CINDERELLAS? RESCUE, TRAUMA AND THE CIVIL LIABILITY ACTS

By Peter Handford

Some years ago, the late Professor Fleming suggested that the rescuer, once the Cinderella of the law, had since become its darling.[1]

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Fleming was referring primarily to the duty owed to rescuers who were physically injured in the course of a rescue attempt, but the statement could be applied with equal force to rescuers who suffered psychiatric injury as a result of their involvement at the scene of an accident: from the late 1960s onwards, the law was ready to include rescuers alongside close family members as persons to whom a duty of care might be owed in such a situation. In recent years, however, there has been a major change. In England, at least, the ball is definitely over; in Australia, it seemed that the *Civil Liability Acts*, at least in New South Wales (NSW), might similarly have spoiled the party, but the High Court in *Wicks v State Rail Authority of New South Wales*[2] overturned a rather restrictive Court of Appeal decision and suggested that, at least in some circumstances, traumatised rescuers might still be owed a duty of care. However, the decision in *Wicks* highlights the fact that in the area of mental harm, as with much else, the *Civil Liability Acts* have created considerable disuniformity within the Australian law of torts.

THE COMMON LAW

Chadwick v British Railways Board[3] was the first case in which it was recognised that rescuers who suffered psychiatric as opposed to physical injury might be owed a duty of care. Mr Chadwick, who voluntarily assisted in rescue operations at the scene of a major train disaster near his home, suffered permanent mental injury as a result of his experience. Waller J held that injury by shock to a physically unhurt rescuer was reasonably foreseeable. Three years later, in *Mount Isa Mines Ltd v Pusey*,[4] the High Court considered the claim of a man who began to suffer symptoms of psychiatric injury some weeks after going to the scene of an explosion in the powerhouse in which he was working and helping to carry a badly injured workmate to the ambulance. Windeyer J's leading judgment recognised that traumatised rescuers might be owed a duty of care, though in Mr Pusey's case he held that the duty was based on the obligations owed by an employer to employees. Subsequent cases in England and Australia, and also in Canada, have confirmed that psychiatrically injured rescuers are owed a duty of care, and there is a substantial body of authority on the circumstances under which a person qualifies as a rescuer and various other points of detail, for example, confirming that the rescue attempt need not be successful.[5]

In England, this position has been fundamentally affected by the unfortunate decision of the House of Lords in *Page v Smith*.[6] In *Alcock v Chief Constable of South Yorkshire Police*[7] (which involved claims for psychiatric injury by relatives of persons killed or injured in the Hillsborough soccer disaster), Lord Oliver had classified rescuers as primary victims for the purposes of psychiatric injury law, because they were involved as participants, whereas those (such as relatives) who were simply witnesses of injuries suffered by others were secondary victims. It seems clear that Lord Oliver did not intend this classification to limit in any way the scope of the duty owed to rescuers and other primary victims, but Lord Lloyd in *Page v Smith* (not a rescue case), in the course of holding that the rules for primary victims were different from those applicable to secondary victims, hinted strongly that primary victims were persons who were 'directly involved in the accident, and well within the range of foreseeable physical injury'.[8] A few years later, in *White v Chief Constable of South Yorkshire Police*[9] (the second Hillsborough case), the House of Lords held that in light of the approach adopted in *Page v Smith*, police officers involved in rescue attempts were not owed a duty of care because the accident had already taken place and they could not be said to be within the zone of physical danger. >>

From the late 1960s onwards, rescuers at a scene of an accident were recognised, alongside family members, as people to whom a duty of care might be owed.

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Australian law has decisively rejected the distinction between primary and secondary victims adopted by the English cases,[10] and so cases such as *Chadwick* and *Pusey* can still be said to be representative of Australian common law. However, it seemed that the *Civil Liability Act* provisions on mental harm in jurisdictions such as NSW have affected the position of rescuers in a way not dissimilar to *White*: at any rate until the decision of the High Court in *Wicks*. This case suggested that the NSW statute can be read in a way that leaves some scope for the rescuer's claim. In other jurisdictions, much will depend on the wording of the individual provisions, which are different in nearly every case. This article therefore examines the *Civil Liability Act* provisions regarding mental harm and the way in which rescuers' claims are likely to be treated in each state.

