

# Insurance Law Case Note

18 June 2010

## High Court: rescuers attending scene of train wreck are entitled to damages for psychiatric illness

by Linda Hamilton, Partner, Notary Public

*Wicks -v- State Rail Authority of New South Wales; Sheehan -v- State Rail Authority of New South Wales* [2010] HCA 22; 16 June 2010

On 31 January 2003 a train accident occurred near Waterfall Station, south of Sydney in New South Wales. The train was travelling at high speed. It derailed. All four carriages were badly damaged. Seven people died, others were injured. State Rail admitted that it was negligent in the operation of the railway and of the particular train that derailed.

The appellants, Mr Wicks and Mr Sheehan were policemen. They responded to a radio message to attend the scene. They were amongst the first to arrive.

The scene included that some of the people had been thrown out of the train. Also that overhead electrical cables had been torn down and were lying across the wreckage. The appellants forced their way into the wrecked carriages. They observed passengers that were so badly injured they were obviously dead. Some were trapped, some seriously injured and very distressed. During the period of hours they were in attendance performing their

duties, they relieved the suffering of the survivors and removed them. As they removed them they took care that they looked straight ahead lest they see the deceased persons' damaged bodies.

Both appellants lost in their claims for damages for psychiatric injury before the Supreme Court and Court of Appeal.

The High Court on 16 June 2010, has remitted the matter back to the Court of Appeal to determine whether there was a duty of care and whether psychiatric illness had been suffered.

### The High Court considered the *Civil Liability Act 2002*

#### 32 Mental harm – duty of care

- (1) A person (*the defendant*) does not owe a duty of care to another person (*the plaintiff*) to take care not to cause the plaintiff mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.
- (2) For the purposes of the application of this section in respect of pure mental harm, the circumstances of the case include the following:
  - (a) whether or not the mental harm was suffered as the result of a sudden shock,
  - (b) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril,
  - (c) the nature of the relationship between the plaintiff and any person killed, injured or put in peril,

- (d) whether or not there was a pre-existing relationship between the plaintiff and the defendant.
- (3) For the purposes of the application of this section in respect of consequential mental harm, the circumstances of the case include the personal injury suffered by the plaintiff.
- (4) This section does not require the court to disregard what the defendant knew or ought to have known about the fortitude of the plaintiff.

#### 30 Limitation on recovery for pure mental harm arising from shock

- (1) This section applies to the liability of a person (*the defendant*) for pure mental harm to a person (*the plaintiff*) arising wholly or partly from mental or nervous shock in connection with another person (*the victim*) being killed, injured or put in peril by the act or omission of the defendant.
- (2) The plaintiff is not entitled to recover damages for pure mental harm unless:
  - (a) the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril, or
  - (b) the plaintiff is a close member of the family of the victim.
- (3) Any damages to be awarded to the plaintiff for pure mental harm are to be reduced in the same proportion as any reduction in the damages that may be recovered from the defendant by or through the victim on the basis of the contributory negligence of the victim.
- (4) No damages are to be awarded to the plaintiff for pure mental harm if the recovery of damages from the defendant by or through the victim in respect of the act or omission would be prevented by any provision of this Act or any other written or unwritten law.
- (5) In this section:

*close member of the family* of a victim means:

  - (a) a parent of the victim or other person with parental responsibility for the victim, or
  - (b) the spouse or partner of the victim, or
  - (c) a child or stepchild of the victim or any other person for whom the victim has parental responsibility, or

(d) a brother, sister, half-brother or half-sister, or stepbrother or stepsister of the victim.

*spouse or partner* means:

- (a) a husband or wife, or
- (b) a de facto partner,

but where more than one person would so qualify as a spouse or partner, means only the last person to so qualify.

The High Court made the following observations:

- Section 30 (relating to damages) of the *Civil Liability Act 2002* (the “**Act**”) must only be considered in the light of the provision affecting duty of care otherwise, the risk is that the limitation contained in section 30(2) will be read divorced from its context.
- Part 3 of the Act is entitled “Mental Harm”. “Mental Harm” means the impairment of a person’s mental condition (s27).
- There are two species of mental harm. “Consequential mental harm” that is a consequence of a personal injury of any other kind, and “pure mental harm” which is mental harm other than consequential mental harm. The appellants’ claims were for pure mental harm.
- Section 32 of the Act (which relates to the establishment of a duty of care) has to be applied before section 31 (which relates to damages).
- Section 32 does not say when there will be a duty of care. Rather, it says the necessary condition for such a duty is that the defendant ought to have foreseen that a person of normal fortitude might in the circumstances of the case suffer a recognised psychiatric illness if reasonable care were not taken.
- Those circumstances of the case to which regard had to be given, were whether the mental harm was caused by a sudden shock, whether there was witnessing at the scene of certain types of

event, what was the relationship between the plaintiff and the victim and whether there was a relationship between the plaintiff and defendant. But, the High Court observed, section 32 did not prescribe any particular consequence that might follow from the presence or absence of any or all of those circumstances.

