IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A26 of 2014

BETWEEN:

GEORGE KING
Appellant

and

RYAN PHILCOX
Respondent

RESPONDENT'S SUBMISSIONS

Part I: PUBLICATION

1. I certify that this submission is in a form suitable for publication on the internet.

Part II: CONCISE STATEMENT OF ISSUES

2. The respondent agrees with the statement of issues of the appellant. The respondent in particular notes that the 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'.

Part III: SECTION 78B OF THE JUDICIARY ACT 1903 (Cth)

3. It is certified that the respondent has considered whether a notice should be given pursuant to s78B of the *Judiciary Act* 1903 (Cth). No such notice is required.

Part IV: APPELLANT'S NARRATIVE OF FACTS OR CHRONOLOGY

4. The respondent does not challenge the appellant's narrative or chronology. The respondent considers that the following additional facts might be considered.

5. After hearing the devastating news the respondent (plaintiff):

> *"straightaway tried to work out what I'd seen and tried to work out for myself what had happened and how I could have been there and not known it was my brother."* [TJ [22], T60.4-.7]

6. The plaintiff went to the scene in the early hours of the following morning and ruminated over the scene *"trying to think what I'd noticed having driven through."* [TJ [24], T61.28 - 31]

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7. The report of the psychologist Mary Johnson was that upon being told of the death of his brother: "*I was flooded by thoughts – What could I have done? I was there!*" and that he suffered feelings of guilt "*I was there, I could have done something, possibly saved him.*"[1]

8. The finding that the respondent suffered mental illness as a consequence of the fatal accident[2] FC [31 – 42] is not the subject of challenge in this appeal.

9. As is accepted by the appellant [11] the mental illness suffered is a recognized psychiatric illness FC [33].

10. The assault on the respondent's senses was sudden and proximate to the time to the accident.[3]

Decision of the trial judge
Duty of Care and s.33 of the CLA

11. Duty was not argued by the appellant at trial. The appellant's case at trial was that the plaintiff was excluded from recovery of damages because he was not in the class of persons referred to in s.53(1) (parent, spouse, domestic partner or child) and he was not present at the scene of the accident when the accident occurred i.e. at the time of impact. In the alternative, and relevantly, the appellant pleaded that the mental harm was not caused by what the plaintiff saw at the scene but rather by his hearing news of his brother's death and therefore he was precluded from claiming damages pursuant to s 53(2) and (3) [Defence [7]].[4]

12. The appellant's conduct of the trial, in relation to the duty issue, was consequently absent any scrutiny in cross-examination of the plaintiff or otherwise of the criteria in s. 33. Thus evidence led by the plaintiff of the closeness of the sibling relationship [T28, T29, T42, T43] was not challenged in cross-examination by the appellant.[5]

13. The issues as identified by the trial judge were consequently so focused [TJ [6 – 7]]. Duty was raised for the first time on appeal to the Full Court by the filing of a Notice of Alternate Contention, but in a limited way (see [19-21] herein).

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1 P. 5 of Exhibit "P5", psychological report of Mary Johnson dated 20 March 2006.

2 Leave to appeal having been refused as to causation. The findings of fact in relation to causation are at FC [31 – 42] and the evidence in support: Exhibits "P8" and "P5".

3 P. 5 of Exhibit "P8" and p. 5 of Exhibit "P5".

4 Rule 100 of the *District Court Rules 2006* requires a defendant in relation to a special defence (being a defence other than a denial of facts) to state the basis of each special defence on which the defendant relies, including reference to any statutory provision and must contain a short statement of the material facts on which the special defence is based.

5 I.e., was the plaintiff 'so closely and directly affected…' (per Lord Atkin in *Donoghue v Stevenson* [1931] UKHL 3; (1932) AC 562 at 580) as to constitute a 'neighbour'?

14. As to paragraphs [12] – [15] of the appellant's submissions the respondent notes that the case on appeal is one of pure mental harm so that s.33(2)(a) has application. S.33 raises a factual determination for the trial judge having regard to "the circumstances of the case". Sub-section (2)(a) requires the court to consider certain matters, which are not exhaustive.

15. The trial judge considered "the circumstances of the case", including those that she was bound to consider (s.33(2)(a)) and found the existence of a duty of care. By so considering the circumstances the trial judge necessarily brought concepts of proximity to bear on her judgment. It cannot be said that she treated "reasonable foreseeability" as conclusive.

Section 53(1)(a) of the CLA

16. As to paragraphs [16] to [21] of the appellant's submissions the trial judge imported a requirement in s 53(1)(a) that for the plaintiff to be present he had to witness his brother being killed, injured or put in peril [TJ 96]. That concept appears in the duty section (s 33) as a matter for consideration, but not in the damages section (s 53). The two sections do different work and are applied at different stages of the enquiry. See [FC [23] :

> *"The Judge made it clear that but for the failure to "witness" his brother being killed, injured or put in peril at the scene of the accident the appellant would have satisfied any requirement of presence "when the accident occurred".*

17. The trial judge's analysis correctly accepts that the accident extends beyond the point of impact and that it takes in "*the occurrence of the accident including its aftermath*" (TJ [82]]).

