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Economic impact of *Wicks v State Rail Authority (NSW)* (2010) 84 ALJR 497

In Wicks v State Rail Authority (NSW) (2010) 84 ALJR 497^[PDF] the High Court of Australia held that, among other things, plaintiffs (who establish that they suffer a recognised psychiatric illness as a result of the breach of duty of care owed to them by the defendant under s 32 of the *Civil Liability Act 2002 (NSW)*) are entitled to recover damages for pure mental harm under s 30 if their psychiatric injury arose "wholly or partly from" a "series of shocking experiences" in the form of "a sudden and disturbing impression on the mind and feelings" in connection with witnessing at the scene "another person ('the victim') being killed, injured or put in peril by the act or omission of the defendant". The High Court construed the phrase "being ... injured or put in peril" to include plaintiffs who suffer pure mental harm by witnessing at the scene another person being injured through the process of suffering pure mental harm in the form of psychiatric injury occasioned by the defendant's negligent act or omission. The *Wicks* decision raises the question whether the expanded liability of defendants for pure mental harm is economically sustainable.

Introduction

The first part of this analysis provides the factual background to [Wicks v State Rail Authority \(NSW\)](#) (2010) 84 ALJR 497^[PDF] and then examines the construction of the relevant pure mental harm provisions contained in Pt 3 of the *Civil Liability Act 2002 (NSW)* , first by the New South Wales Court of Appeal and then by the High Court. This is followed by an investigation of the economic impact of these statutory provisions as constructed by the High Court.

Factual background and the relevant statutory provisions

Nearly a million Sydneysiders catch trains every day.¹

On 31 January 2003 at 7:15 am, a train driver suffered a heart attack and lost control of his train, which was travelling at 117 km/h as it approached a curve in the tracks through a gorge where the speed limit was 60 km/h. The gorge lay between Waterfall railway station and Port Kembla station. The train derailed, overturned and crashed into the rocks of the gorge.²

Police officers (along with other professionals, such as paramedics, linesmen and ambulance drivers) were sent to render help at the scene of the accident in the course of their duties.

The State Rail Authority of New South Wales admitted that its negligence was the legal cause of the accident. The State Rail Authority thus accepted liability for compensation claimed by the estates

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of seven passengers who died in the accident under wrongful death legislation,³ and by the passengers who sustained injuries as a result of the train crash. The latter claims would have included damages for personal injuries (prenatal injuries, impairment of physical or mental condition, and disease),⁴ and for consequential mental harm, which s 27 of the *Civil Liability Act 2002* (NSW) (the *Civil Liability Act*) defines as "mental harm that is a consequence of a personal injury of any other kind".⁵ Somewhat vaguely, s 27 states that " 'mental harm' means impairment of a person's mental condition". However, to be compensated for economic loss, claimants suffering consequential mental harm would have had to establish that their condition fell within the nosology of a "recognised psychiatric illness".⁶ Likewise, under s 30 and s 32 of the *Civil Liability Act* (see discussion below), the State Rail Authority was liable to pay damages for pure mental harm resulting from its negligence to passengers who did not sustain physical injuries but, as a result of their traumatic experience, suffered "pure mental harm" defined by s 27 as "mental harm other than consequential mental harm". In order to recover any damages, these passengers were required by s 31 to establish that the harm in question consisted of a "recognised psychiatric illness",⁷ eg post-traumatic stress disorder. Presumably, close members of the victims' family⁸ who suffered pure mental harm in the form of psychiatric injury (ss 31 and s 32) occasioned by the loss of their loved ones,⁹ also recovered damages from the State Rail Authority. The circumstances in which the State Rail Authority owed a duty¹⁰ to avoid negligently causing pure mental harm or consequential mental harm are governed by s 32 , which reads:

- (1) A person ("the defendant") does not owe a duty of care to another person ("the plaintiff") to take care not to cause the plaintiff mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.
- (2) For the purposes of the application of this section in respect of pure mental harm, the circumstances of the case include the following:
 - (a) whether or not the mental harm was suffered as the result of a sudden shock,
 - (b) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril,
 - (c) the nature of the relationship between the plaintiff and any person killed, injured or put in peril,
 - (d) whether or not there was a pre-existing relationship between the plaintiff and the defendant.
- (3) For the purposes of the application of this section in respect of consequential mental harm, the circumstances of the case include the personal injury suffered by the plaintiff.

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However, the question whether the defendant owed the plaintiff a duty of care under s 32 only becomes relevant after the latter can establish that he or she falls within the class of persons to which the legislation applies. For in s 30(1) of the *Civil Liability Act* , the Parliament of New South Wales has imposed limitations on "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". In particular, s 30(2) provides:

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.

In [Wicks v State Rail Authority \(NSW\) \(2010\) 84 ALJR 497](#)^[PDF], the question was not whether the s 32 duty based on foreseeability "that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken" extended to police officers (and other rescue personnel) per se. Rather, in issue was the construction of s 30(2) and the elucidation of the statutory requirements that must be fulfilled to entitle persons who come to the scene in the wake of a catastrophic accident to recover damages for pure mental harm.

Analysis of s 30 of the Civil Liability Act 2002 (NSW) in the Court of Appeal of the Supreme Court of New South Wales

Mr Wicks and Mr Sheehan sued the State Rail Authority for pure mental harm occasioned by

their attendance as policemen at the scene of the derailment and their participation in the rescue effort. Although both claimants were employees of the New South Wales Police Force, they chose to sue the State Rail Authority at common law for pure mental harm under Pt 3 of the *Civil Liability Act* rather than their employer, the NSW Police Service, under the *Workers Compensation Act 1987* (NSW).¹¹ They were entitled to sue for damages at common law, for s 28 of the *Civil Liability Act* provides that Pt 3 (except s 29)¹² "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". However, should their claims be successful, in order to be entitled to recover damages they had to satisfy the requirements of s 30(2)(a).¹³

In *Sheehan v State Rail Authority (NSW)* [2009] Aust Torts Reports 82-028 Beazley JA of the Court of Appeal of the Supreme Court of New South Wales construed s 30 as identifying "the classes of persons who are entitled to recover damages provided a duty of care is owed and the cause of action is otherwise established. No other class of persons has any such entitlement" (at [46]).

At the trial (*Wicks v Railcorp; Sheehan v State Rail* [2007] NSWSC 1346), Malpass AsJ found (at [86]):

The evidence (including that of the plaintiffs and the experts) falls hopelessly short of relating any psychiatric illness to any victim. The thrust of the evidence is to relate their problems to other matters (including the overall impact of their exposure to the scene of the derailment, the carnage and the seeing of dead and injured bodies). For this deficiency alone, both claims [Sheehan's and Wick's] are doomed to failure.

Malpass AsJ concluded (at [90]) that "neither plaintiff has been able to demonstrate pure mental harm

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in connection with another person being killed, injured or put in peril by the act or omission of the defendant". The plaintiffs' appeal to the Court of Appeal of the Supreme Court of New South Wales was dismissed, in separate judgments, by Beazley JA (Giles JA agreeing), and McColl JA.

