HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

Matter No S27/2010

DAVID COLIN WICKS APPELLANT

AND

STATE RAIL AUTHORITY OF NEW SOUTH WALES
KNOWN AS STATE RAIL RESPONDENT

Matter No S28/2010

PHILIP KEVIN SHEEHAN APPELLANT

AND

STATE RAIL AUTHORITY OF NEW SOUTH WALES
KNOWN AS STATE RAIL RESPONDENT

Wicks v State Rail Authority of New South Wales
Sheehan v State Rail Authority of New South Wales
[2010] HCA 22
16 June 2010
S27/2010 & S28/2010

ORDER

In each matter order that:

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 31 August 2009.*

3. *Remit the matter to the Court of Appeal for further consideration in accordance with the reasons of this Court.*

4. *The costs of the proceedings in the Court of Appeal to date, and the costs of the further proceedings in that Court, be in the discretion of that Court.*

On appeal from the Supreme Court of New South Wales

Representation

B J Gross QC with K O Earl for the appellant in both matters (instructed by Baker & Edmunds)

J T Gleeson SC with P M Morris and B A Arste for the respondent in both matters (instructed by DLA Phillips Fox Lawyers)

CATCHWORDS

Wicks v State Rail Authority of New South Wales
Sheehan v State Rail Authority of New South Wales

Negligence – Duty of care – Personal injuries – Psychological and psychiatric injuries – Train derailment – Passengers killed and injured – Police officers who attended scene sued railway operator in negligence for psychological and psychiatric injuries – Whether police officers "witnessed, at the scene, [one or more persons] being killed, injured or put in peril" by railway operator.

Words and phrases – "another person", "being killed, injured or put in peril", "foreseeability", "mental or nervous shock", "recognised psychiatric illness", "shocking event", "sudden shock", "victim", "witnessed at the scene".

Civil Liability Act 2002 (NSW), ss 30, 32.

1 FRENCH CJ, GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ. At about 7.14 am on 31 January 2003, a passenger train operated by "State Rail"[1] left the tracks at high speed near Waterfall Station, south of Sydney. Seven of the almost 50 people on the train died. Many others were injured, some very seriously. All four carriages of the train were very badly damaged.

2 At the time of the accident, the appellant in each appeal (Mr Wicks and Mr Sheehan respectively) was a serving member of the New South Wales Police Force. In response to a radio message, Mr Wicks and Mr Sheehan were among the first to arrive at the scene, soon after the accident had happened. What confronted them was death, injury and the wreckage of the train. Because the overhead electrical cables had been torn down, and were lying across the wreckage, it was anything but clear whether it was safe to go close to the wreckage.

3 Some of those on board had been thrown out of the train. Many remained in the wreckage. Mr Wicks and Mr Sheehan each forced his way into damaged carriages. Some passengers were so badly injured that they were obviously dead. Some passengers were trapped, evidently seriously injured, and very distressed.

4 Mr Wicks and Mr Sheehan each did his best to relieve the suffering of the survivors and to get them to a place of safety. As further emergency workers arrived at the scene, Mr Wicks and Mr Sheehan each continued his rescue efforts and, later, undertook other tasks assigned at the scene. Each remained at the scene for a considerable time – Mr Wicks until about 4.00 pm; Mr Sheehan until about 2.00 pm.

5 State Rail admits that it was negligent in the operation of the railway and of the particular train that derailed.

---

1 State Rail Authority of New South Wales, the party named as the respondent to each appeal, is said, in some of the papers in the appeal books in this Court, to be the successor to a corporation (Rail Corporation New South Wales known as Railcorp) that operated the train. Nothing was said to turn on any question of succession and the question need not be explored in these reasons. It is convenient to refer to the respondent to each appeal as "State Rail".

6 Mr Wicks and Mr Sheehan each alleges that he was injured as a result of being present at the crash site and what he witnessed there. Each pleaded, as particulars of the injuries he suffered: psychological and psychiatric injuries, post traumatic stress syndrome, nervous shock and major depressive disorder.

