
Pure Psychiatric Injury Pursuant to the Civil Liability Legislation: An(other) Economic Perspective

Martin Allcock*

*Despite the enactment of civil liability legislation affecting claims for pure mental harm in many jurisdictions in Australia, the High Court decision in *Wicks v State Rail Authority (NSW) (2010) 241 CLR 60; [2010] HCA 22* has caused some concern that the economic goals underpinning the civil liability legislation will be threatened. In this article, the economic sustainability of the law of negligence with respect to pure mental harm is considered in light of three particular issues. The first is the High Court's 2015 decision in *King v Philcox (2015) 255 CLR 304; [2015] HCA 19* in which the South Australian civil liability legislation was considered. The second is the threat to healthy insurance markets posed by the civil liability legislation itself as a result of inconsistencies between jurisdictions. The third relates to the threat posed by the civil liability legislation to the ability of the law of negligence to achieve economically efficient levels of accident and accident-prevention costs. It is argued that the civil liability legislation is not only not well-suited to achieve its primary goal of reducing the social costs of accidents, but may well be a greater threat to that goal than the common law.*

Keywords: *negligently inflicted psychiatric injury; economic analysis of law; nervous shock; pure mental harm*

INTRODUCTION

In this article, the economic sustainability of the law of negligence with respect to pure psychiatric injury in Australia is reviewed in light of three particular issues. The first is a relatively recent development in the law in this area, namely, the High Court's decision in *King v Philcox (King)*¹ in which South Australia's civil liability legislation was considered in relation to a claim for pure psychiatric harm. Second, the threat to the economic efficiency of the law posed by the lack of clarity and consistency in the law in this area as a result of the various pieces of civil liability themselves will be considered. And finally, theoretical aspects of law and economics are considered in the context of the economic effects of the law of negligence and the social costs of accidents in relation to these developments. It will be argued that while healthy insurance markets contribute towards dealing with risk in society in an economically efficient manner, discussion of the costs of accidents should also take into consideration all of the actors within the system. More particularly, it will be contended that it is an inefficient allocation of resources within society to ensure the health of insurance markets by externalising the costs of accidents onto accident victims.

BACKGROUND

Concerns about the Ongoing Health of Insurance Markets

Laws governing liability for injuries are intimately connected with the availability of liability insurance. This is in no small part a result of the gradual shift in the focus of the law from punishing wrongdoers to compensating victims, this being consequent upon the influence of the introduction of compulsory

* Lecturer, School of Business and Law, Edith Cowan University, and PhD Candidate (Queensland University of Technology).

Correspondence to: m.allcock@ecu.edu.au.

¹ *King v Philcox* (2015) 255 CLR 304; [2015] HCA 19.



liability regimes in order to address the significant social problems caused by accidents in specific contexts.² The two most significant contexts in which regimes of this kind have been introduced arise in respect of motor vehicle accidents³ and industrial accidents,⁴ in relation to which, significant rates of injuries and death are a significant negative side to otherwise socially beneficial activities. The availability of insurance has been, and continues to be, integral to the healthy functioning of legislative schemes of liability such as these.

The availability of liability insurance also has some association with developments in the common law, although this connection is less clear-cut and often open to dispute.⁵ It has been argued that the ever-expanding circumstances in which a defendant can be found guilty of negligence – the “imperial march of negligence” – is a symptom of the connection between the law and the availability of insurance.⁶ There are a number of areas of liability in negligence which have expanded considerably since *Donoghue v Stevenson*.⁷ These include the expansion of liability to include liability for economic loss caused by negligence misstatement,⁸ recovery of damages for gratuitously provided services,⁹ the expansion of the concept of foreseeable risk,¹⁰ the expansion of the duty of care to children in utero,¹¹ the relaxation of rules restricting actions relating to occupier’s liability,¹² the expansion of liability in medical negligence cases by the court determining the relevant standard of care¹³ and the abolition of the nonfeasance

² Peter Cane, *Atiyah’s Accidents, Compensation and the Law* (CUP, 8th ed, 2013) 245–246.

³ In response to the significant social problem of motor vehicle accidents, no-fault liability schemes were adopted in the 20th century in a number of jurisdictions in Australia, including in Victoria, Tasmania and the Northern Territory, as well as in New Zealand, and in many states of the United States. Related to this has been the introduction of compulsory third-party insurance regimes in Australia, Britain and the United States, established with the aim of ensuring that those suffering injury as a result of motor vehicle accidents were not left uncompensated as a result of accidents caused by uninsured drivers. Legislative schemes of this kind have also been enacted in New Zealand, Germany, Austria, Norway, Sweden, Finland, Denmark, Switzerland and Czechoslovakia: see Nick Allsop, Hardik Dalal and Peter McCarthy, “To Fault or Not to Fault That Is the Question?” (Paper Presented at the 12th Accident Compensation Seminar, Institute of Actuaries of Australia, Melbourne, 22–24 November 2009) 9; Shippen Lewis, “The Merits of the Automobile Accident Compensation Plan” (1936) 2 *Law & Contemporary Problems* 583, 583; Edward A Hogan Jr and Lee M Stubbs, “The Sociological and Legal Problem of the Uncompensated Motor Victim” (1938) 11 *Rocky Mountain Law Review* 11, 20; Francis Deák, “Compulsory Liability Insurance under the British Road Traffic Acts of 1930 and 1934” (1936) 3 *Law & Contemporary Problems* 565, 566.

⁴ No-fault liability and compulsory third-party insurance worker’s compensation schemes were adopted in the 19th and early 20th centuries in Britain, Australia, the United States and in many countries across Europe. The first jurisdiction to enact workers’ compensation legislation in Australia was South Australia, doing so in 1900. Western Australia introduced its regime soon after in 1902, followed by Queensland in 1905, New South Wales and Tasmania in 1910, Victoria in 1914, the Northern Territory in 1920 and the Australian Capital Territory in 1946. The Commonwealth also introduced a regime for commonwealth employees in 1912. New Zealand brought into effect its own worker’s compensation legislation in 1900, and Canada did the same in 1902: see Peter WJ Bartrip and PT Fenn, “The Measurement of Safety: Factory Accident Statistics in Victorian and Edwardian Britain” (1990) 63 *Historical Research* 58, 58; Michael L Perlin, “The German and British Roots of American Workers’ Compensation Systems: When Is an ‘Intentional Act’ ‘Intentional’?” (1985) 15 *Seton Hall Law Review* 849, 865; PWJ Bartrip and PT Fenn, “Factory Fatalities and Regulation in Britain, 1878–1913” (1988) 25 *Explorations in Economic History* 60, 65; Lawrence M Friedman and Jack Ladinsky, “Social Change and the Law of Industrial Accidents” (1967) 67 *Columbia Law Review* 50, 77; Stefan A Riesenfeld, “Contemporary Trends for Industrial Accidents Here and Abroad” (1954) 42 *California Law Review* 531, 559–560.

