Wicks v State Rail Authority (NSW) - [2010] HCA 22

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.

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[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".

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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.

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.

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

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

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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 C ivil Liability Act has remained unamended. Section 30(1)–(4) of the Civil Liability Act provid es:

"(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."

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 subsection 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.

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[4] [2007] NSWSC 1346 at [83] .

[5] [2007] NSWSC 1346 at [84] .

15. **Following paragraph cited by:**

The Owners Strata Plan No 84674 v Pafburn Pty Ltd (13 December 2023) (Ward P, Adamson JA and Basten AJA)
Philcox v King (11 April 2014) (Gray, Sulan and Parker JJ)

> 67. The second important distinction is that the *Motor Accidents Act 1988* (NSW) does not contain an equivalent provision to s 33 of the Act. As the High Court observed in *Wicks* , the interpretation of the limitation on the recovery of damages must be considered in the context of the provision affecting the duty. It was observed: [36]
>
> > 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.
>
> *via*
> [36] *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60, [15] .

Manthe v BHP Billiton Iron Ore Pty Ltd (29 September 2011) (Curthoys DCJ)

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 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.

[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.

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.

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.
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> (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 preexisting 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. **Following paragraph cited by:**

Hodson v Hurex Pty Ltd and Lederer Pty Ltd (26 April 2024) (Fitzsimmons SC DCJ)
Karpik v Carnival plc (The Ruby Princess) (Initial Trial) (25 October 2023) (Stewart J)

564. By providing that a duty is *not* to be found unless certain conditions are satisfied, s 32 operates as a condition for the establishment of a duty of care: *Wicks* at [22] . That is, s 32 defines or controls what would otherwise be a duty of care arising under the common law. As explained in section D.6 above, s 32 has no application to Mrs Karpik's claim for failure to comply with ACL ss 60 and 61.

Sdrolias v Power Distribution Services Pty Limited (01 April 2021) (Fagan J)

38. In *Optus Administration Pty Limited v Glenn Wright* [2017] NSWCA 21 Gleeson JA explained s 32 in these terms:

> [206] The operation of s 32 and the extent to which it reflected the common law in *Tame v State of New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; [2002] HCA 35 (*Tame*), was discussed by the High Court in *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60; [2010] HCA 22 (*Wicks*) at [16]-[30] , and again in *King v Philcox* (2015) 320 ALR 398; [2015] HCA 19 at [75]-[85] , in relation to s 33 of the *Civil Liability Act 1936* (SA) . […] The following propositions, which can be taken from *Wicks* , have relevance to the present case.
>
> [207] First, s 32 defines or controls what otherwise would be a duty of care arising out of the common law for damages for mental harm resulting from negligence. The provision is cast negatively. The statutory condition for the 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: *Wicks* at [22] .

[208] Secondly, whether the defendant ought to have foreseen mental injury to a person of normal fortitude must be determined with regard to "the circumstances of the case". Some such kinds of circumstance are identified in s 32(2) , but s 32 does not prescribe any particular consequence as following from the presence or absence of any or all of those circumstances: *Wicks* at [23] .

[209] Thirdly, s 32 is to be understood against the background provided by the common law of negligence in relation to psychiatric injury as stated by the High Court in *Tame* . Consistent with *Tame* , s 32 assumes that foreseeability is the central determinant of the existence of any duty of care. Further, and consistent with Tame, circumstances of a "shocking event" and the existence and nature of any connection between perpetrator 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: *Wicks* at [26] .

[210] As Gleeson CJ observed in *Tame* at [35] , the existence of a "sudden shock" is a relevant factual indicator of the presence or absence of the proximity of a relationship between the plaintiff and the defendant. As Gaudron J further noted in *Tame* (at [66]), under the general law, in many cases, the risk of psychological or psychiatric injury will not be foreseeable in the absence of a sudden shock. Similarly, the Court held in *Wicks* that "sudden shock", as 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": *Wicks* at [27] .

[211] Fourthly and importantly, the focus of s 32 is "mental harm" and "a recognised psychiatric illness", not "mental or nervous shock" (as used in both ss 29 and 30 of the *Civil Liability Act*): *Wicks* at [29] . The expression "sudden shock" in s 32(2)(a) may be understood as referring to an event or a cause. This is different to "mental or nervous shock" which refers to a consequence: *Wicks* at [30] . The Court emphasised (at [30]) that the notion of "shock" was central to both expressions, and referred to the following dictionary definition of "shock":

> … 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": Oxford Dictionary, 2nd ed (1989), vol xv at 293, meaning 4a.

[212] Fifthly, the question of foreseeability must be judged before the relevant incident happened: *Wicks* at [33] .

DOQ17 v Australian Financial Security Authority (No 3) (10 September 2019) (Perry J)

Capar v SPG Investments Pty Limited t/a Lidcombe Power Centre & Ors. (No 5) (13 May 2019) (Bellew J)

> 129. Wicks v State Rail Authority of New South Wales [2010] 241 CLR 60; [2010] HCA 22 ("Wicks") at [22] .

Frangie v South Western Sydney Local Health District trading as Liverpool Hospital (07 March 2019) (Abadee DCJ)
Walsh v State of New South Wales (04 October 2018) (Harrison AsJ)

> 84. Gleeson JA at [206] to [212] (who was in dissent but his statement of principles are not in doubt), stated the following propositions from *Wicks v State Rail Authority (NSW) (known as State Rail)* (2010) 267 ALR 23; [2010] HCA 22 *("Wicks")*, which the defendant asserts as having relevance to the present case:
>
> 1. s 32 is cast negatively. Therefore, to establish the statutory duty of care identified by s 32(1) , it must be established 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 (*Wicks* at [22]);
>
> 2. whether the defendant ought to have foreseen mental injury to a person of normal fortitude must be determined with regard to "the circumstances of the case". While some circumstances are identified in s 32(2) , s 32 does not prescribe any particular consequence as following from the presence or absence of any or all of those circumstances (*Wicks* at [23]);
>
> 3. s 32 is to be understood against the background provided by the common law of negligence in relation to psychiatric injury as stated by the High Court in *Tame*. Consistent with *Tame*, s 32 assumes that foreseeability is the central determinant of the existence of any duty of care. Circumstances of a "shocking event" and the existence and nature of any connection between perpetrator and victim and between plaintiff and defendant, are considerations relevant to foreseeability, although neither is a condition necessary to finding a duty of care (*Wicks* at [26]);
>
> 4. the focus of s 32 is "mental harm" and "a recognised psychiatric illness" (*Wicks* at [29]). "Sudden shock" in s 32(2)(a) may be understood as referring to an event or a cause. This is different to "mental or nervous shock", which refers to a consequence (*Wicks* a t [30]). The Court emphasised at [30] that the notion of "shock" was central to both expressions, and referred to the following dictionary definition of "shock" in *Oxford Dictionary* (vol XV, 2nd ed, 1989, Oxford University Press) at 293:
>
> > ... 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";

5. the question of foreseeability must be judged before the relevant incident happened (*Wicks* at [33]).

Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (17 February 2017) (Basten, Hoeben and Gleeson JJA)
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (17 February 2017) (Basten, Hoeben and Gleeson JJA)
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (17 February 2017) (Basten, Hoeben and Gleeson JJA)

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 subss (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. **Following paragraph cited by:**

Hodson v Hurex Pty Ltd and Lederer Pty Ltd (26 April 2024) (Fitzsimmons SC DCJ)
Sdrolias v Power Distribution Services Pty Limited (01 April 2021) (Fagan J)
Frangie v South Western Sydney Local Health District trading as Liverpool Hospital (07 March 2019) (Abadee DCJ)

111. As the High Court noted in *Wicks* (at [23]), s 32 does not assign any particular hierarchy to this list of circumstances, nor any other consequence flowing from their presence or absence in any given case. The authorities which have reviewed these considerations provide some limited assistance. It is clear that the presence (or absence) of any such consideration in the case is not decisive: *Wicks* at [31] .

Walsh v State of New South Wales (04 October 2018) (Harrison AsJ)
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (17 February 2017) (Basten, Hoeben and Gleeson JJA)

208. Secondly, whether the defendant ought to have foreseen mental injury to a person of normal fortitude must be determined with regard to "the circumstances of the case". Some such kinds of circumstance are

identified in s 32(2) , but s 32 does not prescribe any particular consequence as following from the presence or absence of any or all of those circumstances: *Wicks* at [23] .

Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (17 February 2017) (Basten, Hoeben and Gleeson JJA)
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (17 February 2017) (Basten, Hoeben and Gleeson JJA)

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. **Following paragraph cited by:**

Karpik v Carnival plc (The Ruby Princess) (Initial Trial) (25 October 2023) (Stewart J)
Manthe v BHP Billiton Iron Ore Pty Ltd (29 September 2011) (Curthoys DCJ)

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. **Following paragraph cited by:**

Lundbergs v Fu (06 June 2025) (Crowley J)
Lundbergs v Fu (06 June 2025) (Crowley J)
Fazio v The City of Melville [No 2] (18 September 2013) (Principal Registrar Gething)
Saunders v Department for Communities (18 July 2013) (Schoombee DCJ)
Manthe v BHP Billiton Iron Ore Pty Ltd (29 September 2011) (Curthoys DCJ)

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 preconditions to liability.

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[9] (2002) 211 CLR 317 at 331 [12], 335336 [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 332333 [16][18] per Gleeson CJ, 340-341 [51]-[52], 3433 44 [61]-[62], [66] per Gaudron J, 383384 [197], 384-386 [199]-[203], 390 [213], 393 [221][222], 394 [225] per Gummow and Kirby JJ, 411412 [275] per Hayne J.

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26. **Following paragraph cited by:**

Lederer Group Pty Ltd v Hodson (18 December 2024) (Ward P, Leeming JA and Basten AJA)
Hodson v Hurex Pty Ltd and Lederer Pty Ltd (26 April 2024) (Fitzsimmons SC DCJ)
Karpik v Carnival plc (The Ruby Princess) (Initial Trial) (25 October 2023) (Stewart J)

> 571. As explained in *Wicks* at [26] and [31] , neither of those circumstances is necessary to found the existence of a duty. They are merely aspects of the "circumstances of the case" that are relevant to the inquiry directed by s 3 2(1) , namely whether the respondents ought to have foreseen that a person of "normal fortitude" might suffer a recognised psychiatric injury if reasonable care were not taken. They are to be treated as relevant to the assessment of the foreseeability of risk of harm as a necessary condition to the existence of the duty of care: *King v Philcox* at [13] per French CJ, Kiefel and Gageler JJ.

Sdrolias v Power Distribution Services Pty Limited (01 April 2021) (Fagan J)
DOQ17 v Australian Financial Security Authority (No 3) (10 September 2019) (Perry J)

> 185. Section 32 also raises the bar for establishing a duty of care by imposing restrictions upon the circumstances in which a person owes a duty of care to another with respect to "*mental harm*": *Wicks v State Rail Authority of New South Wales* [2010] HCA 22; (2010) 241 CLR 60 (***Wicks***) at [26] (t he Court); *Optus Administration Pty Limited v Glenn Wright* [2017] NSWCA 21; (2017) 94 NSWLR 229 (***Optus Administration***) at [30] (Ba sten JA (with whose reasons Hoeben JA agreed)). "*Mental harm*" is defined in s 27 of Part 3 of the Act to mean "*impairment of a person's*

mental condition". " ***Pure*** *mental harm*" in turn means "*mental harm other than consequential mental harm*", the latter being "*mental harm that is a consequence of a personal injury of any other kind*" (emphasis added). There is no suggestion here by the applicant that she suffered personal injury other than by reason of an impairment of her mental condition. Nor is it suggested that the mental harm alleged is a consequence of another kind of personal injury. As such, she seeks damages for pure mental harm.

Michael Szczerbanik v Carnival PLC trading as Carnival Cruise Lines (26 March 2019) (Judge J and Smith SC)
Isobella Madeline Szczerbanik v Carnival PLC trading as Carnival Cruise Lines (26 March 2019) (Judge J and Smith SC)
Walsh v State of New South Wales (04 October 2018) (Harrison AsJ)
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (17 February 2017) (Basten, Hoeben and Gleeson JJA)

209. Thirdly, s 32 is to be understood against the background provided by the common law of negligence in relation to psychiatric injury as stated by the High Court in *Tame* . Consistent with *Tame* , s 32 assumes that foreseeability is the central determinant of the existence of any duty of care. Further, and consistent with *Tame* , circumstances of a "shocking event" and the existence and nature of any connection between perpetrator 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: *Wicks* at [26] .

Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (17 February 2017) (Basten, Hoeben and Gleeson JJA)
Saunders v Department for Communities (18 July 2013) (Schoombee DCJ)
Manthe v BHP Billiton Iron Ore Pty Ltd (29 September 2011) (Curthoys DCJ)

196. In ***Wicks*** at [26] the court further stated:

> In part, s 5S of the *Civil Liability Act* reflects the state of the common law identified in ***Tame*** . Consistent with what was decided in ***Tame*** , s 5S assumes that foreseeability is the central determinant of duty of care. Consistent with ***Tame*** , '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 5S 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.

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.

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[11] (2002) 211 CLR 317 at 333 [18] per Gleeson CJ, 344 [66] per Gaudron J, 394 [225] per Gummow and Kirby JJ, 411412 [275] per Hayne J.