The determinative issue

7 The determinative issue in each appeal is whether, if State Rail owed the appellant a relevant duty of care, and if the appellant suffered a recognised psychiatric illness of which the negligence of State Rail was a cause, State Rail is liable to the appellant. All parties accept that resolution of this issue turns on the construction and application of Pt 3 (ss 27–33) of the *Civil Liability Act* 2002 (NSW) ("the Civil Liability Act"). The issue should be resolved in favour of the appellants, and each matter remitted to the Court of Appeal of New South Wales for its further consideration.

8 To explain how the issue arises, and why it is necessary for this Court to leave the questions of duty of care, recognised psychiatric illness and causation undecided, something must be said about the history of the litigation in the courts below.

Proceedings in the courts below

9 Each appellant commenced an action against State Rail in the Common Law Division of the Supreme Court of New South Wales. Both actions were set down before Malpass AsJ for trial on the same day. The parties agreed that, in each action, issues of liability should be tried separately from issues of damages. The parties agreed that there were five issues in the case:

> "1. Did the defendant owe the plaintiff, a rescuer, a duty of care?
>
> 2. Did the plaintiff witness, at the scene, victims of the derailment, being killed injured or put in peril, in accordance with section 30(2) of [the Civil Liability Act]?
>
> 3. Did the plaintiff's attendance at the derailment cause him to suffer a recognised psychiatric illness? If so, what is the nature of that illness?
>
> 4. What is the plaintiff's entitlement to damages?

5. Are the plaintiff's damages to be reduced by reason of his employer's negligence in accordance with the provisions of section 151Z of the *Workers Compensation Act* 1987 (NSW)?"

In accordance with the agreement to try liability separately from any necessary assessment of damages, trial of the fourth and fifth issues was postponed.

10 At first instance, Malpass AsJ concluded[2] that liability was not established, and directed the entry of judgment in each action for the defendant. Appeals to the Court of Appeal of the Supreme Court of New South Wales (Beazley, Giles and McColl JJA) against those judgments were dismissed[3]. It is from the orders of the Court of Appeal that, by special leave, the appellants now appeal to this Court.

11 Both at first instance, and on appeal to the Court of Appeal, the answer to the second issue identified by the parties, concerning the application of s 30(2) of the Civil Liability Act, was treated as determinative of the liability of State Rail. Since its insertion into the Civil Liability Act by the *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW), Pt 3 of the Civil Liability Act has remained unamended. Section 30(1)–(4) of the Civil Liability Act provides:

"(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.

---

2 *Wicks v Railcorp* [2007] NSWSC 1346.

3 *Sheehan v SRA* (2009) Aust Torts Reports ¶82-028.

(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."

Section 30(5) provides definitions of the expressions "close member of the family" and "spouse or partner" (an expression used in the definition of close member of the family).

12 The outcome of the litigation was treated, both at trial and on appeal to the Court of Appeal, as turning upon whether Mr Wicks and Mr Sheehan "witnessed, at the scene, the victim being killed, injured or put in peril" within the meaning of s 30(2)(a). Both Malpass AsJ and the Court of Appeal concluded that neither appellant witnessed a victim or victims of the derailment "being killed, injured or put in peril".

13 However, s 30(2) is drawn in negative terms, using the word "unless" to indicate the operation of the sub-section as an exception to, or reservation from, what otherwise would be the entitlement of the plaintiff. This use of "unless" appears also in ss 31, 32 and 33, to which further reference will be made.

14 At first instance, Malpass AsJ concluded[4] that it was unnecessary to consider the third issue identified by the parties: whether in either case the appellant's attendance at the derailment caused him to suffer a recognised psychiatric illness. His Honour noted[5] that there had been no real dispute that Mr Wicks had suffered such an illness as a result of his exposure to the derailment, but that in Mr Sheehan's case there was a dispute about those matters.