In the Court of Appeal, Mr Wicks and Mr Sheehan argued that they fell within the class of persons entitled to recover damages under s 30(2)(a) because, while rendering help, they witnessed how "the passengers were in continuing peril of physical and mental injury during the rescue operation and remained so until their evacuation for treatment" (at [62], Beazley JA). Another reason for inclusion within s 30(2)(a) provided by the appellants was "that they each witnessed persons being put in peril by the live power line hanging over part of the train". However, according to Beazley JA (at [65]), "the evidence did not establish whether or not the electric wires were live. The evidence went no higher than the appellants being unable to ascertain the position as to whether the power had been cut or not."¹⁴

The respondent State Rail Authority argued (at [25]) that "it was not reasonably foreseeable that either appellant would suffer psychiatric harm in the circumstances" because their injury was not occasioned by a sudden shock as required by s 32(2)(a), and they did not witness, "at the scene, a person being killed, injured or put in peril" as stipulated in s 32(2)(b) (at [26], Beazley JA).¹⁵ The State Rail Authority contended that s 32 defines temporal and physical boundaries of the relevant "circumstances of the case" created by the wrongful incident. These boundaries focus on the "causal event" (in this case, the instant of derailment), whereby another "person is being killed, injured or put in peril at the scene" (at [66], [68], Beazley JA). If so constructed, the legislative boundaries of the relevant circumstances of the case itemised in s 32(2) "do not extend to what occurs during a rescue effort" (at [66], Beazley JA). To fall within the scope of the relevant circumstances of the case in s 32(2) the causal event must be directly witnessed by the claimant (at [68], Beazley JA). Beazley JA rejected the State Rail Authority's construction of s 32(2) as too narrow, but noted (at [77]) that the provisions governing recovery of damages for negligently inflicted consequential and pure mental harm were part of the legislative effort to reform the principles of negligence, as recommended in the *Review of the Law of Negligence* (2 October 2002) (the Ipp Review).¹⁶ The Ipp Review in its Recommendation 7 (p 144) proposed that the legislative "circumstances of the case" should include matters such as

- 7(c)(ii): "whether the plaintiff was at the scene of shocking events, or witnessed them or their aftermath" (emphasis added); and
- 7(c)(iii): "whether the plaintiff witnessed the events or their aftermath with his or her own unaided senses".

The Parliament of New South Wales, however, chose not to enact the "aftermath" component of Recommendation 7.¹⁷ By contrast, the *Civil Liability Act 2002* (Tas), s 32(2)(a), which imposes "Limitation on recovery for pure mental harm arising from shock", states that "the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril or the immediate aftermath of the victim being killed or injured". Tasmanian legislation followed Recommendation 7(c)(ii) of the Ipp Review, though its wording replicates the common law concept of "the immediate aftermath" in the sense of such immediate post-incident events as rescue operations.¹⁸ Beazley JA concluded (at [77]) with regard to s 30(2)(a) :

There is an immediacy about the language of "witnessed, at the scene" something that was happening, that is, persons "being killed, injured or put in peril". Had the provision used the language of "aftermath" as recommended in the *Ipp Report* [Recommendation 7, p 144] and as included in the Tasmanian provision, or other language that included persons who came on the scene, the appellants' argument would be available. The omission of such language is significant, in my opinion, in marking out the operation of the provision. Properly construed, I am of the opinion that s 30(2)(a) does not extend to persons who came upon the scene after the incident itself in which persons were killed, injured or put in peril was over. It follows that the appellants do not fall within the scope of those entitled to recover for purely mental harm.

Her Honour observed (at [75]) that a passenger who "saw a fellow passenger being pinned under a falling stanchion that crushed the train" would come within the class of persons who "witnessed, at the scene", another person "being killed, injured or put in peril in the course of the incident". Likewise,

If the stanchion was knocked loose in the collision and then fell during the rescue process, killing or injuring passengers, or putting them in peril, then a rescuer who saw the stanchion crushing or pinning persons underneath and who suffered mental harm as a result, would, arguably at least, fall within s 30(2)(a). In that situation, "being" would be satisfied, as would the causal connection with the negligent act or omission whereby the derailment occurred.

However, according to her Honour (at [76]), Mr Wick and Mr Sheehan were unable to bring their claims within s 30(2)(a) because first, they arrived at the scene after the derailment caused by the State Rail Authority's "act or omission" – "the incident which killed, injured and put in peril passengers in the train". Secondly, "there was no consequential event such as the falling of the stanchion knocked loose in the collision. The process of victims being put in peril had ended, and the appellants witnessed what some cases and the Ipp Review refer to as the aftermath."

McCull JA undertook a close textual analysis of the legislation and its historical context. Her Honour (at [144]) did not consider that s 30 should be construed as prescribing

a temporal relationship between the events the class of potential claimants must have witnessed and the event that triggered them. It does not in terms require the plaintiff to be at the scene when the relevant "act or omission" occurs, only when the victim is "being killed, injured or put in peril". Nor does it refer to any "accident" per se, but, rather, to the "scene" of the event relevant to establish entitlement to make a claim.

She provided (at [145]) examples of scenarios where potential claimants may come onto the scene *after* the initial or "principal" causal event, but nevertheless witness others "being killed, injured, or put in peril" within the meaning of s 30(2)(a). Thus, if following a derailment "one of the carriages containing passengers had been left teetering on the edge of a cliff", the rescuers would be observing "passengers 'being ... put in peril' " until the evacuation of the latter from the carriage; or, "if the carriage plunged over the cliff", the rescuers would witness others "being killed". Similarly, rescuers who come on the scene after a derailment would witness "victims in one carriage 'being ... put in peril' because another carriage might crash onto them". McCull JA determined (at [150]):

It is not necessary for a person seeking to satisfy s 30(2)(a) to have been present at the time of the principal causal event, in this case the derailment. The question whether the putative plaintiff witnessed the events described in s 30(2)(a) falls for objective factual determination in each case.

McCull JA, however, found (at [162]) that "the possibility that the victims' conditions may deteriorate either during the rescue operation or if medical attention was not promptly administered" did not constitute "witnessing a victim 'being ... put in peril' ".¹⁹ According to her Honour (at [163]):

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[T]he evidence that the victims' conditions may deteriorate did not constitute them "being put in peril" in the sense for which s 30(2)(a) provides. They had been injured and, like all in that position, required expeditious medical treatment. But they were not exposed to a danger which was a sequelae of the derailment in the sense that some aspect of the derailed train and/or the surrounding environment posed a danger. While a deterioration in their condition was a continuation of their original injury the evidence did not objectively demonstrate that they were imminently exposed to further injury.

Though expressed in somewhat different terms and emphasis, both Beazley JA and McCull JA appear to construe s 31(2)(a) along similar lines: namely, assuming that the foreseeability conditions under s 32 are satisfied, involuntary onlookers (the term "bystander" does not appear in the legislation), whether or not they act as rescuers, are entitled to recover damages for pure mental harm if their injury arose "wholly or partly from mental or nervous shock" connected to the wrongful event which they witnessed at the scene, and which involved others being killed, injured or put in peril. The plaintiffs who were not present at the scene when the "principal wrongful event" caused death and injury to others, are also entitled to recover damages if they actually witnessed others being killed, injured, or put in peril of an imminent injury created as the consequence of the initial event.²⁰ However, this statutory construction excluded claimants who arrived at the scene subsequent to the initial event which caused "the victim being killed, injured or put in peril" through the defendant's wrongful act or omission, and suffered pure mental harm as a result of witnessing others endure an

exacerbation or deterioration of the existing injuries caused by that principal event.²¹ This construction of s 30(2)(a) meant that Mr Wicks and Mr Sheehan, who in the course of rescue witnessed deterioration in medical conditions of some injured passengers, were not entitled to recover damages for pure mental harm.

The joint judgment of the High Court of Australia

Mr Wick and Mr Sheehan appealed to the High Court which, in a joint judgment (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) reversed the decisions of Malpass AsJ and the Court of Appeal by providing a novel construction of s 30(1) and (2) : see *Wicks v State Rail Authority (NSW)* (2010) 84 ALJR 497^[PDF].

Unlike the judgments of the lower instance courts, the High Court discussed s 32 at some length, noting (at [33]) that the question of foreseeability is one of law and "must be judged before the accident happened"²² in accordance with the following formulation:

[W]as 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?

