KING ..... APPELLANT;
DEFENDANT,

AND

PHILCOX ..... RESPONDENT.
PLAINTIFF,

[2015] HCA 19

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA

HC of A 2015

ADELAIDE *March* 10, 11;

CANBERRA *June* 10 2015

French CJ, Kiefel, Gageler, Keane and Nettle JJ

Negligence — Duty of care — Mental harm — Motor accident — Negligent driving causing death of passenger — Brother of deceased witnessing aftermath of accident — Subsequent suffering of psychiatric illness — Liability of driver — Whether brother "present at the scene of the accident when the accident occurred" — Civil Liability Act 1936 (SA), ss 33(1), 53(1)(a).

Section 33(1) of the *Civil Liability Act 1936* (SA) provided that 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. The term "mental harm" was defined by s 3 to mean "impairment of a person's mental condition". The term "psychiatric illness" was not defined. Section 53(1)(a), which was in a Part of the Act which applied where damages were claimed for personal injury arising from a motor accident or from an accident caused wholly or in part by negligence, provided that damages could only be awarded for mental harm if the injured person (other than a parent, spouse or child of the person killed, injured or endangered in the accident) was physically injured in the accident or was present at the scene of the accident when the accident occurred.

As a result of the driver's negligence a car collided with another car at an intersection. A passenger in the first car died while trapped in the car. The deceased's brother drove through the intersection and noticed that an accident had occurred. He drove several times through the intersection in the evening while the damaged vehicles were there. He was later told that his brother had been killed in a motor accident. He then made the connection with what he had seen at the intersection earlier in the day and was devastated by the thought that, although he had been present, he had not known that his brother was involved and had not stopped to help. He suffered distress and grief as a result of the events. It was accepted that he suffered mental harm consisting of a recognised psychiatric illness in the

nature of a major depressive disorder with significant anxiety-related components of a post-trauma stress reaction. He sued the driver of the car for damages for mental harm.

Held, that, although in the circumstances the driver owed the deceased's brother a duty of care not to cause him mental harm, the claim was defeated because the deceased's brother had not been present at the scene of the accident when the accident occurred within the meaning of s 53(1)(a) of the *Civil Liability Act*.

Wicks v State Rail Authority (NSW) (2010) 241 CLR 60, distinguished.

Hoinville-Wiggins v Connelly (1999) 29 MVR 169 and *Spence v Biscotti* (1999) 151 FLR 350, approved.

Jaensch v Coffey (1984) 155 CLR 549, considered.

Decision of the Supreme Court of South Australia (Full Court): *Philcox v King* (2014) 119 SASR 71, reversed.

APPEAL from the Supreme Court of South Australia.

Ryan Philcox sued George King in the District Court of South Australia for damages for mental harm caused by him as the negligent driver of a car which was involved in a collision in which Scott Philcox, a brother of the plaintiff was killed. The facts concerning the plaintiff's connection with the collision are set out in para [5] of the joint judgment of French CJ and Kiefel and Gageler JJ below.

Judge Bampton held that the defendant owed the plaintiff a duty of care; that the plaintiff had suffered mental harm within the meaning of the *Civil Liability Act 1936* (SA), consisting of a recognised psychiatric illness, as a result of sudden shock on receiving the news of his brother's death; that the plaintiff did not witness, at the scene of the accident, his brother being killed, injured or put in peril and hence was not present at the scene of the accident when the accident occurred, as required by s 53(1)(a) of that Act; and that, if the preceding conclusions were wrong and the plaintiff was present at the scene of the accident when the accident occurred, that circumstance did not cause the mental harm he had suffered; it had been caused when he later received the news of his brother's death.

The plaintiff appealed from the judgment to the Full Court of the Supreme Court (Gray, Sulan and Parker JJ). The defendant filed a notice of contention challenging the finding that he owed the plaintiff a duty of care. That contention was dismissed and the appeal was allowed. The Court held that the plaintiff had been "present at the scene of the accident when the accident occurred" within the meaning

of s 53(1)(a) and that he had thereby satisfied the statutory condition for the recovery of damages for pure mental harm (1).

The defendant was granted special leave by French CJ and Keane J to appeal to the High Court from the judgment of the Full Court on the undertaking that he would not seek to disturb orders as to costs in the plaintiff's favour that had been made in the Supreme Court and that he would pay the plaintiff's costs of the appeal, including the costs of the application for special leave, in any event. The grant of special leave to appeal was limited to the grounds (a) that the Full Court erred in finding that the defendant owed a duty of care not to cause the plaintiff mental harm by learning about the death of his brother in a motor accident: (i) the Court erred in finding that the existence of a duty of care was determined solely by reference to s 33(1) of the *Civil Liability Act*; (ii) the Court erred in finding that a reasonable person in the position of the defendant would have foreseen that a person of normal fortitude in the plaintiff's position might, in the circumstances of the case, have suffered psychiatric illness within the meaning of s 33(1); (b) that the Full Court erred in overturning the finding by the trial judge that the plaintiff was not "present at the scene of the accident when the accident occurred" as was required by s 53(1)(a).

M C Livesey QC (with him *B J Doyle*), for the appellant. The resolution of the question arising under s 33(1) of the *Civil Liability Act* is informed by the common law considered in *Tame v New South Wales* (2) and *Wicks v State Rail Authority (NSW)* (3). [GAGELER J. Does the common law question have to be addressed before s 53(1) can be?] *Wicks v State Rail Authority (NSW)* (4) requires a view to be formed about the extent of the duty before a view is formed about the extent of the statutory limitation. Counterparts of s 53 in other jurisdictions differ in terms but the duty of care does not. This case is within the category of nervous shock from communication or news of an event, not from things seen or heard at the scene of an accident. The cases provide a base from which to consider the recognition of a duty of care by ordinary common law technique. In motor accident cases a duty has been recognised in favour of a spouse who witnessed the immediate aftermath of an accident (5) or to rescuers who may be expected to see distressing scenes. A duty has also been recognised in favour of parents and children who have not witnessed anything

(1) *Philcox v King* (2014) 119 SASR 71.
(2) (2001) 211 CLR 317.
(3) (2010) 241 CLR 60.
(4) (2010) 241 CLR 60 at 69 [15].
(5) eg, *Jaensch v Coffey* (1984) 155 CLR 549.

distressing in an accident or its immediate aftermath but where there has been a pre-existing assumption of responsibility or an employment relationship (6). Where there is no such assumption or employment or other special relationship and where the plaintiff did not see anything that distressed him the question for this case becomes whether the relationship of a sibling alone is sufficient basis to impose a duty of care (7). [FRENCH CJ. Is there not under s 33(1) an overlap between the issue of foreseeability and the nature of the relationship which depends upon particular facts rather than categories?] Reasonable foreseeability is a compound conception of fact and value or policy (8). Relationship is an element in the foreseeability of harm of a particular kind. Foreseeability is directed to the question of whether it is reasonable to require a person to have in contemplation injury of the kind suffered by another and to take reasonable care to guard against it. The distinction between ordinary and abnormal grief which may be regarded as a form of psychiatric illness is magnified in the case of filial relationship. Hence there is a practical difficulty in recognising a duty of care which depends on nothing more than filial relationship.

In applying s 53(1) the Full Court erred in holding that "accident" incorporated the aftermath as that term has been understood in this area of the law (9). [He referred to amendments of the relevant provisions of the *Wrongs Act 1936* (SA) made by the *Wrongs Act Amendment Act 1986* (SA) and to the Second Reading Speech for the Bill for that Act (10).] The plaintiff was not present at the scene of the accident when the accident occurred.

P A Heywood-Smith QC (with him *G Stathopoulos*), for the respondent. Section 33 of the *Civil Liability Act* modifies the common law relating to nervous shock or mental harm. It substantially codifies the law following *Tame v New South Wales* and *Annetts v Australian Stations Pty Ltd* (11), but it leaves some scope for its development within identified limits. Under s 33 mental harm must be foreseeable in terms of the section "in the circumstances of the case", including, but not confined to, four mentioned circumstances. The existence of a duty of care under s 33 involves an anterior question of law based on

(6) eg, *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; *Gifford v Strong Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269.

(7) *Tame v New South Wales* (2002) 211 CLR 317 at 340-341 [52]-[53], 413-414 [280]-[283].

(8) *Tame v New South Wales* (2002) 211 CLR 317 at 356 [108].

(9) *Hoinville-Wiggins v Connelly* (1999) 29 MVR 169.

(10) South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 27 November 1986, p 2410.

(11) (2002) 211 CLR 317.

findings of fact. The common law in Australia as reflected in s 33 does not limit liability for damages for psychiatric injury to cases where the injury was caused by a sudden shock or where a plaintiff has directly perceived a distressing event or its immediate aftermath. [He referred to s 33(2)(a).] The relationship between the plaintiff and the injured person is relevant to foreseeability though not decisive (12). Section 33(2)(a)(iii) requires regard to be had to the nature of the relationship between the plaintiff and any person killed etc. The relevant relationship includes a close familial relationship such as that between siblings. The circumstances of this case include the fact that the plaintiff attended the scene of the accident without awareness of the identity of the victim, made a decision not to stop and render aid, giving rise to overwhelming feelings of guilt when later told of his brother's death. The negligent driver should have contemplated a situation in which a relative of a person killed as a result of his driving came on the scene, made such a decision and later felt guilt. Less specifically, he should have foreseen attendance at the scene of the accident when rescue was being attempted by others. In either case the plaintiff would establish a duty of care at common law, whether or not modified by s 33. The plaintiff saw the immediate aftermath of the accident. His injury was caused by his subsequent appreciation of what he had seen. The distinction between compensable psychological effects and non-compensable grief has been recognised (13). A finding of duty of care was reasonable on the evidence of all the circumstances here.

Section 53 acknowledges that s 33 will recognise a duty of care in circumstances in which Parliament considers that remoteness justifies a limit on recoverability beyond what the common law would impose. Section 53(1)(a) requires a person claiming damages other than a person mentioned in para (b) to have been present at the scene of the accident when the accident occurred. Section 77(a)(ii) of the *Motor Accidents Act 1998* (NSW), considered in *Hoinville-Wiggins v Connelly* (14), was in different terms from s 53. That Act did not contain a definition of "accident" as in s 3 of the *Civil Liability Act*. The s 3(1) definition was sufficient to cover ongoing injury as the injured person's condition worsened to death. The plaintiff was present at the scene of the accident during that period and hence was present when the accident occurred. That is consistent with the approach

(12) *Gifford v Strong Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at 277 [10]-[12], 289 [50], 300 [86].
(13) *Pham v Lawson* (1997) 68 SASR 124.
(14) (1999) 29 MVR 169.

adopted in *Wicks v State Rail Authority (NSW)* (15). Section 53 excludes damages that would be available under s 33. A section having that effect should be construed strictly so as to impact on the common law only so far as it clearly does so (16). A road accident and its aftermath are not confined to the immediate impact. The legislative history of s 53, dating from the insertion in 1986 of s 35A(1)(c) of the *Wrongs Act 1936*, shows that its purpose was not to significantly alter the law stated in *Jaensch v Coffey* (17). It was unnecessary for Parliament to refer to aftermath in the amendments enacted by the *Law Reform Act 2004* (SA) as it was by then established that the aftermath was within the concept of accident. It is sufficient for s 53(1)(a) for the person to be in the location of the accident at which it was apparent directly through one of the senses. [NETTLE J. If the plaintiff was present at the scene of the accident, was he present when the accident occurred?] Occurrence is not confined to actual impact. [FRENCH CJ. The ordinary meaning of "when the accident occurred" would relate to the occurrence of the collision. It is your submission that the phrase encompasses not only a point in time but a period up to and including, in this case, the death of the deceased?] Yes; but it has to be at the scene of the accident.

M C Livesey QC, in reply. The plaintiff did not see anything horrific or distressing at the scene of the accident such as would be assumed to be a requirement from the reference to s 53(1)(a) to presence at the scene of the accident when the accident occurred. This is a case of mental illness caused by communication, potentially a very broad class which is confined by s 53(1).

Cur adv vult

10 June 2015

The following written judgments were delivered: —

FRENCH CJ, KIEFEL AND GAGELER JJ.