Decision of the Full Court
Duty of Care and s.33 of the CLA

18. As to the appellant's submissions at [23] and [24] and in particular at [24] that that "*the Full Court appears to have treated the test of foreseeability formulated in s 33 as conclusive on the existence of a duty*", the comments as to reasonable foreseeability were made after referring to the finding of the trial Judge that a duty was owed [FC [19 – 20]] The trial Judge's analysis of the existence of a duty is not that foreseeability is a sufficient criteria, but also involved the consideration and weighing of the relevant circumstances to be taken into account [TJ [61 – 92]].

19. The appellant's Notice of Alternative Contention (filed on 26 February 2014) before the Full Court did not complain of the analysis of the Trial Judge as to foreseeability but agitated:

> *"... the appellant's (plaintiff's) claim should be dismissed because no duty of care was owed to a person who suffered mental illness as a result of being told of the death of a family member, having regard to the common law as modified by s 33 of the Civil Liability Act 1936 (SA)."* [underlining added]

20. Thus the duty issue, having been raised by the appellant for the first time in the Full Court in this way did not complain of any error in the analysis of the trial Judge as to foreseeability, nor error of the factors to be weighed, nor of a failure to scrutinise the circumstances, but raised a discrete submission that notwithstanding the terms of s.33 "*no duty of care was owed to a person who suffered mental illness as a result of being told of the death of a family member*" [underlining added].

21. Further, the consideration of the duty question by Gray J at [19] and [20] needs to be considered in conjunction with the findings by the Full Court as to causation at [31 – 44] which findings are relevant as to firstly, the circumstances to be had regard to, and secondly, as to the reasonableness of imposing a duty.

Section 53(1)(a) of the CLA

22. As to the appellant's submissions at [25] to [32], Sulan J pointed out that the current provision in s 53 has essentially remained unchanged since it was introduced in 1986 as s 35A(1)(c) of the *Wrongs Act 1936* with the purpose of recognizing the result of *Jaensch* [FC [58 - 60]].

23. Further, as to the observation by Sulan J that s 30(2)(a) of the NSW Act was not in identical terms to s 53 of CLA, Sulan J identified the question that arose as one of statutory construction, namely whether the phrase "witnessed, at the scene, the victim being killed, injured or put in peril", (being the NSW provision construed in *Wicks v State Rail Authority of NSW* (2010) 241 CLR 60), has the same meaning (so as to include the aftermath) as "was present at the scene of the accident when the accident occurred" for the purposes of the South Australian Act [FC [52].

24. As to [27] and [28] and the absence of the words "or their aftermath" in s 53 contained in Recommendation 34 of the Ipp Committee Report, it was observed by Sulan J that the predecessor of s 53 (s 35A(1)(c) of the *Wrongs Act* (which was re-enacted (essentially unchanged) as s 53) did encompass the aftermath of an accident despite the absence of such words [FC [60]; that such a conclusion was supported by the legislative history and purpose of the section and by the plain reading of the section [FC [60]. In addition it was also supported by the common law [FC [55].

25. As to [28] Sulan J also considered the decision of *Hoinville-Wiggins v Connelley* [1999] NSWSC 263 and the then s 77 of the *Motor Accidents Act 1988* (NSW) when the New South Wales Court of Appeal considered the construction of the phrase "when the accident occurred" [FC [61 – 62]] and distinguished the legislation and that authority.

26. In relation to [32] Parker J, before referring to the definition of the terms "accident" and "motor accident", indicated that he generally agreed with the reasons of Gray and Sulan JJ.

Part V: APPLICABLE CONSTITUTIONAL PROVISIONS

27. Not applicable.

Part VI: RESPONDENT'S STATEMENT OF ANSWERING ARGUMENT

EXISTENCE OF A DUTY OF CARE *[28 – 71]*

28. The finding that *"plainly a duty was owed"* [FC [20]] and the way that duty was addressed did not treat foreseeability as determinative. The Full Court's treatment of those issues reflected the way that the issues were treated at trial, that there was no real contest as to the existence of a duty. It also reflected that the issue of the existence of a duty of care involved, in the circumstances of the case, an established category of case in which the common law has imposed a duty on a class of persons (motorists) to take care of other road users (including a sibling or close family member of the latter). It was not such a category of case that required that the scope and or content of the duty was to be determined by considering not only reasonable foreseeability of the risk of harm occurring, but by examining the features of the relationship between the plaintiff and the defendant.