Notably, apart from referring to some tasks that such person may undertake, the joint judgment did not provide a specific definition of a "rescuer" – Mr Wicks and Mr Sheehan were not part of a

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rescue team;²³ consequently, the s 32 formulation of foreseeability can be adjusted to suit a wide range of claimants who may come to the scene of an accident.²⁴

In its construction of the legislation (and unlike the Court of Appeal), the High Court declared (at [41]) that "Extrinsic material provides no assistance in this case in construing the relevant provisions". The plurality observed (at [36]) that the text in s 30(1), and in particular the phrase, "wholly or partly from mental or nervous shock in connection with another person ... being killed, injured or put in peril" ... must be construed as a whole". The terms "mental or nervous shock" have been part of common law jurisprudence since the 1860s.²⁵ However, the joint judgment (at [30]) adopted the *Oxford English Dictionary*'s definition of "shock" as "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".²⁶ Psychiatrists, psychologists, and even lay people may wince at the implication that there is an equivalence between "lasting depression" and "loss of composure".

Their Honours (at [37]) had "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' ". The joint judgment did not mention, let alone offer reasons for departing from, the well-established definition of "shock" as a starting point of, or a trigger for, the onset of a psychiatric illness, which was provided by Brennan J in *Jaensch v Coffey* (1984) 155 CLR 549^[PDF] at 567. Brennan J defined "shock" as "the sudden sensory perception – that is, by seeing, hearing or touching – of a person, thing or event, which is so distressing that the perception of the phenomenon affronts or insults the plaintiff's mind and causes a recognizable psychiatric illness".

Technically, the definition of "shock" in and of itself may be of little importance because, according to s 31, "There is no liability to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness". Moreover, plaintiffs suing under mental harm legislation have to establish under s 32(1) 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". Therefore, just like at common law,²⁷ damages for pure mental harm are recoverable not for the shock caused by the wrongful event, but for the recognised psychiatric condition consequent upon it. However, since the two are causally linked, it would behove the law to make the link credible. Lord Steyn in *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 492 commented that "Courts of law must act on the best medical insight of the day". For instance, judgments in *Jaensch v Coffey*, particularly those of Deane and Brennan JJ, which formulated tests extending common law liability of defendants for pure mental harm (called at the time "pure nervous shock"), were informed by, and in conformity with, the then

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most current medical and scientific thought.²⁸ The Wicks judgment is bereft of any references to scientific literature on the aetiological links between psychiatric conditions and something as ill-defined and subjective as "sudden and disturbing impression on the mind or feelings".

Instead, their Honours provided a vivid description of what they imagined the appellants would have experienced (at [37]):

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 ... 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.

To sum up, as construed by the High Court, s 30(1) applies to recovery by the plaintiff of damages for pure mental harm "arising wholly or partly from" a "series of shocking experiences" in the form of "a sudden and disturbing impression on the mind and feelings" "in connection with another person ('the victim') being killed, injured or put in peril by the act or omission of the defendant". However, s 30(1) is subject to s 30(2)(a) , which replicates the phrase "being killed, injured or put in peril", but has a different focus. The High Court (at [43]) explained the difference between the two paragraphs by holding that s 30(1) "must be read as referring to an event [of 'another being killed, injured or put in peril'] that may (but need not) have been complete before the suffering of nervous or mental shock" by the plaintiff. In contradistinction, s 30(2)(a) "requires witnessing of the event at the scene, [and] it must be read as directing attention to an event that was happening while the plaintiff 'witnessed' it". Nevertheless, according to the joint judgment (at [44]), " s 30 , or s 30(2)(a) in particular" should not be read on the assumption

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 ... 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.

This interpretation effectively blurs the differences in focus between s 30(1) and s 30(2)(a) delineated by the plurality at [43]. The High Court then found (at [46]) that "it may readily be inferred" that "passengers physically injured by the derailment suffered further injury as they were removed from the wrecked carriages". The inference was explained as following "from the fact that some were trapped in the wreckage. It would be very surprising if each was extricated without further harm." The assertion (no evidence was cited to substantiate it) that passengers would suffer further harm while being extricated from the broken carriages may surprise the highly trained paramedics, ambulance teams and emergency medicine personnel. However, on the basis of the High Court's reasoning, just like Mr Wicks and Mr Sheehan, all these professionals also are entitled to sue for pure mental harm under s 30(2)(a) . Just as controversially, the High Court, again with no mention of psychiatric data or scientific studies, made another "ready" inference, stating (at [47]):

[M]any 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 ... As they were removed from the train, at least some of the passengers were still being injured.

The High Court's first inference (at [46]) was based on the assumption that persons who are physically injured may suffer a further physical injury in the process or as a result of the rescue efforts. The plurality's second inference stemmed from the assumption that some passengers, including those who escaped physical injury in the derailment, must have suffered initially and then continued to suffer "psychiatric injuries as a result of what happened to them in the derailment and at the scene".

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They "*were still being injured*", presumably in the sense of the "impairment of [their] mental condition", ie pure mental harm, during the rescue operation. Indeed, the judgment does not indicate an end-point to when those "*still being injured*" would be categorised as "had been injured".

The High Court concluded (at [48]):

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

Their Honours then provided (at [49]) the following rider, highlighting the determinative importance of plaintiffs' subjective perceptions and suppositions:

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.

Thus, under s 30(2)(a) , as construed by the High Court of Australia in *Wicks* , a plaintiff is entitled to recover damages for pure mental harm (in the form of a recognised psychiatric illness) by witnessing a person already injured by the defendant's negligent act or omission suffer an aggravation of that injury; moreover, it is sufficient for the rescuer to form a subjective belief that the rescuee is in peril of a further injury. The plaintiff will also fall within the class encompassed by s 30(2)(a) if he or she suffers psychiatric injury by witnessing

another person being injured through the process of suffering psychiatric injury occasioned by the defendant's negligent act or omission.

Admittedly, both parties in *Wicks* agreed that the litigation involved rescuers, albeit professional ones; however, the above tests for determining whether a claimant falls within s 30(2)(a) are not confined to rescuers. When read in conjunction with the High Court's definition of "shock" ("sudden and disturbing impression on the mind or feelings"), the class of persons entitled to recover damages for pure mental harm under s 30 has been greatly extended.

Discussion

The impulse to provide an expansive statutory construction that aims at addressing the real problem of the exclusion of rescuers from compensation for pure mental harm is most commendable. However, such an exercise should not give an impression that the court is actively re-writing validly enacted legislation the stated purpose of which is to limit liability of defendants for negligently occasioned personal injury. Though it is arguable that the legislative provisions governing liability of defendants for pure mental harm are too harsh and in need of re-balancing, the courts may not be the appropriate vehicle to do so. Within our federal constitutional system, the Commonwealth *Constitution* allocates, among other things, the legislative and judicial powers to the corresponding organs of government.²⁹ The High Court has judicial power to interpret, construct and determine constitutional validity as well as the operation (including striking down on the grounds of invalidity) of federal laws, and where relevant, State and Territory laws; but amendments to and repeal of validly enacted statutory provisions is the province of the democratically elected legislature.

Moreover, not only the legal profession but the community at large is entitled to expect that judicial construction of statutory provisions results in reasonably specific legal tests. The High Court did not refer to *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455. This case involved unsuccessful claims for damages for pure mental harm (then pure nervous shock) by three police officers who in April 1989 were on duty at the Hillsborough Stadium when, shortly before the start of the FA Cup semi-final match, a senior police officer opened to the crowd outside an outer gate providing access to the inner area of the stadium which was already full, and had no accessible exits.

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As a consequence, 96 people were crushed to death and 730 others were injured. In dealing with the aftermath of the disaster, the plaintiffs witnessed chaotic and gruesome scenes at the stadium. In the Court of Appeal, Beazley JA discussed the case (at [32]-[36]), and observed (at [36]) that the *White* decision

illustrated a boundary whereby a rescuer could recover following involvement in the aftermath of the event caused by the tortfeasor. In New South Wales, however, the legislature has drawn the boundary line at those who witnessed death, injury and peril as it happened during the course of the incident and not as part of the aftermath.