Introduction

1 On 12 April 2005 between 4.50 pm and 4.55 pm Scott Philcox was a passenger in a motor vehicle driven by George King, the appellant, in

(15) (2010) 241 CLR 60.

(16) *Balog v Independent Commissioner against Corruption* (1990) 169 CLR 625 at 635-636; *Thompson v Australian Capital Territory Television Pty Ltd* (1994) 54 FCR 513 at 526.

(17) (1984) 155 CLR 549: see South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 27 November 1986, p 2410; South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 14 August 2002, p 1034; Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002), p 144, Recommendation 34(c)(ii), (iii).

Campbelltown, a suburb of Adelaide. As a result of Mr King's negligence the vehicle collided with another at the intersection of Newton/Darley and Gorge Roads. Scott Philcox was fatally injured and died at about 5.30 pm while trapped in the vehicle.

2 The deceased's brother, Ryan Philcox, the respondent to this appeal, heard of the accident, which caused his brother's death, a few hours later. He then realised that he had driven past the location of the accident earlier that day while the vehicle in which his brother was trapped and dying was still there. Subsequently, he developed a major depressive disorder.

3 Mr King was found by the Full Court of the Supreme Court of South Australia (18), on Ryan Philcox's appeal from the District Court of South Australia (19), to be liable to pay Ryan Philcox damages for mental harm. Mr King appeals against that decision on two grounds. The first ground is that he did not owe Ryan Philcox a duty of care. He relies upon s 33 of the *Civil Liability Act 1936* (SA). That section confines the cases in which one person (the defendant) owes a duty of care not to cause mental harm to another (the plaintiff) to cases in which 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, have suffered a psychiatric illness. Mr King contends that the circumstances of the case did not satisfy that necessary condition. The second ground relied upon by Mr King is that because Ryan Philcox was not present at the scene of the accident when the accident occurred, he did not satisfy the condition imposed by s 53(1)(a) of the *Civil Liability Act* (SA) upon recovery of damages for mental harm by someone other than a parent, spouse or child of a person killed, injured or endangered in an accident. While it has not been shown to have erred in finding that a duty of care existed, the Full Court was in error in holding that Ryan Philcox was present at the scene of the accident when the accident occurred within the meaning of s 53(1)(a). That conclusion means that Ryan Philcox was not entitled to recover damages for mental harm and that the appeal must be allowed.

Procedural background

4 Although duty of care was in issue at trial in the District Court, the focus of the case was upon causation and the application of s 53(1)(a). On 10 May 2013, her Honour Judge Bampton made an order that Ryan Philcox was "not entitled to an award of damages for mental harm". She did so in part on the basis that he was not present at the scene of

(18) *Philcox v King* (2014) 119 SASR 71.
(19) *Philcox v King* [2013] SADC 60.

the accident when the accident occurred within the meaning of s 53(1)(a). The Full Court of the Supreme Court of South Australia held that the primary judge had found, and found correctly, that Mr King owed Ryan Philcox a duty of care. It also held, however, that the primary judge erred in finding that Ryan Philcox was not present at the scene of the accident when it occurred. The Full Court allowed his appeal against the judgment of the District Court and awarded him damages in the sum of $69,212.75. It ordered that Mr King pay Ryan Philcox's costs of the action and of the appeal. On 14 November 2014, this Court gave Mr King special leave to appeal against the decision of the Full Court (20). Special leave was granted on the undertaking that he would not seek to disturb orders as to costs which had been made in the Supreme Court and that he would pay Ryan Philcox's costs of the appeal, including the costs of the application for special leave, in any event (21).

The District Court findings

The primary judge accepted Ryan Philcox's evidence, in particular, his evidence of five occasions on which he drove through or turned left at the intersection (22) and his evidence of how he learned of his brother's death. His evidence, as summarised in the primary judge's reasons, was as follows (23):

(i) At about 5 pm Ryan Philcox drove through the intersection on the way to pick up his girlfriend from her workplace. He noticed that an accident had occurred in the centre of the intersection. He did not think that anyone involved in it had been seriously injured.

(ii) Shortly after 5 pm, having picked up his girlfriend, he drove back through the intersection. Police officers were directing traffic and emergency vehicles were present. He drove back to his home at Campbelltown.

(iii) He drove from Campbelltown with his girlfriend to her parents' home at Rostrevor for dinner. On the way he turned left at the intersection on to Gorge Road. He would have seen the vehicles involved in the accident as he went past the scene but did not take any notice of them.

(20) [2014] HCATrans 253 (French CJ and Keane J).

(21) A certificate at the end of the second defence stated it was put forward in accordance with the instructions of Allianz Australia Insurance Ltd, the claims manager for the compulsory third party insurer for Mr King. The insurer had the conduct of the defence of the action pursuant to s 125 of the *Motor Vehicles Act 1959* (SA).

(22) [2013] SADC 60 at [9].

(23) [2013] SADC 60 at [10]-[24].

(iv) Half an hour after arriving at his girlfriend's parents' home, Ryan Philcox had to return to his home at Campbelltown to collect something. Again he passed through the intersection, which was five minutes away. He noticed a blue or grey wagon with severe damage on the passenger side on a flatbed tow-truck. The wagon had been cut open to retrieve someone and he wondered about the injuries sustained by those in the vehicle.

(v) When he travelled back to Rostrevor from his home a short time later the intersection had been cleared.

(vi) Ryan Philcox's parents came to his girlfriend's parents' home between 10.30 pm and 11 pm and told him that his brother had been killed in a traffic accident. He then realised that this was the accident, the aftermath of which he had witnessed, at the intersection.

(vii) He returned to the intersection in the early hours of the following morning. He thought he stayed there for a few hours. He was angry at himself for being at the intersection and not knowing what had happened to his brother. As he put it, he was "angry, guilty for not knowing, [and] not stopping".

6 In summary the primary judge held (24):

(i) Mr King owed Ryan Philcox a duty of care.

(ii) Ryan Philcox suffered mental harm within the meaning of the *Civil Liability Act* (SA) consisting of a recognised psychiatric illness, as a result of sudden shock upon receiving the news of his brother's death.

(iii) Ryan Philcox did not witness, at the scene of the accident, his brother being killed, injured or put in peril and was therefore not present at the scene of the accident when the accident occurred.

(iv) If the preceding conclusions were wrong and Ryan Philcox was present at the scene of the accident at the time the accident occurred, that circumstance did not cause the mental harm he suffered. That harm was caused when he received the news of his brother's death (25).

The last mentioned finding was said by the primary judge to have the result that "s 53(2) is not satisfied" (26). How it related to s 53(2) was not apparent.

7 On the basis of the findings in (iii) and (iv) Ryan Philcox was held not to be entitled to damages for mental harm.

(24) [2013] SADC 60 at [103].
(25) [2013] SADC 60 at [101].
(26) [2013] SADC 60 at [101].

The Full Court decision

8 In the Full Court Mr King filed a notice of alternative contention challenging the primary judge's finding that he owed Ryan Philcox a duty of care (27). That contention was briefly dismissed by Gray J, who wrote the leading judgment, with which Sulan J and Parker J, who wrote shorter and separate judgments, agreed (28):

> "To my mind, the observations of the High Court in *Wicks v State Rail Authority (NSW)* have direct application to s 33 as discussed above. It was open to the judge to conclude that a duty was owed. Further, in the circumstances, I consider that plainly a duty was owed. 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."

(Footnote omitted.)

9 The approach of the Full Court to the construction and application of s 53(1)(a) of the *Civil Liability Act* (SA) is discussed below. Essentially, the Court found that Ryan Philcox had been present at the scene of the accident when the accident occurred and that he thereby satisfied the condition for recovery of damages for pure mental harm.

The legislation – history and construction

10 The *Civil Liability Act* (SA) began its life as the *Wrongs Act 1936* (SA). The *Wrongs Act 1936* was renamed and substantially amended pursuant to the *Law Reform (Ipp Recommendations) Act 2004* (SA) (the Law Reform Act 2004). The Law Reform Act 2004 introduced the current ss 33 and 53 (29).

11 Section 33 relevantly 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:

(27) (2014) 119 SASR 71 at 77 [18].

(28) (2014) 119 SASR 71 at 77 [20].

(29) Neither s 33 nor s 53 has been amended save for the introduction of the class of "domestic partner" after "spouse" in s 53(1)(b) by s 46 of the *Statutes Amendment (Domestic Partners) Act 2006* (SA).

(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 a case of consequential mental harm, the circumstances of the case include the nature of the bodily injury out of which the mental harm arose."

Section 33 appears in Pt 6, entitled "Negligence". The term "negligence" is defined as "failure to exercise reasonable care and skill, and includes a breach of a tortious, contractual or statutory duty of care" (30). The term "duty of care" is defined as "a duty to take reasonable care or to exercise reasonable skill (or both)" (31).

12 The present case concerns "pure mental harm", defined as "mental harm other than consequential mental harm". "Consequential mental harm" is mental harm that is a consequence of bodily injury to the person suffering the mental harm, which is not this case. "Mental harm" is "impairment of a person's mental condition" (32). "Accident" is defined as "an incident out of which personal injury arises and includes a motor accident". A "motor accident" means an incident in which personal injury arises out of the use of a motor vehicle (33).

13 The common law, as explained in *Wicks v State Rail Authority (NSW)* (34), rejects propositions that "reasonable or ordinary fortitude", "shocking event" or "directness of connection" are preconditions to liability additional to "the central question … whether, in all the circumstances, the risk of the plaintiff sustaining such an injury was reasonably foreseeable". Section 33 does not adopt any of those criteria as additional conditions of liability save that the foreseeability of risk must relate to "a person of normal fortitude in the plaintiff's position". The circumstances set out in s 33(2) are not

(30) *Civil Liability Act* (SA), s 3, definition of "negligence", which gave effect to Recommendation 2 of the "Ipp Report": see Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002), p 36.

(31) *Civil Liability Act* (SA), s 3, definition of "duty of care".

(32) *Civil Liability Act* (SA), s 3, definitions of "mental harm", "consequential mental harm" and "pure mental harm".

(33) *Civil Liability Act* (SA), s 3, definitions of "accident" and "motor accident". The definition of "motor accident" was amended by cl 2(1) of Sch 2 to the *Motor Vehicle Accidents (Lifetime Support Scheme) Act 2013* (SA) to insert "is caused by or" before "arises out of".

(34) (2010) 241 CLR 60 at 71-72 [25].

necessary conditions of the existence of a duty of care. Rather they are to be treated as relevant to the assessment of that foreseeability of harm that is a necessary condition. The term "psychiatric illness" used in s 33(1) describes a subset of "mental harm". A similar category is also found in s 53(2), which limits recovery of damages awarded for pure mental harm to cases of harm consisting of "a recognised psychiatric illness" (35). The question of causation is not raised by the grounds of appeal in this case. It follows, for the purposes of this appeal, that if Mr King owed Ryan Philcox the relevant duty of care, it was breached by his negligent driving which had the consequence that Ryan Philcox suffered a recognised psychiatric illness.

14 If the duty of care existed and was breached the second question arises, namely, whether Ryan Philcox was disentitled by s 53 from recovering damages because he was not present at the scene of the accident when the accident occurred. Section 53 is within Pt 8 of the *Civil Liability Act* (SA), which applies where damages are claimed for personal injury arising from a motor accident or from an accident caused wholly or in part by negligence (36). It 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 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.
>
> (3) Damages may only be awarded for economic loss resulting from consequential mental harm if the harm consists of a recognised psychiatric illness."

The text of both ss 33 and 53 must be understood in their context and in part by reference to their legislative histories.

15 As enacted, the *Wrongs Act 1936* contained no provision relating to recovery for nervous shock. The common law in the United Kingdom and in Australia at that time was not sympathetic to such recovery, treating it as "too remote" (37) and outside the scope of the relevant duty of care (38). In 1939, however, a new s 28(1) was introduced into the *Wrongs Act 1936* (39) providing that a plaintiff should not be

(35) It is not necessary for present purposes to consider whether "a recognised psychiatric illness" is a narrower concept than "a psychiatric illness".