29. It is not attended by doubt or error that the scope of the duty is defined in the circumstances of this case, as extending:

> *To take reasonable care in the driving and management of the car to avoid causing death to his passenger and that it was reasonably foreseeable that a sibling, of normal fortitude, coming upon the scene of this collision, including its aftermath, would on hearing of his brother's death suffer mental harm.* (Headnote [2] FC; TJ [90]; FC [20])

30. It is for the tribunal of fact to determine whether the defendant ought to have reasonably foreseen that his or her conduct might cause a person of normal fortitude to suffer psychiatric injury: *Tame v NSW; Annetts v Australian Stations* (2002) 211 CLR 317 (*Tame/Annetts*) per Mc Hugh J at [115].

Determination of Duty (foreseeability)

31. The Appellant seems to accept [38, 39] that the determination of duty by foreseeability is determined in a prospective way. Essentially it is to be determined in the abstract,

particularly in a recognised category of duty (road users) whereas in other categories, such as in *Tame/Annetts* it may need more scrutiny.

32. As to the class of persons of which the plaintiff forms a part, namely sibling, the foreseeability and scope of the duty was properly addressed by the Full Court and TJ.

33. The imposition of ***a requirement of*** seeing the carnage of an accident in relation to the class of persons of rescuers [40] might be appropriate to such class but is not equally appropriate to a class based on a close family relationship with the primary victim.

34. Section 33 addresses all scenarios: a gardener leaving a rake in a passageway, a supermarket operator suffering liquid to be spilt in an aisle, a teacher failing to supervise children in a playground, a driver getting behind the wheel of a modern motor vehicle. In some scenarios the risk might not be seen to extend to more than a cut, or abrasions, or a broken arm. In others death might ensue. These are the "circumstances of the case".

35. In the case under appeal the circumstances were – driving a motor vehicle[6] – passenger – relationship (sibling) between passenger and plaintiff – death of passenger – mental harm suffered as the result of a 'sudden shock' [TJ66]. Whilst not stated by the trial judge a 'background of insurance practice'[7] should be a circumstance.

36. It was open on the findings of fact that an additional 'circumstance' was available as further support for the existence of duty, namely, the plaintiff witnessing, at the scene, the circumstances of a person being killed or in peril, but not realising until shortly thereafter that it was his brother (s.33(2)(a)(ii)).

37. Para [41] of the appellant's submissions poses a question which is not warranted by s.33 of the CLA. Section 33 does not replace the common law as it relates to 'nervous shock' but acts upon it by way of modification.[8] Under s.33 mental harm must be foreseeable in the terms of the section "in the circumstances of the case".

38. S.33 directs a question as follows: would a person getting behind the wheel of a motor vehicle with a passenger foresee that if he so drives as to cause the death of the passenger a close relative who is present at the scene of the accident in its aftermath might suffer psychiatric injury when later apprised of the fact that the victim of the accident was deceased, and, whilst hitherto anonymous, was in fact his sibling?[9]

39. The appellant [43] argues that a duty of care to the recipient of distressing news in the absence of a pre-existing relationship or undertaking is not warranted. This submission

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6 Cf. the 'nature of the activity' in *Tame/Annetts*: per Gleeson CJ at [23]-[28].
7 Gleeson CJ in *Tame/Annetts* at [15].
8 *Wicks* at [[22] – [31].
9 This scenario is remarkably similar to *Jaensch*, refer Hayne J in *Tame* at [263].

invites a reconsideration of the common law as it addresses 'nervous shock', rather than considering how s.33 impacts on the determination of duty.

Shock

40. The South Australian legislature has moved away from describing the harm from "nervous shock" to "mental harm".[10]

41. The control criteria requiring that the mental injury arise out of shock or shocking events was the subject of considerable criticism both in Australia; *Coates & Coates v General Insurance Office (NSW)*[11] and UK[12] before it was discarded as such in *Tame/Annetts* and *Gifford v Strang Patrick Stevedoring pl* (2003) 214 CLR 269. Before *Tame/Annetts* the Queensland Supreme Court of Appeal in 2001 held that direct perception of a tort or its immediate aftermath was not required in order to establish an entitlement to damages (*Hancock v Wallace* (2001) Aust Torts Reports 81-616), which approach was confirmed by *Tame*.

42. Gleeson CJ in *Tame/Annetts* [41] observed that the circumstances may not have been likely to result in a sudden sensory perception of anything by the appellants but it was clearly likely to result in mental anguish of a kind that could give rise to a recognised psychiatric illness.

43. Similarly, Gaudron J [65] in *Tame/Annetts* said that once a plaintiff is a person who would be closely affected by harm through negligence to their son and it was readily foreseeable that, in that event, persons of normal fortitude in their position might suffer a recognised psychiatric injury:

> *"... there is no principled reason why liability should be denied because, instead of experiencing sudden shock, they suffered psychiatric injury as a result of uncertainty and anxiety culminating in the news of their son's death."*

44. Gummow and Kirby JJ in *Tame/Annetts* referred to advances in the capacity of medicine [183], analysed the previous control requirement of shock [186], [204], [213], and remarked that a more significant causal factor for the development of mental harm is not "direct perception" but the relationship between the plaintiff and the accident victim [222].