⁵ See Cane, n 2, 248–254; Carolyn Sappideen and Prue Vines (eds), *Fleming’s The Law of Torts* (Lawbook Co, 10th ed, 2011) 471–472; Martin Davies, “The End of the Affair: Duty of Care and Liability Insurance” (1989) 9 *Legal Studies* 67; Jane Stapleton, “Tort, Insurance and Ideology” (1995) 58 *Modern Law Review* 820; R Lewis, “Insurance and the Tort System” (2005) 25 *Legal Studies* 85.

⁶ See JJ Spigelman, “Negligence: The Last Outpost of the Welfare State” (2002) 76 ALJ 432, 433.

⁷ *Donoghue v Stevenson* [1932] AC 562.

⁸ See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

⁹ See *Van Gervan v Fenton* (1992) 175 CLR 327.

¹⁰ See *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd* [1967] 1 AC 617; *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

¹¹ See *Watt v Rama* [1972] VR 353.

¹² See *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

¹³ See *Rogers v Whitaker* (1992) 175 CLR 479.

rule protecting local authorities from liability.¹⁴ Among the areas of liability in negligence which have expanded considerably since *Donoghue v Stevenson*¹⁵ can be included liability for negligently inflicted psychiatric injury.¹⁶

Concerns have been expressed that this “imperial march” poses a threat to the ongoing health of the commercial insurance industry, and that the availability of insurance has widened liability further than is socially useful and made awards of compensation higher than is economically sustainable.¹⁷ At around the turn of the 20th century, a public debate commenced in Australia regarding the threat posed to the health of insurance markets – and in turn the functioning of Australian society – by the ever-expanding law of negligence in the context of significant rises in liability insurance premiums.¹⁸ Significantly impacting upon this debate was the collapse in 2001 of Heath International Holdings (HIH), the largest personal injury indemnity insurer in Australia, which resulted in the Australian government intervening to underwrite HIH’s obligations.¹⁹ Medical protection organisation United Medical Protection was also close to collapse at this time, forcing the Australian government to guarantee its debts and liabilities.²⁰

One of the perceptions commonly expressed in the media at this time was that the unpredictability of the common law of negligence was leading to huge increases in insurance premiums, and that public liability insurance was consequently becoming less affordable.²¹ Fears surrounding the economic effect of a widening ambit of liability included the concern that if the common law was not limited in some way, the number and size of claims of negligence would reach such a level as to make the provision of insurance totally uneconomic. Of particular concern was that this would in turn lead to insurance becoming unavailable in relation to many activities, potentially threatening the core of Australian society.²² This perceived problem provided the political impetus for the Australian government to investigate measures to consider restrict liability in negligence.²³

¹⁴ See *Brodie v Singleton Shire Council* (2001) 206 CLR 512; [2001] HCA 29. See Peter Underwood, “Is Mrs Donoghue’s Snail in Mortal Peril?” (2004) 12 *Torts Law Journal* 39, 47–49.

¹⁵ *Donoghue v Stevenson* [1932] AC 562.

¹⁶ See *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383; *Jaensch v Coffey* (1984) 155 CLR 549; *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35.

¹⁷ Spigelman, n 6, 432, 433. The Hon JJ Spigelman, the then Chief Justice of New South Wales writing extra-judicially in 2002, posited the following potential answer to the question of why this might be, stating: “Judges may have proven more reluctant to make findings of negligence, if they knew that the consequence was likely to be to bankrupt the defendant and deprive him or her of the family home.” It is for this reason that Spigelman describes the law of negligence as “the last outpost of the welfare state”. Spigelman, n 6, 432, 432. Also see Danuta Mendelson, “Economic Impact of *Wicks v State Rail Authority* (NSW)” (2010) 18 *JLM* 221, 237.

¹⁸ See, eg, Des Butler, “A Comparison of the Adoption of the Ipp Report Recommendations and Other Personal Injuries Liability Reforms” (2005) 13 *Torts Law Journal* 203, 203–204; Peter Handford, *Mullany and Handford’s Tort Liability for Psychiatric Damage* (Lawbook Co, 2nd ed, 2006) 427; Des Butler, *Damages for Psychiatric Injuries*, (Federation Press, Sydney, 2004); Des Butler, “Gifford v Strang and the New Landscape for Landscape for Recovery for Psychiatric Injury in Australia” (2004) 12 *Torts Law Journal* 1, 13–14; Danuta Mendelson, “The Modern Australian Law of Mental Harm: Parochialism Triumphant” (2005) 13 *JLM* 164, 169–170.

¹⁹ See Underwood, n 14, 39, 41–42.

²⁰ Underwood, n 14.

²¹ This was recognised in the Ipp Panel’s final report into the law of negligence: see Introduction, Commonwealth of Australia, *Review of the Law of Negligence Report* (2 October 2002) 25 (Ipp Report). Also see Danuta Mendelson, “Psychiatric Injury Law in England and Australia – Drawing Closer Together?” (2007) 17 *JLM* 176.

²² These included professional activities, particularly those related to the medical profession. In 2000, the President of the Australian Medical Association Dr Kerryn Phelps expressed concern about the effect of the law of negligence on the medical profession, claiming that many obstetricians were leaving obstetrics because they were imposed with unduly burdensome insurance premiums. Similar claims were made in the media that neurosurgeons were leaving that speciality. There were reports also of this issue affecting many desirable social and cultural activities. Of particular concern was that the cost of insurance premiums had risen to such an extent that local authorities could no longer afford to stage many longstanding community activities, such as fetes and blue light discos: see Underwood, n 14, 39, 39–42.

²³ For further discussion of this social and political context, see JJ Spigelman, “Negligence and Insurance Premiums: Recent Changes in Australian Law” (2003) *Bar News: The Journal of the NSW Bar Association* 10, 10–12; Underwood, n 14, 39, 39–42; David Ipp, “The Politics, Purpose and Reform of the Law of Negligence” (2007) 81 *ALJ* 456; Danuta Mendelson, “Defendants’ Liability for Pure Mental Harm to Third Parties in Australia: Still a Work in Progress” (2009) 17 *JLM* 165.