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27. **Following paragraph cited by:**

Sdrolias v Power Distribution Services Pty Limited (01 April 2021) (Fagan J)
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (17 February 2017) (Basten, Hoeben and Gleeson JJA)
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (17 February 2017) (Basten, Hoeben and Gleeson JJA)

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 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. **Following paragraph cited by:**

Sdrolias v Power Distribution Services Pty Limited (01 April 2021) (Fagan J)
Walsh v State of New South Wales (04 October 2018) (Harrison AsJ)
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (17 February 2017) (Basten, Hoeben and Gleeson JJA)

> Fourthly and importantly, the focus of s 32 is “mental harm” and “a recognised psychiatric illness”, not “mental or nervous shock” (as used in both s 29 and s 30 of the Civil Liability Act): Wicks at [29] . The expression “sudden shock” in s 32(2)(a) may be understood as referring to an event or a cause. This is different to “mental or nervous shock” which refers to a consequence: Wicks at [30] . The

court emphasised (at [30]) that the notion of “shock” was central to both expressions, and referred to the following dictionary definition of “shock”:

“[30]… 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’ [Oxford English Dictionary, 2nd ed (1989), vol xv, p 293, meaning 4a] …” (Footnote supplied)

Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (17 February 2017) (Basten, Hoeben and Gleeson JJA)

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. **Following paragraph cited by:**

Sdrolias v Power Distribution Services Pty Limited (01 April 2021) (Fagan J)

38. In *Optus Administration Pty Limited v Glenn Wright* [2017] NSWCA 21 Gleeson JA explained s 32 in these terms:

[206] The operation of s 32 and the extent to which it reflected the common law in *Tame v State of New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; [2002] HCA 35 (*Tame*), was discussed by the High Court in *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60; [2010] HCA 22 (*Wicks*) at [16]-[30] , and again in *King v Philcox* (2015) 320 ALR 398; [2015] HCA 19 at [75]-[85] , in relation to s 33 of the *Civil Liability Act 1936* (SA) . […] The following propositions, which can be taken from *Wicks* , have relevance to the present case.

[207] First, s 32 defines or controls what otherwise would be a duty of care arising out of the common law for damages for mental harm resulting from negligence. The provision is cast negatively. The statutory condition for the 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: *Wicks* at [22] .

[208] Secondly, whether the defendant ought to have foreseen mental injury to a person of normal fortitude must be determined with regard to “the circumstances of the case”. Some such kinds of circumstance are identified

in s 32(2) , but s 32 does not prescribe any particular consequence as following from the presence or absence of any or all of those circumstances: *Wicks* at [23] .

[209] Thirdly, s 32 is to be understood against the background provided by the common law of negligence in relation to psychiatric injury as stated by the High Court in *Tame* . Consistent with *Tame* , s 32 assumes that foreseeability is the central determinant of the existence of any duty of care. Further, and consistent with Tame, circumstances of a "shocking event" and the existence and nature of any connection between perpetrator 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: *Wicks* at [26] .

[210] As Gleeson CJ observed in *Tame* at [35] , the existence of a "sudden shock" is a relevant factual indicator of the presence or absence of the proximity of a relationship between the plaintiff and the defendant. As Gaudron J further noted in *Tame* (at [66]), under the general law, in many cases, the risk of psychological or psychiatric injury will not be foreseeable in the absence of a sudden shock. Similarly, the Court held in *Wicks* that "sudden shock", as 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": *Wicks* at [27] .

[211] Fourthly and importantly, the focus of s 32 is "mental harm" and "a recognised psychiatric illness", not "mental or nervous shock" (as used in both ss 29 and 30 of the *Civil Liability Act*): *Wicks* at [29] . The expression "sudden shock" in s 32(2)(a) may be understood as referring to an event or a cause. This is different to "mental or nervous shock" which refers to a consequence: *Wicks* at [30] . The Court emphasised (at [30]) that the notion of "shock" was central to both expressions, and referred to the following dictionary definition of "shock":

> … 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": Oxford Dictionary, 2nd ed (1989), vol xv at 293, meaning 4a.

[212] Fifthly, the question of foreseeability must be judged before the relevant incident happened: *Wicks* at [33] .

Barlow v St Vincent's Hospital Sydney Limited (04 September 2020) (Russell SC DCJ)
Frangie v South Western Sydney Local Health District trading as Liverpool Hospital (07 March 2019) (Abadee DCJ)

112. The High Court in *Wicks* considered (at [30]) the concept of 'shock'. It referred to 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". The Court emphasised that it is not right to assume that in all cases of death, injury or being put in peril, the event(s) must begin and end in an instant, or even that it or they necessarily occupy only a time measured in minutes (at [44]). In *Tame* , the consideration of 'sudden shock' (s 32(2)(a)) tended to be wrapped up in other requirements, such as the relationship between the plaintiff and the defendant (per Gleeson CJ) or the response of a person of ordinary fortitude (per Hayne J).

Walsh v State of New South Wales (04 October 2018) (Harrison AsJ)

84. Gleeson JA at [206] to [212] (who was in dissent but his statement of principles are not in doubt), stated the following propositions from *Wicks v State Rail Authority (NSW) (known as State Rail)* (2010) 267 ALR 23; [2010] HCA 22 *("Wicks")*, which the defendant asserts as having relevance to the present case:

    1. s 32 is cast negatively. Therefore, to establish the statutory duty of care identified by s 32(1) , it must be established 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 (*Wicks* at [22]);

    2. whether the defendant ought to have foreseen mental injury to a person of normal fortitude must be determined with regard to "the circumstances of the case". While some circumstances are identified in s 32(2) , s 32 does not prescribe any particular consequence as following from the presence or absence of any or all of those circumstances (*Wicks* at [23]);

    3. s 32 is to be understood against the background provided by the common law of negligence in relation to psychiatric injury as stated by the High Court in *Tame.* Consistent with *Tame*, s 32 assumes that foreseeability is the central determinant of the existence of any duty of care. Circumstances of a "shocking event" and the existence and nature of any connection between perpetrator and victim and between plaintiff and defendant, are considerations relevant to foreseeability, although neither is a condition necessary to finding a duty of care (*Wicks* at [26]);

    4. the focus of s 32 is "mental harm" and "a recognised psychiatric illness" (*Wicks* at [29]). "Sudden shock" in s 32(2)(a) may be understood as referring to an event or a cause. This is different to "mental or nervous shock", which refers to a consequence (*Wicks* a

t [30]). The Court emphasised at [30] that the notion of “shock” was central to both expressions, and referred to the following dictionary definition of “shock” in *Oxford Dictionary* (vol XV, 2nd ed, 1989, Oxford University Press) at 293:

> ... 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”;

5. the question of foreseeability must be judged before the relevant incident happened (*Wicks* at [33]).

Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (17 February 2017) (Basten, Hoeben and Gleeson JJA)

> 211. Fourthly and importantly, the focus of s 32 is “mental harm” and “a recognised psychiatric illness”, not “mental or nervous shock” (as used in both ss 29 and 30 of the *Civil Liability Act*): *Wicks* at [29] . The expression “sudden shock” in s 32(2)(a) may be understood as referring to an event or a cause. This is different to “mental or nervous shock” which refers to a consequence: *Wicks* at [30] . The Court emphasised (at [30]) that the notion of “shock” was central to both expressions, and referred to the following dictionary definition of “shock”:
>
> > … 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": *Oxford Dictionary*, 2nd ed (1989), vol xv at 293, meaning 4a.

Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (17 February 2017) (Basten, Hoeben and Gleeson JJA)

Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (17 February 2017) (Basten, Hoeben and Gleeson JJA)

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.

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

31. **Following paragraph cited by:**

Frangie v South Western Sydney Local Health District trading as Liverpool Hospital (07 March 2019) (Abadee DCJ)

> 111. As the High Court noted in *Wicks* (at [23]), s 32 does not assign any particular hierarchy to this list of circumstances, nor any other consequence flowing from their presence or absence in any given case. The authorities which have reviewed these considerations provide some limited assistance. It is clear that the presence (or absence) of any such consideration in the case is not decisive: *Wicks* at [31] .

Philcox v King (11 April 2014) (Gray, Sulan and Parker JJ)

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 "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. **Following paragraph cited by:**

Lederer Group Pty Ltd v Hodson (18 December 2024) (Ward P, Leeming JA and Basten AJA)
Sdrolias v Power Distribution Services Pty Limited (01 April 2021) (Fagan J)
Walsh v State of New South Wales (04 October 2018) (Harrison AsJ)
Caffrey v AAI Limited (22 November 2017) (Applegarth J)

> Particular reliance was placed on this application upon the decision of the High Court in *Wicks* , and I have regard to that case. I note immediately that the issue that was considered by the High Court, but not decided by it, concerned whether the Rail Authority owed serving police officers, who were rescuers, a certain duty of care. I emphasise that they were described as rescuers. In that context, the Court said at [33] :

Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (17 February 2017) (Basten, Hoeben and Gleeson JJA)

212. Fifthly, the question of foreseeability must be judged before the relevant incident happened: *Wicks* at [33] .

Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (17 February 2017) (Basten, Hoeben and Gleeson JJA)
Lee v State of Queensland (16 April 2015) (McGill SC DCJ)
Palmer & Ors v State of Queensland (27 March 2015) (McGill DCJ)

71. Although the duty is owed to employees individually, so that an employer must take into account any information specific to a particular employee which could reasonably indicate a particular vulnerability and hence risk of psychiatric injury, in the absence of any relevant information it appears that an employer is entitled to assume that an employee is a person of normal fortitude. [87] On the other hand, it is clear that an employer who has relevant information about a specific employee is not protected from liability merely because the conditions to which the employee was exposed would probably not have caused psychiatric injury to a person of normal fortitude. [88]

via

[87] This appears to follow from the formulation of the test in *Wicks v State Rail Authority of NSW* (2010) 241 CLR 60 at [33] .

Johnson v Box Hill Institute of TAFE (12 December 2014) (J Forrest J)

426. First, in determining what is a reasonable response to a risk, one cannot rely too heavily on hindsight. The fact that a foreseeable risk has eventuated does not bespeak a lack of an adequate response. The reasonableness of a response must be evaluated in the context of the identified risk as it existed immediately prior to the subject injury. [384]

via

[384] *Rosenberg v Percival* (2001) 205 CLR 434, [88] ; *Vairy v Wyong Shire Council* (2005) 223 CLR 422, [60]-[61], [124], [126]-[129] ; *Wicks v State Rail Authority* (2010) 241 CLR 60, [33] ; *Hookey v Paterno* (2009) 22 VR 362, [109] .

Placer (Granny Smith) Pty Ltd v Specialised Reline Services Pty Ltd (30 July 2010) (Pullin JA, Newnes JA, Mazza J)

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.

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[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 461463 [126][129] ; *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at 438 [31]; [2009] HCA 48.

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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 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. **Following paragraph cited by:**

Naw Eh Soe v Alberto Carapella; Saw Rain Bow v Alberto Carapella; Naw Su Su Bow v Alberto Carapella; Moe Moe Aye v Alberto Carapella (20 November 2014) (Hamill J)

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.

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[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 subs (1) and subs (2) use the phrase "being killed, injured or put in peril", subs (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); subs (2) requires that the plaintiff either witnessed that event or was a close relative of the victim. The reference in subs (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 subs (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. **Following paragraph cited by:**

Philcox v King (11 April 2014) (Gray, Sulan and Parker JJ)

43. As discussed above, and as in *Wicks v State Rail Authority of New South Wales* , [16] the scene of an accident in cases of death, injury or being put in peril does not begin and end in an instant but can take place over an extended period and continue while persons are trapped in wreckage or remain in peril.

via

[16] *Wicks v State Rail Authority of New South Wales* (2010) 241 CLR 60, [44] , [46] , [49]-[51] .

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 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.

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[16] [1925] 1 KB 141 .

[17] (1939) 62 CLR 1 at 4142; [1939] HCA 25 .

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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. **Following paragraph cited by:**

Ioannidis v Carretero (15 July 2025) (Catsanos SC DCJ)

77. It may well be that, as discussed in *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60; [2010] HCA 22 at [54] (in a different but nonetheless relevant context), this is a case where it is unrealistic to attempt to dissect the components of a psychiatric injury suffered in one traumatic event.

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, 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.

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

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.

Cited by:

Ioannidis v Carretero [2025] NSWDC 258 (15 July 2025) (Catsanos SC DCJ)

77. It may well be that, as discussed in *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60; [2010] HCA 22 at [54] (in a different but nonetheless relevant context), this is a case where it is unrealistic to attempt to dissect the components of a psychiatric injury suffered in one traumatic event.

Tsiragakis v Mallet [2025] VSCA 134 (17 June 2025) (Beach, Kennedy and Kaye JJA)

110. Where a driver attempts to drive into a pole it may be reasonably foreseeable that those in the immediate vicinity could be affected by such a distressing event. However, there is nothing inherent in the nature of such an event which suggests that the impact would be likely to continue to be distressing to a person who came upon the scene after the victim had already been taken away. This makes it readily distinguishable from other cases where it was foreseeable that a victim might continue to be seen by a plaintiff (eg, *Pusey* and *Wicks*). For example, in *Wicks* , one might readily envisage that the 'sights' a policeman might see and 'sounds' they might hear at the aftermath of a massive rail derailment might be highly distressing.