The available statistical information about the prevalence of psychiatric disorders and their aetiology in the community³⁰ would not be very helpful in estimating the number of persons who might develop a diagnosable psychiatric illness as a result of a "sudden and disturbing impression on the mind or feelings" consequent upon the defendant's negligent act or omission. Moreover, it is simply impossible to foresee, estimate or predict how many others would suffer pure mental harm by witnessing, at the scene, the former developing a psychiatric disorder.³¹ The question therefore arises whether the decision in *Wicks* is economically sustainable.

Economic analysis

At this point, readers should bear in mind the role, strengths and limitations of economic analysis to the application of law and legal issues. In the authors' view, the following quotations are apt:

The goal of the economist is to "model what is going on" in a way that will be helpful to the court ... to tie all the pieces together and tell a complete story.³²

The economist's competence in discussion of the legal system is strictly limited. He can predict the effect of legal rules and arrangements on value and efficiency, in their strict technical senses, and on the existing distribution of income and wealth. He cannot prescribe social change.³³

In keeping with traditional economic analysis, the present authors focus mainly on efficiency issues with passing reference to distributional matters, since the impact of the former is likely to be more serious.

The nexus between insurance and negligence law

It is possible to present in paradigmatic form the economic relationship between costs incurred as a result of liability to pay damages for negligently caused harm and costs of precautions to prevent the occurrence of such harm. For example, in *Wicks*, the defendant State Rail Authority admitted that its negligence was the cause of the accident. The purpose of Figure 1 is to show the relationship between failure to take cost-effective precautions,

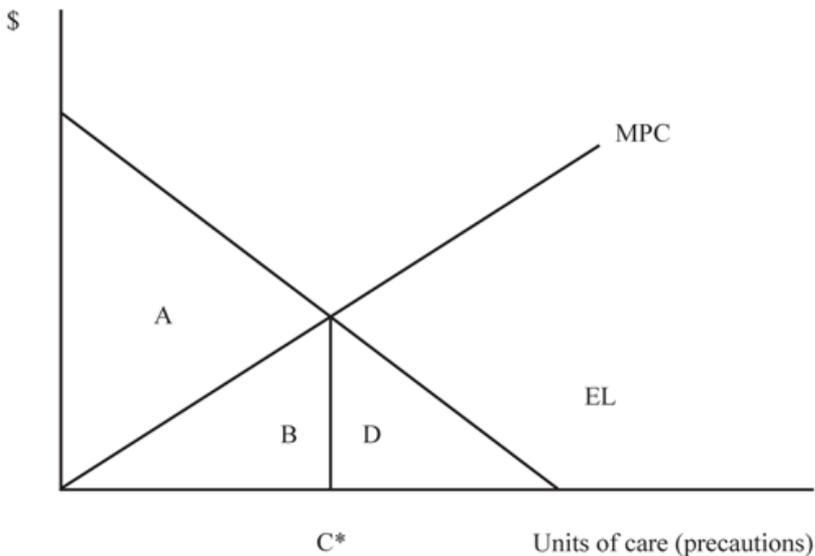
breach of duty of care (defined at the intersection point) and quantum of damages. Instead of being at C^* , the Rail Authority was quite clearly operating well below this level of care and was therefore negligent.

In Figure 1, the downward sloping line measures expected loss (EL) as a consequence of an accident caused by negligence. The expected loss or money value of the risk of an accident is the total social cost of the accident to the victims and society (eg, costs of medical treatment of both physical and psychiatric injuries; non-compensable psychiatric sequelae of trauma and death; costs of non-medical care; loss of capacity to earn income or to provide care to others, etc), multiplied by the probability P that an accident, as a consequence of negligence, will occur. The EL line in Figure 1 is drawn for a given value of P . As units of care or precautions (measured along the horizontal axis)

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increase, the expected loss of an accident declines. The upward sloping line measures the extra cost of additional units of care, eg a railway company, employing a second train driver, or installing a more powerful emergency braking system. The area $+A+B+D$ measures the dollar value of the total expected damages payment if a negligently caused accident ensues. This expected payment of damages can be avoided by meeting the legal standard of duty of care, which in economic terms means taking the optimal amount of cost-effective precautions C^* . C^* is the optimal amount of care because up until C^* , with each extra unit of care, there is a reduction in the expected loss from the accident, a benefit, which exceeds the cost of preventing it. Consequently, for each unit of care there is a net gain. The sum of these net gains is maximised at C^* and is equal to A .³⁴

Figure 1: The socially optimal amount of care



One important function of the law of negligence is to encourage the optimal amount of care because, if less than C^* care is taken, the tortfeasor will have to pay damages equal to the area $+A+B+D$. In Wicks, the defendant State Rail Authority admitted that its negligence caused the accident. Consequently, in terms of Figure 1, it took a suboptimal amount of care, ie $< C^*$.

The payment of expected damages can be financed by a risk-averse tortfeasor through self-insurance; alternatively, the risk can be outsourced to an independent insurer. In addition to other insurance products such as first party policies, independent insurers offer third party policies or long tail classes of insurance. These policies have claims paid over many years and encompass professional indemnity, product liability, public liability and employers' liability insurance. Third party insurance is often compulsory for those at risk of being sued by third parties for negligently caused personal injury. Consequently, it is this class of insurance policy that provides the nexus between insurance and torts law.

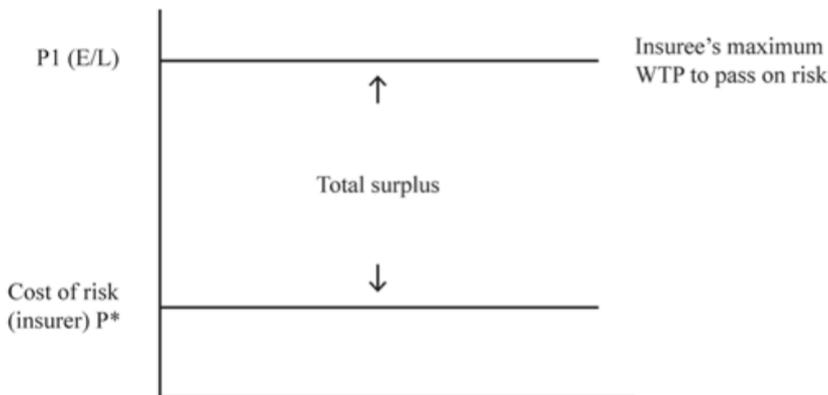
Insurance markets can improve economic welfare

Professional insurers can usually be expected to have a comparative advantage in risk management, which is why risk-averse decision-makers tend to purchase an insurance policy rather than to self-insure. Risk imposes an economic cost on risk-averse individuals and corporations. A risk-averse decision-maker prefers a certain outcome to the equivalent expected gamble, eg the receipt of \$500 with certainty would be preferred to an 0.5 probability of winning \$1,000 (expected value of the gamble = \$500). The cost of risk to a risk-avertter is measured by the willingness to pay to avoid the

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risk, or the risk premium. Risk management, particularly where expected payouts are very large, requires a mix of technical skills; these include identifying the risks, and then characterising and quantifying the underlying probability distribution of losses, should the insured-against event occur. If self-insurance were chosen, the risk premium would be the sum of money invested periodically in a special fund, so as to meet any expected damages claim that may eventuate down the track. The problem confronting the self-insurer is estimating the probability and timing of an accident, the likely damages award, the amount of money that has to be invested periodically, and in which asset class, in order to be able to meet any expected liability. Professional actuaries employed by insurance companies have the comparative advantage in this exercise, which is why the outsourcing of risk to professional insurers is so ubiquitous in the economy. The comparative advantage of the professional insurer gives rise to a wealth-creating transaction, because risk moves from a higher to a lower cost bearer, following the purchase of an insurance policy. The increase in wealth and the improvement in resource allocation are measured by the total surplus which the transaction generates. This is shown in Figure 2.