A substantial body of authority in England, Australia and Canada has confirmed that psychiatrically injured rescuers are owed a duty of care.

RESCUE AND THE CIVIL LIABILITY ACTS

The *Review of the Law of Negligence Final Report* of September 2002 (the Ipp Report) recommended that all Australian jurisdictions should adopt a statutory statement of the current law on the duty of care owed in cases of mental harm.[11] The current law was that expounded by the High Court three weeks earlier in *Tame v New South Wales*.[12] Had all jurisdictions accepted this recommendation, there would at least have been uniformity, but this is not what has happened. The varied legislative responses to this recommendation typify the unfortunate position of post-Ipp Australian tort law.

Queensland and Northern Territory

First, two jurisdictions, Queensland (QLD) and the Northern Territory (NT), decided not to adopt any legislative provisions on mental harm. In QLD, the law remains entirely case-based; in the NT, the only legislative provision is one imported from NSW in 1956 which *extends* the common law duty of care to certain categories of relatives.[13] This has no impact on the position of rescuers. In these two jurisdictions, therefore, it can be assumed that the duty owed to rescuers is still as stated in cases such as *Chadwick* and *Pusey*.

Western Australia and Australian Capital Territory

The only two Australian jurisdictions that adopted the recommendations of the Ipp Report without attempts at addition or variance were Western Australia (WA) and the Australian Capital Territory (ACT). (The ACT, like the NT, retains the earlier legislation extending the common law duty owed to certain categories of relatives,[14] but since this in no way attempts to restrict the scope of the provisions introduced in 2002 and has no relevance to rescuers, it can be ignored for present purposes.) The legislation in these jurisdictions therefore provides that the defendant does not owe a duty to take care not to cause a 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.[15] In cases of pure mental harm (that is, mental harm other than that which is a consequence of personal injury), the circumstances of the case include whether or not the mental harm was suffered as a result of a sudden shock; whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril; the nature of the relationship between the plaintiff and any person killed, injured or put in peril; and whether or not there was a pre-existing relationship between the plaintiff and the defendant.[16]

Should a case with facts similar to *Pusey* arise in WA or the ACT, it can confidently be predicted that the outcome would be the same. At the time *Pusey* was decided, sudden shock had not emerged as a separate requirement: it was first identified by Brennan J in *Jaensch v Coffey*[17] in 1984, and was assumed to be essential until the High Court in *Tame v New South Wales* held that it was no more than a relevant factor. Though it was four weeks before Mr Pusey's symptoms began to show, the facts in *Jaensch v Coffey* were not dissimilar and neither Brennan J nor any other judge ruled out Mrs Coffey's claim on this ground. Brennan J was principally concerned with the situation where psychiatric injury resulted from the effects of giving post-accident care to badly injured victims. Mr Pusey could claim some relationship with the immediate accident victims, since they were his workmates, and there was a pre-existing relationship between the plaintiff and the defendant, since the mine was Mr Pusey's employer. The only circumstance that was not present was the second one: Mr Pusey could perhaps not claim that he witnessed, at the scene, a person *being* killed, injured or put in peril. Even here, however, the High Court's interpretation of these words in *Wicks* might give some hope, as we will see, although they were set in a different context.

New South Wales

Though the legislation in the remaining four jurisdictions contains equivalent provisions setting out the circumstances under which a defendant owes a duty of care in cases of mental harm,[18] the opportunity has been taken to impose restrictions additional to those which had been recommended by the Ipp Report. It appears that these states have used this opportunity to attempt to create a duty narrower in scope than that recognised by the High Court in *Tame*. In NSW, which was the first state to legislate, s30(2) of the *Civil Liability Act* 2002 (NSW) provides that the plaintiff is not entitled to recover damages for pure mental harm unless (a) s/he witnessed, at the scene, the victim being killed,

injured or put in peril, or (b) s/he is a close member of the family of the victim.[19] However, s30(1) provides that this limitation applies only in so-called secondary victim situations: it says that the section applies to the liability of the defendant for pure mental harm to a plaintiff arising wholly or partly from mental or nervous shock in connection with a third person being killed, injured or put in peril by the act or omission of the defendant.

