

KING v PHILCOX (A26/2014)

Court appealed from: Full Court, Supreme Court of South Australia
[2014] SASCFC 38

Date of judgment: 4 June 2014

Date special leave granted: 14 November 2014

On 12 April 2005, the respondent's brother, Scott Philcox, was a front seat passenger in a motor vehicle driven by the appellant, which was involved in a collision with another vehicle at an intersection at Campbelltown. The collision, which was caused by the negligence of the appellant, occurred between 4.50 and 4.55 pm. Scott Philcox died at about 5.30 pm while still trapped in the vehicle. On the afternoon of 12 April 2005, the respondent drove through or turned left at the intersection on five separate occasions after the collision. He was unaware that his brother was a passenger in one of the vehicles, and unaware that he had been fatally injured. Later that evening, the respondent's parents told him that his brother had been killed in a car accident. He then realised that this was the accident he had passed by on the five occasions. The respondent issued proceedings for damages in the District Court of South Australia, claiming that he was present at the scene of the collision and that, as a result, he suffered mental harm.

The trial judge (Judge Bampton) found that although the respondent had suffered a recognised psychiatric illness as the result of the sudden shock of hearing the news of his brother's death, and it was reasonably foreseeable that a person of normal fortitude in the respondent's position might suffer a psychiatric illness as a result of that shock, so that the duty of care specified in s 33 of the *Civil Liability Act 1936* (SA) (the Act) applied, the respondent was not present at the scene of the accident when the accident occurred as required by s 53(1)(a) of the Act.

In his appeal to the Full Court of the Supreme Court (Gray, Sulan and Parker JJ), the respondent submitted, inter alia, that the trial judge erred in finding that the respondent was not present at the scene of the accident when the accident occurred. The Full Court held that the facts constituting a road accident and its aftermath are not confined to "the immediate point of impact", but include the aftermath of an accident which encompasses events at the scene after its occurrence, including the extraction and removal of persons from damaged vehicles. The Court noted that section 3 of the Act defines the word "accident" and the words "motor accident" as follows:

"accident means an incident out of which personal injury arises and includes a motor accident;
motor accident means an incident in which personal injury is caused by or arises out of the use of a motor vehicle."

The Court considered that the use of the word "incident" encompasses events directly related to and following on from the actual impact. The use of the phrase "is caused by or arises out of" confirms this construction. They were therefore satisfied

that the respondent was “*present at the scene of the accident when the accident occurred*” within the meaning of s 53(1)(a) of the Act.

The grounds of appeal include:

- The Full 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 1936* (SA).
- The Full Court erred in finding that a reasonable person in the position of the appellant would have foreseen that a person of normal fortitude in the respondent’s position might, in the circumstances of the case, have suffered psychiatric illness, within the meaning of s 33(1) of the *Civil Liability Act 1936* (SA).