Ipp Report and Civil Liability Legislation

Against this background, in 2002 the Honourable David Ipp²⁴ was appointed chairperson of a panel of experts which was asked to examine methods for the reform of the common law in order to limit liability in negligence.²⁵ The Terms of Reference for the panel explicitly referenced concerns that damages in negligence were becoming unaffordable and that it was accordingly desirable to examine methods to limit the common law.²⁶ In its final report,²⁷ the panel recommended a number of significant changes to the law of negligence, including amendments relating to limitations of actions, foreseeability, standard of care, remoteness of damage, contributory negligence, assumption of risk, duties of protection, non-delegable duties, vicarious liability, proportionate liability and damages.²⁸ In relation to claims of negligently inflicted psychiatric injury, the panel effectively recommended legislative enactment of the common law principles as stated by the High Court in *Tame v New South Wales (Tame and Annetts)*,²⁹ outlining a number of principles in Recommendation 34 of its final report.³⁰ As a result of the Ipp Report, Western Australia, New South Wales, Victoria, the Australian Capital Territory, South Australia and Tasmania enacted civil liability legislation affecting claims relating to pure psychiatric injury.³¹ Legislation was also enacted in Queensland and the Northern Territory, although the common law still governs claims in these jurisdictions as this legislation did not affect claims for mental harm.³²

²⁴ At the time the report was released, the Honourable David Ipp was Acting Judge of the Court of Appeal, Supreme Court of New South Wales, and Justice of the Supreme Court Western Australia.

²⁵ See Terms of Reference, Ipp Report, n 21. Other panel members were Professor Peter Cane, Professor of Law in the Research School of Social Sciences at the Australian National University (currently Director of Research ANU College of Law), Associate Professor Donald Sheldon, Surgeon and Chairman of the Council of Procedural Specialists, and Mr Ian Macintosh, Mayor of Bathurst City Council in New South Wales and Chairman of the New South Wales Country Mayors Association. For a critical analysis of the circumstances leading to the political pressure to undertake such an examination of the law of negligence, see Underwood, n 14, 39.

²⁶ The Terms of Reference stated: “[T]he award of damages for personal injury has become unaffordable and unsustainable as the principle source of compensation for those injured through the fault of another.” Consequently, it was “desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death”. The Terms consequently required the panel to “Develop and evaluate principled options to limit liability and quantum” in relation to a wide range of areas of liability affecting the law of negligence: Terms of Reference, Ipp Report, n 21, ix. This came out of a Ministerial Meeting on Public Liability held on 30 May 2002 in which Ministers from the Commonwealth, as well as state and territory governments discussed “public concerns about the cost and availability of public liability insurance”. Following this meeting, the Ministers released a communiqué which included the comment that the “unpredictability in the interpretation of the law of negligence is a factor driving up [insurance] premiums”: Terms of Reference, Ipp Report, n 21, 25.

²⁷ Commonly referred to as the “Ipp Report”.

²⁸ See List of Recommendations, Ipp Report, n 21, 1–24.

²⁹ *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35 (*Tame and Annetts*). Although not explicitly stated in the Ipp Report, it seems reasonable to presume that the panel regarded legislative enactment of the principles in *Tame and Annetts* as likely to result in the prevention of further expansion of the ambit of liability.

³⁰ Ipp Report, n 21, 135–146. The Ipp Panel’s outline of the common law principles laid down by the High Court in *Tame v New South Wales (Tame and Annetts)* and the principles actually enunciated by the High Court in that case differ in some respects. The Ipp Panel regarded “normal fortitude” as an independent requirement for a duty of care to be owed, whereas the High Court in *Tame and Annetts* regarded this as merely as one of a number of factors to be taken into consideration in relation to the overriding question of reasonable foreseeability: see *Tame v New South Wales* (2002) 211 CLR 317, 333 [16] (Gleeson CJ), 343 [61] (Gaudron J), 385 [201] (Gummow and Kirby JJ); [2002] HCA 35. The Ipp Panel’s view that the claimant was required to suffer a “recognised psychiatric illness” was also narrower than the High Court’s epithet of “recognisable psychiatric illness”: *Tame v New South Wales* (2002) 211 CLR 317, [7] (Gleeson CJ), [44] (Gaudron J), [193] (Gummow and Kirby JJ), [261], [285] (Hayne J); [2002] HCA 35. For further discussion in relation to this point, see Butler, “Gifford v Strang and the New Landscape for Landscape for Recovery for Psychiatric Injury in Australia”, n 18, 1, 16–17; Peter Handford, “Psychiatric Injury – The New Era” (2003) 11 Tort L Rev 1, 13; Peter Handford, “Limiting Liability for Mental Harm: Back to the Future?” (2010) 18 Tort L Rev 5.

³¹ See *Civil Liability Act 2002* (WA); *Civil Liability Act 2002* (NSW); *Wrongs Act 1958* (Vic); *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 1936* (SA); *Civil Liability Act 2002* (Tas).

³² See *Civil Liability Act 2003* (Qld); *Personal Injuries (Liability and Damages) Act 2003* (NT).

Wicks v State Rail Authority (NSW)

The Australian High Court first considered the civil liability legislation in relation to a claim for pure psychiatric injury in negligence in *Wicks v State Rail Authority (NSW) (Wicks)*.³³ *Wicks* involved claims by two policemen of New South Wales who, after a train derailment in New South Wales in 2003, attended the accident scene to provide assistance. As a result of the accident, seven people were killed and many others were seriously injured. The claimants, policemen who attended the accident scene as part of their employment, stayed there for many hours assisting with the rescue, being exposed in the process to the horrific injuries and deaths of many victims.³⁴ At issue in *Wicks* was the interpretation of s 30 of the *Civil Liability Act 2002* (NSW) which applies to claimants suffering pure mental harm “in connection with another person (the victim) being killed, injured or put in peril by the act or omission of the defendant”.³⁵ In particular, s 30 restricts liability to only those claims in relation to which the claimant can establish that he or she “witnessed, at the scene, the victim being killed, injured or put in peril”,³⁶ or “is a close member of the family of the victim”.³⁷ Given that the claimants were not close family members of any of the victims of the disaster, liability in *Wicks* turned on whether they could establish that they had “witnessed, at the scene” and victims “being killed, injured or put in peril” as required by s 30(2)(a).