(36) *Civil Liability Act* (SA), s 51(a)(i)-(ii)(A).

(37) *Victorian Railways Commissioners v Coultas* (1888) LR 13 App Cas 222.

(38) *Chester v Waverley Corporation* (1939) 62 CLR 1.

(39) *Wrongs Act Amendment Act 1939* (SA), s 6.

debarred from recovering damages for injury arising wholly or in part from mental or nervous shock (40). A similarly motivated and more significant legislative response in New South Wales was the enactment of s 4 of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW). It was discussed in *Gifford v Strang Patrick Stevedoring Pty Ltd* (41). Section 4 allowed for recovery for mental or nervous shock for a parent, husband or wife of a person killed, injured or put in peril by the negligence of the defendant. It also allowed recovery for any other member of the victim's family where the victim was "killed, injured or put in peril within the sight or hearing of such member of the family" (42). The new provision used the language of sensory perception later found in s 30(2) of the *Civil Liability Act 2002* (NSW) and considered by this Court in *Wicks*. Importantly, however, it operated as a defined extension of liability.

16 In 1983, the Full Court of the Supreme Court of South Australia in *Coffey v Jaensch* (43) held that a woman who suffered nervous shock after seeing her husband in hospital following a motor accident and being told that he might not survive, could recover damages. This Court affirmed that decision on appeal in *Jaensch v Coffey* (44). In his Second Reading Speech for the Bill which became the *Wrongs Act Amendment Act 1986* (SA), the Attorney-General for South Australia described the Bill as limiting the range of persons entitled to claim for nervous shock. He did not refer to the decision of the High Court but cited that of the Full Court as having extended the law beyond cases in which (45) "nervous shock is suffered by a person in the proximity of injury or peril caused to a third party by the negligence of another". The proposed amendment was evidently not intended to affect the common law as stated in *Jaensch v Coffey* but "to prevent any further

(40) See discussion in *Richards v Baker* [1943] SASR 245 at 248-249 and similar provisions in other jurisdictions: *Law Reform (Miscellaneous Provisions) Act 1944* (NSW), s 3(1); *Wrongs Act 1932* (Vic), s 4; *Law Reform (Miscellaneous Provisions) Ordinance 1955* (ACT), s 23(1); *Law Reform (Miscellaneous Provisions) Ordinance 1956* (NT), s 24(1).

(41) See especially (2003) 214 CLR 269 at 277-280 [14]-[22] per Gleeson CJ; at 295-298 [70]-[79] per Gummow and Kirby JJ (Hayne J agreeing at 303 [96]); see also at 282-286 [32]-[42] per McHugh J; at 311-316 [124]-[131] per Callinan J. Similar provisions were enacted in the Australian Capital Territory and the Northern Territory: *Law Reform (Miscellaneous Provisions) Ordinance 1955* (ACT), s 24; *Law Reform (Miscellaneous Provisions) Ordinance 1956* (NT), s 25.

(42) See *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 407-408 per Windeyer J.

(43) (1983) 33 SASR 254.

(44) (1984) 155 CLR 549.

(45) South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 27 November 1986, p 2410.

expansion of this head of damage" (46). Section 35A(1)(c) was the precursor of s 53. It precluded recovery for mental harm or nervous shock arising from a "motor accident" except in favour of a person physically injured in the accident, a person who was a driver or passenger of or in a motor vehicle involved in the accident, a person "who was, when the accident occurred, present at the scene of the accident" (47), or "a parent, spouse or child of a person killed, injured or endangered in the accident" (48). The term "motor accident" was defined as "an incident in which injury is caused by or arises out of the use of a motor vehicle" (49). Unlike s 4 of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW), s 35A(1)(c) was expressly directed to the limitation of liability. That was its purpose, as appeared from the Second Reading Speech (50), and that was its operation, as appeared from its text.

17 In 2002, s 35A(1)(c) was repealed (51). The limitation it imposed upon recovery of damages for mental or nervous shock arising out of a motor accident was extended by a new s 24C to cover mental or nervous shock arising out of any accident (52). Section 24C provided:

> "Damages may only be awarded for mental or nervous shock 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 or child of a person killed, injured or endangered in the accident."

The same amending legislation introduced the current definition of the word "accident" (53). In the Second Reading Speech it was said (54):

(46) South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 27 November 1986, p 2410.

(47) *Wrongs Act 1936*, s 35A(1)(c)(i).

(48) *Wrongs Act 1936*, s 35A(1)(c)(ii).

(49) *Wrongs Act 1936*, s 35A(6).

(50) The operation of s 35A(1)(c) was explained as limiting awards for mental and nervous shock to an injured party, a person at the scene of the accident or a parent, spouse or child of a person killed, injured or endangered in an accident: see South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 27 November 1986, p 2411.

(51) *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA), s 4.

(52) *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA), s 3.

(53) *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA), s 3.

(54) South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 14 August 2002, p 1034.

> "The current rule in motor accident cases that damages for mental or nervous shock may only be awarded in limited circumstances is carried over to other personal injury cases. In essence, the claimant must have been physically injured in the accident, or present at the scene at the relevant time, unless the claimant is the parent, spouse or child of someone killed, injured or endangered in the accident."

The condition of recoverability of damages by a person other than a parent, spouse or child of the victim, of presence "at the scene of the accident when the accident occurred", was continued.

18 The *Law Reform Act 2004*, which renamed the *Wrongs Act 1936* as the *Civil Liability Act 1936* (SA) and enacted ss 33 and 53, was described in the Second Reading Speech as implementing the key liability recommendations contained in the Review of the Law of Negligence Final Report dated September 2002 (the Ipp Report) (55). It did not attempt a codification of the law of negligence (56). Sections 33 and 53 were based in part on Recommendation 34 of the Ipp Report. Recommendation 34(a) proposed that there be "no liability for pure mental harm" unless the relevant harm consisted of a recognised psychiatric illness (57). That constraint is reflected in s 33(1) limiting the nature of the foreseeable mental harm which conditions the duty of care. It is also reflected in the constraint found in s 53(2).

19 Recommendation 34(c) of the Ipp Report dealt with presence at the scene of the accident but only as one of a number of "circumstances of the case" going to the question of whether pure mental harm was foreseeable in the terms proposed in Recommendation 34(b). Relevantly, the proposed circumstances set out in Recommendation 34(c) were:

- whether the plaintiff was at the scene of shocking events or witnessed them or their aftermath (58); and
- whether the plaintiff witnessed the events or their aftermath with his or her own unaided senses (59).

The absence of any reference to "aftermath" in either s 33 or s 53 is significant having regard to the terms of Recommendation 34(c)(ii)-(iii). It is also significant that the Recommendation distinguished between a plaintiff who was at the scene of or witnessed the shocking

(55) Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002).

(56) South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 15 October 2003, p 351.

(57) Ipp Report, p 144.

(58) Ipp Report, p 144, Recommendation 34(c)(ii).

(59) Ipp Report, p 144, Recommendation 34(c)(iii).

events and a plaintiff who witnessed their aftermath. That accords with ordinary English usage. To witness the aftermath of an event is not to witness the event itself.

20 Sections 33 and 53 of the *Civil Liability Act* (SA) were said in the Second Reading Speech for the *Law Reform Act 2004* to restate the existing law with a departure (60). The departure was the requirement, contained in s 53(3), that, in the case of consequential mental harm, damages for economic loss would be recoverable only if the mental harm amounted to a recognised psychiatric illness. That provision is not material for present purposes as it only relates to mental harm that is a consequence of bodily injury to the person suffering the mental harm. In the Explanation of Clauses incorporated in Hansard, s 53 was described as a "substituted provision [which] uses the previous provision [s 24C] as a basis but amends it in keeping with the Ipp recommendations" (61).

Section 53(1)(a) applied

21 The text of s 53(1)(a), read in light of its legislative ancestry and by way of contrast with the Ipp Report Recommendations, does not support the extended notion of "[presence] at the scene of the accident when the accident occurred" for which Ryan Philcox contends. According to ordinary English usage he drove past "the scene of the accident" several times. Assuming he can be taken, on that basis, to have been "present at the scene of the accident", he was not "present at the scene of the accident when the accident occurred".

22 A similar approach to the same words, appearing in s 77(a)(ii) of the *Motor Accidents Act 1988* (NSW) (62), was taken by the Court of Appeal of New South Wales in *Hoinville-Wiggins v Connelly* (63), in which Giles JA, with whom Mason P and Stein JA agreed, said that (64):

> "Close connection in space and time is required. The words 'when the accident occurred' mean that it is not enough that [the plaintiff] came to the scene of the accident after the accident had occurred, as might have happened in 'rescuer' cases at common law."

(60) South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 15 October 2003, p 354.

(61) South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 15 October 2003, p 356.

(62) Section 77(a)(ii) was expressed in the following terms: "was, when the accident occurred, present at the scene of the accident."

(63) (1999) 29 MVR 169.

(64) (1999) 29 MVR 169 at 173 [23].

Similarly, in *Spence v Biscotti* (65) Miles CJ, dealing with the same provision in proceedings in the Supreme Court of the Australian Capital Territory, said (66):

> "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."

23 Sulan J in the Full Court considered that s 77 of the *Motor Accidents Act* could be distinguished from s 53(1)(a) as that Act did not define "accident". The definition of "accident" in the *Civil Liability Act* (SA), his Honour said, imported the term "incident", which was said to be synonymous with an event, eventuality or aftermath. The definition of a "motor accident" was therefore broad enough to encompass events directly related to and following on from the actual impact (67). Parker J also viewed the use of the word "incident" in the definition of "accident" as extending the ordinary meaning of accident (68).

24 With respect to their Honours, the relevant ordinary English meaning of the word "incident" is "[a] distinct occurrence or event" (69). The use of the term "incident" in the definition of "accident" dates back to the enactment of s 35A(1)(c), when it was used to define the class of event constituting a "motor accident" by reference to the use of a motor vehicle.

25 The approach taken by the Full Court also invoked the reasoning adopted by this Court in *Wicks*, which was seen as applicable to the construction and application of s 53. That approach makes it necessary to compare the text of s 53 with that of the analogous but significantly different text of s 30 of the *Civil Liability Act 2002* (NSW) (the New South Wales Act), which was considered in *Wicks*. Under s 30, it was a necessary condition of the entitlement to recover damages for pure mental harm for any person other than a close member of the victim's family that "the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril" (70). Similar language of sensory perception had appeared in s 4 of the *Law Reform (Miscellaneous Provisions) Act 1944*, discussed earlier in these reasons. The purpose of s 30, however, was to limit liability, whereas s 4 had defined the

(65) (1999) 151 FLR 350.
(66) (1999) 151 FLR 350 at 359 [31].
(67) (2014) 119 SASR 71 at 90 [64]-[66].
(68) (2014) 119 SASR 71 at 90 [70].
(69) *Shorter Oxford English Dictionary*, 5th ed (2002), p 1343, "incident", sense 2.
(70) New South Wales Act, s 30(2)(a).

bounds of an extension of liability. The criterion in s 30(2) limiting recoverability of damages was identical with the circumstance of foreseeability conditioning the existence of a duty of care in the New South Wales Act (71). There was, therefore, a degree of symmetry within the New South Wales statute that is missing from the South Australian Act. The question of the existence of a duty of care was not decided by this Court in *Wicks* (72). The Court considered the application of s 30(2) on the assumption that a relevant duty of care was owed (73). The key submission by State Rail was that the necessary condition of recovery for mental harm required a plaintiff to have observed at the scene an event unfolding which included another's death, injury or peril (74). The Court held that s 30(2)(a) directed attention to an event that was happening while the plaintiff "witnessed" it (75). The Court held (76):

> "It would not be right … 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."

As appears from that passage and the arguments that were put to the Court in *Wicks*, the text of s 30(2)(a) required a different inquiry from that required by the text of s 53(1)(a) of the *Civil Liability Act* (SA).

26 In the Full Court, Gray J said that what had been said in *Wicks*, in connection with s 30(2) of the New South Wales Act, had "obvious relevance" (77) to the construction of s 53 of the *Civil Liability Act* (SA). However, having regard to the textual differences and the inquiry which they require of a court in determining whether damages are recoverable, the statement that "Section 30 is broadly comparable to s 53" (78) is apt to lead to error, as it did in this case.