Rescuers, in almost all cases, will be unrelated to the immediate accident victim,[20] and so s30 requires that they must witness, at the scene, the accident victim *being* killed, injured or put in peril. Since rescuers usually come on the scene only after the accident has happened, the legislation prompted the question whether the common law duty to rescuers had been narrowed, in a way not dissimilar to the result of recent House of Lords activity in England.[21]

Wicks v State Rail Authority of New South Wales

The matter was put to the test in *Wicks v State Rail Authority of New South Wales*. Two police officers were called to the scene of a horrific train derailment at Waterfall, south of Sydney, in which seven people had been killed and many injured. They had to deal with dead bodies and move the injured, in some cases entering wrecked carriages to extricate them. Fallen power lines presented a threat of electrocution. The plaintiffs claimed that this experience had caused them to suffer symptoms of post-traumatic stress disorder and other traumatic conditions. At first instance and (by majority) in the NSW Court of Appeal, it was held that neither plaintiff witnessed, at the scene, a person being killed, injured or put in peril.[22] Beazley JA, giving the main judgment in the Court of Appeal, said that the statute had to be interpreted by looking to the ordinary meaning of the words, and that applying this approach, the plaintiff had to be at the scene when the incident occurred and had to witness a person being killed, injured or put in peril. Here, it was the derailment that put the victims in peril, and when the plaintiffs arrived the derailment was over and the process of victims being put in peril had ended.

This suggested that the clock had struck 12 for traumatised rescuers and that the legislation had effectively eliminated the duty of care which had been developed by the common law. However, on further appeal, the High Court produced a more beneficent interpretation – whether or not it was one which had been intended by the NSW legislature. In a joint judgment, it said that it was not possible to assume that all cases of death, injury or being put in peril are events that begin or end instantaneously, or even within the space of a few minutes. Even if the deaths were instantaneous or nearly so, not all the injuries were suffered during the process of derailment: it could be inferred that some suffered further injury as they were extricated from the wreckage, or suffered *psychiatric* injuries as a result of what happened to them during the crash and its aftermath at the accident scene. >>

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Even if it was not appropriate to draw these inferences, the victims remained in peril during the rescue process.[23] Each rescuer was therefore owed a duty of care. The High Court also made important observations concerning the relationship between s30 and the duty of care provisions.[24]

Until 2002, Australian tort law was predominantly case law, and uniformity was preserved by the role of the High Court as final court of appeal.

Victoria

The position in the other three jurisdictions depends on whether the variations in the wording of the *Civil Liability Act* provisions equivalent to s30 of the NSW Act give rise to material differences so far as the position of rescuers is concerned. In Victoria, apart from minor drafting differences,[25] s73 of the *Wrongs Act* 1958 is identical to s30 of the NSW CLA except that the plaintiff is not entitled to recover damages unless s/he witnessed, at the scene, the victim being killed, injured or put in danger, or is *or was in a close relationship with the victim*.[26] The close relationship required by this provision appears to cover a much wider group than being a close member of the family as required in NSW, and may, for example, extend to close friends or same-sex partners; however, rescuers who are not in a close relationship with the victim must witness, at the scene, the victim being killed, injured or put in danger, and it is presumed that the *Wicks* interpretation of the NSW provision would apply to this provision also.

Tasmania

In Tasmania (TAS), it may well not be necessary to rely on *Wicks* to preserve the duty owed to rescuers. Section 32 of the *Civil Liability Act* 2002 (Tas) is identical in wording to s30 of the NSW Act,[27] subject to one all-important difference: it provides that (except where the plaintiff is a close member of the family of the victim) the plaintiff cannot recover damages for pure mental harm unless s/he witnessed, at the scene, the victim being killed, injured or put in peril *or the immediate aftermath of the victim being killed or injured*.[28] The problem with the original NSW provision was that it could be read as negating the aftermath principle as developed by the common law from the 1960s onwards. In a series of well-known decisions, the law first relaxed the original requirement that the plaintiff perceive the accident with his or her own senses and deemed it sufficient that the plaintiff be present at the aftermath of the accident at the scene, and then widened the concept by ruling that viewing the aftermath in hospital was sufficient.[29] The Tasmanian provision has preserved the notion that it was enough if the plaintiff was present at the aftermath of the accident, at the scene at least. When *Wicks* was in the NSW Court of Appeal, the majority judgment controversially made use of the different wording of the TAS Act to confirm that the NSW Act was limited to cases where the plaintiff actually saw the accident happen.[30] As a result of the overturning of the Court of Appeal's decision, this interpretation must now be open to doubt. However, as far as TAS is concerned the interpretation of 'witnessing, at the scene, the victim being killed, injured or put in peril' is immaterial, at least so far as rescuers are concerned, because the rescuer will normally be a person who witnesses the immediate aftermath of the victim being killed or injured.