The High Court held that the phrase should be interpreted according to its common meaning; that is, “a person is put in peril when put at risk; the person remains in peril (is ‘being put in peril’) until the person ceases to be at risk”.³⁸ As such, this included not only an accident-causing event itself, but also events which occurred after that initial event, during which the perils to which the victims were exposed were continuing.³⁹ The High Court made the inference that some of the accident victims suffered further physical and psychiatric injuries during the process of being rescued, and that therefore, the claimants likely witnessed victims of the accident “being injured”. As such, the claimants were able to satisfy s 30.⁴⁰

Economic Concerns about the Decision in Wicks

Concerns have been raised about the High Court’s interpretation of the NSW legislation in *Wicks*, partly on the basis that the decision risks leading to indeterminate liability in relation to “rescuers”. In particular, Professor Mendelson has argued that the decision in *Wicks* threatens the goal of protecting the health of insurance markets underpinning the civil liability legislation, and as such, may be economically unsustainable and a threat to social welfare.⁴¹ The basis of this contention is that the decision leaves the law open – and perhaps even indeterminate – in relation to the category of “rescuers”, which makes the

³³ *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60; [2010] HCA 22.

³⁴ *Wicks* and Sheehan pleaded that their injuries consisted of “psychological and psychiatric injuries, post-traumatic stress syndrome, nervous shock and major depressive disorder”: see *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60, 67 [6]; [2010] HCA 22.

³⁵ *Civil Liability Act 2002* (NSW) s 30(1).

³⁶ *Civil Liability Act 2002* (NSW) s 30(2)(a).

³⁷ *Civil Liability Act 2002* (NSW) s 30(2)(b).

³⁸ See *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60, 77 [50]; [2010] HCA 22. The evidence in the case indicated that while some victims had died as a result of the accident, others had survived, and that upon reaching the area of the accident, the claimants participated in the rescue of those survivors: *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60, 77 [52]; [2010] HCA 22.

³⁹ See *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60, 76 [44]–[45]; [2010] HCA 22. One of the arguments advanced by the State Rail Authority in this case was that the word “being” required that the plaintiff witness an unfolding event that resulted in the death, injury or peril of another person. The State Rail Authority argued that the claimants only witnessed people who were no longer being killed, injured or put in peril, and therefore, that this was not sufficient to satisfy the *Civil Liability Act 2002* (NSW) s 30(2)(a).

⁴⁰ *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60, 75 [40], 76 [46]–[48]; [2010] HCA 22. This construction of the NSW legislation has been described by Mendelson as expansive: see Mendelson, n 17, 221, 229.

⁴¹ See generally Mendelson, n 17, 221.

provision of insurance in relation to such potential claimants uneconomic. Underpinning this argument is the contention that professional insurers are in a better position than individuals to manage risk, and can do so with lower cost than if individuals self-insured.⁴² It is on this basis that it is contended that healthy insurance markets increase wealth and improve resource allocation in society.⁴³ One of the sources of the professional insurer's advantage is using knowledge gained from considering large numbers of types of risk, and arranging these into efficient risk pools.⁴⁴

Taking this into consideration, the expansion of liability in negligence gives rise to a corresponding increase in the burden upon insurers to ultimately pay for the negligence of their insured customers.⁴⁵ This is not a particular problem in relation to risks which are predictable, simply being taken into account by insurers in their risk-pooling calculations and then passed onto their insured customers through premiums which take into account this potential increase in liability.⁴⁶ However, where the expansion in liability relates to risks are *not* predictable, this threatens the insurer's advantage. Unpredictable risks are either impossible or prohibitively expensive for insurers to consider covering in their risk-pooling calculations.⁴⁷ According to this argument, the result of this is a misallocation of resources and the destruction of societal wealth.⁴⁸ One potential solution to this situation is to make insurance for particular activities subject to compulsory insurance schemes. However, where these particular activities relate to unpredictable risks, this will simply require insurers to offer insurance sub-optimally, again leading to a range of economically undesirable outcomes.⁴⁹ Ultimately, this may well result in the costs to insurers increasing, leading to an increase in the chances of insurers becoming insolvent. The argument here is that this will itself potentially have a further negative effect on other insurers, and potentially on governments if they are forced to ultimately supply insurance.⁵⁰

King v Philcox

With these arguments in mind, it is important to consider the second case to come before the High Court concerning a claim for pure psychiatric injury pursuant to the civil liability legislation, namely *King*.⁵¹ *King* is a South Australian case in which the claimant suffered psychiatric injury as a result of the death of his brother in a car accident. The claimant's brother was a passenger in a car being driven by the defendant, and was killed when the vehicle was involved in an accident with another vehicle. The claimant was informed of the accident a few hours afterwards, and he realised he had earlier seen the vehicle in which his brother had died, having driven past the scene of the accident a number of times earlier in the day. This brought with it the distressing realisation that his brother was still trapped inside the car dying when he drove past it. A few hours after the accident, the claimant went to the scene of the accident and spent, by his own estimation, a few hours there.⁵² It was recognised by the High Court that

⁴² Mendelson, n 17.

⁴³ Mendelson, n 17, 231–234.

⁴⁴ Mendelson, n 17, 234–235.

⁴⁵ Mendelson, n 17, 235.

⁴⁶ Mendelson, n 17, 235–236.

⁴⁷ Mendelson, n 17.

⁴⁸ Mendelson, n 17, 237.

⁴⁹ These include increases in the total cost and amount of precautions to defendants, increases in expected damages, upward pressure on third-party insurance premiums, upward pressure on first-party insurance premiums, higher insurance premium costs of those insured being passed on to customers, increases in reinsurance premiums and some first-party insurers leaving insurance pools, either voluntarily or from being forced out: Mendelson, n 17, 221, 235–236.

⁵⁰ Mendelson, n 17.

⁵¹ *King v Philcox* (2015) 255 CLR 304; [2015] HCA 19.

⁵² The claimant consequently suffered a recognisable psychiatric illness in the form of “a major depressive disorder with significant anxiety-related components of a post-trauma stress reaction”: *King v Philcox* (2015) 255 CLR 304, 331 [63] (Nettle J); [2015] HCA 19.

the claimant was owed a duty at common law and pursuant to s 33 of the South Australian legislation.⁵³ Implicit in this decision was the view that sibling relationships would be sufficient, in principle, to support a finding of duty. However, the court found against the claimant on the grounds that he could not satisfy the additional limitations on liability in the South Australian legislation.⁵⁴

The outcome of this case turned on the interpretation of the additional limitations provisions in s 53(1) of the South Australian Act.⁵⁵ In particular, in addition to having to satisfy s 33, the provisions in s 53 required the claimant to have been “physically injured in the accident or ... present at the scene of the accident when the accident occurred”,⁵⁶ or to be “a parent, spouse, domestic partner or child of the person killed, injured or endangered in the accident”.⁵⁷ As the relationship of siblings was not included in the list of relationships in s 53(1)(b), and the claimant was not physically injured in the accident, he was required to establish that he was present at the scene of the accident when the accident occurred for the purposes of s 53(1)(a).