Figure 2: The social value of insurance



The total potential surplus in Figure 2 is the difference between the higher cost of risk management to the insuree equal to P_1 (top line) and the lower cost to the insurer P^* (bottom line). This total surplus is the extra wealth created (reduction in the cost of risk management including elimination of the psychic cost of risk to the insuree), as a consequence of the superior allocation of resources, if the insuree, whose maximum willingness to pay P_1 , to pass on the risk to the insurer, does so.³⁵ The insuree's maximum willingness to pay will be equal to the expected loss if the insured-against event ensues. For example, in the case of a first party home fire insurance policy, the expected loss is equal to the value of replacing the house multiplied by the probability of a house fire. Such a transaction improves economic welfare as that term is used by the economist. Similarly, other risk-averse home owners will have different costs of managing the risks or expected losses from a house fire that yield them disutility, and therefore different maximum willingness to pay to transfer these to a lower cost risk manager. This locus of maximum willingness to pay generates a downward sloping line, which is the market demand curve D for insurance, as shown in Figure 3. It also measures the monetary value or expected loss (EL) of each of the insured against risks of house fires.

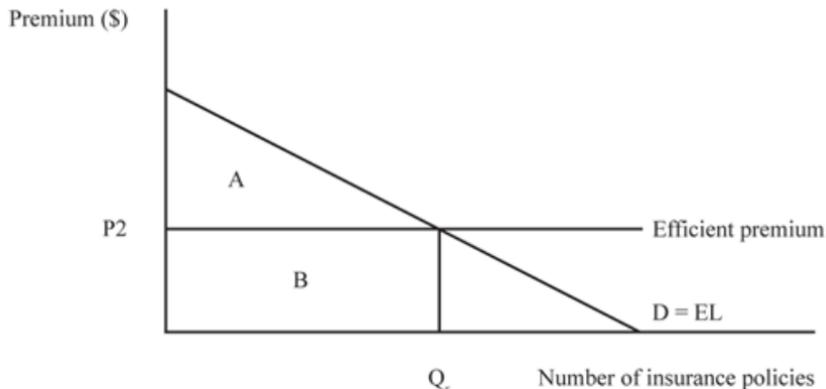
A simplified version of the pricing problem confronting the insurer is to try and set the premium as close as possible to the average true expected loss or risk that each insuree brings to this particular risk pool, in order to ensure that total premiums received will be equal to the total expected claims made each year. This is called the efficient premium. Assuming that risks are normally distributed, each risk pool can be characterised by its mean (expected loss) and standard deviation. The expected loss determines the centre of the curve and the standard deviation its height and width. Consequently,

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if, eg, risks are sorted into two different pools, with the first having a smaller expected loss and standard deviation than the second, a different premium should be set for each pool. It should be lower for the first group of insurees and higher for the second group, reflecting the higher expected loss and variability of risks that are being insured, in the latter case. The

efficient premium P2 in Figure 3 corresponds to one of these risk pools. In any risk pool, moral hazard is always a threat. The notion of "moral hazard" refers to insureds behaving in riskier ways as a consequence of being insured. For example, burglary insurance gives individuals an incentive to underspend on home security, because only a small proportion of the cost is borne by the insuree, if the insured-against event ensues. That part of the cost not borne by the insuree is passed on to or externalised to other insurees in the pool, who do not engage in moral hazard, through higher premiums to meet the unexpected payout.

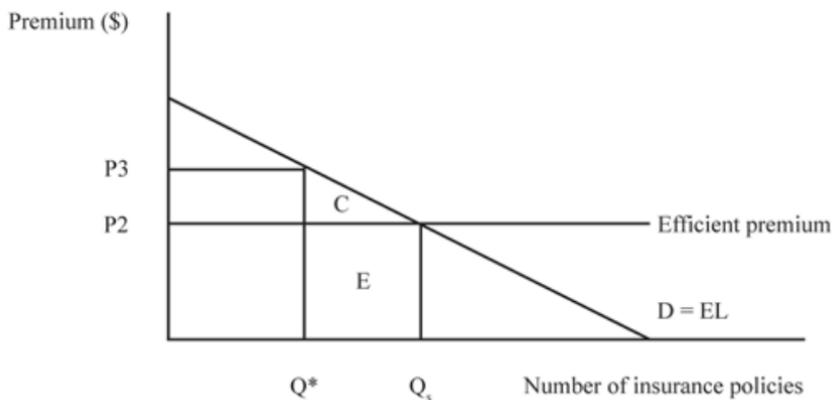
Figure 3: The market demand curve for insurance



Returning to Figure 3, the efficient premium is set at P2. Corresponding to P2, the socially optimal number of insurance policies in this particular risk pool is Q_s . This combination of P2 and Q_s maximises social welfare because TSB (total social benefits) minus TSC (total social cost) is at a maximum. Total social benefits in Figure 3 are measured as +A+B and total social cost is -B, which yields net social benefits equal to A. TSB are the saved risk management costs as a consequence of the expected losses or risks of house fires being transferred to the lower cost risk manager (insurer), and TSC equals the resources used up by the insurer in providing the service, such as labour and capital inputs.

Due to moral hazard and externalised cost, however, insurance or risk transfer markets are prone to market failure, which means that they yield suboptimal outcomes. This is illustrated in Figure 4.

Figure 4: The impact of moral hazard on an insurance pool



P3 in Figure 4 is an inefficient price relative to P2. This is on the assumption that it has been imposed by the insurer on all insurees in the pool, in order to cover the cost of an unexpected payout

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due to some members engaging in risky activity or moral hazard, which could have been avoided had they taken appropriate precautions. This externalised cost causes some members to leave the insurance pool and bear their own cost of risk, even though they can only do so at a higher cost than the insurer. In Figure 4, this impact is shown as a movement from Q_s back to Q^* as a consequence of the increase in the premium from P2 to P3. Since $Q^* < Q_s$ (the number of policies that would be issued in the absence of the moral hazard and externalised cost) and the price is higher than the efficient price, there is a welfare loss or net social cost equal to C. The TSB is the reduction in TSC + E (saved costs from writing out fewer insurance policies) and the TSC is the reduction in TSB - C-E (the higher risk management costs being borne by individuals who have left the insurance pool).³⁶ TSB - TSC therefore equals -C. While they cannot be eliminated, there are devices for minimising moral hazard problems in first party insurance markets. For example, in the case of burglary,

typical devices include discounts for having burglar alarms and window locks, and the insertion of deductibles into the insurance contract. With deductibles, the insurer and insuree share the risk of the expected loss because the latter has to pay a proportion of the expected loss before being entitled to reimbursement from the insurer.

Sources of the insurer's comparative advantage

A professional insurer's comparative advantage in risk management emanates from exploiting the law of large numbers and being able to sort risks into efficient risk pools. As discussed, the latter is critical in setting the efficient premium in Figure 3. The former concept is well known and is usually illustrated as follows. An insurer cannot predict whether the house of someone in a particular area will be destroyed by fire. However, judging from past experience, it is reasonably predictable what proportion of the houses of a large group of persons will burn down. Consequently, writing and selling more house fire insurance policies enables the insurer to increasingly predict the total expected payout from offering this sort of insurance policy. Likewise, it is possible to estimate the number of train derailments over time, the number of crew and passengers who would sustain injuries in such accidents, and the costs (including long-term costs of medical care in cases of those severely injured) to be covered through insurance. Actuaries specialise in modelling these sorts of events (stochastic processes) and use many different types of probability distributions. For example, while the probability of an aircraft accident is commonly stated as being very low based on past experience, the probability of survival following an aircraft accident differs depending on the cause of the mishap, whether the bracing position is adopted etc. Likewise, in the case of train mishaps, probabilities of their occurrence and resulting casualties can be reasonably estimated. What cannot be estimated is the number of rescuers and onlookers who might suffer compensable injuries as a result of their attendance at the scene of the particular accident.