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10 Referred to as "mental or nervous shock" in s.28 of the *Wrongs Act, 1936-1975* (SA), s.35A(10(c) [1986], s.24C [2002], changed in 2002 to refer only to "mental harm" in s.33 and s.53 of *Civil Liability Act 1936* (SA)].

11 (1995) 36 NSWLR 1 per Kirby J in dissent (whose views were ultimately accepted in *Tame*) at [15]to [22] and the cases and academic articles referred to therein).

12 *Scneider v Isovitch* (1960) 2 QB 430 referred to by Kirby J in *Coates* op. cit. at [15]; *Hevican v Ruane* [1991] 3 All ER 65; *Ravenscroft v Rederiaktiebolaget Transatlantic* [1991] 3 All ER 73 at pp. 76 – 78.

45. Therefore the present Australian position is that for liability for negligently caused psychiatric injury it is not an essential requirement that it is caused by a sudden shock, or that there is direct perception of distressing phenomenon or its immediate aftermath; *Tame/Annetts* per Gleeson CJ agreeing with Gummow and Kirby JJ [18], [51], [66]; Hayne J [305] considerations of "shocking" event and closeness of connection did not affect the finding of duty of care but are significant in deciding whether the duty was breached; see also [210], [213], [225].

46. Nevertheless s.33(2)(a)(i) requires consideration of the existence or otherwise of a 'sudden shock' as one circumstance.

Close Relationship

47. The High Court in *Tame/Annetts* and *Gifford* recognized that the familial relationship of parent and child was sufficient to give rise to a foreseeable duty to such a class. The principle is not limited to such class, as McHugh J remarked in *Gifford* at [50]:

> *"Nor can the wrongdoer reasonably disregard some other close and loving relationships. Husband and wife, sibling, defacto partners and engaged couples, for example, almost invariably have close and loving relationships. No doubt the parties to such relationships may sometimes be estranged. Despite this possibility, however, so commonly are these relationships close and loving that a wrongdoers must* ***always*** *have such persons in mind as neighbours in Lord Atkin's sense whenever the person harmed is a neighbor in that sense. To require persons in such relationships to prove closeness and loving nature of the relationship would be a waste of curial resources in the vast majority of cases. The administration of justice is better served by a fixed rule that persons in such relationships are "neighbours" for the purposes of the law of nervous shock and the defendant must always have them in mind. Similarly, the wrongdoer must* ***always*** *have in mind any person who can establish a close and loving relationship with the person harmed."*

48. Gleeson CJ in *Gifford* [10] identified that the relationship was important in two respects, firstly it goes to foreseeability of injury being not beyond "common experience of mankind" and secondly, it bears on the reasonableness of recognising a duty on the part of the defendant. Gleeson CJ concluded that children were in such a class so as to be in contemplation of risk of consequent psychiatric injury [12]. Gummow and Kirby JJ remarked [86] that the "*neighbourhood*" principle encapsulated by Lord Atkin in *Donoghue v Stevenson* that children of an employee are:

> *"persons who are so closely and directly affected by my act that I ought to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question."*

49. Gaudron J in *Tame/Annetts* [49], [50], [52], [53] referring to *Jaensch* extending the class of persons to who a duty is owed to avoid a foreseeable risk of psychiatric injury

to a close and intimate relationship with another who has been negligently killed or injured said that the categories of claimants is not closed.

50. Recovery by siblings has been upheld in Australia[13], England[14] and other jurisdictions.[15]

51. Section 33(2)(a)(iii) requires consideration of the relationship between "plaintiff and any person killed...etc."

Antecedent Relationship

52. No relationship analogous to that in *Annetts* and *Gifford* was necessary for the existence of a duty in a road accident case. Both those cases dealt with the injury (death) arising in employment, and further they involved claims based on being told of the death and there was an absence of exposure to the aftermath.

53. As to [52], of the appellant's submissions the existence of a prior relationship (employer/employee in *Gifford*) or a prior assumption of responsibility (*Annetts*) is a consideration where there is no prior established category of duty and for the purposes of ascertaining whether there is an Atkinian "neighbour" i.e. as to whether a person or class of persons should be within the reasonable contemplation of the defendant for the purposes of postulating a duty. Clearly a close family member of a road user is an Atkinian "neighbour" to give rise to a duty. So in *Gifford* per Hayne J at [101] the pre-existing relationship between the three parties, in that case employee, employer and children (in the present case passenger, driver and sibling) ***coupled*** with reasonable foresight of the particular harm suffered, required the conclusion that a duty to take reasonable care to avoid psychiatric injury was owed by the employer to the employee's children (in the present case by the driver to the passenger's sibling).

54. Section 33(2)(a)(iv) requires consideration of a pre-existing relationship. The trial judge gave consideration to this circumstance and found there was not one.

Section 33

55. The respondent says that it is necessary to come back to s.33 and ***consider the circumstances***. For example, a duty would be readily accepted in respect of a mother

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13 *Storm v Geeves* [1965] Tas SR 252 at 266 – 267; *Gannon v Transport Accident Commission* (Unreported, Vic AAT, No 1995/17514, 1997); *Quayle v New South Wales* (1995) Aust Torts Rep 81-367.