The claimant argued that his actions in driving past the accident site a number of times and then spending a few hours there later in the evening after the accident were sufficient to satisfy s 53(1)(a). Key to this issue was whether the definition of the term “accident” in s 3 of the South Australian legislation – meaning “an incident out of which personal injury arises and includes a motor accident” – was limited in space and time to the immediate point of impact in this case between the vehicles involved, or whether it included the common law’s extension of liability in *Jaensch v Coffey*.⁵⁸ If the narrower meaning of the term “accident” was preferred, the claimant could not satisfy s 53(1)(a).

The High Court ultimately adopted the narrower interpretation and denied liability.⁵⁹ In coming to this decision, French CJ, Kiefel and Gageler JJ considered the legislative history of the *Civil Liability Act 1936* (SA), in particular the precursor to ss 53 and 35A(1)(c) of the *Wrongs Act 1936* (SA). Their Honours remarked that this history indicated that s 35A(1)(c) was inserted into the Act in 1986⁶⁰ following the South Australian Supreme Court’s decision in *Coffey v Jaensch*⁶¹ in order to limit further expansion of the ambit of liability.⁶² Nettle J was also of the view that a motor accident occurred at the point of collision between the vehicles concerned, and did not include anything after that moment.⁶³ On a similar

⁵³ *King v Philcox* (2015) 255 CLR 304, 322 [29] (French CJ, Keifel and Gageler JJ), 323 [32] (Keane J), 340 [91] (Nettle J); [2015] HCA 19.

⁵⁴ *King v Philcox* (2015) 255 CLR 304, 319 [21] (French CJ, Kiefel and Gageler JJ), 323–324 [32]–[34] (Keane J), 346 [12]–[14] (Nettle J); [2015] HCA 19.

⁵⁵ *Civil Liability Act 1936* (SA).

⁵⁶ *Civil Liability Act 1936* (SA) s 53(1)(a).

⁵⁷ *Civil Liability Act 1936* (SA) s 53(1)(b).

⁵⁸ *Jaensch v Coffey* (1984) 155 CLR 549.

⁵⁹ *Jaensch v Coffey* (1984) 155 CLR 549, 319 [21] (French CJ, Kiefel and Gageler JJ), 323–324 [32]–[34] (Keane J), 146 [12]–[14] (Nettle J). In support of this conclusion, their Honours referred to the judgment of the New South Wales Court of Appeal in *Hoinville-Wiggins v Connelly* (1999) 29 MVR 169; [1999] NSWCA 263 in which the court considered the meaning of the same words in the *Motor Accidents Act 1988* (NSW) s 77(a)(ii) and found that coming to accident after it had occurred was not sufficient: *Jaensch v Coffey* (1984) 155 CLR 549, [23] (French CJ, Kiefel and Gageler JJ), [34]–[36] (Keane J). Their Honours further noted the comments of Miles CJ in *Spence v Biscotti* (1999) 151 FLR 350; [1999] ACTSC 70 in considering the meaning of these words. Miles CJ stated that these words required the claimant to satisfy “a spatial and temporal test, present at that place, the scene, when the event, the accident, occurred”: *Jaensch v Coffey* (1984) 155 CLR 549, [31] (French CJ, Kiefel and Gageler JJ), [34]–[36] (Keane J).

⁶⁰ By the *Wrongs Act Amendment Act 1986* (SA).

⁶¹ *Coffey v Jaensch* (1983) 33 SASR 254, 279.

⁶² This was clear from a reading of the text of the legislation, as well as from considering the second reading speech of the South Australia Attorney-General in introducing the bill into Parliament. In his second reading speech, the Attorney-General noted that the purpose of s 35A(1)(c) was “to prevent and further expansion of this head of damage”: South Australia, *Parliamentary Debate*, Legislative Council, 27 November 1986, 2410, cited in *King v Philcox* (2015) 255 CLR 304, 316–317 [16] (French CJ, Kiefel and Gageler JJ); [2015] HCA 19.

⁶³ *King v Philcox* (2015) 255 CLR 304, 346 [112]. Nettle J was of the view that the common law distinction between the accident and its immediate aftermath pointed to the conclusion that s 3 would have explicitly included the immediate aftermath if it was the intention of the legislature to include it: *King v Philcox* (2015) 255 CLR 304, 346 [14].

basis, Keane J ultimately found that the claimant could not satisfy s 53(1)(a) because he had not been “directly exposed to the sights and sounds of the accident”.⁶⁴

While *Wicks* caused some concern that the High Court may in the future interpret the civil liability legislation in such an expansive manner as to undermine the state and territory parliaments’ intentions in enacting their various civil liability regimes, the decision in *King* may well assuage this unease. There is some reason to suggest that the claimant may have succeeded at common law. The decision in *Jaensch v Coffey*⁶⁵ provides some support for the contention that the claimant’s perception of the accident scene may have been sufficient to justify a finding that psychiatric injury to him was reasonably foreseeable. Moreover, in another case decided according to the common law prior to the enactment of the civil liability legislation in South Australia, siblings of a 14 years old who died as a result of the defendant hospital’s negligent treatment were found to be owed a duty of care.⁶⁶ The High Court arguably adopted a more conservative approach to statutory construction in *King* than it had in *Wicks* and came to a decision which, in taking a view of the ambit of liability which was arguably narrower than may well have been the case at common law, appeared to give effect to the underlying purpose of the legislation.

LACK OF CONSISTENCY BETWEEN JURISDICTIONS

Having argued this, I would like to argue that there is a significant issue with respect to the civil liability legislation itself which potentially poses a serious threat to the health of insurance markets and consequently to societal wealth. This relates to the lack of consistency in the form of the restrictions on liability in relation to pure mental harm from jurisdiction to jurisdiction, which, it will be argued, impedes the ability of the legislation to achieve its apparent goals. To understand the extent of the problem, the various pieces of legislation must be considered. This is done below, beginning with the legislation which in many ways is broadly consistent with the decisions in *Tame and Annetts*, followed by the legislation which generally is not. The first category, which includes the WA and ACT Acts, largely reflects Recommendation 34 of the Ipp Report. The second, which includes the New South Wales, Victorian, South Australian and Tasmanian legislation, introduces additional limitations on liability which go beyond those recommended in the Ipp recommendations. It will be shown that far from bringing about a consistent national approach to such claims – one of the aims of the law identified in the Ipp Report⁶⁷ – the civil liability legislation has resulted in considerable variation between the jurisdictions, a problem likely to lead to the law becoming more fractured and inconsistent over time.⁶⁸

Western Australian and Australian Capital Territory Legislation

The *Civil Liability Act 2002* (WA) and the *Civil Law (Wrongs) Act 2002* (ACT) are largely identical,⁶⁹ and substantially reflect Recommendations 34(b) and (c) of the Ipp Report. Section 5S(1) of the *Civil Liability Act 2002* (WA) provides:

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 harm⁷⁰ unless the defendant ought to have foreseen that a person of normal

⁶⁴ *King v Philcox* (2015) 255 CLR 304, 330 [52]. His Honour did not regard spatial limits on recovery as arbitrary, considering the requirement of presence as “an intelligible legislative choice to limit the extent of liability”, this being “an informed and rational response to issues thrown up by the case law as to where the law should best draw the line to limit indeterminate liability and unreasonable or disproportionate burdens upon defendants”: *King v Philcox* (2015) 255 CLR 304, 328 [49].