Two conditions are necessary for efficient risk pooling: first, risks in the pool need to be as homogenous as possible in order to prevent low-risk insurees in the pool cross-subsidising high-risk insurees by paying premiums that are too high; and secondly, the risks should be independent of each other.³⁷ The probabilities of the risks in an insurance pool would be perfectly correlated or interdependent, if eg, when one house burned down, all of the others did so at the same time. This would be very likely if the insurer only provided coverage for houses or pooled fire risks in highly bushfire-prone areas, because then the risks would not be independent across all of the issued insurance policies. The outbreak of one bushfire would most likely destroy almost all houses at once, given the combustion dynamics of these events. But how does it work in the case of rail disasters and personal injuries? In the case of personal injuries and rail disasters, the risks of travelling in the

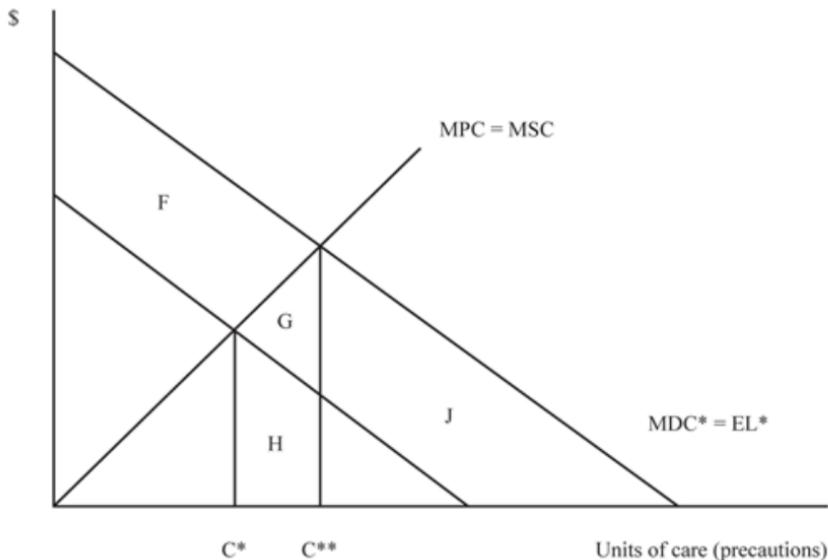
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doomed train and being injured are not independent of each other. However, it would be highly improbable that coincidentally with one or two trains crashing or derailing, all other trains using the network would also have a mishap.³⁸

Expanding liability

Whenever the law expands the scope of defendants' liability for negligently caused harm, it also imposes a concomitant, though unexpressed, obligation on insurance companies to potentially pay damages, under a third party policy, to a greater number of persons injured as a result of (the insured) defendant's negligence. Such expansion of liability should not be too great a problem as long as the numbers and the risks are predictable.³⁹ However, where the numbers of those who may be injured cannot be predicted from past experience, where there is uncertainty relating to size, and the nature of the risks insurers are expected to bear is imprecise, the EL (expected loss) line in Figure 1 will randomly shift out to the right. It is at this point that the expansive construction of s 30(2)(a) of the *Civil Liability Act 2002* (NSW) becomes relevant. Under the Wicks decision, subject to the requirements of s 31 and s 32 (discussed above), and some involvement with those "killed, injured or put in peril" by the defendant's negligence, not only police officers, but also paramedics, ambulance officers – and depending on circumstances, electricians, mechanics, other members of rescue teams, emergency physicians, surgeons, nurses, even media representatives – would all fall into the class of plaintiffs entitled to recover damages for pure mental harm. Such large and disparate classes of potential claimants would make defendants' liability for psychiatric injury in the form of pure mental harm virtually indeterminate. This is the equivalent of the EL line continuously and randomly shifting out to the right.

Figure 5: Expanding liability in the market for compulsory third party insurance



In Figure 5, one such shift of the EL line is illustrated. The ultimate outcome of random continuous displacements to the right such as this is that the risk becomes uninsurable, which is

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simply a manifestation of market forces adjusting either optimally or suboptimally to these shocks.⁴⁰ The compulsory nature of third party insurance, however, coupled with indeterminate liability, almost guarantees that the adjustment mechanism will operate suboptimally in third party accident liability markets. Economic theory predicts all or a combination of the following consequences following a rightward shift of the EL line:

- (i) in Figure 5 the total cost and amount of precautions to the defendant respectively increase by the area +G+H and from C^* to C^{**} ;
- (ii) the expected damages increase by +F+G+J;
- (iii) increasing upward pressure will be placed on third party insurance premiums;
- (iv) increasing upward pressure will be placed on first party insurance premiums in order to cross-subsidise third party premiums;
- (v) the third party insuree, such as the defendant State Railway Authority in Wicks, will come under pressure to pass on higher third party insurance premiums to its customers through higher ticket prices;⁴¹
- (vi) reinsurance premiums will increase, as insurers resort to their reinsurers to protect themselves against very large losses; and
- (vii) some first party insurees will either leave voluntarily, or be forced to leave the insurance pool and either self-insure or go without insurance, which will put further upward pressure on premiums for those who remain. In effect, first party insurance pools may be totally crowded out.

These factors, combined with an unexpected and unplanned-for payout of large damages, could effectively destroy a substantial part of the insurer's financial reserves,⁴² and thus increase the risk of even a very profitable insurance company⁴³ becoming financially distressed or insolvent. If this occurs, another insurer would have to absorb the policies at even higher prices. In some circumstances, the government would need to become an insurance supplier, as happened in 2002 when United Medical Protection (UMP), the medical defence organisation which provided professional insurance cover for approximately 90% of doctors in New South Wales and many in Queensland, entered provisional voluntary liquidation.⁴⁴ The New South Wales Government decided to fully indemnify all visiting medical officers for all work performed on public patients in public hospitals in New South Wales (this included "liability for all claims that may arise from public work in past years that have not been reported as yet").⁴⁵ Also in 2002, the Federal Government, having covered payments for some claims, enacted a package of legislation to assist and regulate the medical insurance industry.⁴⁶

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Wealth destruction

The negative effects can be classified into resource misallocation (wealth destruction) and income redistribution effects. The last item falls under the former, and all other items under

the latter category. The mechanism of wealth destruction in relation to first party insurance markets was discussed in the analysis of Figure 4. Adverse selection or choosing a poor selection of risks to insure is the other problem confronting insurers. In legal terms, adverse selection is technically different from moral hazard because the former occurs at the time of entering into the contract, and the latter post-contractually. Economically, however, the distinction is more blurred since poor risks are more likely to engage in moral hazard and vice versa.

The problem of adverse selection in particular is greatly amplified and potentially much more serious in compulsory third party insurance markets for accidents caused by negligence. In relation to the Wicks decision, the source of the adverse selection will lay in the difficulty of satisfying the law of large numbers and efficient risk-pooling criteria. For example, State Rail Authority, unlike a first party insurer, has virtually no information available about the predisposition towards psychiatric illness of rescuers, onlookers and others who may attend an accident scene and see others being psychiatrically injured (as a result of the insuree's negligence), during the term of the policy. Nor is this information readily available.

While the probability of a train being involved in an accident and the number of resulting casualties should be reasonably ascertainable using the law of large numbers principle, discussed earlier, the number of persons who attend an accident as professional and altruistic rescuers, onlookers, bystanders or relatives of the victims, and the latency period for any mental trauma to manifest itself, is random and defies prediction. Consequently, the risk pool will be heterogeneous and the risks highly correlated, so that an unanticipated event is capable of destroying a substantial amount of the insurer's capacity (financial reserves) all at once.⁴⁷ If the insurance were provided through a voluntary first party mechanism, victim risks could be uncorrelated and more easily separated into different risk pools.⁴⁸ One possibility would be the insurer deciding to only insure professional rescuers for a particular psychiatric condition, eg post-traumatic stress disorder that manifests itself within 12 months after the accident.⁴⁹

Conclusions

Uninsurable risks, which are required to be insured against, would seem to warrant the provision of government insurance. In 2002, Australian State, Territory and Federal Governments attempted to control the risk of potential widespread market failure of third party insurance markets by substantially modifying the law of torts. The construction of pure mental harm provisions in the *Civil Liability Act 2002* (NSW) by the High Court, however, may threaten the optimal functioning of these markets. In the worst case scenario, the government, confronted with the private sector abandoning third party insurance markets, would be forced to meet all of the demand itself. Yet, even then, government involvement would be no guarantee against market failure and wealth destruction in the sense that has been described in this column. Furthermore, government interventions often entail very high

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opportunity costs. The solution to encouraging the development of efficiently operating third party insurance markets is an ability on the part of insurers to reasonably predict total expected payouts following an accident. This predictability is fundamentally tied to the clarity and consistency with which the High Court of Australia approaches and advances the law of negligence.