South Australia

In NSW, Victoria (VIC) and TAS, it seems that by one means or another it may be possible for rescuer claims to be brought within the ambit of the Civil Liability Acts. But this is not the case in South Australia (SA), because of a crucial difference in the wording of the legislation. Section 53(1) of the SA *Civil Liability Act* 1936 provides that damages may only be awarded for mental harm if the injured person is a parent, spouse, domestic partner or child of a person killed, injured or endangered in the accident,[31] or if the injured person was physically injured in the accident *or was present at the scene of the accident when the accident occurred*. This form of words avoids some of the complications of the provisions in force in NSW, VIC and TAS. It means that the decision in *Wicks* has no direct effect in SA, and so South Australian courts will not have to apply the doctrine in *Wicks*, which suggests that in a rescue situation further injuries might be happening during the rescue process, or that some people may still be suffering psychiatric injuries at that point, or that the victims or some of them remained in peril after the accident had happened. However, the problems for rescuers in SA stem from the fact that s53, unlike its counterparts in NSW, VIC and TAS, is not limited to cases where liability for pure mental harm arises wholly or partly from mental or nervous shock in connection with the immediate victim being killed, injured or put in peril by the defendant's act or omission: there is no equivalent of the NSW s30(1) or the similar provisions in VIC and TAS.

I have argued elsewhere[32] that it may not have been necessary to rely on s30(1) in *Wicks*. The High Court emphasised that all parties in that case had assumed that the claim had to be characterised as one arising in connection with another being killed, injured or put in peril,[33] whereas Lord Oliver's seminal judgment in *Alcock v Chief Constable of South Yorkshire Police* had classified rescuers as primary, not secondary victims. This suggests that rescuer cases can be put in a category different from that identified by s30(1). However, this argument is not open in SA, where there seems no way in which the police officers in *Wicks*, for example, could satisfy the requirements of s53(1). It could surely not be said that they were present at the scene of the accident when the accident occurred, and even given the High Court's extensive interpretation of the differently worded NSW provision, it is

surely not possible to say that *the accident* was still happening when they commenced rescue operations. In SA, it seems that Cinderella is well and truly back in the kitchen.

CONCLUSION

The mental harm provisions, like much else in the *Civil Liability Acts*,[34] suggest that whether or not the reforms stemming from the Ipp Report are thought to have been desirable, the lack of uniformity that now prevails in Australia is to be deplored. Until 2002, Australian tort law was predominantly case law, and uniformity was preserved by the role of the High Court as a final court of appeal. Where there had been statutory intervention – as, for example, in the introduction of apportionment for contributory negligence – uniformity had generally been maintained by adherence to English legislative precedents. After 2002, that uniformity no longer exists. As the rescue example and much else show, there is now a tendency for Australian tort law to vary from one state to another, as it does in the USA. This is surely undesirable. Is there any reason in logic or policy why rescuers in SA, for example, should be worse off than anywhere else? ■