15 Although State Rail submitted that Malpass AsJ made findings which affect whether State Rail should be found to have owed each appellant a duty of

---

4 [2007] NSWSC 1346 at [83].

5 [2007] NSWSC 1346 at [84].

care, his Honour expressly refrained[6] from deciding that issue. The Court of Appeal also expressly decided[7] that it was not necessary to address that issue. To begin inquiries by asking whether s 30(2)(a) of the Civil Liability Act is engaged, without first deciding whether State Rail owed a duty to each appellant to take reasonable care not to cause him psychiatric injury, was to omit consideration of an important anterior question. To examine the content of the limitation on liability provided by s 30 without a proper understanding of the provisions affecting duty runs the risk of reading the limitation divorced from its statutory context.

Part 3 of the Civil Liability Act

16 Part 3 of the Civil Liability Act is entitled "Mental harm". That term is defined in s 27 to mean "impairment of a person's mental condition".

17 Section 28(1) provides that Pt 3, *except s 29*, "applies to any claim for damages for mental harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise". Section 28(2) provides that s 29 "applies to a claim for damages in any civil proceedings". Section 29 provides that: "In any action for personal injury, the plaintiff is not prevented from recovering damages merely because the personal injury arose wholly or in part from mental or nervous shock." The phrase "mental or nervous shock" is not defined.

18 Neither the purpose of s 29, nor the reason for the differential treatment of that provision in the specification by s 28 of the application of Pt 3, is immediately apparent. It need not be decided whether s 29 applies to these cases. For the purposes of these matters, it is necessary to notice only that, by operation of s 28(1), the other provisions of Pt 3 apply to any claim for damages for mental harm resulting from negligence, and thus apply to each appellant's claim against State Rail.

---

6 [2007] NSWSC 1346 at [63].

7 (2009) Aust Torts Reports ¶82-028 at 63,485 [78] per Beazley JA (Giles JA agreeing), 63,499 [164] per McColl JA.

19 Section 27 identifies two species of "mental harm": "consequential mental harm" and "pure mental harm". Consequential mental harm is defined as "mental harm that is a consequence of a personal injury of any other kind". Pure mental harm is defined as "mental harm other than consequential mental harm". The claims made by both Mr Wicks and Mr Sheehan are claims for damages for pure mental harm. Damages for economic loss for consequential mental harm resulting from negligence may not be awarded "unless the harm consists of a recognised psychiatric illness" (s 33).

20 Section 31 provides that: "There is no liability to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness." As noted earlier, no finding was made at trial, or on appeal, whether either Mr Wicks or Mr Sheehan suffers "a recognised psychiatric illness", or whether the negligence of State Rail was a cause of either appellant suffering such an illness.

21 Section 32 is entitled "Mental harm – duty of care". It provides:

> "(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."

22 Because s 32 defines or controls what otherwise would be a duty of care arising at common law, it falls for consideration before the limitation upon entitlement to damages imposed by s 30(2). Consideration of the operation of s 32 (in particular sub-ss (1) and (2)) must begin from the observation that neither s 32 itself, nor any other provision of the Civil Liability Act (whether in Pt 3 or elsewhere), identifies positively when a duty of care to another person to take care not to cause mental harm to that other should be found to exist. Rather, like s 30(2), s 32(1) is cast negatively. It provides that a duty is *not* to be found unless a condition is satisfied. The necessary condition for establishment of a duty of care, identified by s 32(1), 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.

23 The determination of whether the defendant ought to have foreseen mental injury to a person of normal fortitude must be made with regard to "the circumstances of the case". Section 32(2) identifies four kinds of circumstance to which regard should be had: whether the mental harm was caused by sudden shock, whether there was "witness[ing], at the scene," of certain types of event, what was the relationship between plaintiff and victim, and whether there was a relationship between plaintiff and defendant. But s 32 does not prescribe any particular consequence as following from the presence or absence of any or all of those circumstances.