⁶⁵ *Jaensch v Coffey* (1984) 155 CLR 549.

⁶⁶ See *Kemp v Lyell McEwin Health Service* (2006) 96 SASR 192, 200 [17] (DeBelle J); [2006] SASC 364.

⁶⁷ See Ipp Report, n 21, 26 [1.8].

⁶⁸ See, eg, Mendelson, n 18, 164, 169–172.

⁶⁹ The only difference between the two pieces of legislation is that the *Civil Law (Wrongs) Act 2002* (ACT) uses of the word “danger” in s 34(2)(b), (c) instead of the word “peril”, as used in the *Civil Liability Act 2002* (WA) s 5S(2)(c). This arguably does not change the meaning in any significant way.

⁷⁰ The term “mental harm” is defined in the *Civil Liability Act 2002* (WA) s 5Q to mean “impairment of a person’s mental condition”. The definition of this term is the same in s 32 of the Australian Capital Territory legislation.

fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.⁷¹

Section 5S(2) reflects Recommendation 34(c), providing:

- (1) For the purpose 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; and
 - (d) whether or not there was a pre-existing relationship between the plaintiff and the defendant.⁷²

The only difference of any note between the Ipp Panel’s recommendations and these provisions is that s 5S(2)(b) of the *Civil Liability Act 2002* (WA)⁷³ is a combination of Recommendations 34(c)(ii)⁷⁴ and (iii).⁷⁵ The combination of these two recommendations into one provision has effectively removed the consideration of whether the plaintiff witnessed the “aftermath” of a shocking event. The Australian Capital Territory took the same approach by combining Recommendations 34(c)(ii) and (iii) into a single consideration in s 34(2)(b) of the *Civil Law (Wrongs) Act 2002* (ACT).

The WA and ACT legislation superficially mirrors the common law position outlined in *Tame and Annetts*, as it places the test of reasonable foreseeability as the overriding test of duty, informed by a number of considerations considered relevant in these cases. However, this legislation is narrower than the common law in three separate respects. The first is that the normal fortitude rule appears to be an independent requirement in s 5S(1) of the WA legislation and in s 34(1) of the ACT legislation.⁷⁶ The second is the removal of the consideration of whether the plaintiff witnessed the “aftermath” of a shocking event in s 5S(2)(b) of the WA legislation and in s 34(2)(b) of the ACT legislation.⁷⁷ By removing this consideration, the legislation has the potential to limit liability in time and in space to the scene of the accident in cases where the claimant cannot satisfy one of the remaining considerations. If this interpretation is correct, this is a significant contraction of the ambit of liability when compared to the common law.⁷⁸

The third is the requirement in s 5S(1) of the WA Act and s 34(1) of the ACT Act that the claimant suffer a “recognised psychiatric illness” as opposed to a “recognisable psychiatric illness”.⁷⁹ The difference, while apparently small, is anything but. Scientific understandings of psychiatric disorders are still progressing rapidly, and the requirement for a recognised psychiatric illness locks claimants into historical understandings of psychiatric disorders. Pursuant to this definition, a claimant could suffer a psychiatric condition which expert psychiatric opinion might regard as a psychiatric condition but

⁷¹ *Civil Liability Act 2002* (WA) s 5S(1). The equivalent in the Australian Capital Territory legislation is *Civil Law (Wrongs) Act 2002* (ACT) s 34(1).

⁷² *Civil Liability Act 2002* (WA) s 5S(2). The Australian Capital Territory legislation equivalent is *Civil Law (Wrongs) Act 2002* (ACT) s 34(2).

⁷³ Namely, “whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril”.

⁷⁴ Namely, “whether the plaintiff was at the scene of shocking events, or witnessed them or their aftermath”.

⁷⁵ Namely, “whether the plaintiff witnessed the events or their aftermath with his or her own unaided senses”. New South Wales was the first jurisdiction to adopt this approach, with the other four States and Territories who chose this approach choosing to do so for the sake of uniformity following a Ministerial meeting in November 2002: see Handford, “Limiting Liability for Mental Harm” n 30, 5, 5.

⁷⁶ This follows Recommendation 34 of the Ipp Report, n 21.

⁷⁷ This is more restrictive than Recommendation 34 of the Ipp Report, which refers to the aftermath of an event.

⁷⁸ This omission may effectively remove the extension of liability resulting from the High Court’s decision in *Jaensch v Coffey* (1984) 155 CLR 549.

⁷⁹ This follows Recommendation 34 of the Ipp Report, n 21.

which had not yet been formally identified, and in this case fail to satisfy the requirement of recognised psychiatric illness.⁸⁰

New South Wales, Victorian, South Australian and Tasmanian Legislation

The legislation in New South Wales, Victoria, South Australia and Tasmania contains the restrictions mentioned above, but also contains further limitations on liability which do not reflect the common law position outlined in *Tame and Annetts*. For example, s 32(1) and (2) of the *Civil Liability Act 2002* (NSW) is similar to s 5S(1) and (2) of the WA legislation and s 34(1) and (2) of the ACT legislation. However, the NSW legislation contains additional limitations on liability in s 30, the subject of consideration in *Wicks*. Applying to claims arising out of the injury or death of third parties,⁸¹ the additional restrictions on liability in s 30 restrict liability to only those in which “the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril”,⁸² or in which “the plaintiff is a close member of the family of the victim”.⁸³ A “close member of the family of a victim” is defined in s 30(5) to mean parents,⁸⁴ spouses,⁸⁵ children⁸⁶ and siblings.⁸⁷ The ability to appreciate the risk of psychiatric injury to loved ones does not, in reality, restrict itself to the categories of loved ones outlined in the *NSW Act*. Thus, in addition to the arbitrary and unprincipled restrictions on liability contained in the WA and ACT legislation, the New South Wales also imposes further relationship category restrictions.