27 The submissions for Ryan Philcox with respect to s 53 followed the reasoning of the Full Court. To the extent that that reasoning and Ryan Philcox's submissions relied upon this Court's reasoning in *Wicks* in its application to s 30(2) of the New South Wales Act, they did not give effect to the significant textual differences between the two provisions. Ryan Philcox was not present at the scene of the accident when the

(71) New South Wales Act, s 32(2)(b).
(72) (2010) 241 CLR 60 at 73 [33], 74 [35]. Duty of care had not been decided by the Court of Appeal of New South Wales and the parties in *Wicks* submitted that this Court should not decide it either.
(73) (2010) 241 CLR 60 at 74 [36].
(74) (2010) 241 CLR 60 at 75 [40].
(75) (2010) 241 CLR 60 at 76 [43].
(76) (2010) 241 CLR 60 at 76 [44].
(77) (2014) 119 SASR 71 at 80 [28].
(78) (2014) 119 SASR 71 at 78 [25].

accident occurred. The Full Court erred in its construction and application of s 53(1)(a) in this case.

Duty of care – s 33

28 Having regard to the disentitling operation of s 53, it is not strictly necessary to decide whether the Full Court erred in holding that Mr King owed a duty of care not to cause pure mental harm to Ryan Philcox.

29 At common law, as under s 33, the existence of a duty of care not to cause another person pure mental harm is dependent upon a number of variables which inform the foreseeability of risk. Section 33 does not prescribe any particular pre-existing relationship. It does not require the plaintiff to have witnessed at the scene a person being killed, injured or put in peril. It does not require a sudden shock. It does require that the defendant has in contemplation a person of normal fortitude in the plaintiff's position. Having regard to the variables which can be taken into account for the purpose of determining the existence of the duty of care, it cannot be said that the conclusion reached by the Full Court in this case was wrong. This Court has considered the extent of the common law duty of care not to cause mental harm to a person connected with the primary victim in decisions which have necessarily focused upon the particular relationships between the victim and the plaintiff. To say that a duty of care is owed to a parent (79), spouse (80), child (81), fellow employee or rescuer (82) of a victim is not to say that it cannot be owed to the sibling of a victim. The terms of s 33 are consistent with that approach for they include, as one of the circumstances relevant to the foreseeability that is a necessary condition of the duty of care, "the nature of the relationship between the plaintiff and any person killed, injured or put in peril". A sibling relationship is a circumstance of that character. Whether it is a close or loving relationship or a distant one may go to the question of causation more than the existence of a duty of care, but it is not necessary to explore that issue further for the purposes of this case.

30 Counsel for Mr King made submissions against the existence of a duty of care based upon analogical arguments from other decisions.

(79) *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317.
(80) *Jaensch v Coffey* (1984) 155 CLR 549.
(81) *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269.
(82) *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383.

However, as Windeyer J said in *Mount Isa Mines Ltd v Pusey* (83): "We must always beware lest words used in one case become tyrants over the facts of another case."

Conclusion

31 Despite the existence of a duty of care and its breach and resulting mental harm to Ryan Philcox, his claim is defeated by the explicit language of the condition imposed by s 53(1)(a). The Court cannot go beyond the clear meaning of the text, which allows of no reasonable alternative construction favourable to Ryan Philcox. For the preceding reasons, the appeal will be allowed. The following orders should be made:

1. The appeal is allowed.
2. Set aside paras 1 and 3.1, and para 2 in so far as that paragraph relates to the setting aside of the judgment appealed against, of the order of the Full Court of the Supreme Court of South Australia made on 4 June 2014 and, in their place, order that the appeal be dismissed.
3. The appellant is to pay the respondent's costs of the appeal to this Court.

32 KEANE J. It may be accepted that the courts below were right to hold that the appellant owed the respondent a duty to exercise reasonable care in the manner of his driving so as to avoid injury to the respondent. Because the respondent was not a parent, spouse or child of the deceased, s 53(1)(a) of the *Civil Liability Act 1936* (SA) (the Act) prevented him from recovering damages for the mental harm he was caused by the appellant's negligent driving unless he was "present at the scene of the accident when the accident occurred". This was so even though the appellant had, by his negligent driving, breached his duty of care to the respondent.

33 Section 53(1) of the Act provided relevantly that:

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

34 The respondent was not "present at the scene of the accident when the accident occurred" for two independent reasons. First, the respondent was not *present* at the scene of the accident: that he was in the same locale as the accident is insufficient to satisfy s 53(1)(a) of the

(83) (1970) 125 CLR 383 at 400.

Act. Secondly, even if the respondent was present at the scene of the accident, he was not present *when the accident occurred*. It is convenient to deal first with this latter point. Its determination is assisted by the decision of the Court of Appeal of the Supreme Court of New South Wales in *Hoinville-Wiggins v Connelly* (84).

When the accident occurred

35 In *Hoinville-Wiggins*, the Court was concerned with the construction of s 77(a)(ii) of the *Motor Accidents Act 1988* (NSW) (the MAA), a close analogue of s 53(1)(a) of the Act. The plaintiff, having been told of a motor vehicle accident involving a pedestrian nearby, went to the scene and administered mouth to mouth resuscitation to the pedestrian until it became apparent that the pedestrian had died. The plaintiff claimed damages for nervous shock. Section 77(a)(ii) of the MAA provided that no damages for psychological or psychiatric injury shall be awarded in respect of a motor vehicle accident except in favour of a person who was, inter alia, present at the scene of the accident "when the accident occurred". The primary judge held that the plaintiff was not present at the scene of the accident when the accident occurred. This conclusion was upheld on appeal. Of s 77(a)(ii) of the MAA, Giles JA, with whom Mason P and Stein JA agreed, said (85):

> "The words 'when the accident occurred' mean that it is not enough that [the plaintiff] came to the scene of the accident after the accident had occurred, as might have happened in 'rescuer' cases at common law. The [plaintiff] argued that the accident included what she described as its aftermath, and extended to her attendance to minister to the pedestrian. For the notion of aftermath she referred to *Benson v Lee* (86); *McLoughlin v O'Brian* (87) and *Jaensch v Coffey* (88). The passages were to do with recovery at common law of damages for nervous shock suffered not only by a plaintiff who saw or heard the accident, but also by a plaintiff who saw or heard events at the scene of the accident after its occurrence or even at a hospital during immediate post-accident treatment. They 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 aftermath was never part of the accident and (at least for the

(84) (1999) 29 MVR 169.
(85) (1999) 29 MVR 169 at 173 [23]-[24].
(86) [1972] VR 879 at 880.
(87) [1983] 1 AC 410 at 422.
(88) (1984) 155 CLR 549 at 606-608.

purposes of s 77(a)) seeing or hearing the aftermath no longer founds recovery of damages.

… The accident occurred when the opponent's motor vehicle struck the pedestrian, whether or not the pedestrian's death was immediate, and the [plaintiff'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."

36 The same view of the operation of s 77(a)(ii) of the MAA was taken by Miles CJ in *Spence v Biscotti* (89). It is the approach which should have been applied in this case. It was not disputed that *Hoinville-Wiggins* was correctly decided. The analysis undertaken in that case was applicable here in relation to the materially similar language of s 53(1)(a) of the Act.

37 In the present case, each member of the Full Court rejected (90) the appellant's argument that the phrase "present at the scene of the accident when the accident occurred" required that the respondent should have witnessed the impact of the vehicles in the accident. Several strands of reasoning were said to support that conclusion: none is compelling.

38 Gray J said (91) that:

"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."

39 With respect, to say that an "accident … encompasses events at the scene *after its occurrence*" is expressly to depart from the language of s 53(1)(a) of the Act. Events which take place after an accident has occurred have not taken place "when the accident occurred".

40 Sulan J said (92), with reference to this Court's decision in *Jaensch v Coffey* (93), that:

"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."

41 It may be noted that the same point was made in relation to the common law in the passage excerpted from the reasons in

(89) (1999) 151 FLR 350 at 358-359 [31].
(90) *Philcox v King* (2014) 119 SASR 71 at 81 [30] per Gray J; at 90 [68] per Sulan J; at 90 [70] per Parker J.
(91) *Philcox v King* (2014) 119 SASR 71 at 77 [22].
(92) *Philcox v King* (2014) 119 SASR 71 at 86 [55].
(93) (1984) 155 CLR 549.

Hoinville-Wiggins (94) cited above; but Sulan J went on to say (95) that, although s 53(1)(a) of the Act does not refer to the aftermath of the accident, it should not be construed as abrogating the common law doctrine that presence at the aftermath of an accident may found a claim for damages for mental harm. Sulan J reasoned (96) that because the Act defined "motor accident" to mean "an incident", and because "an incident" is, according to *Roget's Thesaurus*, "synonymous with an event, eventuality or aftermath", the term "motor accident" as used in the Act was "broad enough to encompass the events directly related to and following on from the actual impact [of the vehicles]". On this basis, his Honour concluded (97) that in the case of a motor accident "[p]resence at the aftermath of an accident, as that phrase is understood by the common law, is sufficient to satisfy s 53(1)(a)".

42 While it is true that the common law has recognised that a plaintiff's presence at the aftermath of an accident may found a claim for damages for mental harm, the plain intention of s 53(1)(a) of the Act is to deny the recovery of damages to persons who in those circumstances would have been entitled to recover damages for mental harm. Legislative measures which deny the remedy of damages in certain cases of negligently inflicted personal injury are now familiar measures, taken in the public interest to preserve the general availability of the remedy by ensuring the viability and affordability of arrangements to meet the costs involved: such measures should not be given an artificially narrow operation (98). Given the unmistakable intention of s 53(1)(a) of the Act to cut back common law rights on a selective basis, it would be out of place to insist upon an artificial construction in order to preserve common law rights. As was said by Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ in *Australian Securities and Investments Commission v DB Management Pty Ltd* (99):

> "It is of little assistance, in endeavouring to work out the meaning of parts of [a legislative] scheme, to invoke a general presumption against the very thing which the legislation sets out to achieve."

43 In any event, it is to strain too far against the plain meaning of the language of s 53(1)(a) of the Act to say that "an incident" is "synonymous" with its aftermath. Like s 77(a)(ii) of the MAA,

(94) (1999) 29 MVR 169 at 173 [23].
(95) *Philcox v King* (2014) 119 SASR 71 at 88 [60].
(96) *Philcox v King* (2014) 119 SASR 71 at 90 [65]-[66].
(97) *Philcox v King* (2014) 119 SASR 71 at 90 [68].
(98) *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at 284 [36]; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 328-329 [19]; *Daly v Thiering* (2013) 249 CLR 381 at 392 [32]-[33].
(99) (2000) 199 CLR 321 at 340 [43].

considered in *Hoinville-Wiggins*, s 53(1)(a) of the Act requires, in plain language, presence at the scene "when the accident occurred". This requirement may have unattractive consequences. For example, rescuers, such as the plaintiff in *Hoinville-Wiggins*, may be denied recovery of damages for serious psychological or psychiatric injury. But the amelioration of that state of affairs, which itself is a consequence of legislative action, is properly a matter for the legislature.

44 In this regard, it is important to note the difference between s 53(1)(a) of the Act and the terms of the legislation under consideration in *Wicks v State Rail Authority (NSW)* (100). In that case, this Court was concerned, not with s 77(a)(ii) of the MAA, but with s 30(2)(a) of the *Civil Liability Act 2002* (NSW), which provided that a plaintiff is not entitled to recover damages for pure mental harm unless "the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril". The plaintiffs were policemen who suffered psychiatric injuries arising from their attendance at the scene of a passenger train derailment in which passengers were injured and killed. They attempted to rescue passengers on the train who had survived the accident. Passengers suffered physical and psychiatric injury as they were removed from the train. The survivors of the derailment remained in peril of further injury until they were removed from the train to a place of safety.

45 This Court held that s 30(2)(a) did not preclude recovery of damages for the mental harm that the plaintiffs suffered because the plaintiffs had witnessed, at the scene, victims of the accident being injured or put in peril over the period while they were attempting to rescue them (101). For present purposes, it is important to note that the Court said (102):

> "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."

