



HIGH COURT OF AUSTRALIA

10 June 2015

KING v PHILCOX

[2015] HCA 19

Today the High Court unanimously allowed an appeal from a decision of the Full Court of the Supreme Court of South Australia and held that while the Full Court did not err in finding that the appellant owed the respondent a duty of care under s 33 of the *Civil Liability Act 1936 (SA)*, the respondent could not recover damages for mental harm because of the operation of s 53 of the Act.

Section 33(1) provides that it is a necessary condition for the establishment of a duty of care not to cause mental harm that "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 recognised psychiatric illness". Section 33(2) lists circumstances to be considered in applying s 33(1), which, in the case of pure mental harm, include the nature of the relationship between the plaintiff and any person killed, injured or put in peril. Section 53(1) limits the circumstances in which a plaintiff may recover damages for mental harm caused by an accident. If the plaintiff is not a parent, spouse or child of a person killed, injured or endangered in the accident, he or she must have been physically injured in the accident or "present at the scene of the accident when the accident occurred" to recover damages.

On 12 April 2005, the respondent's brother was a passenger in a motor vehicle driven by the appellant. Between 4.50pm and 4.55pm, as a result of the appellant's negligence, the vehicle collided with another vehicle at an intersection in Campbelltown, Adelaide. The respondent's brother died while trapped in the vehicle. After the collision, the respondent drove through or turned left at the intersection on five occasions. On the final occasion the accident scene had been cleared. The respondent was told later that evening that his brother had died in a traffic accident. He realised this was the accident at the intersection, the aftermath of which he had witnessed. He visited the accident scene the next day. Subsequently, he developed a major depressive disorder.

The respondent brought proceedings in the District Court of South Australia seeking damages for mental harm. The District Court found that the respondent owed the appellant a duty of care, but that the appellant could not recover damages because he had failed to establish causation and did not satisfy the requirements for recovery of damages under s 53. The Full Court of the Supreme Court of South Australia allowed an appeal from that decision and awarded damages. The Full Court held that the respondent satisfied the necessary requirements of duty, breach and causation, and that he was present at the scene of the accident "when the accident occurred", within the meaning of s 53(1)(a). By grant of special leave, the appellant appealed to the High Court. The appellant submitted he did not owe the respondent a duty of care and that even if a duty of care existed, the respondent could not recover damages because of the operation of s 53.

The High Court allowed the appeal, holding that while the Full Court did not err in finding that a duty of care was owed to the respondent under s 33, the respondent was not present at the scene of the accident "when the accident occurred", within the meaning of s 53(1)(a). As the respondent could not satisfy the requirements of s 53, he could not recover damages.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*