Like the NSW legislation, the *Wrongs Act 1958* (Vic) imposes additional limitations on liability in s 73. These are worded almost identically to those contained in the NSW legislation, with one point of variation.⁸⁸ While the NSW legislation denies recovery unless the plaintiff is a “close member of the family of the victim”, the Victorian legislation denies recovery unless the plaintiff is or was in a “close relationship with the victim”.⁸⁹ While the NSW legislation defines the term “close member of the family of the victim”, the Victorian legislation leaves the term “close relationship with the victim” undefined and open to interpretation by the courts.⁹⁰

The Victorian legislation arguably opens the category up to include those in a close relationship but who are not in one of the relationship categories outlined in the NSW legislation. Thus, the Victorian legislation may therefore apply to family members such as aunts, uncles and cousins of the victim. It may also apply to those who are not members of the victim’s family, such as close friends, as long as sufficient closeness of the relationship can be established. The Victorian Act also arguably narrows the category to those who might be in the same family as the victim, but who are perhaps not in a close relationship, for

⁸⁰ For further discussion of the significance of the distinction between the legal formulae “recognisable psychiatric illness” and “recognised psychiatric illness”, see Butler, “Gifford v Strang and the New Landscape for Landscape for Recovery for Psychiatric Injury in Australia” n 18, 1, 16; Butler, *Damages for Psychiatric Injuries*, n 18, 126; Handford, n 18, 35–38; Handford, “Psychiatric Injury” n 30, 1, 13, 23–24; Mendelson, n 21, 176, 189–190.

⁸¹ The limitations in *Civil Liability Act 2002* (NSW) s 30(1) apply to claims “arising wholly or partly from mental or nervous shock in connection with another person ... being killed, injured or put in peril by the act or omission of the defendant”.

⁸² *Civil Liability Act 2002* (NSW) s 30(2)(a).

⁸³ *Civil Liability Act 2002* (NSW) s 30(2)(b).

⁸⁴ *Civil Liability Act 2002* (NSW) s 30(5)(a). This also includes “other persons with parental responsibility for the victim”.

⁸⁵ *Civil Liability Act 2002* (NSW) s 30(5)(b). This also includes a “partner of the victim”. “Spouse or partner” is further defined in s 30(5) as “(1) a husband or wife”, or “(2) a de facto partner”, “but where more than one person would so qualify as a spouse or partner, means only the last person to so qualify”.

⁸⁶ *Civil Liability Act 2002* (NSW) s 30(5)(c). This also includes a “stepchild of the victim or any other person for whom the victim has parental responsibility”.

⁸⁷ *Civil Liability Act 2002* (NSW) s 30(5)(d). This includes brothers, sisters, half-brothers, half-sisters, stepbrothers and stepsisters of the victim.

⁸⁸ See *Wrongs Act 1958* (Vic) s 72; compare *Civil Liability Act 2002* (NSW) s 30.

⁸⁹ See *Wrongs Act 1958* (Vic) s 72; compare *Civil Liability Act 2002* (NSW) s 30.

⁹⁰ See Butler, “Gifford v Strang and the New Landscape for Landscape for Recovery for Psychiatric Injury in Australia”, n 18, 1, 18.

example, those family members who perhaps are estranged. In these circumstances, despite being able to satisfy one of the relationship categories, harm to the claimant may not be appreciable because the parties may not have been in a particularly close relationship. Thus, the Victorian and the NSW Acts vary in relation to those who may be able to satisfy the relevant relationship provisions.

The South Australian legislation also contains additional limitations on liability, but unlike the additional limitation provisions in the NSW and Victorian legislation, the provisions in the *Civil Liability Act 1936* (SA) apply to all cases of mental harm, rather than only to claims arising from injury or death to a third party.⁹¹ The additional limitation provisions in the South Australian legislation also differ to the other jurisdictions in two further respects. The first is that the South Australian legislation only requires that the claimant be “present” at the scene of the accident at the time of the accident, rather than that they “witness” the victim being killed, injured or put in peril, as required by the NSW and Victorian legislation.⁹² The second respect in which additional limitation provisions in the South Australian Act differ from the other jurisdictions is that the South Australian legislation allows recovery where the claimant is “a parent, spouse, domestic partner or child of a person killed, injured or endangered in [an] accident”.⁹³

The legislation separately defines each of these relationships: “child” is defined to include, “son, daughter, grandson, granddaughter, stepson and stepdaughter”; “domestic partner” is defined to mean “a person declared under the *Family Relationships Act 1975* (SA) to have been a domestic partner on the day on which the cause of action arose”; “parent” is defined to include “father, mother, grandfather, grandmother, stepfather and stepmother”; and “spouse” to mean “a person who was legally married to another on the day on which the cause of action arose”.⁹⁴ Thus, the range of relationships in the South Australian legislation is arguably narrower than the NSW legislation, and potentially also the Victorian legislation. The South Australian Act focuses on a narrow interpretation of the nuclear family, barring claims of siblings, be they natural or step, as well as aunts, uncles and cousins.

While the Tasmanian legislation contemplates recovery when the claimant witnessed the immediate aftermath of an accident,⁹⁵ the *Civil Liability Act 2002* (Tas) includes a smaller list of “circumstances of the case” to be considered in relation to the test of reasonable foresight than the other Acts, only including “whether or not the mental harm was suffered as the result of a sudden shock”⁹⁶ and “whether or not there was a pre-existing relationship between the plaintiff and the defendant”.⁹⁷ In addition, the *Civil Liability Act 2002* (Tas) also contains additional limitations on recovery similar to those contained in the NSW and Victorian legislation.⁹⁸

The inconsistency of the various regimes can be demonstrated well by considering how a case such as *King*⁹⁹ would likely be treated under each. If the claimant in *King* had a reasonable prospect of success pursuant to the common law,¹⁰⁰ a claimant in this position may have had reasonable prospects of success

⁹¹ *Civil Liability Act 1936* (SA) s 53(1).

⁹² See *Civil Liability Act 1936* (SA) s 53(1)(a); compare *Civil Liability Act 2002* (NSW) s 30(2)(a); *Wrongs Act 1958* (Vic) s 73(2)(a); *Civil Liability Act 2002* (Tas) s 32(2)(a).

⁹³ *Civil Liability Act 1936* (SA) s 53(1)(b).

⁹⁴ See *Civil Liability Act 1936* (SA) s 3. These additional limitations were both in issue in *King v Philcox* (2015) 255 CLR 304; [2015] HCA 19, discussed above.

⁹⁵ See *Civil Liability Act 2002* (Tas) s 32(2)(a); compare *Civil Liability Act 2002* (NSW) s 30(2)(a); *Wrongs Act 1958* (Vic) s 73(2)(a).

⁹⁶ *Civil Liability Act 2002* (Tas) s 34(2)(a).