46 These observations have no application to the present case. Nor do they entail any criticism of the decision in *Hoinville-Wiggins*. Indeed, there was no occasion for this Court in *Wicks* to refer to *Hoinville-Wiggins*. That is because the legislation under consideration

(100) (2010) 241 CLR 60.
(101) (2010) 241 CLR 60 at 76-77 [45]-[52].
(102) (2010) 241 CLR 60 at 76 [44].

in *Wicks* did not require that the plaintiffs be present at the scene of the accident "when the accident occurred" in order to recover damages for mental harm; it rather required the plaintiffs to have witnessed, at the scene of the accident, victims "being put in peril". That difference in the statutory language was of critical importance to the conclusion in *Wicks* and the observations cited above.

Present at the scene

47 Section 53(1) of the Act provides that only two categories of person are entitled to recover damages for negligently inflicted mental harm: persons who were injured in the accident or present at the scene of the accident when it occurred; and persons who, though they were not injured in the accident or present at the scene of the accident when it occurred, were in a specified relationship to a person killed, injured or endangered in the accident. Persons who have suffered negligently inflicted mental harm, but who were not in a specified relationship with a person killed, injured or endangered in the accident, and who were not present at the scene of the accident when it occurred, are excluded from recovering damages even if the circumstances of the accident involved a breach of a duty of care owed to them by the defendant and the occurrence of the accident had some causal connection with the mental harm suffered. In the present case, the respondent was not, in the relevant sense, "present at the scene" at any time.

48 The *Oxford English Dictionary* defines the word "present", as it relates to places, in a number of senses: one sense is "Beside, before, with, or in the same place as the person who or thing which is the point of reference"; another, less frequently used, sense is "Having the mind, thought, etc, focused on or closely engaged with what one is doing; attentive, alert, aware (opposed to 'absent')". This latter sense is pertinent to the operation of s 53(1)(a) of the Act.

49 The requirement of presence at the scene is not, as the respondent argued, an arbitrary limit upon the recovery of damages to be strictly confined in its effect. Rather, it is a limitation upon the recovery of damages which reflects an intelligible legislative choice to limit the extent of liability for the consequences of a defendant's negligence. The exclusion of liability effected by s 53(1)(a) of the Act is an informed and rational response to issues thrown up by the case law (103) as to where the law should best draw the line to limit indeterminate liability and unreasonable or disproportionate burdens upon defendants and those who are obliged, under private or public

(103) *Chester v Waverley Corporation* (1939) 62 CLR 1 at 44; *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 411; *Jaensch v Coffey* (1984) 155 CLR 549 at 564-570, 590-591; *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 400-405; *Tame v New South Wales* (2002) 211 CLR 317 at 381 [192].

insurance arrangements, to defray the cost of meeting those burdens. The exclusion reflects a balancing of interests (104), the rationale of which is readily intelligible. Arguments as to whether the line drawn by the legislation accords with the latest stage in the ongoing development (105) of the common law by the courts are beside the point; it is wrong to characterise the exclusionary line drawn by the legislation as arbitrary, so as to justify reading the expression "present at the scene" as meaning no more than in the same place as the accident.

50 The language in which the legislative choice made by s 53(1)(a) has been expressed can be seen to be informed by the discussion in *Jaensch v Coffey* (106). The requirement of presence at the scene of the accident as a condition for the recovery of damages for mental or nervous shock was first adopted by legislation in South Australia in 1986 by the insertion of s 35A into what was then called the *Wrongs Act 1936* (SA). In the Attorney-General's Second Reading Speech for the Bill (107) that introduced this predecessor to s 53(1)(a) of the Act, specific reference was made to the decision of the Full Court of the Supreme Court of South Australia in *Coffey v Jaensch* (108), affirmed by this Court in *Jaensch v Coffey*. It is evident from the separate reasons of Gibbs CJ, Brennan, Deane and Dawson JJ in *Jaensch v Coffey* (109) that their Honours spoke of a plaintiff's presence at the scene of an accident as a natural way of referring to the plaintiff's personal experience of seeing and hearing the sights and sounds of the accident. Section 53(1)(a) proceeds on the same basis.

51 The balance struck by s 53(1)(a) of the Act treats mental harm by way of reaction to a report of an accident as too remote to be compensable, unless the plaintiff was in one of the relationships with the victim specified in s 53(1)(b) of the Act. Plaintiffs who are in a specified relationship to a person injured in the accident may recover damages for mental harm as a consequence of a report of the accident. Plaintiffs not in such a relationship may recover only if their mental harm is a consequence of presence at the scene, understood as

(104) cf *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 400-405.

(105) *Tame v New South Wales* (2002) 211 CLR 317 at 390-394 [214]-[225]; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at 275-276 [7].

(106) (1984) 155 CLR 549.

(107) South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 27 November 1986, p 2410.

(108) (1983) 33 SASR 254.

(109) (1984) 155 CLR 549 at 551-552, 564, 590-597, 612.

involving an awareness of the accident from direct personal experience. The balance so struck recognises that the social utility of an award of damages (whether as compensation to the plaintiff or as an incentive to the adoption of higher safety standards within the community) diminishes as the causal connection between negligent conduct and the onset of mental harm in the plaintiff becomes more attenuated (110).

52 In summary, on this aspect of the case, one must conclude that, when s 53(1)(a) of the Act speaks of presence at the scene of an accident, it is speaking of the scene presented to the sight and hearing of the person claiming damages for mental harm caused by the accident. In this case, the respondent was not directly exposed to the sights and sounds of the accident.

53 Although it may be said that the accident was causally related to the mental harm from which he suffered, that harm was not the result of direct exposure to the sights and sounds of the accident. Accordingly, the respondent's mental harm was, by reason of s 53(1)(a) of the Act, too remote from the appellant's negligent driving to be compensable.

Conclusion and orders

54 The appeal should be allowed. Paragraphs 1 and 3.1, and para 2 in so far as that paragraph relates to the setting aside of the judgment appealed against, of the order made by the Full Court should be set aside. In their place it should be ordered that the appeal to the Full Court is dismissed. Because of the conditions on which special leave to appeal was granted, the appellant must pay the respondent's costs of the appeal to this Court and the order for costs made by the Full Court should not be disturbed.

55 NETTLE J. The appellant was the driver of a motor car which was involved in an accident at an intersection in Campbelltown, Adelaide between 4.50 pm and 4.55 pm on 12 April 2005. The respondent's brother was a passenger in the car and sustained serious injuries as a result of the force of the impact. He died as a result of his injuries at about 5.30 pm while still trapped in the car.

56 The intersection was one through which the respondent frequently drove. On the afternoon of 12 April 2005, shortly after the collision occurred, he drove through it or turned left at it on five separate occasions; each time unaware that his brother was a passenger in one of the vehicles involved in the collision and had been fatally injured.

(110) *Jaensch v Coffey* (1984) 155 CLR 549 at 590-591; *Tame v New South Wales* (2002) 211 CLR 317 at 404 [254].

57 On the first occasion, the respondent noticed that the accident had occurred but did not think that anyone had been seriously injured. There were others assisting and so he decided to drive on. At that stage, it is likely that the respondent's brother, although fatally injured, was still alive trapped in one of the vehicles which had collided.

58 On the second occasion, which was sometime between 5 pm and 5.30 pm, the respondent noticed the presence of police and emergency vehicles but, once again, he did not pay a great deal of attention to what was occurring. His girlfriend, who was with him, did not recognise either of the vehicles which had collided.

59 On the third occasion, which was probably about twenty minutes later again, the respondent did not notice anything specific. He saw vehicles but did not focus on them.

60 On the fourth occasion, more than thirty minutes later again, the scene had "been pretty much cleared" but the respondent noticed a blue or grey station wagon on a flatbed tow truck with severe damage to the passenger side and, at that point, he realised that the car was far more seriously damaged than he had earlier thought. He could see that it had been cut open and, because of the extent of the damage, that someone had been horrifically hurt or killed.

61 On the fifth occasion, the scene had been cleared.

62 Later that evening, between about 10.30 pm and 11 pm, the respondent's parents told him that his brother had been killed in a motor accident. He thereupon made the connection with what he had seen at the intersection earlier in the day and was devastated by the thought that, although he had been present, he had not known that his brother was involved and had not stopped to help. Later, in the early hours of the morning, he returned to the intersection and spent some hours there, angry at himself for having been at the intersection and not knowing of his brother's involvement: "angry, guilty for not knowing, not stopping."

63 The respondent suffered distress and grief which had an ongoing impact on his personal and professional life. Based on expert psychological and psychiatric evidence, it was accepted that he had suffered mental harm comprised of a recognised psychiatric illness in the nature of a major depressive disorder with significant anxiety-related components of a post-trauma stress reaction.

64 Subsequently, he brought proceedings against the appellant in the District Court of South Australia for damages for mental harm.

Relevant legislation

65 Section 33 of the *Civil Liability Act 1936* (SA) (the CL Act) controlled the extent of the duty of care to avoid causing mental harm. It provided:

> "*33 – Mental harm – duty of care*
>
> (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 a case of 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 (the *plaintiff*) if the defendant knows, or ought reasonably to know, that the plaintiff is a person of less than normal fortitude."

"Mental harm" was defined in s 3 of the CL Act as follows: "*mental harm* means impairment of a person's mental condition."

66 Section 53 of the CL Act restricted the class of persons who may recover damages for mental harm, thus:

> "*53 – Damages for mental harm*
>
> (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 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.

(3) Damages may only be awarded for economic loss resulting from consequential mental harm if the harm consists of a recognised psychiatric illness."

The proceedings below

67 At first instance, the judge found that the respondent suffered mental harm as a result of sudden shock caused by being told of his brother's death and thus a "sudden and disturbing impression on the mind or feelings" (111) within the meaning of s 33(2)(a)(i).

68 The judge also 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 as a result of the sudden shock upon seeing or hearing of his brother's death. It followed, the judge held, that the appellant owed the respondent a duty to take reasonable care not to cause him mental harm.

69 The judge then went on to consider the application of s 53. Her Honour accepted, or at least was prepared to assume, that "accident" for the purposes of the section includes the aftermath of an accident. But she reasoned that, in order to be "present" at the scene of an accident when the accident occurs within the meaning of s 53(1)(a), a claimant has to "witness" the accident or at least the recovery or rescue following the accident. The respondent did not "witness" the accident or the recovery or rescue because he was not aware when he passed through the intersection that his brother had been killed, injured or put in peril and did not observe anyone else being killed, injured or put in peril. Accordingly, the respondent's claim failed.

70 In case that conclusion were wrong, the judge considered whether, in any event, the respondent's injuries were caused by the appellant's negligence. The judge found as a matter of fact that the respondent's mental harm was caused by what his parents told him of his brother's death – as opposed to anything he had seen at the intersection – and, therefore, that there was no causal link between the mental harm and what the respondent had seen of the aftermath of the accident. On that basis, the judge concluded that, even if s 53(1)(a) were satisfied, the respondent's claim would still have failed.

71 On appeal to the Full Court of the Supreme Court, Gray J (112), with whom Sulan and Parker JJ agreed (113), upheld the trial judge's determination that the appellant owed the respondent a duty of care.

(111) See *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60 at 72-73 [30] per curiam.

(112) *Philcox v King* (2014) 119 SASR 71 at 77 [20].

(113) *Philcox v King* (2014) 119 SASR 71 at 83 [46] per Sulan J; at 90 [70] per Parker J.

Like the judge, Gray J considered it was reasonably foreseeable that a person coming upon the scene of the collision, including its aftermath, would suffer mental harm on hearing of his or her sibling's death. The Full Court, however, reversed the judge's finding that what the respondent saw of the aftermath of the accident was not causative of his mental harm. Gray J was satisfied (114) that there was "a direct temporal link between the motor vehicle accident death and the development of the condition, in that the latter developed directly after the former" and "a causal relationship in that [the respondent's] condition focuses directly upon the psychological traumas related to the fatal motor vehicle accident" (115).