Notes: **1** JG Fleming, *The Law of Torts* (5th ed, Law Book Co, 1977), 161. **2** (2010) 241 CLR 22; see P Handford, 'Limiting Liability for Mental Harm: The High Court of Australia and the Civil Liability Acts' (2010) 18 *Tort Law Review* 129. **3** [1967] 1 WLR 912. **4** (1970) 125 CLR 383. **5** See P Handford, *Mullany and Handford's Tort Liability for Psychiatric Damage* (2nd edn, Lawbook Co, 2006), 485-94. **6** [1996] 1 AC 155. **7** [1992] 1 AC 310. **8** [1996] 1 AC 155 at 184. **9** [1999] 2 AC 455. **10** See, for example, *Morgan v Tame* (2000) 49 NSWLR 21; [2000] NSWCA 121, Spigelman CJ at [8]-[20], Mason P at [121]. **11** Recommendation 34. **12** (2002) 211 CLR 317. **13** See *Law Reform (Miscellaneous Provisions) Act* 1956 (NT) s25. Section 4 of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW), the model for this provision, was repealed in 2002. **14** See now *Civil Law (Wrongs) Act* 2002 (ACT) s36. **15** *Civil Liability Act* 2002 (WA) s5S(1); *Civil Law (Wrongs) Act* 2002 (ACT) s34(1). There are minor drafting differences: the ACT provision refers to 'a reasonable person in the defendant's position' rather than 'the defendant'. **16** *Civil Liability Act* 2002 (WA) s5S(2); *Civil Law (Wrongs) Act* 2002 (ACT) s34(2). The ACT provision prefers 'danger' to 'peril'. **17** (1984) 155 CLR 549. **18** *Civil Liability Act* 2002 (NSW) s32; *Wrongs Act* 1958 (Vic) s72; *Civil Liability Act* 2002 (Tas) s34; *Civil Liability Act* 1936 (SA) s33. Each is subject to minor variations. The Victorian provision asks whether the defendant 'foresaw or ought to have foreseen'; the South Australian provision refers to 'a reasonable person in the defendant's position' rather than 'the defendant'; and the Tasmanian provision lists only two of the four circumstances: sudden shock and a pre-existing relationship between the plaintiff and the defendant. **19** 'Close member of the family' is defined in *Civil Liability Act* 2002 (NSW) s30(5). **20** For an exception, see *Greatorex v Greatorex* [2000] 1 WLR 1970. **21** See notes 6-9 above. **22** *Wicks v Railcorp* [2007] NSWSC 1346; *Sheehan v State Rail Authority (NSW)* [2009] NSWCA 261 (see P Handford, 'Limiting Liability for Mental Harm – Back to the Future?' (2010) 18 *Tort Law Review* 5). **23** (2010) 241 CLR 60. **24** *Ibid* at [24]-[26]. **25** Such as the use of the word 'danger' instead of 'peril'. **26** *Wrongs Act* 1958 (Vic), s73(2). As in NSW, s73 is limited to the liability of a defendant for pure mental harm to a plaintiff arising wholly or partly from mental or nervous shock in connection with the immediate victim being killed, injured or put in danger by the act or omission of the defendant: s73(1). **27** And so again it is limited to the liability of a defendant for pure mental harm to a plaintiff arising wholly or partly from mental or nervous shock in connection with the immediate victim being killed, injured or put in peril by the act or omission of the defendant: *Civil Liability Act* 2002 (Tas), s32(1). **28** *Civil Liability Act 2002* (Tas) s32(2). **29** For a full discussion of the cases, see Handford, above note 5, 217-22. **30** McColl JA, who dissented, was not prepared to accept the submission that the meaning of s30 should be influenced by the different wording of the Tasmanian Act: [2009] NSWCA 261 at [120]. **31** It should be noted in passing that the relatives covered by this provision are different from those in NSW or Tas: grandparents and grandchildren are included, but siblings are not. **32** Handford, above note 2, at 131. **33** (2010) 241 CLR 60 at [39]. **34** See, for example, J Dietrich, 'Liability for Personal Injuries Arising from Recreational Services' (2003) 11 *Tort Law Journal* 244; J Dietrich, 'Duty of Care under the "Civil Liability Acts"' (2005) 13 *Tort Law Journal* 17; M McGregor-Lowndes and L Nguyen, 'Volunteers and the New Tort Reform' (2005) 13 *Tort Law Journal* 41; D Butler, 'A Comparison of the Adoption of the Ipp Report Recommendations and Other Personal Injuries Liability Reforms' (2005) 13 *Tort Law Journal* 203; P Vines, 'Apologising to Avoid Liability: Cynical Civility or Practical Morality?' 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