concluded that the legal test of causation was in fact satisfied. Gray J considered that the conclusion of Dr Ewer, upon whom the trial judge had placed reliance (TJ [71]), had not addressed the test for causation required by a Court (FC [41]).

12. In this Court, the appellant does not challenge that, if duty is established, then the breach of duty in causing the accident can be said, in law, to be a relevant cause of the appellant's mental harm. That does not mean, however, that the evidence about the way in which that harm came to be suffered is not relevant to the duty inquiry[2]. In the appellant's respectful submission, although the negligence which caused the accident can be seen to be a 'but for' cause of the mental harm, it was the receipt of the distressing news, and perhaps also the rumination on the fact of having earlier been present[3], that brought about the mental harm. Quite apart from the opinion of the expert witness relied upon by the appellant (Dr Ewer), the respondent's expert psychologist recorded in her reports that:

    12.1. the respondent and the victim (his brother) had never really got on from an early age (AB 287);

    12.2. the question the respondent kept asking himself after the accident was "what was [his brother] doing in Campbelltown, was he visiting me?" (AB 288).

Other matters relevant to recognition of duty

13. The respondent asserts that the difficulty in distinguishing between compensable mental harm and non-compensable grief ought not be a barrier to recovery and reference is made to advances in psychiatry and the ability to distinguish between the two (RS [65]). But the difficulties are readily apparent from the reports in this case[4], and are highlighted in

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2 The appellant's submission is that when assessing s 33(1) and the existence of a duty of care, the relevant category of class of persons in respect of whom the inquiry into reasonable foreseeability of harm to a person of normal fortitude is directed is *not* those persons who witness something distressing at the scene of the accident or its aftermath.

3 Indeed, as the respondent notes in his submissions (RS [7]), he was flooded by thoughts upon being told of the death ("What could I have done? I was there!") and he suffered (irrational) feelings of guilt ("I was there, I could have done something, possibly saved him").

4 The respondent's expert noted that he was psychologically vulnerable to stress at the time of the accident. The extent of the reasoning on causation was that the adjustment disorder with distressed mood was caused by the motor vehicle accident, in that there was a direct temporal link between the motor vehicle accident death and the development of the condition, and a causal

the most recent Diagnostic and Statistical Manual of Mental Disorders (DSM-5)[5]. Further, the respondent's invocation of insurance considerations is not supported by authority[6].

Present at scene of accident when accident occurred

14. As to the requirement of presence at the scene of the accident at the time the accident occurred, the respondent submits, *inter alia*:

    14.1. that the provision considered in *Hoinville-Wiggins* in "quite different terms" to s 53 of the CLA (RS [74]). The short answer to this is that the provisions are virtually identical;

    14.2. that the definition of "accident" in the CLA assists the respondent (RS [75]). For reasons identified in chief, and having regard to the usage of "accident" elsewhere in the CLA, the definition tends to reinforce the notion that an accident involves a discrete event. The submission also overlooks that "accident" was introduced into the legislative scheme *after* the predecessor provision to s 53 of the CLA; and

    14.3. that the restriction should be construed consonantly with the common law (RS [81]) which recognised the potential for a claim by a person present at the aftermath. This submission is contradicted by the plain fact, recognised by an earlier submission (RS [79]), that the provision is designed to restrict liability.

15. While the respondent seeks to support the notion that "accident" includes "its aftermath", the respondent appears to advance an alternative, narrower, contention, that the relevant "incident" is not complete until death has occurred (RS [82]). That approach is inconsistent with the "aftermath" submission, and lacks textual support.

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relationship his condition focussed upon the psychological traumas which followed the fatal accident (AB 291, see also AB296).

5 In the treatment of "Depressive Disorders", it is noted that careful consideration is given to the delineation of normal sadness and grief from a major depressive episode (p 155), and it is noted that responses to significant loss including bereavement may include feelings including intense sadness and rumination which may resemble a depressive episode (p 161). The presence of a major depressive episode in addition to a normal response to a significant loss requires careful consideration and "inevitably involves the exercise of clinical judgment based on the individual's history and the cultural norms for the expression of distress in the context of loss" (p 161). There may also be a difficult distinction to be drawn between PTSD from witnessing a traumatic events to others and other emotional reactions (see eg p 274). Adding further to the complexity is the recognition in DSM-5 of "Persistent Complex Bereavement Disorder", the diagnosis for which is differentiated from "normal grief" only according to the time frame over which the persistent yearning/longing, intense sorrow or preoccupation with the deceased persists (see at p 789-792).

6 The respondent cites the observations of Gleeson CJ in *Tame* at [15], but the Chief Justice there simply referred to established instances of the recognition of a duty of care in respect of physical injury to person or property. In contrast he emphasised caution where what was involved was emotional disturbance resulting in clinical depression.