72 The Full Court were further of the opinion that "presence at the aftermath of an accident" as that phrase is understood by the common law is sufficient to satisfy s 53(1)(a) and, therefore, that the respondent was present at the scene of the accident when the accident occurred within the meaning of the provision (116). Thus, the appeal was allowed.

Grounds of appeal

73 The appeal to this Court was put on the basis that both the judge at first instance and the Full Court erred in holding that the appellant owed the respondent a duty to take reasonable care to avoid causing the respondent mental harm; and that the Full Court erred in holding that the respondent was present at the scene of the accident when the accident occurred within the meaning of s 53(1)(a).

74 There was no ground of appeal against the Full Court's finding of fact that the respondent's mental condition was caused by what he observed at the scene of the accident on the five occasions that he passed by. Counsel for the appellant referred to the issue in the course of argument and referred to some of the evidence as if the Full Court's finding should be doubted. But he did not seek to amend the grounds of appeal or otherwise to take the matter further.

Duty of care

75 Like s 32 of the *Civil Liability Act 2002* (NSW) (the NSW Act), which was considered by this Court in *Wicks v State Rail Authority (NSW)* (117), s 33 of the CL Act defines or controls what would otherwise be a duty of care arising at common law but it does not positively identify when the duty arises. It provides that foreseeability

(114) *Philcox v King* (2014) 119 SASR 71 at 83 [44].

(115) *Philcox v King* (2014) 119 SASR 71 at 82 [37] (emphasis removed).

(116) *Philcox v King* (2014) 119 SASR 71 at 77 [22]-[23], 81 [29]-[30] per Gray J; at 90 [68] per Sulan J; at 90 [70] per Parker J.

(117) (2010) 241 CLR 60.

is a necessary condition for a duty of care to arise (118). It then delineates four kinds of circumstances to which regard should be had in the identification of a duty of care (119). But it does not prescribe particular consequences flowing from the presence or absence of any of those circumstances (120).

76 Similarly, like s 32 of the NSW Act, s 33 of the CL Act is to be understood against the background of the common law of negligence relating to psychological injury. It reflects and in part responds to the state of the law which had developed by the time of its enactment: that the notions of "normal fortitude", "shocking event" and "directness of connection" were no longer conditions of liability but rather considerations relevant to the centrally determinative issue of foreseeability (121).

77 In contradistinction, however, to the common law of negligence, s 33 of the CL Act denies the existence of a duty of care unless it is foreseeable that a person of normal fortitude might, in the circumstances of the case, suffer a psychiatric illness (122). It should also be noticed that, in contrast to the comparable expression "mental or nervous shock" which appears in the NSW Act (123), the natural and ordinary meaning of "mental harm" as defined in s 3 of the CL Act is not in terms restricted to something in the nature of a sudden and disturbing adverse mental impact. It may include adverse mental conditions which develop over time.

78 It follows, as was pointed out in *Wicks* (124), that in cases like this there are three aspects of provisions like s 33 which are important. First, although a "sudden shock" suffered by the plaintiff is a circumstance which may bear on the recognition of a duty, it is neither a necessary nor a sufficient condition of duty. Secondly, witnessing at the scene a person being killed, injured or put in peril, although relevant, is not a necessary or sufficient condition of duty. Thirdly, because "mental harm" is defined (125) for the purposes of the section as "impairment of a person's mental condition", it means something different from the "sudden shock" which is referred to in s 33(2)(a)(i).

(118) CL Act, s 33(1).
(119) CL Act, s 33(2)(a).
(120) See *Wicks* (2010) 241 CLR 60 at 71 [22]-[23].
(121) *Tame v New South Wales* (2002) 211 CLR 317 at 332-333 [16]-[18] per Gleeson CJ; at 340-341 [51]-[52], 343-344 [61]-[62], [66] per Gaudron J; at 384 [199], 390 [213], 393 [221]-[222], 394 [225] per Gummow and Kirby JJ; at 411-412 [275] per Hayne J.
(122) See *Wicks* (2010) 241 CLR 60 at 72 [26].
(123) NSW Act, ss 29-30.
(124) (2010) 241 CLR 60 at 72 [27]-[29].
(125) CL Act, s 3.

79 Foreseeability alone, however, is not enough. Section 33(1) does not displace the common law imperative that "reasonable foreseeability" be understood and applied bearing in mind that it is bound up with the question of whether it is reasonable to require a person to have in contemplation the risk of injury that has eventuated. As Gleeson CJ observed in *Tame v New South Wales* (126):

> "What a person is capable of foreseeing, what it is reasonable to require a person to have in contemplation, and what kinds of relationship attract a legal obligation to act with reasonable care for the interests of another, are related aspects of the one problem. The concept of reasonable foreseeability of harm, and the nature of the relationship between the parties, are both relevant as criteria of responsibility."

80 This Court has not before had to determine whether a duty of care is owed in the circumstances presented by this case. *Wicks* made passing reference to the issue of duty of care owed to those present at the aftermath of an accident but did not deal with it in detail (127). *Jaensch v Coffey* (128), *Tame* and *Gifford v Strang Patrick Stevedoring Pty Ltd* (129) all provide relevant guidance, but the issue cannot be properly decided by reference only to the nature of the relationship between the victim of an accident and the claimant, or the victim and the defendant. As Deane J concluded in *Jaensch* (130), the question of whether a duty of care is owed in particular circumstances falls to be resolved by a process of legal reasoning, by induction and deduction by reference to the decided cases and, ultimately, by value judgments of matters of policy and degree. Although the concept of "proximity" that Deane J held to be the touchstone of the existence of a duty of care (131) is no longer considered determinative, it nonetheless "gives focus to the inquiry" (132). It does so by directing attention towards the features of the relationships between the parties and the factual circumstances of the case, and prompting a "judicial evaluation of the factors which tend for or against a conclusion" (133) that it is reasonable (in the sense spoken of by Gleeson CJ in *Tame* (134)) for a

(126) (2002) 211 CLR 317 at 331 [13]; see also at 379 [185] per Gummow and Kirby JJ; at 410 [272] per Hayne J.
(127) (2010) 241 CLR 60 at 73-75 [33]-[39].
(128) (1984) 155 CLR 549.
(129) (2003) 214 CLR 269.
(130) (1984) 155 CLR 549 at 585.
(131) *Jaensch v Coffey* (1984) 155 CLR 549 at 584-585.
(132) *Sullivan v Moody* (2001) 207 CLR 562 at 578-579 [48] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ.
(133) *Sullivan v Moody* (2001) 207 CLR 562 at 580 [50].
(134) (2002) 211 CLR 317 at 331 [13].

duty of care to arise. That these considerations may be tempered or assisted by policy considerations and value judgments is not, however, an invitation to engage in "discretionary decision-making in individual cases" (135). Rather, it reflects the reality that, although "[r]easonableness is judged in the light of current community standards" (136), and the "totality of the relationship[s] between the parties" (137) must be evaluated, it is neither possible nor desirable to state an "ultimate and permanent value" (138) according to which the question of when a duty arises in a particular category of case may be comprehensively answered.

81 As it happens, in this case, each of the considerations identified by Deane J in *Jaensch* points in favour of the recognition of a duty of care.

Foreseeability

82 The threshold inquiry mandated by s 33(1) is whether a reasonable person in the defendant's position would have foreseen that a person of normal fortitude in the plaintiff's position might suffer a psychiatric illness. The reference to a person in the "position" of the plaintiff is to the class of persons of which the plaintiff is a member (139), not necessarily the particular plaintiff. Approaching the matter in the first place as one of common sense and ordinary human experience, there can surely be little doubt that it is reasonably foreseeable that close relatives of a motor accident victim might be at, or later come to the aftermath of, the accident.

83 Most often, if such a relative is not already at the scene of the accident, he or she might go to the aftermath having been told of what has occurred or otherwise to see what has occurred. If so, as *Jaensch* shows, it is reasonably foreseeable that a person of normal fortitude in that situation might suffer mental harm as the result of what he or she there sees or otherwise learns of the plight of the victim.

84 It is perhaps less likely that a close relative of a motor accident victim may fortuitously stumble upon the aftermath of the accident, as occurred here; and, in that sense, it is less likely that a close relative of the victim might suffer mental harm by stumbling across the aftermath. That does not mean, however, it is any less reasonably foreseeable that

(135) *Sullivan v Moody* (2001) 207 CLR 562 at 579 [49].
(136) *Tame* (2002) 211 CLR 317 at 332 [14] per Gleeson CJ; see also at 379 [185] per Gummow and Kirby JJ; at 410 [272] per Hayne J.
(137) *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 596 [145] per Gummow and Hayne JJ.
(138) *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 445 [67] per Gummow J.
(139) *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 487 per Brennan J.

a close relative who stumbles upon the aftermath of an accident might suffer mental harm as a consequence.

85 For once it is accepted that it is reasonably foreseeable that a close relative of a motor accident victim might suffer mental harm as a consequence of what he or she sees and learns at the aftermath of the accident, it is beside the point that, in a given case, such a close relative may happen upon the scene of the aftermath in a statistically unlikely manner. Subject to considerations of reasonableness remaining to be mentioned, it is enough that it is reasonably foreseeable that a close relative may arrive at the aftermath of the accident and suffer mental harm to recognise the existence of a duty to take reasonable care to guard against such close relatives suffering mental harm.

Other considerations

86 In terms of induction, the considerations which emerge from the decided cases include whether the mental condition to be guarded against is limited to a condition in the nature or the result of a sudden nervous shock (140); whether it is limited to mental harm suffered as the result of presence at the scene of the accident or its aftermath (141); any pre-existing relationships between the defendant and the victim and the defendant and the plaintiff (142); and the nature of the relationship between the victim and the plaintiff (143). In effect, they are the considerations adumbrated in s 33 of the CL Act, on which the trial judge based her decision, and, although s 33 does not purport to be an exhaustive prescription of relevant considerations, it is not suggested that there are any others which arise from the facts of this case.

87 In terms of deduction, there is little in point of principle to distinguish between this case and *Jaensch*. In *Jaensch* it was recognised that the causal proximity between a motor accident which caused physical injury to a victim and the psychiatric injury suffered by the victim's wife when she later learned of and saw some of the effects of the physical injury was such that a duty was owed to the victim's wife to take reasonable care to guard against the kind of mental harm which she suffered (144). Here, the causal proximity between the motor accident and the respondent's mental harm is comparable to, if not closer than, that in *Jaensch*. In this case, the respondent was

(140) See *Tame* (2002) 211 CLR 317 at 386-390 [204]-[213] per Gummow and Kirby JJ.

(141) *Jaensch* (1984) 155 CLR 549.

(142) *Annetts v Australian Stations Pty Ltd*, reported with *Tame v New South Wales* (2002) 211 CLR 317 at 337 [37] per Gleeson CJ; at 341 [54] per Gaudron J; at 367 [144] per McHugh J; at 398 [239]-[240] per Gummow and Kirby JJ; at 419 [304] per Hayne J.

(143) *Gifford* (2003) 214 CLR 269 at 288-290 [47]-[50] per McHugh J.

(144) *Jaensch* (1984) 155 CLR 549 at 606-609.

present at the scene of the accident in the aftermath of the accident and, although he was not then aware of his brother's involvement, his presence at the scene of the accident was later determined to have been causative of his condition.

88 In terms of the relationship between the deceased and the claimant, although the relationship between siblings might be presumed not to be as close as it is between husband and wife, the ordinary expectation as to ties between siblings makes it just as foreseeable that the death of one brother could impact severely on the mental health of the other as it is that the death of a husband may impact upon the mental health of his wife (145).

89 In terms of contemporary standards of liability and responsibility, it is not unreasonable that a driver should have in contemplation not only an accident victim who suffers physical injury caused by the driver's negligence but also a close relative of the victim, such as a sibling, who might suffer mental harm the result of what he or she sees and learns of the victim's physical injuries in the aftermath of the accident. As has been recognised or assumed by courts in the United Kingdom (146), Canada (147) and the United States (148) and in some States in Australia (149), such a relative is a person who is so closely and directly affected by the driver's negligence that the driver should have them in contemplation as potentially so affected (150).