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¹ Brogden J (Pittwater – Leader of the Opposition), Second Reading, *Transport Legislation Amendment (Implementation of Waterfall Rail Inquiry Recommendations) Bill*, New South Wales Legislative Assembly, *Hansard and Papers* (24 February 2005), <http://www.parliament.nsw.gov.au/prod/parliament/hansart.nsf/V3Key/LA20050224004> viewed 27 October 2010.

² The Special Commission of Inquiry into the Waterfall Rail Accident, *Final Report, Vol 1* (January 2005). The Chair of the Commission, the Hon Peter Aloysius McInerney QC, made 127 recommendations, most of which have since been implemented. However, before the Waterfall accident, McInerney J headed another inquiry into the rail accident at Glenbrook, in which also seven people were killed. Many recommendations of the Glenbrook final report were not implemented by the time of the Waterfall disaster: Special Commission of Inquiry into the Waterfall Rail Accident, *Final Report* (2005), http://www.railcorp.info/publications/other_publications viewed 27 October 2010.

- 3 *Compensation to Relatives Act 1847* (NSW), s 3(1) : "Whosoever the death of a person is caused by a wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to felony." See also *Compensation (Fatal Injuries) Act 1974* (NT), s 7(1) ; *Civil Liability Act 1936* (SA), s 23 ; *Fatal Accidents Act 1934* (Tas), s 4 ; *Fatal Accidents Act 1959* (WA), s 4 ; *Supreme Court of Queensland Act 1991* (Qld), s 17 ; *Civil (Wrongs) Act 2002* (ACT), s 24 ; *Wrongs Act 1958* (Vic), s 16 .
- 4 *Civil Liability Act 2002* (NSW), s 27 .
- 5 *Civil Liability Act 2002* (NSW), s 27 ; *Civil Liability Act 1936* (SA), s 53(2), (3) ; *Civil Law (Wrongs) Act 2002* (ACT), s 35(1), (2) ; *Civil Liability Act 2002* (Tas), ss 33, 35 ; *Wrongs Act 1958* (Vic), ss 72(1), 75 ; *Civil Liability Act 2002* (WA), ss 5S(1), 5T .
- 6 *Civil Liability Act 2002* (NSW), s 33 .
- 7 *Civil Liability Act 2002* (NSW), s 31 provides: "There is no liability to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness."
- 8 Under the *Civil Liability Act 2002* (NSW), s 30(5) , close members of family include parents or other persons with parental responsibility for the victim; spouses or partners, or the last parties in time to a de facto relationship within the meaning of the *Property (Relationships) Act 1984* (NSW) ; children, stepchildren, or any other persons "for whom the victim [had] parental responsibility; brothers, sisters, half-brothers or half-sisters, or stepbrothers or stepsisters of the victim".
- 9 Under the *Civil Liability Act 2002* (NSW), s 30(5) ; [Gifford v Strang Patrick Stevedoring Pty Ltd](#) (2003) 214 CLR 269^[PDF]; *Civil Liability Act 2002* (NSW), ss 30(5), 31, 33 ; see also *Civil Liability Act 1936* (SA), s 53(2), (3) ; *Civil Law (Wrongs) Act 2002* (ACT), s 35(1), (2) ; *Civil Liability Act 2002* (Tas), ss 33, 35 ; *Wrongs Act 1958* (Vic), ss 72(1), 75 ; *Civil Liability Act 2002* (WA), ss 5S(1), 5T .
- 10 [Sheehan v State Rail Authority \(NSW\)](#) [2009] Aust Torts Reports 82-028 at [46] (Beazley JA).
- 11 The question whether their damages were to be reduced by reason of their employer's negligence in accordance with the provisions of s 151Z of the *Workers Compensation Act 1987* (NSW) was raised at the trial but not pursued: [Wicks v Railcorp](#); [Sheehan v State Rail](#) [2007] NSWSC 1346 at [13]. The *Workers Compensation Act 1987* (NSW), s 151Z(1)(a) provides that where the employee's "injury was caused under circumstances creating a liability in some person other than the worker's employer to pay damages in respect of the injury", the employee "may take proceedings both against that person to recover damages and against [the employer] liable to pay compensation ... but [the claimant] is not entitled to retain both damages and compensation".
- 12 *Civil Liability Act 2002* (NSW), s 29 : "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."
- 13 The alternative criterion for recovery of damages, that of being "a close member of the family of the victim" under s 30(2)(b) , did not apply to Sheehan and Wicks.
- 14 See also [Sheehan v State Rail Authority \(NSW\)](#) [2009] Aust Torts Reports 82-028 at [156]-[161] (McCull JA).
- 15 Her Honour noted that Malpass As J's "reasoning on subs 32(2)(b) was based upon his finding that the appellants did not fall within the category of persons entitled to recover damages for purely mental harm within the meaning of s 30(2)(a) , the terms of which are essentially identical to s 32(2)(b) . (Section 32(2)(b) uses the word 'person', whereas s 30(2)(a) refers to 'victim'."
- 16 Ipp D , Cane P , Sheldon D and Macintosh I , *Review of the Law of Negligence* (2 October 2002) (Ipp Review) (named after its Chairman, the Hon Justice David Ipp), <http://www.revofneg.treasury.gov.au/content/reports.asp> viewed 27 October 2010.
- 17 The specification "with his or her own unaided senses" has also been omitted.
- 18 [Chadwick v British Railways Board](#) [1967] 1 WLR 912; [Mount Isa Mines Ltd v Pusey](#) (1970) 125 CLR 383^[PDF]; cf [Alcock v Chief Constable of South Yorkshire](#) [1992] 1 AC 310, [White v Chief Constable of South Yorkshire Police](#) [1999] 2 AC 455. Except for Tasmania, none of the other jurisdictions with similar provisions to s 30(2)(b) of the *Civil Liability Act 2002* (NSW) include the phrase "aftermath" or "immediate aftermath": *Wrongs Act 1958* (Vic), s 72(2)(b) ; *Civil Law (Wrongs) Act 2002* (ACT) s 34(2)(b) ; *Civil Liability Act 2002* (WA) s 5S(2)(b) ; *Civil Liability Act 1936* (SA), s 33(2)(ii) ; however, s 53(1)(a) of the *Civil Liability Act 1936* (SA) specifically provides that "(1) Damages may