Tsiragakis v Mallet [2025] VSCA 134 (17 June 2025) (Beach, Kennedy and Kaye JJA)

91. We nevertheless accept that a duty of care might be owed to persons who attend accident scenes subsequent to the occurrence of an accident, even in the absence of some pre-existing relationship. [77] Thus, the courts have found that a duty of care might be owed to those who may be categorised as 'rescuers' who attend the 'aftermath' of an accident. [78] However, the attendance at an 'aftermath' is not of itself decisive. Rather, the key point is that it is foreseeable that rescuers will come to an accident scene, such that their arrival is viewed as

the natural and probable consequence of the conduct which causes the injury. [79] It must also be foreseeable that they will suffer injury in doing so by reason, for example, of the likely distressing aspects of that scene.

via

[78] See, eg, *Caffrey* [2019] QSC 7, affd *AAI* (2019) 3 QR 88; [2019] QCA 293 ; *Wicks* (2010) 241 CLR 60; [2010] HCA 22 ; *Pusey* (1970) 125 CLR 383; [1970] HCA 60.

Tsiragakis v Mallet [2025] VSCA 134 (17 June 2025) (Beach, Kennedy and Kaye JJA)

96. As we have earlier explained, the primary issue in *Wicks* was the applicability of s 30(2) of the *Civil Liability Act 2002* (NSW) and the Court did not actually decide the issue of whether there was a duty of care. Nevertheless, the Court observed that the resolution of the issue of duty would involve consideration of whether it was reasonably foreseeable that a rescuer might suffer psychiatric injury as a result of his experiences at the scene. The Court continued:

> 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 before the accident happened. [83]

Tsiragakis v Mallet [2025] VSCA 134 (17 June 2025) (Beach, Kennedy and Kaye JJA)

68. Nettle J took the same view, [52] but gave separate detailed reasons about the principles that ought to apply:

> Foreseeability alone, however, is not enough. Section 33(1) does not displace the common law imperative that 'reasonable foreseeability' be understood and applied bearing in mind that it is bound up with the question of whether it is reasonable to require a person to have in contemplation the risk of injury that has eventuated. As Gleeson CJ observed in *Tame v New South Wales* :
>
> > What a person is capable of foreseeing, what it is reasonable to require a person to have in contemplation, and what kinds of relationship attract a legal obligation to act with reasonable care for the interests of another, are related aspects of the one problem. The concept of reasonable foreseeability of harm, and the nature of the relationship between the parties, are both relevant as criteria of responsibility.
>
> This Court has not before had to determine whether a duty of care is owed in the circumstances presented by this case. *Wicks* made passing reference to the issue of duty of care owed to those present at the aftermath of an accident but did not deal with it in detail. *Jaensch v Coffey* , *Tame* and *Gifford v Strang Patrick Stevedoring Pty Ltd* all provide relevant guidance, but the issue cannot be properly decided by reference only to the nature of the relationship between the victim of an accident and the claimant, or the victim and the defendant. As Deane J concluded in *Jaensch* , the question of whether a duty of care is owed in particular circumstances falls to be resolved by a process of legal reasoning, by induction and deduction by reference to the decided cases and, ultimately, by value judgments of matters of policy and degree. Although the concept of 'proximity' that Deane J held to be the touchstone of the existence of a duty of care is no longer considered determinative, it nonetheless 'gives focus to the inquiry'. It does so by directing attention towards the features of the relationships between the parties and the factual circumstances of the case, and prompting a 'judicial evaluation of the factors which tend for or against a

> conclusion' that it is reasonable (in the sense spoken of by Gleeson CJ in *Tame*) for a duty of care to arise. That these considerations may be tempered or assisted by policy considerations and value judgments is not, however, an invitation to engage in 'discretionary decision-making in individual cases'. Rather, it reflects the reality that, although '[r]easonableness is judged in the light of current community standards', and the 'totality of the relationship[s] between the parties' must be evaluated, it is neither possible nor desirable to state an 'ultimate and permanent value' according to which the question of when a duty arises in a particular category of case may be comprehensively answered. [53]

Tsiragakis v Mallet [2025] VSCA 134 (17 June 2025) (Beach, Kennedy and Kaye JJA)

96. As we have earlier explained, the primary issue in *Wicks* was the applicability of s 30(2) of the *Civil Liability Act 2002* (NSW) and the Court did not actually decide the issue of whether there was a duty of care. Nevertheless, the Court observed that the resolution of the issue of duty would involve consideration of whether it was reasonably foreseeable that a rescuer might suffer psychiatric injury as a result of his experiences at the scene. The Court continued:

> 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 before the accident happened. [83]

via

[83] *Wicks* (2010) 241 CLR 60, 73 [33] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); [2010] HCA 22 (citations omitted).

Tsiragakis v Mallet [2025] VSCA 134 (17 June 2025) (Beach, Kennedy and Kaye JJA)

107. The applicant also appeared to place much reliance on what actually occurred after the accident, ie, that the applicant did in fact arrive at the scene some 40 minutes after it occurred. However, the question of reasonable foreseeability is to be judged prospectively, before the 'event' occurred. [89]

via

[89] *Wicks* (2010) 241 CLR 60, 73 [33] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) ; [2010] HCA 22 .

Tsiragakis v Mallet [2025] VSCA 134 (17 June 2025) (Beach, Kennedy and Kaye JJA)

64. In *Wicks* , the High Court considered a claim brought by two police officers who sued a railway operator in negligence for psychiatric injuries developed following their attendance at the scene of a passenger train derailment where they were confronted with 'death, injury and the wreckage of the train'. The officers attempted to relieve the suffering of survivors and to get them to a place of safety. They also later undertook other tasks at the scene, where they remained for a considerable time.

Tsiragakis v Mallet [2025] VSCA 134 (17 June 2025) (Beach, Kennedy and Kaye JJA)

107. The applicant also appeared to place much reliance on what actually occurred after the accident, ie, that the applicant did in fact arrive at the scene some 40 minutes after it

occurred. However, the question of reasonable foreseeability is to be judged prospectively, before the 'event' occurred. [89]

via

[89] *Wicks* (2010) 241 CLR 60, 73 [33] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); [2010] HCA 22 .

Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
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Tsiragakis v Mallet [2025] VSCA 134 -
Lundbergs v Fu [2025] QSC 135 -
Lundbergs v Fu [2025] QSC 135 -
Lederer Group Pty Ltd v Hodson [2024] NSWCA 303 (18 December 2024) (Ward P, Leeming JA and Basten AJA)

170. Hurex says that, like the rescuers in *Wicks* who were leading away passengers who were not physically injured but psychiatrically affected by the event , when Mr Hodson attended on Mr Brydon he had been informed and witnessed a colleague who was deeply psychologically affected by the tragic accident, and Mr Brydon's process of suffering was not over when Mr Hodson arrived at the scene of the tragedy and rendered him aid by taking him from the scene to the office. Hurex says that the primary judge was correct to conclude that it was reasonably foreseeable on the part of Lederer that a person of normal fortitude might suffer a recognised psychiatric illness and Lederer's duty of care is not excluded by s 32 of the *Civil Liability Act* . I note that Hurex appears to be here emphasising the impact of Mr Brydon's distress on Mr Hodson. However, I note that Mr Hodson did not specifically plead below that Mr Brydon's distress in and of itself contributed to his psychiatric injury (other than making reference to his exposure to "the traumatic incident").

Determination

Lederer Group Pty Ltd v Hodson [2024] NSWCA 303 (18 December 2024) (Ward P, Leeming JA and Basten AJA)

153. Mr Hodson points to the recognition in *Wicks* (at [26]) (which Lederer here accepts) that none of the matters to which s 32(2) is directed is "to be treated as a condition necessary to finding a duty of care", nor would their existence be a sufficient condition for such a finding (citing *Wicks* at [27]-[28]).

Lederer Group Pty Ltd v Hodson [2024] NSWCA 303 -
Lederer Group Pty Ltd v Hodson [2024] NSWCA 303 -
Lederer Group Pty Ltd v Hodson [2024] NSWCA 303 -
Lederer Group Pty Ltd v Hodson [2024] NSWCA 303 -
Lederer Group Pty Ltd v Hodson [2024] NSWCA 303 -
Lederer Group Pty Ltd v Hodson [2024] NSWCA 303 -
Lederer Group Pty Ltd v Hodson [2024] NSWCA 303 -

Johnson v Insurance Australia Limited t/as NRMA Insurance [2024] NSWPICMR 68 -
Johnson v Insurance Australia Limited t/as NRMA Insurance [2024] NSWPICMR 68 -
Johnson v Insurance Australia Limited t/as NRMA Insurance [2024] NSWPICMR 68 -
Azzi v Allianz Australia Insurance Limited [2024] NSWPIC 459 (21 August 2024) (Terrence Broomfield)

18. The claimant submits that he is a first responder and with the severely injured pedestrian still alive as referred to in the sentencing judgement of the insured, that person was still '' in peril'' and hence falls within s 32 of the CL Act, as referred to by the High Court in *Wicks v State Rail Authority of New South Wales* [2010] HCA 22 (16 June 2010) . Further, by assisting to restrain the insured the injured pedestrian continued to remain ''in peril''. It was submitted that the claimant attended to and witnessed the severely injured pedestrian ''in peril'' and assisted paramedics providing rescue from the situation. As such the claimant falls squarely within s 30 (CL Act).

Azzi v Allianz Australia Insurance Limited [2024] NSWPIC 459 -
Azzi v Allianz Australia Insurance Limited [2024] NSWPIC 459 -
Blo v CMA [2024] NSWPICMR 19 -
Bro v CRG [2024] NSWPICMR 18 -
Cavar v Campbelltown Catholic Club Ltd [2024] NSWCA 126 (23 May 2024) (Meagher and White JJA)

- The applicant pleaded (paras 12 and 22) that she suffered pain and that she had "got mental disorder" (para 17). Damages are not recoverable at common law for distress not amounting to a recognised psychiatric illness (*Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35; 329 [7] (Gleeson CJ); 339 [44] (Gaudron J); 382 [194] (Gummow and Kirby JJ); *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60; [2010] HCA 22 ; 70 [20] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel, and Bell JJ); *King v Philcox* (2015) 255 CLR 304; [2015] HCA 19; 318 [18] (French CJ, Kiefel and Gageler JJ)). Only damages for past or future economic loss are recoverable as damages in respect of an injury to a worker caused by the negligence or other tort of the worker's employer (*Workers Compensation Act* , ss 151E and 151G) . Moreover, if the applicant's claim were not for work injury damages, then the release provided to the respondent by cl 7 of the terms of settlement would apply as cl 9 would not be engaged.

Hodson v Hurex Pty Ltd and Lederer Pty Ltd [2024] NSWDC 143 (26 April 2024) (Fitzsimmons SC DCJ)

181. In *Optus Administration* Gleeson JA stated: –

> "[206] The operation of s 32 and the extent to which it reflected the common law in *T ame v State of New South Wales*; *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; [2002] HCA 35 *(Tame)*, was discussed by the High Court in *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60 ; [2010] HCA 22 (*Wicks*) at [16]-[30] , and again in *King v Philcox* (2015) 320 ALR 398; [2015] HCA 19 at [75]-[85] , in relation to s 33 of the *C ivil Liability Act* 1936 (SA) . Surprisingly, the parties did not refer to *Wicks* either at trial or in this Court. The following propositions, which can be taken from *Wicks* , have relevance to the present case.
>
> [207] First, s 32 defines or controls what otherwise would be a duty of care arising out of the common law for damages for mental harm resulting from negligence. The provision is cast negatively. The statutory condition for the 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: *Wicks* at [22] .
>
> [208] Secondly, whether the defendant ought to have foreseen mental injury to a person of normal fortitude must be determined with regard to "the circumstances of the case". Some such kinds of circumstance are identified in s 32(2) , but s 32 does not prescribe any particular consequence as following from the presence or absence of any or all of those circumstances: *Wicks* at [23] .

[209] Thirdly, s 32 is to be understood against the background provided by the common law of negligence in relation to psychiatric injury as stated by the High Court in *Tame*. Consistent with *Tame*, s 32 assumes that foreseeability is the central determinant of the existence of any duty of care. Further, and consistent with *Tame*, circumstances of a "shocking event" and the existence and nature of any connection between perpetrator 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: *Wicks* at [26] ."

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[207] First, s 32 defines or controls what otherwise would be a duty of care arising out of the common law for damages for mental harm resulting from negligence. The provision is cast negatively. The statutory condition for the 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: *Wicks* at [22] .

[208] Secondly, whether the defendant ought to have foreseen mental injury to a person of normal fortitude must be determined with regard to "the circumstances of the case". Some such kinds of circumstance are identified in s 32(2) , but s 32 does not prescribe any particular consequence as following from the presence or absence of any or all of those circumstances: *Wicks* at [23] .

[209] Thirdly, s 32 is to be understood against the background provided by the common law of negligence in relation to psychiatric injury as stated by the High Court in *Tame*. Consistent with *Tame*, s 32 assumes that foreseeability is the central determinant of the existence of any duty of care. Further, and consistent with *Tame*, circumstances of a "shocking event" and the existence and nature of any connection between perpetrator 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: *Wicks* at [26] ."

