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Insurance law update

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CASE NOTE

Accident v aftermath – High Court decision on damages sought for mental harm

KING v PHILCOX [2015] HCA 19

Yesterday, the High Court handed down a significant decision in the context of personal injury claims within South Australia. The decision concerns the interpretation and application of Sections 33 and 53 of the *Civil Liability Act* 1936, which were introduced as part of a suite of amendments in 2004 with the intention of curtailing the class of persons who could recover damages for negligently inflicted mental harm.

THE BACKGROUND

On 12th April 2005, the respondent's brother was a passenger in a motor vehicle driven by the appellant, which was involved in an accident due to the appellant's negligence. The respondent's brother was trapped in the wreckage and died at the scene. After the collision, the respondent drove through the relevant intersection and witnessed the accident aftermath on five separate occasions. Each time, the respondent was not distressed by anything he had witnessed and furthermore had no awareness that his brother had even been in the accident and had been fatally injured.

It was not until approximately 6 hours later that he was informed by family members that his brother had in fact died in the accident in question. The respondent visited the accident scene the next day and subsequently developed a psychiatric reaction which was diagnosed as a major depressive disorder.

At first instance, the Trial Judge (Judge Bampton) held that the appellant owed the respondent a duty of care pursuant to Section 33, but dismissed the claim on the basis that the respondent failed to satisfy the requirement at Section 53(1)(a), namely that that he "*.... was present at the scene of the accident when the accident occurred*".

The Full Court of the Supreme Court (Gray, Sulan and Parker JJ) upheld the Trial Judge's ruling on Section 33, but unanimously allowed the respondent's appeal with respect to Section 53(1)(a). In finding that he had been present at the scene of the accident when the accident occurred, the Full Court considered that the definition of "accident" in Section 3 of the Act imported the term "incident" which was said to be synonymous with an event, eventuality or aftermath and was therefore broad enough to include events directly related to, and following on from, the actual impact. On that basis, Section 53(1)(a) did not require a plaintiff to be present at the actual time of impact between the two vehicles, and presence at the aftermath sometime after the accident is sufficient.

Although the High Court (French CJ, Kiefel, Gaegler, Keane and Nettle JJ) held that the Full Court did not err in finding that the appellant owed the respondent a duty of care pursuant to Section 33, it unanimously rejected the Full Court's analysis of Section 53(1)(a) as straining too far against the ordinary English meaning of the phrase "*present at the scene when the accident occurred*".

CONCLUSION

The High Court's ruling confirms that Section 53(1)(a) is an explicit condition that requires direct exposure to the sights and sounds of an accident itself and which will not be satisfied by merely witnessing the aftermath, notwithstanding the harsh consequences this strict interpretation may have in some circumstances.

APPLICABILITY IN VICTORIA

The decision in the case detailed above was based on Sections 33 and 53 of the South Australian *Civil Liability Act* 1936. The relevant Victorian legislation regarding a person's duty of care not to cause pure mental harm is contained in Sections 72 and 73 of the Wrongs Act 1958 (Vic). Section 72 is in very similar wording to Section 33 of the Civil Liability Act. Therefore, the High Court's finding that the appellant owed a duty of care to the respondent would apply to any cases decided under the Victorian legislation.

However, it is worth noting that Section 73 contains some potentially significant differences from Section 53;

- Firstly, Section 73 permits the plaintiff to recover damages for pure mental harm if the plaintiff "witnessed, at the scene, the victim being killed, injured or put in danger", in comparison to Section 53 which states "present at the scene of the accident when the accident occurred". Section 73 is almost identical to Section 30 of the Civil Liability Act 2002 (NSW), which the High Court did have cause to consider in this case. The High Court held that there were significant textual differences between the two provisions and that Section 30 is not broadly comparable to Section 53. This means that Victorian cases may be able to distinguish the High Court's decision in relation to the recovery of damages, given that the legislation is textually different.
- Secondly, Section 73 provides that the plaintiff can recover damages if the plaintiff "is or was in a close relationship with the victim". Close relationship is not defined in the Victorian legislation and there has not been any case law considering its meaning. Arguably, siblings would be considered to be in a close relationship and so the respondent would have been entitled to damages if this had been decided under the Victorian legislation.

To discuss the details of this recent High Court ruling or any queries you may have relating to claims for damages sought for mental harm, please contact your local Hunt & Hunt lawyer.

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