90 Much was made in argument of what was said to be an essential difference between *Jaensch* and this case – that the respondent in this case did not see any of the victim's injuries whereas in *Jaensch* the claimant was both told and observed something of the victim's injuries in the aftermath of the accident at the hospital to which the victim was taken (151). But, as has been seen, the respondent in this case did see something of the aftermath of the accident and something of the substantial damage that resulted. He realised at that time that someone was likely to have been at least seriously injured. He later came to understand and was affected by the realisation that his brother had died at a time when he was present.

(145) *Gifford* (2003) 214 CLR 269 at 288-290 [47]-[51] per McHugh J.

(146) *Turbyfield v Great Western Railway Co* (1937) 54 TLR 221; *Owens v Liverpool Corporation* [1939] 1 KB 394; *Mortiboys v Skinner (The Devonshire Maid)* [1952] 2 Ll L Rep 95 at 103.

(147) *Cameron v Marcaccini* (1978) 87 DLR (3d) 442.

(148) *Dillon v Legg* (1968) 441 P (2d) 912 (Cal).

(149) See, eg, *Storm v Geeves* [1965] Tas SR 252; *Benson v Lee* [1972] VR 879.

(150) *Gifford* (2003) 214 CLR 269 at 277 [12] per Gleeson CJ; at 300 [86] per Gummow and Kirby JJ; *Donoghue v Stevenson* [1932] AC 562 at 580 per Lord Atkin.

(151) (1984) 155 CLR 549 at 558-559 per Brennan J.

91 Certainly there are some differences but, in terms of physical and temporal proximity, those differences are neither substantial nor particularly significant. As the decided cases show, the requisite degree of temporal proximity as between accident and mental harm need not be as close as it might in the absence of a close or any relationship between accident victim and claimant (152). Furthermore, this case may appropriately be characterised as one where the claim is based on "direct perception of some of the events which go to make up the accident as an entire event [including] the immediate aftermath" (153) or where psychiatric injury results from the combined effect on a claimant of a report of an accident and the claimant's later observation of the aftermath (154).

92 In *Tame*, Gleeson CJ expressed concern as to the effects on the way people conduct their lives of imposing legal responsibility to have in contemplation and guard against emotional disturbance to others (155). In that connection, his Honour referred to the increasing awareness in the medical profession and in the community generally of the emotional fragility of some people and the consequent incidence of clinical depression resulting from emotional disturbances. He added that requiring persons engaged in certain kinds of activity to have in contemplation the risk of clinical depression so caused might be extremely onerous, especially if the predictability of harm were the sole criterion of liability. As his Honour also said, considerations of that kind go to the issue of reasonableness, "which is at the heart of the law of negligence" (156). Reasonableness must be judged in light of contemporary social conditions and community standards, to which conceptions of legal responsibility need constantly to adapt.

93 Arguably, similar considerations apply here. It was submitted on behalf of the appellant that to recognise a duty of care to a sibling of a motor accident victim when the sibling did not see or hear the accident, and did not until later comprehend that the victim had died, would be to go beyond the bounds of proximity repeatedly emphasised in earlier decisions of this Court. It would place an unreasonable burden on human activity by requiring people to guard against all kinds of psychiatric injury suffered as a consequence of learning, after the event, of the death or serious injury of a relative.

(152) *Jaensch* (1984) 155 CLR 549 at 555 per Gibbs CJ; *Pham v Lawson* (1997) 68 SASR 124 at 144, 148 per Lander J; see also *Annetts*, reported with *Tame v New South Wales* (2002) 211 CLR 317; *Gifford* (2003) 214 CLR 269.

(153) *Benson v Lee* [1972] VR 879 at 880 per Lush J.

(154) See *Storm v Geeves* [1965] Tas SR 252 at 267 per Burbury CJ.

(155) (2002) 211 CLR 317 at 332 [14].

(156) *Tame* (2002) 211 CLR 317 at 332 [14].

94 There are, however, a number of reasons why that submission should be rejected. To begin with, albeit at the risk of repetition, the respondent did see something of the aftermath of the accident. As has been observed, the only real difference between this case and *Jaensch* in that respect is that here the respondent did not realise until later told of his brother's death that what he had witnessed at the scene of the accident was his brother trapped dying in the wreckage.

95 Secondly, as has also been noted, where the relationship between a claimant and the victim of physical injuries is close, reasonable foreseeability does not require the same degree of temporal and physical proximity between accident and inception of mental harm as where the relationship is more remote.

96 Thirdly, on the facts as found by the Full Court, there was "a direct temporal link between the motor vehicle accident death and the development of the condition … [and] a causal relationship in that [the respondent's] condition focuses directly upon the psychological traumas related to the fatal motor vehicle accident" (157). There was no appeal against that finding.

97 Fourthly, judged by reference to contemporary social conditions and community standards of what is reasonable, the sort of psychological injury likely to be suffered by a claimant by reason of being exposed to the aftermath of a motor accident in which his or her sibling has been killed is surely much more serious, and so worthy of compensation, than the relatively idiosyncratic strain of mental disorder which it was claimed in *Tame* had resulted from the unintended and transitory publication of misinformation concerning the level of the plaintiff's blood alcohol concentration (158).

98 Fifthly, in seeking to distinguish this case from previous cases in which a duty of care has been found to be owed to the relatives of a victim, counsel for the appellant submitted that in *Gifford* and *Annetts v Australian Stations Pty Ltd* (159) a duty of care arose because the defendant in each case was the victim's employer, and there was no such employment relationship in this case. That submission overlooks that the duty of care owed by a driver to a passenger is an established category of duty that arises from the relationship between the parties, just as does the duty owed by an employer to an employee. In point of principle, there is no relevant distinction between cases in which a duty of care arises because of an employment relationship between the defendant and the victim and a case like this where the duty arises

(157) *Philcox* (2014) 119 SASR 71 at 82 [37] (emphasis removed).
(158) (2002) 211 CLR 317 at 397 [233]-[234] per Gummow and Kirby JJ.
(159) Reported with *Tame* (2002) 211 CLR 317.

because of a relationship of driver and passenger between the defendant and the victim.

99 Sixthly, counsel for the appellant submitted that it was essential for this Court to identify "control mechanisms" limiting the scope of the duty of care to avoid causing mental harm, in order to avoid the spectre of indeterminate liability. But, in circumstances where, as here, the legislature has enacted restrictions on the scope of liability in the form of s 53 of the CL Act, it is not apparent why the Court should, as a matter of common law, impose additional or different limitations within the rubric of duty of care.

100 Finally, and by no means least, to recognise that a motorist in the position of the appellant is under a duty of the kind in question requires no more of the motorist to satisfy the duty than the motorist is already bound to do to satisfy his or her duty of reasonable care to his or her passengers.

101 Counsel for the appellant argued that, even if that be so, to recognise the existence of a duty of care in the present circumstances would be productive of confusion in that a wrongdoer in South Australia is already exposed to a claim for solatium following the negligently caused death of a claimant's spouse or child, and that remedy is expressly intended to compensate the claimant for the anguish and distress associated with the consequences of death. Thus, it was contended, if this new area of liability were recognised, it would result in practical difficulties in distinguishing between the compensable effects of disturbing news and non-compensable grief.

102 The supposed risk of confusion is exaggerated. The possibility of confusion of the kind suggested already exists in relation to recognised categories of duty to take reasonable care to avoid causing a claimant psychiatric injury as a consequence of being present at the scene of an accident in which a close relative is killed or seriously injured. So far it has not proved to be a problem and there is not a great deal of reason to suppose that it will. The law will not allow double recovery.

Conclusion on duty of care

103 In the result, the Full Court were right to hold that the appellant owed the respondent a duty to take reasonable care in the driving of his vehicle not to cause the respondent mental harm of the kind he suffered.

Section 53 of the CL Act

104 As was earlier mentioned, s 53 provided that damages may only be awarded for mental harm if the plaintiff were present at the scene of the accident when the accident occurred. Section 3 defined "accident" as "an incident out of which personal injury arises and includes a

motor accident"; and "motor accident" as "an incident in which personal injury arises out of the use of a motor vehicle".

105 In *Jaensch* (160), Deane J identified a distinction at common law between an accident and its aftermath, as follows:

> "It has already been seen that the requirement of proximity in a case of mere psychiatric injury is satisfied where injury was sustained as a result of observation of matters involved in the aftermath of a road accident at the actual place of collision. 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. In a modern society, the aftermath also extends to the ambulance taking an injured person to hospital for treatment and to the hospital itself during the period of immediate post-accident treatment. It would, in my view, be both arbitrary and out of accord with common sense to draw the borderline between liability and no liability according to whether the plaintiff encountered the aftermath of the accident at the actual scene or at the hospital to which the injured person had been quickly taken. Indeed, as has been mentioned, in some cases the true impact of the facts of the accident itself can only occur subsequently at the hospital where they are known. In the present case, as in *McLoughlin*, the aftermath of the accident extended to the hospital to which the injured person was taken and persisted for so long as he remained in the state produced by the accident up to and including immediate post-accident treatment. Mrs Coffey sustained her psychiatric injury by reason of what she saw and heard at the hospital while her husband was under such treatment. Her psychiatric injuries were the result of the impact upon her of the facts of the accident itself and its aftermath while she was present at the aftermath of the accident at the hospital. That being so, she was not, in my view, precluded from recovering damages for those injuries by reason of the fact that she did not attend at the actual scene of the collision. What, then, is the effect of the fact that her nervous shock was caused by what she was told, as well as by what she observed, at the hospital?"

106 In this case, counsel for the appellant contended that, given the distinction between "accident" and "aftermath" so recognised at common law, the fact that the definition of "accident" in s 3 makes no reference to "aftermath" implies that s 53(1) limits the recovery of damages for mental harm suffered as a result of an accident to a

(160) (1984) 155 CLR 549 at 607-608.

claimant who was present at the scene of impact at the time it occurred. Counsel referred to the decision of the New South Wales Court of Appeal in *Hoinville-Wiggins v Connelly* (161), which concerned the meaning of "when the accident occurred" in s 77 of the *Motor Accidents Act 1988* (NSW), as supporting that conclusion.

107 For the reasons which follow, that argument should be accepted.

"*Accident*" *does not include the aftermath of an accident*

108 Section 77 of the *Motor Accidents Act* (NSW) provided as follows:

> "No damages for psychological or psychiatric injury shall be awarded in respect of a motor accident except in favour of:
>
> (a) a person who suffered injury in the accident and who:
>
> (i) was the driver of or a passenger in or on a vehicle involved in the accident, or
>
> (ii) was, when the accident occurred, present at the scene of the accident, or
>
> (b) a parent, spouse, brother, sister or child of the injured person or deceased person who, as a consequence of the injury to the injured person or the death of the deceased person, has suffered a demonstrable psychological or psychiatric injury and not merely a normal emotional or cultural grief reaction."

109 In *Hoinville-Wiggins*, Giles JA, with whom Mason P and Stein JA agreed (162), reasoned with respect to that section that (163):

> "Close connection in space and time is required. The words 'when the accident occurred' mean that it is not enough that [the claimant] 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. For the notion of aftermath she referred to *Benson v Lee*; *McLoughlin v O'Brian* and *Jaensch v Coffey*. The passages were to do with recovery at common law of damages for nervous shock suffered not only by a plaintiff who saw or heard the accident, but also by a plaintiff who saw or heard events at the scene of the accident after its occurrence or even at a hospital during immediate post-accident treatment. They 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

(161) (1999) 29 MVR 169.
(162) (1999) 29 MVR 169 at 169 [1], [2].
(163) (1999) 29 MVR 169 at 173 [23]-[24].

> 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."

(Citations omitted.)

110 The Full Court rejected the appellant's argument that s 53 should be construed in accordance with the reasoning in *Hoinville-Wiggins*. Gray J, with whom Parker J generally agreed, said that he did so because the common law conception of "accident" includes the aftermath of the accident and therefore it should be assumed that, where the CL Act refers to an "accident", it includes its aftermath (164). His Honour did not refer to *Hoinville-Wiggins*, but said the observations in *Wicks* concerning s 30 of the NSW Act had "obvious relevance" to the construction of s 53 (165).