Hodson v Hurex Pty Ltd and Lederer Pty Ltd [2024] NSWDC 143 (26 April 2024) (Fitzsimmons SC DCJ)

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[207] First, s 32 defines or controls what otherwise would be a duty of care arising out of the common law for damages for mental harm resulting from negligence. The provision is cast negatively. The statutory condition for the establishment of a duty of care identified by s 32(1) is that the defendant ought to have foreseen that a person

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> [208] Secondly, whether the defendant ought to have foreseen mental injury to a person of normal fortitude must be determined with regard to "the circumstances of the case". Some such kinds of circumstance are identified in s 32(2) , but s 32 does not prescribe any particular consequence as following from the presence or absence of any or all of those circumstances: *Wicks* at [23] .
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> [209] Thirdly, s 32 is to be understood against the background provided by the common law of negligence in relation to psychiatric injury as stated by the High Court in *Tame*. Consistent with *Tame*, s 32 assumes that foreseeability is the central determinant of the existence of any duty of care. Further, and consistent with *Tame*, circumstances of a "shocking event" and the existence and nature of any connection between perpetrator 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: *Wicks* at [26] ."

Hodson v Hurex Pty Ltd and Lederer Pty Ltd [2024] NSWDC 143 -
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Hodson v Hurex Pty Ltd and Lederer Pty Ltd [2024] NSWDC 143 -
The Owners Strata Plan No 84674 v Pafburn Pty Ltd [2023] NSWCA 301 -
Karpik v Carnival plc (The Ruby Princess) (Initial Trial) [2023] FCA 1280 (25 October 2023) (Stewart J)

571. As explained in *Wicks* at [26] and [31] , neither of those circumstances is necessary to found the existence of a duty. They are merely aspects of the "circumstances of the case" that are relevant to the inquiry directed by s 32(1) , namely whether the respondents ought to have foreseen that a person of "normal fortitude" might suffer a recognised psychiatric injury if reasonable care were not taken. They are to be treated as relevant to the assessment of the foreseeability of risk of harm as a necessary condition to the existence of the duty of care: *King v Philcox* at [13] per French CJ, Kiefel and Gageler JJ.

Karpik v Carnival plc (The Ruby Princess) (Initial Trial) [2023] FCA 1280 (25 October 2023) (Stewart J)

564. By providing that a duty is *not* to be found unless certain conditions are satisfied, s 32 operates as a condition for the establishment of a duty of care: *Wicks* at [22] . That is, s 32 defines or controls what would otherwise be a duty of care arising under the common law. As explained in section D.6 above, s 32 has no application to Mrs Karpik's claim for failure to comply with ACL ss 60 and 61.

Karpik v Carnival plc (The Ruby Princess) (Initial Trial) [2023] FCA 1280 -
Karpik v Carnival plc (The Ruby Princess) (Initial Trial) [2023] FCA 1280 -
BIJ v QBE Insurance (Australia) Limited [2022] NSWPICMR 75 (16 December 2022)

78. The claimant relies on the High Court decision in *Wicks v State Rail Authority* (NSW) (2010) 241 CLR 60 (*Wicks*), where a broader interpretation of the phrase "put in peril" was preferred. In *Wicks*, the Court held that a person is "put in peril when put at risk and they remain in peril until they cease to be at risk". In *Wicks*, several survivors of the derailment were considered by the Court to have remained in peril until they had been rescued and taken to a place of safety. Thus, the plaintiffs witnessed, at the scene, the victims of the accident being put in peril.

BHD v QBE Insurance (Australia) Limited [2022] NSWPICMR 73 -
Khan v R [2022] NSWCCA 47 -
Khan v R [2022] NSWCCA 47 -
Zaghloul v Bayly [2021] WASCA 125 (19 July 2021) (Murphy, Mitchell and Vaughan JJA)

87. The New South Wales equivalent of s 5S is found in s 32 of the *Civil Liability Act 2002* (NSW) (NSW Act). Section 32 of the NSW Act was discussed by the High Court in ***Wicks v State Rail Authority (NSW)*** . [88] The following propositions may be drawn from ***Wicks*** :

1. Section 5S defines or controls what would otherwise be a duty of care arising at common law: ***Wicks*** [22].

2. However, s 5S does not positively identify when the duty arises. Section 5 S(1) is cast negatively; it provides that a duty is *not* to be found unless a condition is satisfied: ***Wicks*** [22].

3. The relevant statutory condition for establishment of a duty of care 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: ***Wicks*** [22].

4. The determination of whether the defendant ought to have foreseen such mental injury to a person of normal fortitude must be made with regard to 'the circumstances of the case' - these including, in relation to 'pure mental harm', the four kinds of circumstance prescribed in s 5S(2) . However, s 5S does not prescribe any particular consequence as following from the presence or absence of any or all of those circumstances. While these circumstances bear upon whether a defendant ought to have foreseen that a person of normal fortitude might have suffered a recognised psychiatric illness if reasonable care was not taken, the occurrence of one or more of the prescribed circumstances is neither a necessary nor sufficient condition for a finding that a defendant owed a duty to take reasonable care not to cause a plaintiff pure mental harm: ***Wicks*** [2 3], [27] - [28], [31].

5. Section 5S must be understood against the background provided by the common law of negligence in relation to psychiatric injury as stated in ***Tame v New South Wales*** : [89] ***Wicks*** [24].

6. ***Tame*** held that the central question in deciding whether a defendant owes a plaintiff a duty to take reasonable care to avoid recognisable psychiatric injury is whether, in all the circumstances, the risk of the plaintiff sustaining such an injury is reasonably foreseeable. A majority of the court rejected the propositions that concepts of 'reasonable or ordinary fortitude', 'shocking event' or 'directness of connection' were additional pre-conditions to liability: ***Wicks*** [25] .

7. Consistently with ***Tame*** :

(a) s 5S assumes that foreseeability is the central determinant of whether a duty of care arises: ***Wicks*** [26] (although subsequently it has been suggested that foreseeability, alone, is not enough);[90]

(b) the concept of 'shocking event' and the existence and nature of any connection between plaintiff and victim and between plaintiff and defendant are considerations relevant to foreseeability (although not necessary to find a duty of care): ***Wicks*** [26].

8. Contrary to ***Tame*** , s 5S 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 injury: ***Wi cks*** [26].

9. The focus of s 5S is 'mental harm' (ie impairment of a person's mental condition) and a 'recognised psychiatric illness' not mental or nervous shock: ***Wicks*** [29].

10. The question of foreseeability must be judged before the relevant incident happened: ***Wicks*** [33].

via

[88] ***Wicks v State Rail Authority (NSW)*** [2010] HCA 22; (2010) 241 CLR 60 [16] - [30]. See also ***King v Philcox*** [2015] HCA 19; (2015) 255 CLR 304 [75] - [85] (in relation to s 33 of the *Civil Liability Act 1936* (SA)).

Zaghloul v Bayly [2021] WASCA 125 -
Watson v State of NSW [2021] NSWSC 765 -
Sdrolias v Power Distribution Services Pty Limited [2021] NSWSC 321 (01 April 2021) (Fagan J)

38. In *Optus Administration Pty Limited v Glenn Wright* [2017] NSWCA 21 Gleeson JA explained s 32 in these terms:

> [206] The operation of s 32 and the extent to which it reflected the common law in *Tame v State of New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; [2002] HCA 35 (*Tame*), was discussed by the High Court in *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60; [2010] HCA 22 (*Wicks*) at [16]-[30], and again in *King v Philcox* (2015) 320 ALR 398; [2015] HCA 19 at [75]-[85], in relation to s 33 of the *Civil Liability Act 1936* (SA). [...] The following propositions, which can be taken from *Wicks*, have relevance to the present case.
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> [207] First, s 32 defines or controls what otherwise would be a duty of care arising out of the common law for damages for mental harm resulting from negligence. The provision is cast negatively. The statutory condition for the 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: *Wicks* at [22].
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> [208] Secondly, whether the defendant ought to have foreseen mental injury to a person of normal fortitude must be determined with regard to "the circumstances of the case". Some such kinds of circumstance are identified in s 32(2), but s 32 does not prescribe any particular consequence as following from the presence or absence of any or all of those circumstances: *Wicks* at [23].
>
> [209] Thirdly, s 32 is to be understood against the background provided by the common law of negligence in relation to psychiatric injury as stated by the High Court in *Tame*. Consistent with *Tame*, s 32 assumes that foreseeability is the central determinant of the existence of any duty of care. Further, and consistent with Tame, circumstances of a "shocking event" and the existence and nature of any connection between perpetrator 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: *Wicks* at [26].
>
> [210] As Gleeson CJ observed in *Tame* at [35], the existence of a "sudden shock" is a relevant factual indicator of the presence or absence of the proximity of a relationship between the plaintiff and the defendant. As Gaudron J further noted in *Tame* (at [66]), under the general law, in many cases, the risk of psychological or psychiatric injury will not be foreseeable in the absence of a sudden shock. Similarly, the Court held in *Wicks* that "sudden shock", as 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": *Wicks* at [27].

[211] Fourthly and importantly, the focus of s 32 is "mental harm" and "a recognised psychiatric illness", not "mental or nervous shock" (as used in both ss 29 and 30 of the *Civil Liability Act*): *Wicks* at [29] . The expression "sudden shock" in s 32(2)(a) may be understood as referring to an event or a cause. This is different to "mental or nervous shock" which refers to a consequence: *Wicks* at [30] . The Court emphasised (at [30]) that the notion of "shock" was central to both expressions, and referred to the following dictionary definition of "shock":

> ... 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": Oxford Dictionary, 2nd ed (1989), vol xv at 293, meaning 4a.

[212] Fifthly, the question of foreseeability must be judged before the relevant incident happened: *Wicks* at [33] .

Sdrolias v Power Distribution Services Pty Limited [2021] NSWSC 321 (01 April 2021) (Fagan J)

38. In *Optus Administration Pty Limited v Glenn Wright* [2017] NSWCA 21 Gleeson JA explained s 32 in these terms:

> [206] The operation of s 32 and the extent to which it reflected the common law in *Tame v State of New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; [2002] HCA 35 (*Tame*), was discussed by the High Court in *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60; [2010] HCA 22 (*Wicks*) at [16]-[30] , and again in *King v Philcox* (2015) 320 ALR 398; [2015] HCA 19 at [75]-[85] , in relation to s 33 of the *Civil Liability Act 1936* (SA) . [...] The following propositions, which can be taken from *Wicks* , have relevance to the present case.
>
> [207] First, s 32 defines or controls what otherwise would be a duty of care arising out of the common law for damages for mental harm resulting from negligence. The provision is cast negatively. The statutory condition for the 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: *Wicks* at [22] .
>
> [208] Secondly, whether the defendant ought to have foreseen mental injury to a person of normal fortitude must be determined with regard to "the circumstances of the case". Some such kinds of circumstance are identified in s 32(2) , but s 32 does not prescribe any particular consequence as following from the presence or absence of any or all of those circumstances: *Wicks* at [23] .
>
> [209] Thirdly, s 32 is to be understood against the background provided by the common law of negligence in relation to psychiatric injury as stated by the High Court in *Tame* . Consistent with *Tame* , s 32 assumes that foreseeability is the central determinant of the existence of any duty of care. Further, and consistent with Tame, circumstances of a "shocking event" and the existence and nature of any connection between perpetrator 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: *Wicks* at [26] .
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[211] Fourthly and importantly, the focus of s 32 is "mental harm" and "a recognised psychiatric illness", not "mental or nervous shock" (as used in both ss 29 and 30 of the *Civil Liability Act*): *Wicks* at [29] . The expression "sudden shock" in s 32(2)(a) may be understood as referring to an event or a cause. This is different to "mental or nervous shock" which refers to a consequence: *Wicks* at [30] . The Court emphasised (at [30]) that the notion of "shock" was central to both expressions, and referred to the following dictionary definition of "shock":

> ... 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": Oxford Dictionary, 2nd ed (1989), vol xv at 293, meaning 4a.

[212] Fifthly, the question of foreseeability must be judged before the relevant incident happened: *Wicks* at [33] .

Sdrolias v Power Distribution Services Pty Limited [2021] NSWSC 321 -
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Sdrolias v Power Distribution Services Pty Limited [2021] NSWSC 321 -
Capar v SPG Investments Pty Ltd t/as Lidcombe Power Centre [2020] NSWCA 354 -
Capar v SPG Investments Pty Ltd t/as Lidcombe Power Centre [2020] NSWCA 354 -
Capar v SPG Investments Pty Ltd t/as Lidcombe Power Centre [2020] NSWCA 354 -
Barlow v St Vincent's Hospital Sydney Limited [2020] NSWDC 500 (04 September 2020) (Russell SC DCJ)

94. This definition of "shock" is said in fn 37, referred to in par [30] of *Wicks* , to come from the *Oxford English Dictionary*, Second Edition (1989) Vol xv, p 293, meaning 4a.