- only be awarded for mental harm if the injured person (a) was physically injured in the accident or was present at the scene of the accident when the accident occurred".
- 19 McColl JA (at [162]) pointed out that those passengers who were "being rescued had already been injured. Their causes of action had accrued: *Hawkins v Clayton* [1988] HCA 15; (1988) 164 CLR 539^[PDF] (at 561) per Brennan J; (at 587) per Deane J; see also *Harriton v Stephens* [2006] HCA 15; (2006) 226 CLR 52^[PDF] (at [218]) per Crennan J (Gleeson CJ, Gummow and Heydon JJ agreeing)."
- 20 As already cited, Beazley and McColl JJA's examples included destabilised stanchion falling, or at the risk thereof, on passengers in a carriage or on an individual; crashing of a dislocated carriage onto another (or an imminent danger thereof); a derailed passenger carriage hanging precariously over a cliff, and the like.
- 21 As noted above, by virtue of s 30(2)(b), close relatives of those killed, injured or put in peril by the act or omission of the defendant can recover as of right damages for non-economic loss provided they establish (i) that their injury arose "wholly or partly from mental or nervous shock" connected to the wrongful event (to recover damages for economic loss, they need to prove that they suffer a recognised psychiatric condition); (ii) the element of foreseeability as defined in s 32. The statutory approach to recovery of damages for pure mental harm by relatives is similar, but not identical to the common law position articulated in *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269^[PDF].
- 22 The joint judgment referred to *Vairy v Wyong Shire Council* (2005) 223 CLR 422^[PDF] at [126]-[129]; *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420^[PDF] at [31].
- 23 See Honoré A, "Law, Morals and Rescue" in Ratcliffe JM (ed), *The Good Samaritan and the Law* (Anchor Books, Garden City, New York, 1966) pp 225-242.
- 24 For example, "was it reasonably foreseeable that sights of the kind a ... [a journalist sent to report an incident] might see, sounds of the kind a [journalist] might hear, tasks of the kind a [journalist] 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?"
- 25 For history of this terminology see Mendelson D, *Interfaces of Medicine and Law: The History of Liability for Negligently Caused Psychiatric Injury (Nervous Shock)* (Ashgate International, Aldershot, 1998); Mendelson D "English Medical Experts and the Claims for Shock Occasioned by Railway Collisions in the 1860s: Issues of Law, Ethics and Medicine" *International Journal of Law and Psychiatry*.
- 26 *Oxford English Dictionary* (2nd ed, 1989) Vol xv, p 293, meaning 4a.
- 27 See also *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383^[PDF] at 394 (Windeyer J): "Sorrow does not sound in damages. A plaintiff in an action in negligence cannot recover damages for a 'shock', however grievous, which was no more than an immediate emotional response to a distressing experience sudden, severe and saddening. It is, however, today a known medical fact that severe emotional distress can be a starting point of a lasting disorder of mind and body, some form of psychoneurosis or a psychosomatic illness. For that, if it be the result of a tortious act, damages may be had. It is in that consequential sense that the term 'nervous shock' has come into law."
- 28 See Mendelson, n 25.
- 29 Under the Commonwealth *Constitution*, s 1 (Ch I) vests the legislative power of the Commonwealth government in a Federal Parliament; while s 71 (Ch III) vests the judicial power of the Commonwealth in the High Court, and such other federal courts as the Parliament creates or invests with federal jurisdiction. The legislative powers of the Parliament are set out in detail throughout the *Constitution*; under Ch 3.
- 30 See eg Australian Institute of Health and Welfare 2010, *Mental Health Services in Australia 2007-08* (Mental Health Series No 12), <http://www.aihw.gov.au/mentalhealth/index.cfm> viewed 27 October 2010.
- 31 Cardozo J.'s concerns in *Ultramares Corp v Touche* 255 NY 170 at 179; 174 NE 441 at 444 (1931) about negligent defendants' exposure to liability "in an indeterminate amount for an indeterminate time to an indeterminate class", though expressed in the context of pure economic loss, are apposite in relation to the decision in *Wicks*.
- 32 Brunt M, *Economic Essays on Australian and New Zealand Competition Law. Closing Reflections* (Kluwer Law/International, The Hague/New York, 2003).
- 33 Cited by Galitsky S "Manufacturer's Liability: An Examination of the Policy and Social Cost of a New Regime" (1979) 3 UNSWLJ 145.
- 34 The total social benefits from C* units of care equal +A+B (the reduction in total expected loss or risk of an accident) and the total social cost equals -B (the total cost of taking precautions up until C*) Therefore TSB – TSC = +A. The net gain of +A is called the net social benefits.

- 35 Instead of undertaking the relatively high-cost activity of risk management, the insuree can employ someone else and devote her or his time to pursuing areas of comparative advantage.
- 36 One measure of this cost would be the capitalised value of the total willingness to pay to avoid the risk of burglary over the effective life of their homes of those insurees forced to abandon the insurance pool.
- 37 Premiums that are too high are actuarially unfair as illustrated in Figure 4.
- 38 This might occur as a consequence of an organised terrorist attack, but that is unlikely.
- 39 These would include, eg, the number of people at risk of being killed, injured (in terms of physical and psychiatric injury), or put in peril of physical and psychiatric injury should an accident (small or massive) occur. The same would pertain to calculating the risk of psychiatric injury that involuntary onlookers may suffer as a result of seeing others being killed, injured or put in peril at the scene of an accident.
- 40 The standard market adjustment that occurs when a risk becomes uninsurable is for that line of insurance coverage to be withdrawn from the market. A risk becomes uninsurable when it is impossible or prohibitively expensive to examine each risk and set the correct premium: Borch K, *Economics of Insurance* (North Holland, Amsterdam, 1990).
- 41 Since third party insurance is compulsory, technically the EL line in Figure 5 should be drawn as a vertical line, because given the absence of substitutes, third party insurers can increase premiums without the fear of third party insurees dropping out of the insurance pool. This means that third party insurers have considerable pricing or market power. Similarly, subject to the pricing power of the third party insurees, it can be expected that the latter will attempt to pass on as much as possible of any premium increase to their customers. This would have the same impact as a regressive tax reducing the welfare of lower income groups disproportionately. In Figure 5, the EL line is not shown as vertical, since this would overly complicate the diagram. None of the predictions change.
- 42 Despite increasing third party insurance premiums, since third party insurance is compulsory, insurees such as those operating rail, tramways, health, road, school, and other services, mining companies, gas and electricity utilities to name but a few, do not have the option of dropping out of the insurance pool. Their only option would be to cease operations.
- 43 See National Insurance Council of Australia, *Industry in Focus – Tort Law Reform* (27 November 2009), <http://www.insurancecouncil.com.au> viewed 27 October 2010. Insurance companies in Australia are supervised by the Australian Prudential Regulation Authority.
- 44 The decision to enter into provisional voluntary liquidation was partly due to UMP's exposure to the failed HIH Insurance, which was the reinsurer for a number of medical defence organisations, and partly to the exposure to a payout of A\$14,202,042 in the medico-legal case of *Simpson v Diamond* (No 2) [2001] NSWSC 1048 (reduced on appeal to \$10,998,692: see *Diamond v Simpson* (No 1) [2003] Aust Torts Reports 81-695).
- 45 Drabsch T, "Medical Negligence: An Update", *Briefing Paper No 2/2004*, <http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/6C1BDA58607A7808CA256ECF0007223D> viewed 27 October 2010; see also National Claims and Policy Database, *Public and Private Sector Medical Indemnity Claims in Australia* (2010), <http://www.aihw.gov.au/publications/hse/86/10740.rtf> viewed 27 October 2010.
- 46 *Medical Indemnity (Consequential Amendments) Act 2002* (Cth) ; *Medical Indemnity (Run-Off Cover Support Payment) Act 2004* (Cth) ; *Medical Indemnity (UMP Support Payment) Act 2002* (Cth) ; *Medical Indemnity Act 2002* (Cth) ; *Medical Indemnity Agreement (Financial Assistance-Binding Commonwealth Obligations) Act 2002* (Cth) ; *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* (Cth) .
- 47 Priest G "The Current Insurance Crisis and Modern Tort Law". In the event of an insurer becoming bankrupt as a consequence of carrying too high a volume of third party insurance policies for negligently caused accidents, the wealth destruction effects would be considerably more severe than in Figure 4.
- 48 Priest, n 47. It should be noted that insurees engaging in moral hazard impose costs on other insurees who do not behave in risky ways simply because they have insurance.
- 49 Another aspect of indeterminate liability is its potential to externalise costs onto professional risk managers and other employees, through job losses.

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