24 Section 32, taking the form it does, must be understood against the background provided by the common law of negligence in relation to psychiatric injury as stated by this Court in *Tame v New South Wales*[8]. Judgment in *Tame* was delivered on 5 September 2002; the provisions of Pt 3 of the Civil Liability Act were inserted in December 2002 by the *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW).

---

8 (2002) 211 CLR 317; [2002] HCA 35.

25 *Tame* held[9] that in deciding whether, for the purposes of the tort of negligence, a defendant owed a plaintiff a duty to take reasonable care to avoid recognisable psychiatric injury, the central question is whether, in all the circumstances, the risk of the plaintiff sustaining such an injury was reasonably foreseeable. A majority of the Court in *Tame* rejected[10] the propositions that concepts of "reasonable or ordinary fortitude", "shocking event" or "directness of connection" were additional pre-conditions to liability.

26 In part, s 32 of the Civil Liability Act reflects the state of the common law identified in *Tame*. Consistent with what was decided in *Tame*, s 32 assumes that foreseeability is the central determinant of duty of care. Consistent with *Tame*[11], "shocking event", and the existence and nature of any connection between plaintiff and victim and between plaintiff and defendant, are considerations relevant to foreseeability, but none is to be treated as a condition necessary to finding a duty of care. But contrary to what was decided in *Tame*, s 32 provides that a duty of care is not to be found 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.

27 For present purposes, there are three important features of s 32. First, "sudden shock" (the expression used in s 32(2)(a)) is no more than one of several circumstances that bear upon whether a 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". The occurrence of "sudden shock" is neither a necessary nor a sufficient condition for a finding

---

9 (2002) 211 CLR 317 at 331 [12], 335-336 [29] per Gleeson CJ, 349 [89]-[90] per McHugh J, 385 [201] per Gummow and Kirby JJ, 411 [275] per Hayne J.

10 (2002) 211 CLR 317 at 332-333 [16]-[18] per Gleeson CJ, 340-341 [51]-[52], 343-344 [61]-[62], [66] per Gaudron J, 383-384 [197], 384-386 [199]-[203], 390 [213], 393 [221]-[222], 394 [225] per Gummow and Kirby JJ, 411-412 [275] per Hayne J.

11 (2002) 211 CLR 317 at 333 [18] per Gleeson CJ, 344 [66] per Gaudron J, 394 [225] per Gummow and Kirby JJ, 411-412 [275] per Hayne J.

that a defendant owed a duty to take reasonable care not to cause a plaintiff pure mental harm.

28 Secondly, witnessing, at the scene, a person being killed, injured or put in peril is also but one of the circumstances that bear upon the central question of foreseeability. Witnessing, of the kind described, is neither a necessary nor a sufficient condition for finding a duty of care.

29 Thirdly, the focus of s 32 is "mental harm" and "a recognised psychiatric illness", not mental or nervous shock. Section 32 does not use the expression "mental or nervous shock". Yet, as noted earlier, the phrase "mental or nervous shock" appears in s 29 of the Civil Liability Act, and in s 30(1), the provision which determines whether s 30 is engaged. Section 30 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.

30 The phrase "mental or nervous shock" (as used in both ss 29 and 30) doubtlessly has a meaning different from "sudden shock" (the phrase used in s 32(2)(a)). The expression "mental or nervous shock" may be understood as referring to a consequence, and "sudden shock" may be understood as referring to an event or a cause. But the notion of "shock", in the sense of a "sudden and disturbing impression on the mind or feelings; usually, one produced by some unwelcome occurrence or perception, by pain, grief, or violent emotion ([occasionally] joy), and tending to occasion lasting depression or loss of composure"[12], is central to both expressions.

31 Because neither "sudden shock", nor witnessing a person being killed, injured or put in peril, is a necessary condition for finding a duty to take reasonable care not to cause mental harm to another, s 30 will be engaged in only some cases where a relevant duty of care is found to exist. As s 30(1) makes plain, s 30 will be engaged only where the claim is for "pure mental harm", where the claim is alleged to arise "wholly or partly from mental or nervous shock", and where the claim is alleged to arise from shock in connection with

---

12 *Oxford English Dictionary*, 2nd ed (1989), vol xv at 293, meaning 4a.