- Therefore there is still a role for the common law of negligence as stated by the High Court in *Tame -v- New South Wales* (2002) 211 CLR 317; [2002] HCA 35.
- Tame’s case rejected that reasonable or ordinary fortitude, shocking event and directness of connection were additional pre-conditions to liability for psychiatric injury. The introduction shortly after Tame’s case of the Act, was to bring back to life in these types of claims the consideration, that the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness.
- There is, by section 32(2) of the Act recognition only, that if there happens to be a “sudden shock” that it is no more than one of several circumstances that bear upon consideration as to whether the duty was owed. Secondly, witnessing at the scene a person being killed injured or put in peril is also, but one of the circumstances that bear upon whether there is foreseeability (duty of care).
- Section 32 does not focus on mental or nervous shock (the words used in sections 29 and 30).
- Mental and nervous shock are words that refer to a consequence. Section 32 only

uses the words “sudden shock” which refer to a cause.

- The notion however, of “shock” is central to “mental or nervous shock” and, “sudden shock”.
- So, that which is common between the section 32 duty of care provision, and the section 30 provision, is the notion of “shock” only.

Thus, the High Court would appear to be saying that there is no natural segue between sections 32 relating to considerations of duty of care, and section 30, on damages.

The High Court observed that:

- The shock which caused a sudden and disturbing impression on the minds and feelings of others, extended to the consequences of the accident – where there were a series of shocking experiences.
- Sub section (2)(a) of section 32, required witnessing of the event at the scene. It must be read as directing attention to an event that was happening while the plaintiff “witnessed” it. There are cases where death or injury or being put in peril takes place over an extended period. In this case, the consequences of the derailment took time to play out. Some that suffered physical trauma suffered further injury as they were removed (this inference was drawn from the fact that some were trapped in the wreckage). Further, the High Court equated the witnessing of psychiatric injuries as equivalent to witnessing physical injuries saying:  
*“it may readily be inferred that many who were on the train suffered psychiatric injuries as a result of what happened to them in the derailment.”*
- The process of suffering injury

was not over when the appellants arrived. The appellants therefore, witnessed victims of the accident being injured. Including being psychiatrically injured.

- Even if this inference could not be drawn, the High Court said, the fact that there were fallen cables draped over the carriages was a dramatic example of the type of peril that the appellants observed the victims to be in prior to being taken to a place of safety.
- A person is put in peril when put at risk. The person remains in peril (is *being* put in peril) until the person ceases to be at risk.
- The reference to “victim” in section 30(2)(a) is to be read as one or more of those persons and is not confined to the appellants shown to be suffering shock as a result of witnessing one particular victim.

### Implications for underwriters

For underwriters, there is now no real confinement of the exposure that might be experienced upon the death or injury of a person/s being witnessed by another, except to the extent perhaps that it might be proven that no psychiatric illness has occurred.

All those persons who see death, the working aftermath of accidents, death or injury, or who are closely related to the victim, are potential claimants. This will embrace ambulance officers, police officers, firemen, paramedics, search and rescue personnel, the media, forensic officers and any persons who attend at the scene whilst the damage is unfolding. It may extend to insurance loss adjusters and assessors.

Further, it is important to note that the High Court has expressly included

in the nature of the injury or peril that is witnessed, psychiatric illness that is in the process of being incurred upon victims, even where the victims may not be physically injured.

Perhaps then, an aggregation clause for pure psychiatric injury may find its way into public liability and professional indemnity policies or, maybe a sub-limit for pure psychiatric injury/illness or even, causing an absolute exclusion for pure psychiatric injury with an extension for such cover to be bought separately?

Given the difficulty of defending these cases due to the subjective element involved in verifying and assessing psychiatric injury, underwriting controls may be justified to prevent mass claims for psychiatric injury.

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