Barlow v St Vincent's Hospital Sydney Limited [2020] NSWDC 500 -
Barlow v St Vincent's Hospital Sydney Limited [2020] NSWDC 500 -
Barlow v St Vincent's Hospital Sydney Limited [2020] NSWDC 500 -
Barlow v St Vincent's Hospital Sydney Limited [2020] NSWDC 500 -
Singh v Lynch [2020] NSWCA 152 (23 July 2020) (Basten, Leeming, Payne and McCallum JJA, Simpson AJA)

9. Wicks v State Rail Authority of New South Wales (2010) 241 CLR 60; [2010] HCA 22 at [22]-[24] (in relation to s 32) .

AAI Limited v Caffrey [2019] QCA 293 (10 December 2019) (Sofronoff P and Philippides and McMurdo JJA)

21. In *Wicks v State Rail Authority (NSW)* , [16] a case in which the plaintiff rescuers were police officers, a unanimous court held that the existence of a duty of care to protect against psychiatric harm to a rescuer depends upon whether it was reasonably foreseeable that the sights that a rescuer might see, sounds that a rescuer might hear and 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. [17]

AAI Limited v Caffrey [2019] QCA 293 -
AAI Limited v Caffrey [2019] QCA 293 -
DOQ17 v Australian Financial Security Authority (No 3) [2019] FCA 1488 (10 September 2019) (Perry J)

185. Section 32 also raises the bar for establishing a duty of care by imposing restrictions upon the circumstances in which a person owes a duty of care to another with respect to "*mental harm*": *Wicks v State Rail Authority of New South Wales* [2010] HCA 22; (2010) 241 CLR 60 (***Wicks***) at [26] (the Court); *Optus Administration Pty Limited v Glenn Wright* [2017] NSWCA 21; (2017) 94 NSWLR 229 (***Optus Administration***) at [30] (Basten JA (with whose reasons Hoeben JA agreed)). "*Mental harm*" is defined in s 27 of Part 3 of the Act to mean "*impairment of a person's mental condition*". " ***Pure*** *mental harm*" in turn means "*mental harm other than consequential mental harm*", the latter being "*mental harm that is a consequence of a personal injury of any other kind*" (emphasis added). There is no suggestion here by the applicant that she suffered personal injury other than by reason of an impairment of her mental condition. Nor is it suggested that the mental harm alleged is a consequence of another kind of personal injury. As such, she seeks damages for pure mental harm.

DOQ17 v Australian Financial Security Authority (No 3) [2019] FCA 1488 -
DOQ17 v Australian Financial Security Authority (No 3) [2019] FCA 1488 -
DOQ17 v Australian Financial Security Authority (No 3) [2019] FCA 1488 -
Roo Roofing Pty Ltd v Commonwealth [2019] VSC 331 -
Capar v SPG Investments Pty Limited t/a Lidcombe Power Centre & Ors. (No 5) [2019] NSWSC 507 (13 May 2019) (Bellew J)

129. Wicks v State Rail Authority of New South Wales [2010] 241 CLR 60; [2010] HCA 22 ("Wicks") at [22] .

Isobella Madeline Szczerbanik v Carnival PLC trading as Carnival Cruise Lines [2019] NSWDC 197 (26 March 2019) (Judge J and Smith SC)

23. Sudden shock was explained by the High Court in *Wicks* , and I accept in this respect the defendant's written submissions at [27] to [30] .

Michael Szczerbanik v Carnival PLC trading as Carnival Cruise Lines [2019] NSWDC 198 -
Michael Szczerbanik v Carnival PLC trading as Carnival Cruise Lines [2019] NSWDC 198 -
Isobella Madeline Szczerbanik v Carnival PLC trading as Carnival Cruise Lines [2019] NSWDC 197 -
Frangie v South Western Sydney Local Health District trading as Liverpool Hospital [2019] NSWDC 42 (07 March 2019) (Abadee DCJ)

111. As the High Court noted in *Wicks* (at [23]), s 32 does not assign any particular hierarchy to this list of circumstances, nor any other consequence flowing from their presence or absence in any given case. The authorities which have reviewed these considerations provide some limited assistance. It is clear that the presence (or absence) of any such consideration in the case is not decisive: *Wicks* at [31] .

Frangie v South Western Sydney Local Health District trading as Liverpool Hospital [2019] NSWDC 42 (07 March 2019) (Abadee DCJ)

112. The High Court in *Wicks* considered (at [30]) the concept of 'shock'. It referred to 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". The Court emphasised

that it is not right to assume that in all cases of death, injury or being put in peril, the event(s) must begin and end in an instant, or even that it or they necessarily occupy only a time measured in minutes (at [44]). In *Tame* , the consideration of 'sudden shock' (s 32(2)(a)) tended to be wrapped up in other requirements, such as the relationship between the plaintiff and the defendant (per Gleeson CJ) or the response of a person of ordinary fortitude (per Hayne J).

Frangie v South Western Sydney Local Health District trading as Liverpool Hospital [2019] NSWDC 42 (07 March 2019) (Abadee DCJ)

111. As the High Court noted in *Wicks* (at [23]), s *32* does not assign any particular hierarchy to this list of circumstances, nor any other consequence flowing from their presence or absence in any given case. The authorities which have reviewed these considerations provide some limited assistance. It is clear that the presence (or absence) of any such consideration in the case is not decisive: *Wicks* at [31] .

Frangie v South Western Sydney Local Health District trading as Liverpool Hospital [2019] NSWDC 42 -
Ford v Elmore Haulage; VWA v Snowy Monaro [2019] VSC 58 (13 February 2019) (Keogh J)

86. The requirements of s 5B(1) should not be applied in a formulaic or mechanical way. [8] Asse ssment of breach must be undertaken prospectively from the point of view of the defendant, not with the benefit of hindsight. [9] Evaluation of a defendant's response to a risk must take account of the context, before the incident, in which the risk arose. [10] A defendant may act reasonably by taking no steps to ameliorate the risk. [11]

via

[10] *Rosenberg v Percival* (2001) 205 CLR 434 [88]; *Vairy v Wyong Shire Council* (2005) 223 CLR 422 [60]–[61], [124], [126]–[129]; *Wicks v State Rail Authority* (2010) 241 CLR 60 [33]; *Hookey v Paterno* (2009) 22 VR 362 [109].

Block v Powercor Australia Ltd [2019] VSC 15 -
Caffrey v AAI Limited [2019] QSC 7 (30 January 2019) (Flanagan J)

71. In terms of the reasoning process by which the above principles should be applied to the case at hand, both parties[66] submit that this Court should again turn to Nettle J's reasons in *Philcox* for guidance: [67]

> "This Court has not before had to determine whether a duty of care is owed in the circumstances presented by this case. *Wicks* made passing reference to the issue of duty of care owed to those present at the aftermath of an accident but did not deal with it in detail. *Jaensch v Coffey* , *Tame* and *Gifford v Strang Patrick Stevedoring Pty Ltd* all provide relevant guidance, but the issue cannot be properly decided by reference only to the nature of the relationship between the victim of an accident and the claimant, or the victim and the defendant. As Deane J concluded in *Jaensch* , the question of whether a duty of care is owed in particular circumstances falls to be resolved by a process of legal reasoning, by induction and deduction by reference to the decided cases and, ultimately, by value judgments of matters of policy and degree. Although the concept of 'proximity' that Deane J held to be the touchstone of the existence of a duty of care is no longer considered determinative, it nonetheless 'gives focus to the inquiry'. It does so by directing attention towards the features of the

relationships between the parties and the factual circumstances of the case, and prompting a 'judicial evaluation of the factors which tend for or against a conclusion' that it is reasonable (in the sense spoken of by Gleeson CJ in *Tame*) for a duty of care to arise. That these considerations may be tempered or assisted by policy considerations and value judgments is not, however, an invitation to engage in 'discretionary decision-making in individual cases'. Rather, it reflects the reality that, although '[r]easonableness is judged in the light of current community standards', and the 'totality of the relationship[s] between the parties' must be evaluated, it is neither possible nor desirable to state an 'ultimate and permanent value' according to which the question of when a duty arises in a particular category of case may be comprehensively answered."

Caffrey v AAI Limited [2019] QSC 7 (30 January 2019) (Flanagan J)

114. Opening Mr Williams' airway was a clear attempt by the plaintiff to increase Mr Williams' chances of survival until he could be safely removed from the vehicle. This accords with the High Court's description in *Wicks* of rescuers undertaking tasks "to try to ease the suffering of others and take them to safety." [118]

Caffrey v AAI Limited [2019] QSC 7 (30 January 2019) (Flanagan J)

94. For completeness, I note too the High Court's decision in *Wicks*. Under the New South Wales legislation there considered, a relevant circumstance in a court's determination of liability for mental harm is whether or not the claimant "witnessed, at the scene, a person being killed, injured or put in peril". [90] The joint judgment held that "being injured" and "being put in peril" are ongoing concepts:

> "It would not be right, however, to read [the relevant legislation] 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.
>
> 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." [91]

via

[91] (2010) 241 CLR 60 at 76, [44]-[45].

Caffrey v AAI Limited [2019] QSC 7 (30 January 2019) (Flanagan J)

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Caffrey v AAI Limited [2019] QSC 7 (30 January 2019) (Flanagan J)

72. Justice Nettle first addressed, in general terms, the "threshold inquiry" of foreseeability. [68] In relation to this inquiry, both parties referred to *Wicks v State Rail Authority (NSW).* [69] That decision concerned the liability of State Rail for psychiatric injuries suffered by two police officers who attended at the scene of a train derailment caused by State Rail's negligence. Though liability for psychiatric harm in New South Wales is regulated by statute, the joint judgment's comments on foreseeability, with the exception of their Honours' statute-based reference to 'normal fortitude', are applicable at common law: [70]

> "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. 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 before the accident happened."

via

[69] *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60 ; Plaintiff's Outline of Submissions, paragraph 12; Defendant's Outline of Submissions, paragraph 26.

Caffrey v AAI Limited [2019] QSC 7 (30 January 2019) (Flanagan J)
Wicks v State Rail Authority (NSW) (2010) 241 CLR 60; [2010] HCA 22 ; applied

Caffrey v AAI Limited [2019] QSC 7 -
Caffrey v AAI Limited [2019] QSC 7 -
Caffrey v AAI Limited [2019] QSC 7 -
Caffrey v AAI Limited [2019] QSC 7 -
Caffrey v AAI Limited [2019] QSC 7 -
Bryant v Competitive Foods Australia Pty Ltd [2018] QDC 258 -
Walsh v State of New South Wales [2018] NSWSC 1480 (04 October 2018) (Harrison AsJ)

84. Gleeson JA at [206] to [212] (who was in dissent but his statement of principles are not in doubt), stated the following propositions from *Wicks v State Rail Authority (NSW) (known as State Rail)* (2010) 267 ALR 23; [2010] HCA 22 *("Wicks")*, which the defendant asserts as having relevance to the present case:

    1. s 32 is cast negatively. Therefore, to establish the statutory duty of care identified by s 32(1) , it must be established 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 (*Wicks* at [22]);

    2. whether the defendant ought to have foreseen mental injury to a person of normal fortitude must be determined with regard to "the circumstances of the case". While some circumstances are identified in s 32(2) , s 32 does not prescribe any particular consequence as following from the presence or absence of any or all of those circumstances (*Wicks* at [23]);

    3. s 32 is to be understood against the background provided by the common law of negligence in relation to psychiatric injury as stated by the High Court in *Tame.* Consistent with *Tame,* s 32 assumes that foreseeability is the central determinant of the existence of any duty of care. Circumstances of a "shocking event" and the existence and nature of any connection between perpetrator and victim and between plaintiff and defendant, are considerations relevant to foreseeability, although neither is a condition necessary to finding a duty of care (*Wicks* at [26]);

    4. the focus of s 32 is "mental harm" and "a recognised psychiatric illness" (*Wicks* at [29]). "Sudden shock" in s 32(2)(a) may be understood as referring to an event or a cause. This is different to "mental or nervous shock", which refers to a consequence (*Wicks* at [30]). The Court emphasised at [30] that the notion of "shock" was central to both expressions, and referred to the following dictionary definition of "shock" in *Oxford Dictionary* (vol XV, 2nd ed, 1989, Oxford University Press) at 293:

        > ... 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";

    5. the question of foreseeability must be judged before the relevant incident happened (*Wicks* at [33]).

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84. Gleeson JA at [206] to [212] (who was in dissent but his statement of principles are not in doubt), stated the following propositions from *Wicks v State Rail Authority (NSW) (known as State Rail)* (2010) 267 ALR 23; [2010] HCA 22 *("Wicks")*, which the defendant asserts as having relevance to the present case:

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3. s 32 is to be understood against the background provided by the common law of negligence in relation to psychiatric injury as stated by the High Court in *Tame.* Consistent with *Tame,* s 32 assumes that foreseeability is the central determinant of the existence of any duty of care. Circumstances of a "shocking event" and the existence and nature of any connection between perpetrator and victim and between plaintiff and defendant, are considerations relevant to foreseeability, although neither is a condition necessary to finding a duty of care (*Wicks* at [26]);

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Walsh v State of New South Wales [2018] NSWSC 1480 (04 October 2018) (Harrison AsJ)

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5. the question of foreseeability must be judged before the relevant incident happened (*Wicks* at [33]).

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Walsh v State of New South Wales [2018] NSWSC 1480 -
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Walsh v State of New South Wales [2018] NSWSC 1480 -
Walsh v State of New South Wales [2018] NSWSC 1480 -
Jones v Ranginui [2018] NSWDC 493 (17 May 2018) (Neilson DCJ)

17. To establish her cause of action, the plaintiff must establish the matter contained in s 32 of the *CLA* , and then satisfy the provisions of s 30 of the same statute. In particular, the defendant relies upon s 30(2) which is in the following terms:

> "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."