14 *Owens v Liverpool Corporation* [1939] 1 KB 394; *Mortiboys v Skinner* [1952] 2 Lloyd's Rep 95; *Turbyfield v Great Western Railway Company* (1937) 54 TLR 221; *McCarthy v Chief Constable of South Yorkshire Police* (Unreported. Eng QBD, 11 December 1996.

15 *Cameron v Marcaccini* (1978) 87 DLR (3d) 442; *Harvey v Cairns* 1989 SLT 107 (Scotland); *Bester v Commercial Union Versekeringsmaatsky van SA Bpk* 1973 (1) SA 769 (A); *Dillon v Legg* 441 P 2d 912 (Cal 1968).

who witnesses a collision (apparently nasty) between a motor vehicle and her son riding a bicycle, notwithstanding that (unbeknown to her) the son had only suffered abrasions. On the other hand, a duty would not be found in respect of the same mother who did not witness the accident but is told that her son was knocked off his bike but had only suffered abrasions.

56. Section 33 must be understood against the background provided by the common law: *Wicks* at [24]. Where the psychiatric injury was sustained as a result of the combined effect, of what the plaintiff observed and what he or she was told, recovery is not precluded; *Jaensch*[16] per Deane J[17] speaking with majority support.

57. See also the authorities referred to in *Jaensch*[18] of *Benson v Lee*[19] where Lush J allowed a claim based upon "*direct perception of some of the events which go to make up the accident as an entire event, and this included ... the immediate aftermath*"[20] and *Storm v Geeves*[21] where psychiatric injury resulted from the combined effect of the report of the accident and the plaintiff's subsequent observation of its aftermath. In *Pham v Lawson,*[22] of the seven stressors identified by the trial judge, which included being woken and told by the police that her child had died, the only stressor connected to the accident scene was being driven to the hospital and seeing the lights at the scene of the accident.[23]

58. The findings of the Full court as to causation are relevant as to the respondent's attendance at the scene of the accident and his awareness on his fourth visit that there had been an accident causing extensive vehicle damage and he realised that the occupants of the last one of the vehicles was likely to have suffered horrific injuries and may well have been killed FC [40]. The finding at FC [32]:

> "*It is evident that he was in a state of some mental anxiety, with feelings of guilt and self-blame at not having stopped and attended to his brother. It was common ground that his brother had not died instantly but had survived for some time.*"

Finding of Duty

59. The description of what constitutes duty of care is no doubt a statement of law. The existence of a duty of care has been said to be a question of law.[24] There are however

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16 (1984) 155 CLR 549

17 Supra at 607-8.

18 Supra per Brennan J at 567-70 and Deane J at 607-8.

19 [1972] VicRp 103; (1972) VR 879

20 Supra at p. 880.

21 [1965] TASStRp 22; (1965) Tas SR 252.

22 (1997) 68 SASR 124.

23 Op. cit. per Lander J at p. 144 that it is a matter of degree and common sense as to whether a duty of care arises and as to whether the involvement of the person who suffered nervous shock was sufficiently close in terms of relationship, involvement or perception.

24 *Wicks* at [33]; *Amaca PL v NSW* [2003] HCA 44 at [26]; *Cole v Sth Tweed Heads Rugby Club*

conflicting statements to the effect that the finding that a duty of care was owed in a particular case is a finding of fact (*Pham v Lawson*[25]). The position might best be expressed with respect to s.33 as being that the existence of a duty of care involves an anterior question of law based however on findings of fact (the "circumstances of the case"). Whatever, the appellant's challenge to the finding of duty is a challenge to the finding of a tribunal of fact as to reasonable foreseeability in the circumstances of the case at bar, being a concurrent finding by the trial judge and an intermediate court.

60. There is no error of principle nor in matters taken into account in the determination of the duty question. It is not demonstrated that an irrelevant circumstance was taken into account nor of a failure to take into account a relevant circumstance that may lead to the rejection of a duty.

Policy

61. The case at bar does not represent a novel category of negligence such as to activate the principle enunciated by Brennan J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 480 that the law should develop incrementally.

62. As to paragraph [44] of the appellant's submissions it would be a distortion of the cohesion of the common law if the appellant's contention is adopted. Arbitrary results would follow.[26] To the extent that it involves the floodgate argument it is exaggerated. As observed by the learned authors of Mullany & Handford's *Tort Liability For Psychiatric Damage* (Second Edition) (2006) (Thomson Law Book Co.) at p. 265 [9.400]:

> *It is only in comparatively rare cases that the relative's suffering will be so extreme as to amount to a recognised psychiatric illness.*

63. The response by *Ipp* was to recommend the codification of the common law of Australia as developed by *Tame/Annetts* and *Gifford* [Recommendation 34]. As to recommending a "list of eligible relationships", after expressing difficulty of justifying a list of relationships in a principled way, a list was suggested which included siblings (including half and step siblings) ([9.27] of Recommendations).