"another person ... being killed, injured or put in peril by the act or omission of the defendant".

32 In considering the application of Pt 3 it would ordinarily be desirable to begin by determining whether State Rail owed the appellants a relevant duty of care.

Duty of care?

33 Although the Court of Appeal expressly declined to decide whether State Rail owed a duty to take reasonable care not to cause mental harm to Mr Wicks and Mr Sheehan, who each came to the scene of this accident as a "rescuer" (the expression used by the parties in their agreed statement of issues), it would be open to this Court to decide that issue. Contrary to the submissions of State Rail, the question of duty of care is a question of law[13]. To resolve this question would require consideration of whether it was reasonably foreseeable that a rescuer attending a train accident of the kind that might result from State Rail's negligence (in which there might be many serious casualties and much destruction of property) might suffer recognisable psychiatric injury as a result of his experiences at the scene. Or to put the same question another way, was it reasonably foreseeable that sights of the kind a rescuer might see, sounds of the kind a rescuer might hear, tasks of the kind a rescuer might have to undertake to try to ease the suffering of others and take them to safety, would be, in combination, such as might cause a person of normal fortitude to develop a recognised psychiatric illness? The question of foreseeability is to be posed in these terms because it must be judged[14] before the accident happened.

34 Any finding at first instance that there was no singular shocking event encountered by either Mr Wicks or Mr Sheehan would not be determinative of the issue of foreseeability and it would not preclude a conclusion that a duty of

---

13 *Amaca Pty Ltd v New South Wales* (2003) 77 ALJR 1509 at 1514 [26]; 199 ALR 596 at 602; [2003] HCA 44; *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 at 487 [56]; [2004] HCA 29; *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 443 [62]; [2005] HCA 62.

14 *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 461-463 [126]-[129]; *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at 438 [31]; [2009] HCA 48.

care was owed. If Malpass AsJ made such a finding (which is itself a doubtful proposition) the finding would seem, on the face of the matter, not to be consistent with the description given in evidence of the scene and the events to which the appellants were exposed at the site of the accident.

35 Because, however, both parties submitted that this Court should not decide the issue of duty of care, these are not issues that should now be decided. The issue of duty of care should be remitted for consideration by the Court of Appeal.

36 Assuming that State Rail did owe Mr Wicks and Mr Sheehan a duty to take reasonable care not to cause mental harm, was s 30(2) engaged? That turns on whether the claims of the appellants were claims alleged to arise "wholly or partly from mental or nervous shock in connection with another person ... being killed, injured or put in peril" by the negligence of State Rail. The phrase must be construed as a whole. It is, however, convenient to begin by noticing some particular matters about one aspect of it: the reference to "shock" in the composite expression "mental or nervous shock".

"Shock"?

37 There can be little doubt that those who came upon the scene of the derailment were confronted with a scene that would cause a "sudden and disturbing impression on the mind or feelings". But it would be wrong to attempt to confine the "shock" that each rescuer suffered to what he perceived on first arriving at the scene. The sudden and disturbing impressions on the minds or feelings of the rescuers necessarily continued as each took in more of the scene, and set about his tasks. Contrary to what appeared to be an unexpressed premise for much of the submissions on behalf of State Rail, the event capable of causing a shock to observers did not finish when the train came to rest as a twisted collection of carriages. The "shock" which caused a sudden and disturbing impression on the minds and feelings of others was not confined to whatever may have happened, or may have been experienced, in the period between the carriages of the train leaving the tracks and stopping. Rather, the consequences, which each appellant alleged he suffered as a result of what happened on that day, were said to follow from some or all of the series of shocking experiences to which he was exposed at the scene.

38 The claim of each appellant can, then, be said to be a claim arising wholly or partly from (a series of) mental or nervous shock(s). Were they claims arising

from mental or nervous shock in connection with another person being killed, injured or put in peril by the negligence of State Rail?