It is common ground that the plaintiff was not a "close member of the family of the victim", that term being something defined in s 30(5). Accordingly, the plaintiff to recover has to establish that she witnessed at the scene, the victim being "killed, injured or put in peril". The defendant in the course of submissions put a very narrow construction on those words, but it is clear from the decision of the High Court of Australia in *Wicks v State Rail Authority* (NSW) (2010) 241 CLR 60 a more expensive construction can be put upon those words. In particular, one needs to consider what fell from the High Court at [43] to [50] .

Caffrey v AAI Limited [2017] QSC 339 (22 November 2017) (Applegarth J)

Particular reliance was placed on this application upon the decision of the High Court in *Wicks* , and I have regard to that case. I note immediately that the issue that was considered by the High Court, but not decided by it, concerned whether the Rail Authority owed serving police officers, who were rescuers, a certain duty of care. I emphasise that they were described as rescuers. In that context, the Court said at [33] :

Caffrey v AAI Limited [2017] QSC 339 (22 November 2017) (Applegarth J)

In *King v Philcox* (2015) 255 CLR 304; [2015] HCA 19 at [29] – [30] , Chief Justice French, and Justices Kiefel and Gageler referred generally to the variables which can be taken into account for the purpose of determining the existence of a duty of care, and expressed caution about arguments based upon analogical arguments. Justice Nettle at [80], referring to Wick's case (2010) 241 CLR 60 , noted that the issue of duty of care owed to those present at the aftermath of an accident was not dealt with in detail. His Honour referred to the fact that the question of whether a duty of care is owed is a matter that is ultimately decided by value judgments of matters of policy and degree.

Caffrey v AAI Limited [2017] QSC 339 -
Caffrey v AAI Limited [2017] QSC 339 -
Ibrahimi v Commonwealth of Australia (No 9) [2017] NSWSC 1051 -
Ibrahimi v Commonwealth of Australia (No 9) [2017] NSWSC 1051 -
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 (17 February 2017) (Basten, Hoeben and Gleeson JJA)

Fourthly and importantly, the focus of s 32 is "mental harm" and "a recognised psychiatric illness", not "mental or nervous shock" (as used in both s 29 and s 30 of the Civil Liability Act): Wicks at [29] . The expression "sudden shock" in s 32(2)(a) may be understood as referring to an event or a cause. This is different to "mental or nervous shock" which refers to a consequence: Wicks at [30] . The court emphasised (at [30]) that the notion of "shock" was central to both expressions, and referred to the following dictionary definition of "shock":

"[30]... 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' [Oxford English Dictionary, 2nd ed (1989), vol xv, p 293, meaning 4a] ..." (Footnote supplied)

Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 (17 February 2017) (Basten, Hoeben and Gleeson JJA)

58. With respect to par (a), the Court in *Wicks* explained the term "sudden shock" as referring "to an event or a cause." [63] As it is not disputed that the respondent suffered mental harm as a result of the attack on him by Mr George, it does not matter whether or not the attack can properly be described as a "sudden shock" though the description may be available. The fact of the attack is undoubtedly a central circumstance of the case which must be taken into account in determining the existence of a duty. The elements of sudden shock and direct perception, contained in pars (a) and (b) of s 32(2) have at times been used as control devices limiting the availability of recovery for mental harm. Both applied in cases involving a third party victim. Their role as necessary requirements of liability was rejected by the High Court in *Annetts v Australian Stations Pty Ltd* , heard with *Tame* . [64] They add nothing to the analysis of the circumstances of the present case.

Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 (17 February 2017) (Basten, Hoeben and Gleeson JJA)

209. Thirdly, s 32 is to be understood against the background provided by the common law of negligence in relation to psychiatric injury as stated by the High Court in *Tame* . Consistent with *Tame* , s 32 assumes that foreseeability is the central determinant of the existence of any duty of care. Further, and consistent with *Tame* , circumstances of a "shocking event" and the existence and nature of any connection between perpetrator 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: *Wicks* at [26] .

Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 (17 February 2017) (Basten, Hoeben and Gleeson JJA)

206. The operation of s 32 and the extent to which it reflected the common law in *Tame v State of New South Wales*; *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; [2002] HCA 35 (***Tame***), was discussed by the High Court in *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60; [2010] HCA 22 (***Wicks***) at [16]-[30] , and again in *King v Philcox* (2015) 320 ALR 398; [2015] HCA 19 at [75]-[85] , in relation to s 33 of the *Civil Liability Act* 1936 (SA) . Surprisingly, the parties did not refer to *Wicks* either at trial or in this Court. The following propositions, which can be taken from *Wicks* , have relevance to the present case.

Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 (17 February 2017) (Basten, Hoeben and Gleeson JJA)

212. Fifthly, the question of foreseeability must be judged before the relevant incident happened: *Wicks* at [33] .

Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 (17 February 2017) (Basten, Hoeben and Gleeson JJA)

With respect to par (a), the court in Wicks explained the term "sudden shock" as referring "to an event or a cause."

Wicks at [30] .

As it is not disputed that the respondent suffered mental harm as a result of the attack on him by Mr George, it does not matter whether or not the attack can properly be described as a "sudden shock" though the description may be available. The fact of the attack is undoubtedly a central circumstance of the case which must be taken into account in determining the existence of a duty. The elements of sudden shock and direct perception, contained in par (a) and par (b) of s 32(2) , have at times been used as control devices limiting the availability of recovery for mental harm. Both applied in cases involving a third party victim. Their role as necessary requirements of liability was rejected by the High Court in Annetts v Australian Stations Pty Ltd, heard with Tame .

Tame at [33] and [41] (Gleeson CJ), [65]–[66] (Gaudron J), [187]–[189] and [213] (Gummow and Kirby JJ).

They add nothing to the analysis of the circumstances of the present case.

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210. As Gleeson CJ observed in *Tame* at [35] , the existence of a "sudden shock" is a relevant factual indicator of the presence or absence of the proximity of a relationship between the plaintiff and the defendant. As Gaudron J further noted in *Tame* (at [66]), under the general law, in many cases, the risk of psychological or psychiatric injury will not be foreseeable in the absence of a sudden shock. Similarly, the Court held in *Wicks* that "sudden shock", as 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": *Wicks* at [27] .

208. Secondly, whether the defendant ought to have foreseen mental injury to a person of normal fortitude must be determined with regard to "the circumstances of the case". Some such kinds of circumstance are identified in s 32(2) , but s 32 does not prescribe any particular consequence as following from the presence or absence of any or all of those circumstances: *Wicks* at [23] .

206. The operation of s 32 and the extent to which it reflected the common law in *Tame v State of New South Wales*; *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; [2002] HCA 35 (***Tame***), was discussed by the High Court in *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60; [2010] HCA 22 (***Wicks***) at [16]-[30] , and again in *King v Philcox* (2015) 320 ALR 398; [2015] HCA 19 at [75]-[85] , in relation to s 33 of the *Civil Liability Act* 1936 (SA) . Surprisingly, the parties did not refer to *Wicks* either at trial or in this Court. The following propositions, which can be taken from *Wicks* , have relevance to the present case.

211. Fourthly and importantly, the focus of s 32 is "mental harm" and "a recognised psychiatric illness", not "mental or nervous shock" (as used in both ss 29 and 30 of the *Civil Liability Act*): *Wicks* at [29] . The expression "sudden shock" in s 32(2)(a) may be understood as referring to an event or a cause. This is different to "mental or nervous shock" which refers to a consequence: *Wicks* at [30] . The Court emphasised (at [30]) that the notion of "shock" was central to both expressions, and referred to the following dictionary definition of "shock":

> ... 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": *Oxford Dictionary*, 2nd ed (1989), vol xv at 293, meaning 4a.

56. The terms of Part 3 generally and s 32 in particular were addressed by the High Court in *Wicks v State Rail Authority (NSW)* . [60] However, the plaintiffs in that case were police officers who had attended a train crash and undertaken rescue operations; their claims for damages for mental harm arose in connection with others being killed or injured. The defendant was the operator of the rail service. With respect to s 32, the Court noted that the provision operated as a necessary condition for a finding that the defendant owed a duty of care, without setting out other circumstances which might be relevant to the existence of such a duty. [61] While s 32(1) required that the negative condition be assessed according to "the circumstances of the case", the High Court further noted that the circumstances identified in s 32(2) were matters to be taken into account and not themselves necessary conditions of the existence of a duty. [62]

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Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 -
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 -
State of New South Wales v Briggs [2016] NSWCA 344 -
Jausnik v Nominal Defendant (No 5) [2016] ACTSC 306 -
Jausnik v Nominal Defendant (No 5) [2016] ACTSC 306 -
Homsi v Homsi [2016] VSC 354 (28 June 2016) (J Forrest J)

25. After identifying the question, the next step is to determine the approach to be adopted in its resolution. This was addressed recently by Nettle J in *King* , where his Honour said*:*

> This Court has not before had to determine whether a duty of care is owed in the circumstances presented by this case. *Wicks* made passing reference to the issue of duty of care owed to those present at the aftermath of an accident but did not deal with it in detail. *Jaensch v Coffey*, *Tame* and *Gifford v Strang Patrick Stevedoring Pty Ltd* all provide relevant guidance, *but the issue cannot be properly decided by reference only to the nature of the relationship between the victim of an accident and the claimant, or the victim and the defendant. As Deane J concluded in Jaensch, the question of whether a duty of care is owed in particular circumstances falls to be resolved by a process of legal reasoning, by induction and deduction by reference to the decided cases and, ultimately, by value judgments of matters of policy and degree. Although the concept of "proximity" that Deane J held to be the touchstone of the existence of a duty of care is no longer considered determinative, it nonetheless "gives focus to the inquiry". It does so by directing attention towards the features of the relationships between the parties and the factual circumstances of the case, and prompting a "judicial evaluation of the factors which tend for or against a conclusion" that it is reasonable (in the sense spoken of by Gleeson CJ in Tame) for a duty of care to arise.* That these considerations may be tempered or assisted by policy considerations and value judgments is not, however, an invitation to engage in "discretionary decision-making in individual cases". Rather, it reflects the reality that, although "[r]easonableness is judged in the light of current community standards", and the "totality of the relationship[s] between the parties" must be evaluated, it is neither possible nor desirable to state an "ultimate and permanent value" according to which the question of when a duty arises in a particular category of case may be comprehensively answered. [13].

via

[13] *King* (2015) 255 CLR 304, 336 [80] (emphasis added). See also *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60 ('*Wicks*').

Homsi v Homsi [2016] VSC 354 -
Homsi v Homsi [2016] VSC 354 -
Sklavos v Australasian College of Dermatologists [2016] FCA 179 (02 March 2016) (Jagot J)

399. In *Wicks v State Rail Authority of New South Wales* [2010] HCA 22; (2010) 241 CLR 60 the High Court observed that:

> [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 subss (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 ss 30(2), 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 [[2002] HCA 35; (2002) 211 CLR 317]. 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) .
>
> ...
> [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*, "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.

Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 (10 August 2015) (Kourakis CJ; Gray and Stanley JJ)
Fox v Percy (2003) 214 CLR 118; *CSR Ltd v Della Maddalena* (2006) 80 ALJR 458; *Anwar v Mondello Farms Pty Ltd* [2014] SADC 105; *March v E & MH Stramare* (1991) 171 CLR 506; *Strong v Woolworths Ltd & Anor* (2012) 246 CLR 182; *Adelaide Stevedoring v Forst* (1940) 64 CLR 538; *Queen Elizabeth Hospital v Curtis* (2008) 102 SASR 534; *Plaintiff M70/2011 v Minister for Immigration and Citizenship & Anor* (2011)

244 CLR 144; *Federal Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 250 CLR 523; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1; *Carr v Western Australia* (2007) 232 CLR 138; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (1981) 147 CLR 297; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383; *Tame v New South Wales* (2002) 211 CLR 317; *Wicks v State Rail Authority (NSW)* (2010) 84 ALJR 497 ; *Rosenberg v Percival* (2001) 205 CLR 434; *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330; *New South Wales v Fahy* (2007) 232 CLR 486; *Wyong Shire Council v Shirt* (1980) 146 CLR 40; *Jaensch v Coffey* (1984) 155 CLR 549; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; *Campbelltown City Council v Mackay* (1989) 15 NSWLR 501; *Watts v Rake* (1960) 108 CLR 158; *Jones v Schiffmann* (1971) 124 CLR 303; *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601; *King v Philcox* [2015] HCA 19 at [42], (2015) 89 ALJR 582 at 594. ; *Purkess v Crittenden* (1965) 114 CLR 164, considered.

Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 -
Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 -
King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

115. Nor does *Wicks* assist in the way in which Gray J appears to have considered that it did. *Wicks* was concerned with the differently worded provisions of s 30 of the NSW Act , in which there was no requirement (as there is in s 53 of the CL Act) that the claimant be present at the scene *when the accident occurred*.

King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

46. These observations have no application to the present case. Nor do they entail any criticism of the decision in *HoinvilleWiggins* . Indeed, there was no occasion for this Court in *Wicks* to refer to *HoinvilleWiggins* . That is because the legislation under consideration in *Wicks* did not require that the plaintiffs be present at the scene of the accident "when the accident occurred" in order to recover damages for mental harm; it rather required the plaintiffs to have witnessed, at the scene of the accident, victims "being put in peril". That difference in the statutory language was of critical importance to the conclusion in *Wicks* and the observations cited above.