Conclusions on Duty

64. Section 33 does not purport to make the list of circumstances exhaustive (the circumstances of the case to which the court is to have regard "***include***" the following). Even if the present case was one of purely "told nervous shock" (which it is not) this of itself does not lead to a denial of a duty. The principle that arises out of *Tame/Annetts* and *Gifford* is that where there is a relationship sufficient to give rise to the Atkinian

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[2004] HCA 29 at [56]; *Vairy v Wyong Shire Council* [2005] HCA 62 AT [62].

25 (1997) 68 SASR 124, per Lander J for the Full Court at 144. See also Brennan J in *Jaensch* at 571 and Deane J at 585.

26 Refer Gummow and Kirby JJ in *Tame/Annetts* at [221], [236].

"neighbour", psychiatric injury caused by receipt of distressing news alone (told nervous shock) is reasonably foreseeable.[27] As is rightly conceded by the appellant, *Tame/Annetts* has removed the requirement of "direct perception" as a strict requirement.

65. As to the appellant's submission [66], the extension of liability by *Tame/Annetts* was not considered by that court, and is not, inconsistent with existing rights and obligations in relation to intentional wrongdoing,[28] solatium[29] nor with the long established principle that grief is not compensable. Any difficulty in distinguishing between compensable effects and non-compensable grief has not been and is not a barrier to recovery.[30] It also fails to take into account advances in psychiatry and the ability to distinguish between the two. The present case does not involve "a new sphere of liability"; it involves recognition of a duty on drivers of motor vehicles not to cause psychiatric injury to close relatives of a person who might be killed by their negligent driving.

66. Paragraphs [67] and [68] of the appellant's submission fail to address the "circumstances" to which s.33 directs the fact finder. In the case at bar those circumstances include death of a near relative, presence at the scene of the accident, the sudden onset of the psychiatric injury in the circumstances of guilt felt by the plaintiff as a result of him being present at the scene but doing nothing.

67. Contrary to the appellant's submission [70] there is no error in relation to the weighing of the relevant considerations by the Full Court, nor did the Full Court or the trial Judge treat foreseeability as a sufficient criterion of the existence of duty.

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27 *Quayle v New South Wales* op.cit.; mother and 3 brothers who suffered shock following the death of a son and sibling (respectively) who hanged himself in a police cell recovered damages, wherein the case of two of the siblings it was the communication of the news of the brother's death which caused them to suffer psychiatric injury;

28 See the analysis of the *Wilkinson v Dowton* principle in Mullany & Handford's *Tort Liability For Psychiatric Damage* (Second Edition) (Thomson Law Book Co.) at pp. 677 – 716.

29 As to an action for wrongful death, it is not a claim for a direct injury to the plaintiff i.e. a psychiatric injury but a derivative claim for the injury to the "primary victim". It was developed by statute as a result of a refusal to recognise anyone other than the primary victim to take action against the tortfeasor. In SA it is now the CLA (ss. 23 – 30).The class of persons entitled to claim for wrongful death are limited to spouse, domestic partner, parent, brother, sister and child (s.24), solatium is limited to a parent of an infant's death (s. 28) and a surviving spouse or domestic partner, in each case capped as to not exceed $10,000. Importantly, s.30(1) provides that the rights conferred by ss. 28 & 29 "shall be in addition to and not in derogation of any rights conferred on the parent, spouse or domestic partner by any other provision of this Act." Such other provisions include recovery for mental harm under s.33. Other damages are limited to funeral expenses, loss of consortium, loss of dependency and loss of nurturing. The modern approach is to treat mental illness as a primary injury arising out of the tort. As to survival of causes of action legislation, the action is limited to the "primary victims" past losses (past special damages, past economic loss). Such statutory exceptions were at a time when the tort of negligence was at an early stage of development.

30 See the South Australian Full Supreme Court in *Pham v Lawson* (1997) 68 SASR 124 which reduced damages to reflect that grief and bereavement were not compensable.

68. The issue agitated before the Full Court was on a limited aspect of the duty question, namely, as to whether foreseeability encompassed mental illness arising from told mental harm.

69. Gray J in the Full Court [19], [20] was clearly addressing the specific issue raised by the appellant and by reference to how the trial Judge dealt with the duty.

70. As to [71], presence at the immediate aftermath of the accident is never irrelevant to the duty enquiry, it being a circumstance in s.33 and the common law. It militates in favour of existence of a duty as it is connected in closeness of time and space to an accident, being the basis of the policy requirements of the previous control criteria. There is no basis for the appellant to assert that the plaintiff 'did not even witness anything distressing'.

71. Whether the matter of duty is considered at the appropriate level of generality (or abstraction) [72] or at a more specific level [73], there is sufficient to support the findings of the Full Court and the trial Judge that a duty was owed given the sort of circumstances to which s.33 directs. It was reasonable that a finding of duty of care was made in light of all the circumstances of the case.