111 Sulan J reasoned differently, albeit to the same conclusion. His Honour said that "[t]he 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" (166). The legislative history and extrinsic materials relating to s 53 did not disclose a parliamentary intention to abrogate the "aftermath doctrine" (167). Further, he said that by defining "accident" as including a "motor accident", and the latter expression as an "*incident* in which personal injury arises", the CL Act had extended the meaning of "accident" to "encompass the events directly related to and following on from the actual impact" (168). His Honour distinguished

(164) *Philcox* (2014) 119 SASR 71 at 77 [22].
(165) *Philcox* (2014) 119 SASR 71 at 80 [28].
(166) *Philcox* (2014) 119 SASR 71 at 86 [55].
(167) *Philcox* (2014) 119 SASR 71 at 87-88 [58]-[60].
(168) *Philcox* (2014) 119 SASR 71 at 90 [66].

Hoinville-Wiggins on the basis that the *Motor Accidents Act* (NSW) did not contain such a definition of "accident".

112 With respect, the Full Court's reasoning was not correct. According to ordinary acceptation, a motor accident occurs when a motor vehicle collides with another motor vehicle or some other object. Where that occurs, it is the forces generated by the impact or impacts of the collision which inflict a victim's personal injuries. What happens in the aftermath of the collision might result in exacerbated or additional injuries such as, for example, might be sustained by the victim in the course of attempts made to remove him or her from a damaged vehicle or as the result of an unsuccessful medical procedure intended to enhance his or her chances of survival. But it remains that it is the collision or collisions which comprise the relevant incident out of which the victim's injuries arise.

113 Significantly, that is plainly the sense in which the word "accident" is used elsewhere in the CL Act: in s 47, which is concerned with contributory negligence; and in s 49, which is directed to the consequences of an injury suffered in a motor accident where the injured person was not wearing a seatbelt.

114 Contrary to the reasoning of Gray and Sulan JJ, the fact that the common law recognised a distinction between an accident and its aftermath points against the idea that, by defining "accident" without reference to "aftermath", s 3 includes the "aftermath" as part of the "accident".

115 Nor does *Wicks* assist in the way in which Gray J appears to have considered that it did. *Wicks* was concerned with the differently worded provisions of s 30 of the NSW Act, in which there was no requirement (as there is in s 53 of the CL Act) that the claimant be present at the scene *when the accident occurred*.

116 Section 30(2)(a) of the NSW Act provided that a plaintiff was not entitled to recover damages for mental harm unless "the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril". The plaintiffs in *Wicks* were members of the New South Wales Police Force who attended the scene of a high-speed train accident soon after it occurred. They saw the bodies of dead passengers, as well as passengers who were trapped, evidently seriously injured, and distressed (169). This Court held that this constituted witnessing, at the scene, the victims of the accident who were still alive being put in peril (170).

(169) *Wicks* (2010) 241 CLR 60 at 66-67 [1]-[2].
(170) *Wicks* (2010) 241 CLR 60 at 77 [50]-[51].

117 As submitted by the appellant, s 30 of the NSW Act is directed to what a plaintiff witnesses in terms of harm done to the victim. In contrast, s 53 of the CL Act is directed to the claimant's presence at the scene of the accident at a particular time – being the time "when the accident occurred".

118 Sulan J's interpretation of "incident" in the definitions of "accident" and "motor accident" in s 3 of the CL Act was equally misplaced. The natural and ordinary meaning of "incident" in s 3 is something akin to the second sense of "incident" identified in the *Oxford English Dictionary*: "[a]n occurrence or event viewed as a separate circumstance" (171). There is nothing about that which suggests a legislative intent to expand the ordinary meaning of "accident" to include the aftermath of an accident. Rather, it suggests a legislative intent to confine "accident" to the separate circumstance or event – the impact – out of which personal injury may arise.

119 The likelihood of that being so is fortified by the superadded requirement in s 53(1)(a) that a plaintiff have been present at the scene of the accident *when the accident occurred*. It conveys the notion of a singular scene of the accident and a singular time at the scene of the occurrence of the accident; and, as such, it stands in contrast to the kind of continuing sequence of incidents during the aftermath of the accident which, in *Wicks*, was found to be causative of the plaintiffs' mental condition (172).

Legislative history and extrinsic materials

120 It follows from the above that, to the extent the Full Court relied on historical considerations and extrinsic materials, their Honours did so in such a way as incorrectly to displace the clear meaning of the statutory text, read in its context (173). The legislative history of s 53 and the extrinsic materials relating to its enactment and subsequent amendments do not suggest that any different construction than that reached above is warranted.

121 The legislative progenitor of s 53(1) was s 35A(1)(c) of the *Wrongs Act 1936* (SA). As enacted in 1986 (174), it provided that:

> "[N]o damages shall be awarded for mental or nervous shock except in favour of —
>
> (i) a person who was physically injured in the accident, who was the driver of or a passenger in or on a motor vehicle involved in the

(171) *Oxford English Dictionary*, 2nd ed (1989), vol VII, p 793, "incident", sense 2(a).
(172) (2010) 241 CLR 60 at 74 [37], 76 [44]-[48].
(173) *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ.
(174) *Wrongs Act Amendment Act 1986* (SA).

accident or who was, when the accident occurred, present at the scene of the accident; or

(ii) a parent, spouse or child of a person killed, injured or endangered in the accident."

122 In the Second Reading Speech relating to the amending Bill, the responsible Minister said of the amendment (175):

"The Bill also provides for limits on the range of persons who will be entitled to make claim for nervous shock. Payments for nervous shock are made where nervous shock is suffered by a person in the proximity of injury or peril caused to a third party by the negligence of another. The law was extended in the 1983 case of *Coffey v Jaensch* [(176)] so that it covered the case where a wife suffered nervous shock from what she saw and was told at a hospital on the night of an accident and on the following day.

The proposed amendment does not significantly alter the law as it currently stands and … it recognises the result in the case of *Coffey v Jaensch*. *However, by defining by statute the operation of nervous shock in cases involving motor vehicle accidents, the Government seeks to prevent any further expansion of this head of damage*."

(Emphasis added.)

123 So, too, in the commentary on the clauses which accompanied the introduction of the section, it was stated that (177):

"[I]t is proposed that … awards for mental or nervous shock be limited to being made in favour of an injured party, a person at the scene of the accident or a parent, spouse or child of a person killed, injured or endangered in an accident."

124 Hence, as is apparent from the text of the provision, s 53 has the effect of recognising the result in *Jaensch* of a right of recovery for mental harm suffered by close relatives of an accident victim, but it restricts the eligible class of claimants to parents, spouses and children of persons killed, injured or endangered in the accident.

125 In 1998, the *Wrongs Act* was amended by the *Statutes Amendment (Motor Accidents) Act 1998* (SA). Section 35A(1)(c) was not amended but, in the course of proposing other amendments, which had been rejected, the Minister stated as follows (178):

(175) South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 27 November 1986, p 2410.

(176) (1983) 33 SASR 254; affd *Jaensch* (1984) 155 CLR 549.

(177) South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 27 November 1986, p 2411.

(178) South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 18 August 1998, p 1771.

"The second [amendment] is for nervous shock which is a recognised psychiatric illness which may be compensable even though no physical injury has been sustained. The difficulty with these cases is that the limits of entitlement to damages are not easy to set and there is potentially a grey area between nervous shock and grief. Section 35A(1)(c) of the *Wrongs Act* was inserted in 1986 and amended the law relating to nervous shock caused by or arising out of a motor vehicle accident.

The provision limits the class of claimants to:

(i) parents, spouses or children of persons killed, injured or endangered in motor accidents, or

(ii) persons actually present, injured or endangered at the scene of a motor accident.

However, despite these limitations, it is considered that the CTP Fund remains unreasonably exposed. For example, there is doubt as to whether or not damages for nervous shock can be awarded where a communication about the accident was the only link between the accident and the nervous shock. It is also arguable that damages could be awarded not only to those who witness an accident personally or receive news of the accident personally, but also to those who receive news via the media. If damages can be awarded in such a situation, there would be a significant increase in the number of potential claimants who were not previously considered in premium setting calculations.

The Bill as introduced to the other place proposed to amend the current provision to tighten the law so that compensation is limited 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. The Government will propose an amendment to restore this provision."

126 In 2002, the *Wrongs Act* was further amended by the *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA) to extend the mental harm provisions to all classes of personal injury (as opposed to just motor accidents) and to insert the current definition of "accident". Section 35A(1)(c) was repealed but s 24C was enacted in substantially similar terms; thus implying a legislative intent that it should continue to limit the class of eligible mental harm claimants to persons who either were present at the scene of the accident at the relevant time or, if not so present, were parents, spouses

and children of persons killed, injured or endangered in the accident. As the Minister noted in the Second Reading Speech (179):

> "The current rule in motor accident cases that damages for mental or nervous shock may only be awarded in limited circumstances is carried over to other personal injury cases. In essence, the claimant must have been physically injured in the accident, or present at the scene at the relevant time, unless the claimant is the parent, spouse or child of someone killed, injured or endangered in the accident."

127 Finally, in response to the *Review of the Law of Negligence* (the Ipp Report) (180), the *Wrongs Act* was substantially revised and re-enacted as the CL Act with effect from 2004 (181). Recommendation 34 of the Ipp Report restated the common law factors relevant to determining whether a duty of care is owed in respect of pure mental harm suffered as the result of injury to another in light of the then-recent decisions of this Court in *Tame* and *Annetts* (182). But, contrary to the reasoning of Sulan J, Recommendation 34 did not necessarily include "recovery for pure mental harm where 'the plaintiff was at the scene of shocking events or witnessed them or their aftermath'" (183). The Ipp Report did not make any recommendation as to whether liability to pay damages to a claimant should be limited to persons present at the scene of the accident or other incident which caused the injury, or its aftermath. The Report set out a number of factors relevant to the imposition of limitations of that kind but concluded that restrictions of that kind are arbitrary and, therefore, that individual legislatures are better placed than courts to prescribe them (184).

128 Consistently with the Ipp Report (185), s 53 of the CL Act restricted claims for damages for pure mental harm to claimants who have suffered a "recognised psychiatric illness". But it also re-enacted (in relevantly identical terms to s 35A(1)(c) of the *Wrongs Act*) the restriction of claims for damages for pure mental harm suffered in relation to accidents to claimants present at the scene of the accident at the relevant time, or to parents, spouses and children of persons killed

(179) South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 14 August 2002, p 1034.

(180) Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002).

(181) *Law Reform (Ipp Recommendations) Act 2004* (SA).

(182) Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002), p 144; see generally pp 137-140 [9.8]-[9.18].

(183) *Philcox* (2014) 119 SASR 71 at 88 [59] (emphasis removed).

(184) Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002), pp 140-143 [9.19]-[9.28].

(185) Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002), p 144, Recommendation 34(a).

or injured as a result of the accident. As the Minister stated in the Second Reading Speech, apart from the introduction of the "recognised psychiatric illness" provision, the purpose of s 53 was to "restate the existing law" as found in s 35A(1)(c) and later s 24C (186).

Conclusions

129 It should be concluded that s 53(1), read with the current definition of "accident", excludes the aftermath of an accident and so confines the class of eligible claimants for pure mental harm suffered as a result of an accident to claimants present at the scene of the accident at the relevant time or, if not present, to parents, spouses and children of persons killed or injured as a result of the accident.

130 Though the appellant owed the respondent a duty to take reasonable care to avoid causing the respondent mental harm, the respondent is not entitled to damages because he was not "present at the scene of the accident when the accident occurred" within the meaning of s 53(1)(a) of the CL Act.

Orders

131 In the result, the appeal should be allowed. The orders proposed in the joint judgment should be made.

1. *Appeal allowed.*
2. *Set aside paras 1 and 3.1, and para 2 in so far as that paragraph relates to the setting aside of the judgment appealed against, of the order of the Full Court of the Supreme Court of South Australia made on 4 June 2014 and, in their place, order that the appeal be dismissed.*
3. *The appellant pay the respondent's costs of the appeal to this Court.*

Solicitors for the appellant, *Finlaysons*.

Solicitors for the respondent, *SE Lawyers*.

JDM

(186) South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 15 October 2003, p 354.