39 The course of argument of all parties, both at trial and in the Court of Appeal, assumed that the claim of each appellant was to be characterised in this way. That assumption depended upon treating each appellant's claims as being that his exposure to the accident scene, while the victims of the accident were still at the scene, amounted to a form of mental or nervous shock in connection with another being killed, injured or put in peril. Only if that were so could s 30(2)(a) be engaged. Did the appellants witness, at the scene, another person or other persons being killed, injured or put in peril?

Section 30(2)(a) – State Rail's submissions

40 The chief weight of the argument for State Rail, that neither appellant had "witnessed, at the scene, the victim being killed, injured or put in peril", was placed on the use in s 30(2)(a) of the expression "*being* killed, injured or put in peril" (emphasis added). State Rail submitted that this expression indicated that, to recover, a plaintiff must have observed, at the scene, an event unfolding which included, perhaps culminated in, another's death, injury or being put in peril. State Rail further submitted that, to satisfy s 30(2)(a), a plaintiff must be able to demonstrate that the psychiatric injury of which complaint was made was occasioned by observation of what was happening to a *particular* victim. It will be convenient to deal with these submissions in the order in which they are set out, but to preface that consideration by one observation about the construction of the relevant provisions.

41 Extrinsic material provides no assistance in this case in construing the relevant provisions. Although the Civil Liability Act was enacted after submission of the Review of the Law of Negligence Final Report, published in September 2002[15], s 30 of the Civil Liability Act does not take a form recommended by that Report. The Second Reading Speech on the Bill which inserted Pt 3 of the Civil Liability Act contains no useful statement about why s 30 takes the form it does.

---

15 The Review was conducted by a panel of which Ipp AJA of the Court of Appeal of the Supreme Court of New South Wales was Chairman. The panel was appointed following ministerial meetings on public liability which were attended by Ministers from the Commonwealth, State and Territory governments.

"Being killed, injured or put in peril"

42 The expression "being killed, injured or put in peril" is used in s 30(1) as well as in s 30(2)(a). The evident intention of s 30(2) is to create a particular subset of cases that fall within the general description of claims "for pure mental harm ... arising wholly or partly from mental or nervous shock in connection with another person ... being killed, injured or put in peril". But the definitions of both the general class, and the particular subset created by s 30(2), hinge about another *being* killed, injured or put in peril. The general class is identified by reference to shock *in connection with* another being killed, injured or put in peril. The subset is fixed by an "unless" clause. The alternative conditions thus fixed, as necessary for membership of the subset, are first, that the plaintiff *witnessed*, at the scene, the victim being killed, injured or put in peril, or second, that the plaintiff is a close member of the family of the victim.

43 Although both sub-s (1) and sub-s (2) use the phrase "being killed, injured or put in peril", sub-s (1) applies to claims for pure mental harm arising wholly or partly from mental or nervous shock in connection with that event (another being killed, injured or put in peril); sub-s (2) requires that the plaintiff either witnessed that event or was a close relative of the victim. The reference in sub-s (1) to the event must be read as referring to an event that may (but need not) have been complete before the suffering of nervous or mental shock. By contrast, because sub-s (2)(a) requires 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.

44 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, at least in so far as reference is made to victims being injured or put in peril.

45 The consequences of the derailment took time to play out. Some aboard the train were killed instantly. But even if all of the deaths were instantaneous (or nearly so), not all the injuries sustained by those on the train were suffered during the process of derailment. And the perils to which living passengers were

subjected as a result of the negligence of State Rail did not end when the carriages came to rest.

46 Most, if not all, who were injured suffered physical trauma during the process of derailment. It may readily be inferred that some who suffered physical trauma in the derailment suffered further injury as they were removed from the wrecked carriages. That inference follows from the fact that some were trapped in the wreckage. It would be very surprising if each was extricated without further harm.