DAMAGES: THE RESTRICTION – S.53

72. It is appropriate to consider s.53 in the context of s.33. S.53 acknowledges that s.33 will recognize a duty in circumstances where nevertheless Parliament considers that there must be a recognition that remoteness justifies a particular limit on recovery beyond what the common law might impose.[31]

73. Section 53 (1) of the CLA requires that a person, not being a close family member as defined, must be present at the scene of the accident when the accident occurs.

74. A different provision confining damages was considered in the cases of *Hoinville - Wiggins* and *Spence v Biscotti* [1999] ACTSC 70 which involved interpretation of section 77 (a) (ii) of the *Motor Accidents Act 1998* (NSW). That section is in quite different terms to s.53 of the CLA.

75. Moreover, the New South Wales legislation did not have a definition of accident as provided in the Civil Liability Act: s.3(1). That definition[32] is broad enough to

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31 *Jaensch*, per Gibbs CJ at 552-3 and Deane J at 585-6. *Tame/Annetts*, per Brennan CJ at [12].

32 Relevantly, "accident means an incident out of which personal injury arises.", and, personal injury means bodily injury and includes death.

encompass ongoing injury as the respondent's brother's condition worsened to the time of eventual death.

76. The respondent was present at the scene of the accident during this period and could therefore be said to be present at the scene of the accident when the accident occurred on this ground alone.

77. Such is consistent with the approach taken by the High Court in *Wicks* in relation to the finding that observing someone dying from the injuries would suffice to satisfy the requirement of having to witness a person being killed and confirms the observations of Gray J in the Full Court of the obvious relevance of *Wicks* to the respondent's case.

78. S.33 falls for consideration before the limitation upon entitlement to damages imposed by s. 53; *Wicks*, [15], [22].

79. Section 53 is a provision that arbitrarily excludes damages that would otherwise be available under the duty section, s.33. Section 53 is an alteration to the common law such as to ***restrict*** liability for damages.

80. In these circumstances s.53 will be construed strictly so as to impact the common law only to the extent that it clearly impacts and no further. The position is encapsulated by Burchett and Ryan JJ in *Thompson v Australian Capital Television PL* (1994) 54 FCR 513 at 526:

> *"Statutory reforms removing a particular plank from the edifice of the common law do not necessarily bring down whole sections of the structure just because a rule expressly changed or abolished had an historical or logical connection with other rules of the common law. To forbid such a consequence the rule has been established (and should be adhered to...) that acts altering the common law should be construed as doing so only so far as necessary to give effect of their provisions."*

81. The High Court in *Balog v Independent Commissioner against Corruption* (1990) 169 CLR 625 at 635-6 observed, *"That where two alternative constructions of legislation are open, that which is consonant with the common law is to be preferred"*.

Presence at the scene of the accident

82. When the definition of accident is applied[33] the requirement under section 53 is that the respondent be present at the scene of an incident out of which death arises. In that sense the incident is not complete until death has occurred. This did not occur until 5:30 pm.

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[33] Footnote 32.

83. The relevant words in s.53 are *"or was present at the scene of the accident when the accident occurred"*. Contrary to the trial judge's observation at [58], s.30 of the *NSW Act* is ***not*** similar (at least in this respect) to s.53 of the Act under consideration.[34]

84. What then does s.53(1)(a) require to establish *"presence at the scene of the accident"*? Clearly it is necessary that the subject person be ***at*** the scene in the sense of being in a location from which the accident was apparent. It must be apparent to the subject person at least directly through one of the five senses. There is no suggestion in the section that blind persons are excluded.

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85. Beyond that, however, there is no requirement that the subject person see or hear anything, for example, associated with *"a parent, spouse, etc"* addressed in s.53(1)(b). The placita are otherwise unrelated.

86. Presence at the immediate aftermath of the accident is sufficient for the purposes of s.53(1)(a).

87. The scene of an accident in cases of death, injury or being put in peril are not events that begin and end in an instant or are measured in minutes but can take place over an
20 extended period and continue whilst persons are trapped in wreckage or remained in peril; *Wicks.*[35] As with s.33, s.53 must be understood against the background of the common law.

88. A road accident and its aftermath is not confined to "the immediate point of impact". It includes the aftermath of an accident which encompass events at the scene after its occurrence, including the extraction and treatment of the injured; *Pham v Lawson.*[36]

89. This result is supported by the legislative history. The predecessor of the current s.53 was originally introduced by the *Wrongs Act Amendment Act, 1986* as s.35A(1)(c). The
30 Second Reading Speech referred to the decision of *Jaensch* and identified that the purpose was not to significantly alter the law as it currently stood.[37]

90. There were further amendments in 1998 to the *Motor Vehicles Act* and the *Wrongs Act* by the *Statutes Amendment (Motor Accidents) Bill 1998.* At the Second Reading speech in the House of Assembly there was reference to the amendment in 1986 inserting s.35A(1)(c) of the *Wrongs Act.* That provision was retained. The purpose was identified

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34 S.30(2) of the *Civil Liability Act 2002 (NSW)* (refer ***Wicks*** at [11]) requires that: "(a) the plaintiff witnessed, at the scene, the victim being killed injured or put in peril, or (b) the plaintiff is a close family member of the family of the victim." Introduced in 2002 after the *Ipp* report.