King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

25. The approach taken by the Full Court also invoked the reasoning adopted by this Court in *Wicks* , which was seen as applicable to the construction and application of s 53 . That approach makes it necessary to compare the text of s 53 with that of the analogous but significantly different text of s 30 of the *Civil Liability Act 2002 (NSW)* ("the New South Wales Act"), which was considered in *Wicks* . Under s 30 , it was a necessary condition of the entitlement to recover damages for pure mental harm for any person other than a close member of the victim's family that "the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril"[53]. Similar language of sensory perception had appeared in s 4 of the *Law Reform (Miscellaneous Provisions) Act 1944* , discussed earlier in these reasons. The purpose of s 30 , however, was to limit liability, whereas s 4 had defined the bounds of an extension of liability. The criterion in s 30(2) limiting recoverability of damages was identical with the circumstance of foreseeability conditioning the existence of a duty of care in the New South Wales Act [54] . There was, therefore, a degree of symmetry within the New South Wales statute that is missing from the South Australian Act. The question of the existence of a duty of care was not decided by this Court in *Wicks* [55] . The Court considered the application of s 30(2) on the assumption that a relevant duty of care was owed[56]. The key submission by State Rail was that the necessary condition of recovery for mental harm required a plaintiff to have observed at the scene an event unfolding which included another's death, injury or peril [57] . The Court held that s 30(2)(a) directed attention to an event that was happening while the plaintiff "witnessed" it[58]. The Court held [59] :

> "It would not be right ... 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."

As appears from that passage and the arguments that were put to the Court in *Wicks* , the text of s 30(2)(a) required a different enquiry from that required by the text of s 53(1)(a) of the Civil Liability Act (SA) .

via

[55] (2010) 241 CLR 60 at 73 [33] , 74 [35] . Duty of care had not been decided by the Court of Appeal of New South Wales and the parties in *Wicks* submitted that this Court should not decide it either.

King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

116. Section 30(2)(a) of the NSW Act provided that a plaintiff was not entitled to recover damages for mental harm unless "the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril". The plaintiffs in *Wicks* were members of the New South Wales Police Force who attended the scene of a high-speed train accident soon after it occurred. They saw the bodies of dead passengers, as well as passengers who were trapped, evidently seriously injured, and distressed [152] . This Court held that this constituted witnessing, at the scene, the victims of the accident who were still alive being put in peril [153] .

King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

25. The approach taken by the Full Court also invoked the reasoning adopted by this Court in *Wicks* , which was seen as applicable to the construction and application of s 53 . That approach makes it necessary to compare the text of s 53 with that of the analogous but significantly different text of s 30 of the *Civil Liability Act* 2002 (NSW) ("the New South Wales Act"), which was considered in *Wicks* . Under s 30 , it was a necessary condition of the entitlement to recover damages for pure mental harm for any person other than a close member of the victim's family that "the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril"[53]. Similar language of sensory perception had appeared in s 4 of the *Law Reform (Miscellaneous Provisions) Act* 1944 , discussed earlier in these reasons. The purpose of s 30 , however, was to limit liability, whereas s 4 had defined the bounds of an extension of liability. The criterion in s 30(2) limiting recoverability of damages was identical with the circumstance of foreseeability conditioning the existence of a duty of care in the New South Wales Act [54] . There was, therefore, a degree of symmetry within the New South Wales statute that is missing from the South Australian Act. The question of the existence of a duty of care was not decided by this Court in *Wicks* [55] . The Court considered the application of s 30(2) on the assumption that a relevant duty of care was owed[56]. The key submission by State Rail was that the necessary condition of recovery for mental harm required a plaintiff to have observed at the scene an event unfolding which included another's death, injury or peril [57] . The Court held that s 30(2)(a) directed attention to an event that was happening while the plaintiff "witnessed" it[58]. The Court held [59] :

> "It would not be right ... 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."

As appears from that passage and the arguments that were put to the Court in *Wicks* , the text of s 30(2)(a) required a different enquiry from that required by the text of s 53(1)(a) of the Civil Liability Act (SA) .

King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

27. The submissions for Ryan Philcox with respect to s 53 followed the reasoning of the Full Court. To the extent that that reasoning and Ryan Philcox's submissions relied upon this Court's reasoning in *Wicks* in its application to s 30(2) of the New South Wales Act , they did not give effect to the significant textual differences between the two provisions. Ryan Philcox was not present at the scene of the accident when the accident occurred. The Full Court erred in its construction and application of s 53(1)(a) in this case.

King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

45. This Court held that s 30(2)(a) did not preclude recovery of damages for the mental harm that the plaintiffs suffered because the plaintiffs had witnessed, at the scene, victims of the accident being injured or put in peril over the period while they were attempting to rescue them[84]. For present purposes, it is important to note that the Court said [85] :

> "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".

via

[85] (2010) 241 CLR 60 at 76 [44] .

King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

115. Nor does *Wicks* assist in the way in which Gray J appears to have considered that it did. *Wicks* was concerned with the differently worded provisions of s 30 of the NSW Act , in which there was no requirement (as there is in s 53 of the CL Act) that the claimant be present at the scene *when the accident occurred*.

King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

67. At first instance, the judge found that the respondent suffered mental harm as a result of sudden shock caused by being told of his brother's death and thus a "sudden and disturbing impression on the mind or feelings" [94] within the meaning of s 33(2)(a)(i) .

via

[94] See *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60 at 72-73 [30] per curiam; [2010] HCA 22 .

King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

46. These observations have no application to the present case. Nor do they entail any criticism of the decision in *HoinvilleWiggins* . Indeed, there was no occasion for this Court in *Wicks* to refer to *HoinvilleWiggins* . That is because the legislation under consideration in *Wicks* did not require that the plaintiffs be present at the scene of the accident "when the accident occurred" in order to recover damages for mental harm; it rather required the plaintiffs to

have witnessed, at the scene of the accident, victims "being put in peril". That difference in the statutory language was of critical importance to the conclusion in *Wicks* and the observations cited above.

King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

25. The approach taken by the Full Court also invoked the reasoning adopted by this Court in *Wicks* , which was seen as applicable to the construction and application of s 53 . That approach makes it necessary to compare the text of s 53 with that of the analogous but significantly different text of s 30 of the *Civil Liability Act* 2002 (NSW) ("the New South Wales Act"), which was considered in *Wicks* . Under s 30 , it was a necessary condition of the entitlement to recover damages for pure mental harm for any person other than a close member of the victim's family that "the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril"[53]. Similar language of sensory perception had appeared in s 4 of the *Law Reform (Miscellaneous Provisions) Act* 1944 , discussed earlier in these reasons. The purpose of s 30 , however, was to limit liability, whereas s 4 had defined the bounds of an extension of liability. The criterion in s 30(2) limiting recoverability of damages was identical with the circumstance of foreseeability conditioning the existence of a duty of care in the New South Wales Act [54] . There was, therefore, a degree of symmetry within the New South Wales statute that is missing from the South Australian Act. The question of the existence of a duty of care was not decided by this Court in *Wicks* [55] . The Court considered the application of s 30(2) on the assumption that a relevant duty of care was owed[56]. The key submission by State Rail was that the necessary condition of recovery for mental harm required a plaintiff to have observed at the scene an event unfolding which included another's death, injury or peril [57] . The Court held that s 30(2)(a) directed attention to an event that was happening while the plaintiff "witnessed" it[58]. The Court held [59] :

> "It would not be right ... 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."

As appears from that passage and the arguments that were put to the Court in *Wicks* , the text of s 30(2)(a) required a different enquiry from that required by the text of s 53(1)(a) of the Civil Liability Act (SA) .

King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

[84] (2010) 241 CLR 60 at 7677 [45][52] .

King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

44. In this regard, it is important to note the difference between s 53(1)(a) of the Act and the terms of the legislation under consideration in *Wicks v State Rail Authority (NSW)* [83] . In that case, this Court was concerned, not with s 77(a)(ii) of the MAA , but with s 30(2)(a) of the *Civil Liability Act* 2002 (NSW) , which provided that a plaintiff is not entitled to recover damages for pure mental harm unless "the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril". The plaintiffs were policemen who suffered psychiatric injuries arising from their attendance at the scene of a passenger train derailment in which passengers were injured and killed. They attempted to rescue passengers on the train who had survived the accident. Passengers suffered physical and psychiatric injury as they were removed from the train. The survivors of the derailment remained in peril of further injury until they were removed from the train to a place of safety.

via

[83] (2010) 241 CLR 60; [2010] HCA 22 .

King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

75. Like s 32 of the *Civil Liability Act 2002 (NSW)* ("the NSW Act"), which was considered by this Court in *Wicks v State Rail Authority (NSW)* [100] , s 33 of the CL Act defines or controls what would otherwise be a duty of care arising at common law but it does not positively identify when the duty arises. It provides that foreseeability is a necessary condition for a duty of care to arise [101] . It then delineates four kinds of circumstances to which regard should be had in the identification of a duty of care [102] . But it does not prescribe particular consequences flowing from the presence or absence of any of those circumstances [103] .

via

[103] See *Wicks* (2010) 241 CLR 60 at 71 [22]-[23] .

King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

15. As enacted, the Wrongs Act 1936 contained no provision relating to recovery for nervous shock. The common law in the United Kingdom and in Australia at that time was not sympathetic to such recovery, treating it as "too remote" [20] and outside the scope of the relevant duty of care [21] . In 1939, however, a new s 28(1) was introduced into the Wrongs Act 1936[22] providing that a plaintiff should not be debarred from recovering damages for injury arising wholly or in part from mental or nervous shock [23] . A similarly motivated and more significant legislative response in New South Wales was the enactment of s 4 of the *Law Reform (Miscellaneous Provisions) Act 1944 (NSW)* . It was discussed in *Gifford v Strang Patrick Stevedoring Pty Ltd* [24] . Section 4 allowed for recovery for mental or nervous shock for a parent, husband or wife of a person killed, injured or put in peril by the negligence of the defendant. It also allowed recovery for any other member of the victim's family where the victim was "killed, injured or put in peril within the sight or hearing of such member of the family" [25] . The new provision used the language of sensory perception later found in s 30(2) of the *Civil Liability Act 2002 (NSW)* and considered by this Court in *Wicks* . Importantly, however, it operated as a defined extension of liability.

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25. The approach taken by the Full Court also invoked the reasoning adopted by this Court in *Wicks* , which was seen as applicable to the construction and application of s 53 . That approach makes it necessary to compare the text of s 53 with that of the analogous but significantly different text of s 30 of the *Civil Liability Act 2002 (NSW)* ("the New South Wales Act"), which was considered in *Wicks* . Under s 30 , it was a necessary condition of the entitlement to recover damages for pure mental harm for any person other than a close member of the victim's family that "the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril"[53]. Similar language of sensory perception had appeared in s 4 of the *Law Reform (Miscellaneous Provisions) Act 1944* , discussed earlier in these reasons. The purpose of s 30 , however, was to limit liability, whereas s 4 had defined the bounds of an extension of liability. The criterion in s 30(2) limiting recoverability of damages was identical with the circumstance of foreseeability conditioning the existence of a duty of care in the New South Wales Act [54] . There was, therefore, a degree of symmetry within the New South Wales statute that is missing from the South Australian Act. The question of the existence of a duty of care was not decided by this Court in *Wicks* [55] . The Court considered the application of s 30(2) on the assumption that a relevant duty of care was owed[56]. The key submission by State Rail was that the necessary condition of recovery for mental harm required a plaintiff to have observed at the scene an event unfolding which included another's death, injury or peril [57] . The Court held that s 30(2)(a) directed attention to an event that was happening while the plaintiff "witnessed" it[58]. The Court held [59] :

"It would not be right ... 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."

As appears from that passage and the arguments that were put to the Court in *Wicks* , the text of s 30(2)(a) required a different enquiry from that required by the text of s 53(1)(a) of the Civil Liability Act (SA) .

via

[57] (2010) 241 CLR 60 at 75 [40] .

King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

46. These observations have no application to the present case. Nor do they entail any criticism of the decision in *HoinvilleWiggins* . Indeed, there was no occasion for this Court in *Wicks* to refer to *HoinvilleWiggins* . That is because the legislation under consideration in *Wicks* did not require that the plaintiffs be present at the scene of the accident "when the accident occurred" in order to recover damages for mental harm; it rather required the plaintiffs to have witnessed, at the scene of the accident, victims "being put in peril". That difference in the statutory language was of critical importance to the conclusion in *Wicks* and the observations cited above.

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King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
Lee v State of Queensland [2015] QDC 83 -
Lee v State of Queensland [2015] QDC 83 -
Palmer & Ors v State of Queensland [2015] QDC 63 (27 March 2015) (McGill DCJ)

71. Although the duty is owed to employees individually, so that an employer must take into account any information specific to a particular employee which could reasonably indicate a particular vulnerability and hence risk of psychiatric injury, in the absence of any relevant information it appears that an employer is entitled to assume that an employee is a person of

normal fortitude. [87] On the other hand, it is clear that an employer who has relevant information about a specific employee is not protected from liability merely because the conditions to which the employee was exposed would probably not have caused psychiatric injury to a person of normal fortitude. [88]

via

[87] This appears to follow from the formulation of the test in *Wicks v State Rail Authority of NSW* (2010) 241 CLR 60 at [33] .