47 Further, it may be readily inferred that many who were on the train suffered psychiatric injuries as a result of what happened to them in the derailment and at the scene. The process of their suffering such an injury was not over when Mr Wicks and Mr Sheehan arrived. That is why each told of the shocked reactions of passengers they tried to help. That is why each did what he could to take the injured to safety looking straight ahead lest the injured see the broken body of one or more of those who had been killed. As they were removed from the train, at least some of the passengers were still being injured.

48 If either inference is drawn, Mr Wicks and Mr Sheehan witnessed, at the scene, victims of the accident "being injured".

49 Even if neither of these inferences should be drawn, the fact remains that when Mr Wicks and Mr Sheehan arrived at the scene of the accident, those who had been on the train, and had survived, remained in peril. The agreed description of each of Mr Wicks and Mr Sheehan as "a rescuer" necessarily implies as much. Each sought to (and did) rescue at least some of those who had been on the train from peril. The observation of fallen electrical cables draped over the carriages is but a dramatic illustration of one kind of peril to which those who remained alive in the carriages were subject before they were taken to a place of safety.

50 Contrary to State Rail's submission, the expression "being ... put in peril" should not be given a meaning more restricted than that conveyed by the ordinary meaning of the words used. More particularly, "being ... put in peril" is not to be confined to the kind of apprehended casualty which was at issue in *Hambrook v Stokes Bros*[16], where a mother feared a runaway lorry might have injured her

---

16 [1925] 1 KB 141.

child. It is not to be read as confined to the cases discussed by Evatt J in *Chester v Waverley Corporation*[17] by reference to the decision in *Hambrook*. Nor is the expression to be read down by reference to how the phrase was to be understood when used in s 4 of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW). Rather, the expression should be given the meaning which the words ordinarily convey. 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.

51 The survivors of the derailment remained in peril until they had been rescued by being taken to a place of safety. Mr Wicks and Mr Sheehan witnessed, at the scene, victims of the accident being put in peril as a result of the negligence of State Rail.

52 State Rail's submission that neither Mr Wicks nor Mr Sheehan witnessed, at the scene, a victim or victims being killed, injured or put in peril should thus be rejected.

53 State Rail's further submission, that the combined effect of s 30(1) and s 30(2) requires that a plaintiff must demonstrate that the psychiatric injury of which complaint is made was occasioned by observation of what was happening to a *particular* victim, should also be rejected.

54 In a case such as the present, where there were many victims, s 30(2) does not require that a relationship be identified between an alleged psychiatric injury (or any particular part of that injury) and what happened to a particular victim. To read the provision as requiring establishment of so precise a connection would be unworkable. It would presuppose, wrongly, that the causes of psychiatric injury suffered as a result of exposure to an horrific scene of multiple deaths and injuries could be established by reference to component parts of that single event. Rather, the reference in s 30(1) to "another person (***the victim***)" should be read[18] as "another person or persons (as the case requires)". The reference to "victim" in s 30(2)(a) is to be read as a reference to one or more of those persons. In a mass casualty of the kind now in issue, s 30(2)(a) is satisfied where there was a witnessing at the scene of one or more persons being killed,

---

17 (1939) 62 CLR 1 at 41-42; [1939] HCA 25.

18 *Interpretation Act* 1987 (NSW), s 8(b).

injured or put in peril, without any need for further attribution of part or all of the alleged injury to one or more specific deaths.

Conclusion and orders

55 Each appeal to this Court should be allowed with costs. In each matter, the orders of the Court of Appeal of the Supreme Court of New South Wales made on 31 August 2009 should be set aside. Because in neither case have there been findings about duty of care and about whether the appellant suffered a recognised psychiatric injury of which the negligence of State Rail was a cause, each matter must be remitted to the Court of Appeal for its further consideration in accordance with the reasons of this Court. Whether that Court can or should decide those issues itself, or whether it should remit the matter for retrial, will be a matter for further argument in, and decision by, the Court of Appeal. The costs of the proceedings in the Court of Appeal to date and the costs of the further proceedings in that Court should be in the discretion of that Court.