35 Supra. at [44], [46], [49]-[51].

36 [1997] SASC 6086 (25 March 1997) (Full Ct) per Lander J (Cox and Bollen JJ agreeing) at paras. 108 and 109; 68 SASR 124.

37 See Hansard, Legislative Council, 27 November 1986, p. 2410 (1st column at .2 the passage: *"The Bill also provides .... this head of damage."*

as to limit compensation to persons at the scene, or family members who sustained nervous shock as a result of being at the scene or immediate aftermath of a motor vehicle accident.[38]

91. The mischief was identified as there being doubt as to whether or not damages for nervous shock can be awarded where communication about the accident was the only link between the accident and the nervous shock. In particular there was concern that it covered those who receive news of the accident via the media, which would increase the number of potential claimants who were not previously considered in premium setting calculations.[39]

92. S.35A(1)(c) was replaced by s. 24C of the *Wrongs Act*[40] which essentially re-enacted the section.[41] The Second Reading Speech in the House of Assembly identified the purpose of the amendment to extend the provision to other personal injury cases i.e non-motor-vehicle cases.[42]

93. S.24C of the Wrongs Act was re-enacted as s.53 of the *Civil Liability Act*[43] with the addition of subsections 2 and 3 providing that damages may only be awarded for pure mental harm if the harm consists of a recognised psychiatric illness and similarly for economic loss resulting from consequential mental harm. At the same time, s.33 – (Mental harm – duty of care) was enacted.

94. The Second Reading Speech in the Legislative Council identified the purpose of the new sections 33 and 53 dealing with mental harm and how they relate to *Ipp* recommendations 34 and 37 and:

> "*For the most part, they restate the existing law, but there is a departure ... Ipp proposed that, in the case of consequential mental harm, damages for economic loss should be recoverable only if the mental harm amounted to recognised psychiatric illness. .....Proposed new section 53 embodies this rule.*"[44]

95. Section 53 remained unchanged as to the requirement for presence at the scene of the accident when the accident occurred. This is consistent with the stated purpose of the

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38 Hansard, House of Assembly, 18 August 1998, the passage: "*The second is for nervous shock .... an amendment to restore this provision.*"

39 Ibid.

40 Operative from 1 December 2002.

41 The only change was to take out a comma, and deleting references to a driver or passenger, and reversing the order of the wording, from "*or who was, when the accident occurred, present at the scene of the accident*" to "*or was present at the scene of the accident when the accident occurred*".

42 Hansard 14 August 2002 at p.1034, second column at .7.

43 Operative from 1 May 2004.

44 At that time in a case of consequential mental harm, damages were payable regardless of whether the mental harm amounted to a psychiatric illness or was merely mental distress.

section, referred to in the Second Reading Speech, that for the most part the sections "*restate the existing law*".

96. The Ipp recommendation 34, referred to in the Second Reading Speech, included recovery for pure mental harm where "*the plaintiff was at the scene of shocking events or witnessed them* ***or their aftermath***"[45] [emphasis added] and "*whether the plaintiff witnessed the events* ***or their aftermath*** *with his or her own unaided senses*"[46]

97. It was unnecessary for the Parliament to specifically refer to the aftermath as it was already established that the aftermath was included. Parliament did not move to legislate to restrict the principle in *Jaensch* that the aftermath was included, other than to restrict the class of persons who could recover damages. Indeed Parliament otherwise accepted the principles established by *Jaensch.*

98. The Full Court distinguished *Hoinville-Wiggins* and the legislation dealt with by that authority. Sulan J considered the decision of *Hoinville-Wiggins* and the then s 77 of the *Motor Accidents Act 1988* (NSW) [FC [61 – 62]]. He said that the legislation can be distinguished on a number of bases, firstly the then NSW provision did not contain a definition of accident, unlike the CLA provision which defines it as an "incident" being broad enough to encompass the events directly related to and flowing on from the actual impact [FC [64]], secondly there was an absence of an equivalent provision of s 33 and therefore the absence of the statutory context, as observed in *Wicks* [FC [64 – 67].

99. Contrary to the appellant's submission [78] Gray J was not in error in observing that *Wicks* had "*obvious relevance*" to the construction of s 53.

Part VIII: ESTIMATE OF THE HOURS REQUIRED TO PRESENT ARGUMENT

100. The respondent estimates that the presentation of his oral argument will require two hours.

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45 Recommendation 34 (c)(ii), *Review of the Law of Negligence Final Report* (Chairman the Hon Justice David Ipp), September 2002 (the *Ipp Report*), pp. 144.

46 Op. cit., Recommendation 34 (c) (iii).