Palmer & Ors v State of Queensland [2015] QDC 63 -
Johnson v Box Hill Institute of TAFE [2014] VSC 626 (12 December 2014) (J Forrest J)

426. First, in determining what is a reasonable response to a risk, one cannot rely too heavily on hindsight. The fact that a foreseeable risk has eventuated does not bespeak a lack of an adequate response. The reasonableness of a response must be evaluated in the context of the identified risk as it existed immediately prior to the subject injury. [384]

via

[384] *Rosenberg v Percival* (2001) 205 CLR 434, [88] ; *Vairy v Wyong Shire Council* (2005) 223 CLR 422, [60]-[61], [124], [126]-[129] ; *Wicks v State Rail Authority* (2010) 241 CLR 60, [33] ; *Hookey v Paterno* (2 009) 22 VR 362, [109] .

Naw Eh Soe v Alberto Carapella; Saw Rain Bow v Alberto Carapella; Naw Su Su Bow v Alberto Carapella; Moe Moe Aye v Alberto Carapella [2014] NSWSC 1644 -
Philcox v King [2014] SASCFC 38 (11 April 2014) (Gray, Sulan and Parker JJ)

25. The Court in *Wicks v State Rail Authority of New South Wales* [9] went on to consider section 30 of the New South Wales *Civil Liability Act* . Section 30 is broadly comparable to section 53 of the South Australian *Civil Liability Act* , as extracted earlier. Section 30 relevantly 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.
>
> ...

via

[9] *Wicks v State Rail Authority of New South Wales* (2010) 241 CLR 60 .

Philcox v King [2014] SASCFC 38 (11 April 2014) (Gray, Sulan and Parker JJ)

23. In her reasons, the Judge correctly adopted the reasoning of the High Court in *Wicks v State Rail Authority of New South Wales* [6] to the effect that witnessing an accident does not require attendance at the point of impact, it is sufficient if the injured person is present at some time

during the succeeding events during which further injury might be occurring. The Judge made it clear that but for the failure to "witness" his brother being killed, injured or put in peril at the scene of the accident the appellant would have satisfied any requirement of presence "when the accident occurred ".

via

[6] *Wicks v State Rail Authority of New South Wales* (2010) 241 CLR 60, [77]-[80] .

Philcox v King [2014] SASCFC 38 (11 April 2014) (Gray, Sulan and Parker JJ)

Wicks v State Rail Authority of New South Wales (2010) 241 CLR 60 ; *Jaensch v Coffey* (1984) 155 CLR 549; *Wicks v State Rail Authority* (NSW) (2010) 241 CLR 60 ; *Thompson v Australian Capital Television PL* (19 94) 54 FCR 513; *Hoinville-Wiggins v Connelley* [1999] NSWCA 263, considered.

Philcox v King [2014] SASCFC 38 (11 April 2014) (Gray, Sulan and Parker JJ)

43. As discussed above, and as in *Wicks v State Rail Authority of New South Wales* , [16] the scene of an accident in cases of death, injury or being put in peril does not begin and end in an instant but can take place over an extended period and continue while persons are trapped in wreckage or remain in peril.

via

[16] *Wicks v State Rail Authority of New South Wales* (2010) 241 CLR 60, [44] , [46] , [49]-[51] .

Philcox v King [2014] SASCFC 38 (11 April 2014) (Gray, Sulan and Parker JJ)

26. Both section 33 and section 53 of the South Australian *Civil Liability Act* focus on mental harm and psychiatric illness. It is to be noted, however, that one of the matters to be considered in assessing whether a duty of care is owed is whether or not the mental harm was suffered as a result of a sudden shock. On this topic the members of the High Court in *Wicks v State Rail Authority of New South Wales* relevantly observed: [10]

> 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 "another person ... being killed, injured or put in peril by the act or omission of the defendant".
>
> ...
>
> 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.**
>
> [Emphasis added.]

Philcox v King [2014] SASCFC 38 (11 April 2014) (Gray, Sulan and Parker JJ)

67. The second important distinction is that the *Motor Accidents Act 1988* (NSW) does not contain an equivalent provision to s 33 of the Act. As the High Court observed in *Wicks* , the interpretation of the limitation on the recovery of damages must be considered in the context of the provision affecting the duty. It was observed: [36]

> 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.

via

[36] *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60, [15] .

Philcox v King [2014] SASCFC 38 (11 April 2014) (Gray, Sulan and Parker JJ)

20. To my mind, the observations of the High Court in *Wicks v State Rail Authority of New South Wales* [5] have direct application to section 33 as discussed above. It was open to the Judge to conclude that a duty was owed. Further, in the circumstances, I consider that plainly a duty was owed. It was reasonably foreseeable that a sibling coming upon the scene of this collision, including its aftermath would, on hearing of his brother's death, suffer mental harm.

Philcox v King [2014] SASCFC 38 (11 April 2014) (Gray, Sulan and Parker JJ)

48. In *Wicks v State Rail Authority (NSW), [18]* the High Court considered s 32 of the *Civil Liability Act 2002* (NSW) (the NSW Act), a provision equivalent to s 33 of the Act. It is not in dispute that the unanimous observations by the High Court regarding the construction of s 32 of the NSW Act , apply to s 33 of the Act. Section 30 of the NSW Act is a provision similar to s 53 of the Act. In *Wicks* , the High Court made the following observations regarding the phrase 'being killed, injured or put in peril', used in both sections 30 and 32 of the NSW Act : [19]

> 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.
>
> Although both sub-ss (1) and (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.
>
> 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.

via

[19] *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60, [42]-[44] .

Philcox v King [2014] SASCFC 38 -
Philcox v King [2014] SASCFC 38 -
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Philcox v King [2014] SASCFC 38 -
Philcox v King [2014] SASCFC 38 -
McKenna v Hunter & New England Local Health District [2013] NSWCA 476 -
Butler v The State of Queensland [2013] QSC 354 (19 December 2013) (Boddice J)

101. Whether or not a duty of care exists is a question of law. [13] However, a duty of care is not owed in the abstract. It is a defined legal obligation arising out of the "relations, juxtapositions, situation or conduct activities". [14] In the context of an ascertained defendant or class of defendants and an ascertained plaintiff or class of plaintiffs, the kind of damage suffered is relevant to the existence and nature of a duty of care. [15]

via

[13] *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60 at 73 [33] .

Butler v The State of Queensland [2013] QSC 354 (19 December 2013) (Boddice J)
Wicks v State Rail Authority (NSW) (2010) 241 CLR 60; [2010] HCA 22 , cited

Fazio v The City of Melville [No 2] [2013] WADC 147 (18 September 2013) (Principal Registrar Gething)
Wicks v State Rail Authority of New South Wales [2010] HCA 22 ; (2010) 241 CLR 60

Fazio v The City of Melville [No 2] [2013] WADC 147 -
Fazio v The City of Melville [No 2] [2013] WADC 147 -
Fazio v The City of Melville [No 2] [2013] WADC 147 -
Saunders v Department for Communities [2013] WADC 113 (18 July 2013) (Schoombee DCJ)

Wicks v State Rail Authority of New South Wales (2010) 241 CLR 60

Saunders v Department for Communities [2013] WADC 113 -
Saunders v Department for Communities [2013] WADC 113 -
Saunders v Department for Communities [2013] WADC 113 -
Philcox v KING [2013] SADC 60 (10 May 2013) (Bampton J)

74. The two police officers in *Wicks* were among the first to arrive at the scene soon after the accident happened, and were directly involved in the rescue operations. They saw injured and deceased passengers. They each brought a claim for damages for resulting psychiatric injuries against the State Rail Authority of New South Wales (State Rail) alleging that they had suffered psychiatric injuries due to State Rail's negligence

Philcox v KING [2013] SADC 60 (10 May 2013) (Bampton J)

60. In accordance with the High Court's reasoning in *Wicks* the provisions of s 33 of the Act must be considered before s 53 is considered.

Philcox v KING [2013] SADC 60 (10 May 2013) (Bampton J)

56. Section 77 of the *Motor Accidents Act (NSW) 1988* considered in *Hoinville*, was replaced by s 30 of the *Civil Liability Act 2002 (NSW)* (the NSW Act). The construction and application of ss 30 and 32 of the NSW Act were considered by the High Court in *Wicks v State Rail Authority of New South Wales* [16] (*Wicks*). As a result, the ratio in *Hoinville* has been superseded by the decision in *Wicks* .

Philcox v KING [2013] SADC 60 (10 May 2013) (Bampton J)

56. Section 77 of the *Motor Accidents Act (NSW) 1988* considered in *Hoinville*, was replaced by s 30 of the *Civil Liability Act 2002 (NSW)* (the NSW Act). The construction and application of ss 30 and 32 of the NSW Act were considered by the High Court in *Wicks v State Rail Authority of New South Wales* [16] (*Wicks*). As a result, the ratio in *Hoinville* has been superseded by the decision in *Wicks* .

via

[16] [2010] HCA 22

Philcox v KING [2013] SADC 60 (10 May 2013) (Bampton J)

78. The High Court said that there were two inferences that could reasonably be drawn from the facts in *Wicks* . The first was that some who suffered physical trauma in the derailment suffered further injury as they were removed from the wrecked carriages. The second was 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. They continued to suffer such injuries after the police officers arrived. The Court held that if either of those inferences was drawn, the police officers witnessed, at the scene, victims of the accident 'being injured'. Even if neither of those inferences could be drawn, the police officers nevertheless arrived at the scene of the accident when those who had survived the derailment remained in peril. The police officers therefore witnessed, at the scene, victims being 'injured' or 'put in peril'.

Philcox v KING [2013] SADC 60 (10 May 2013) (Bampton J)

56. Section 77 of the *Motor Accidents Act (NSW) 1988* considered in *Hoinville*, was replaced by s 30 of the *Civil Liability Act 2002 (NSW)* (the NSW Act). The construction and application of ss 30 and 32 of the NSW Act were considered by the High Court in *Wicks v State Rail Authority of New South Wales* [16] (*Wicks*). As a result, the ratio in *Hoinville* has been superseded by the decision in *Wicks* .

Philcox v KING [2013] SADC 60 (10 May 2013) (Bampton J)

59. The High Court in *Wicks* held that two policemen, who attended the scene of a train crash after the derailment had occurred, were not barred from claiming damages for psychiatric injury on the basis that they had 'witnessed, at the scene, victims being killed, injured or put in peril' within the meaning of s 30(2)(a) of the NSW Act .

Philcox v KING [2013] SADC 60 (10 May 2013) (Bampton J)
Wicks v State Rail Authority of New South Wales [2010] HCA 22 , applied.

Philcox v KING [2013] SADC 60 -
Philcox v KING [2013] SADC 60 -
Philcox v KING [2013] SADC 60 -
Philcox v KING [2013] SADC 60 -
Philcox v KING [2013] SADC 60 -
Philcox v KING [2013] SADC 60 -
AX by tutor ZX v Ashfield Municipal Council [2012] NSWDC 32 (03 April 2012) (Gibson DCJ)

98. More recently the High Court in *Wicks v State Rail Authority of New South Wales; Sheehan v State Rail Authority of NSW* (2010) 241 CLR 60 at [23]-[29] has explained:

"[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*. 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) .

[25] *Tame* held 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 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* , "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 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."

Manthe v BHP Billiton Iron Ore Pty Ltd [2011] WADC 160 (29 September 2011) (Curthoys DCJ)

191. It was foreseeable that a sudden train derailment might cause Mr Manthe psychiatric, or physical, injury. ***Wicks*** , which concerned the Waterfall train disaster, whilst different factually, is a classic example of psychiatric injury arising from a train derailment. BHP owed a common law duty to Mr Manthe to take reasonable care not to cause him psychiatric injury.

Was BHP's duty of care for psychiatric harm displaced by s 5S of the *Civil Liability Act* ?

Manthe v BHP Billiton Iron Ore Pty Ltd [2011] WADC 160 (29 September 2011) (Curthoys DCJ)

196. In ***Wicks*** at [26] the court further stated:

> In part, s 5S of the *Civil Liability Act* reflects the state of the common law identified in ***Tame*** . Consistent with what was decided in ***Tame*** , s 5S assumes that foreseeability is the central determinant of duty of care. Consistent with ***Tame*** , '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 5S 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.

Manthe v BHP Billiton Iron Ore Pty Ltd [2011] WADC 160 -
Manthe v BHP Billiton Iron Ore Pty Ltd [2011] WADC 160 -
Manthe v BHP Billiton Iron Ore Pty Ltd [2011] WADC 160 -
Manthe v BHP Billiton Iron Ore Pty Ltd [2011] WADC 160 -
Manthe v BHP Billiton Iron Ore Pty Ltd [2011] WADC 160 -
Udowenko and Ors v Chief Executive Officer and Board of Directors of St George Bank - A Division of Westpac Banking Corporation and Ors (No. 2) [2011] NSWSC 1122 -
Lindsay-Field v Three Chimneys Farm Pty Ltd [2010] VSC 436 -
Placer (Granny Smith) Pty Ltd v Specialised Reline Services Pty Ltd [2010] WASCA 148 -
Placer (Granny Smith) Pty Ltd v Specialised Reline Services Pty Ltd [2010] WASCA 148 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 (31 August 2009) (Beazley JA at 1; Giles JA at 81; McColl JA at 82)

Special leave granted by the High Court, 12 February 2010 s262/2009 s263/2009 [2010] HCATrans 15

Judgment reserved, 13 April 2010 [2010] HCATrans 87 Appeal allowed with costs, 16 June 2010 [2010] HCA 22