⁹⁷ *Civil Liability Act 2002* (Tas) s 34(2)(b).

⁹⁸ *Civil Liability Act 2002* (Tas) s 32(2).

⁹⁹ *King v Philcox* (2015) 255 CLR 304; [2015] HCA 19.

¹⁰⁰ This argument seems to be reasonable in light of the common law authorities – particularly *Jaensch v Coffey* (1984) 155 CLR 549; *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35; *Kemp v Lyell McEwin Health Service* (2006) 96 SASR 192; [2006] SASC 364 – and also in light of the comments of the High Court itself in *King*: see *King v Philcox* (2015) 255 CLR 304, 322 [29] (French CJ, Keifel and Gagelar JJ), 323 [32] (Keane J), 340 [91] (Nettle J); [2015] HCA 19.

pursuant to the legislation in Western Australia and the Australian Capital Territory if such a claim was brought in either of these jurisdictions. While the WA and ACT legislation apparently both remove the “immediate aftermath” from the range of phenomena which the claimant can perceive in order to satisfy the legislation,¹⁰¹ the test of reasonable foreseeability of recognised psychiatric injury is still the overriding test in both regimes. This means that, unlike in relation to the South Australian legislation, the failure by a claimant to perceive the precise moment of a sibling’s death in a situation such as that in *King* is by no means certain to result in the failure of such a claim pursuant to the WA and ACT legislation.

There is further potential for inconsistent treatment between jurisdictions whose legislation contains additional limitation provisions in relation to at least two particular features of a case such as *King*. The first relates to the claimant’s physical proximity to the accident. Where the claimant cannot satisfy the relevant relationship provisions, the NSW and Victorian legislation require the claimant to have “witnessed, at the scene”, the victim being killed, injured or put in danger or peril.¹⁰² This is different to the South Australian legislation, which requires presence at the scene of the accident when the accident occurred.¹⁰³ What may turn on this inconsistency is not completely clear. However, the different form of these limitations at the very least opens up the possibility that a claimant in the position of *King* might be treated differently by the law in New South Wales and Victoria than a claimant in the same situation in South Australia. Adding further potential for inconsistent treatment between jurisdictions is the fact that while the Tasmanian legislation contains additional limitation provisions similar to those in New South Wales and Victoria, the Tasmanian legislation explicitly contemplates recovery when the claimant witnessed the immediate aftermath of an accident.¹⁰⁴

The second potential for inconsistent treatment between jurisdictions whose legislation contains additional limitation provisions relates to the particular relationship the claimant has with the victim where they cannot satisfy the physical proximity provisions. The NSW legislation and Tasmanian explicitly contemplate claims by siblings,¹⁰⁵ and while not explicitly included, the Victorian presumably allows for claims by siblings by allowing for claims by those in a “close relationship with the victim”.¹⁰⁶ By comparison, the South Australian legislation does not contemplate claims by siblings, only allowing recovery where the claimant is “a parent, spouse, domestic partner or child of a person killed, injured or endangered in [an] accident”.¹⁰⁷ Given the less restrictive relationship provisions in the New South Wales, Tasmanian and Victorian legislation, a claimant in these jurisdictions in a similar situation as the claimant in *King* would apparently have much better prospects for success in relation to a claim for pure mental harm than they would in South Australia.

These inconsistencies between jurisdictions are likely, in combination, to result in the law with respect to pure mental harm becoming more fractured and inconsistent over time as different courts apply the different provisions to new cases.¹⁰⁸ Consequently, it stands to reason that these inconsistencies potentially pose a serious threat to the insurer’s professional advantage – the ability to predict risk based on experience – which allows insurers to set premiums at economically efficient levels. The question must then be asked as to whether these inconsistencies are themselves a threat to the ongoing health of insurance markets in relation to claims involving pure psychiatric injury. And if this answer is answered

¹⁰¹ See *Civil Liability Act 2002* (WA) s 5S(2)(b); *Civil Law (Wrongs) Act 2002* (ACT) s 34(2)(b).

¹⁰² *Civil Liability Act 2002* (NSW) s 30(2)(a); *Wrongs Act 1958* (Vic) s 73(2)(a).

¹⁰³ *Civil Liability Act 1936* (SA) s 53(1)(a), (b).

¹⁰⁴ See *Civil Liability Act 2002* (Tas) s 32(2)(a); compare *Civil Liability Act 2002* (NSW) s 30(2)(a); *Wrongs Act 1958* (Vic) s 73(2)(a).

¹⁰⁵ *Civil Liability Act 2002* (NSW) s 30(5)(d). This includes brothers, sisters, half-brothers, half-sisters, stepbrothers and stepsisters of the victim. Also see *Civil Liability Act 2002* (Tas) s 32(3)(d), which includes the same relationships included in the NSW legislation.

¹⁰⁶ *Wrongs Act 1958* (Vic) s 73(2)(b).

¹⁰⁷ *Civil Liability Act 1936* (SA) s 53(1)(b).

¹⁰⁸ See, eg, Mendelson, n 23, 165.

in the affirmative, it should also be asked whether the civil liability legislation in its current form itself poses a threat to societal wealth.

ECONOMIC THEORIES OF NEGLIGENCE

I would also like to argue that there is another, more fundamental, reason why the civil liability legislation potentially poses a threat to societal wealth. This relates to the overall economic effects of the law of negligence beyond the effects on insurance markets, to society as a whole. In considering the potential economic effects of the law, it seems appropriate to re-examine some of the well-established economic principles that have previously been applied in relation to the law of negligence. It is in this context that an account of economic theories of the law of negligence is presented below.¹⁰⁹ This will begin with a general account of the core features of such theories, followed by a discussion of the threat posed by the civil liability legislation to the efficient management of risk across society as a whole.

Utility and Economic Efficiency

Application of economic theories to the functioning of law in society has become an important way of thinking about and analysing the law, not just in relation to the law of negligence, but in many other areas of law as well, such as contract and property law.¹¹⁰ Economic theories of negligence are not concerned with notions of “fairness” or “justice” in the law. Rather, these theories are utilitarian, in that they see the purpose of the law as serving the interests of society as a whole.¹¹¹ This is to be determined by examining the overall happiness and wellbeing of society in general, explained as the principle of the greatest happiness of the greatest number.¹¹² Economic theories of negligence are concerned with examining whether the law conforms with economic notions such as rationality, efficiency, optimality and how well the law serves to achieve wider social goals, such as wealth maximisation.¹¹³ Accordingly, theories of

¹⁰⁹ Examples of economic theories of negligence include the following: Steven Shavell, *Economic Analysis of Accident Law* (Harvard University Press, 1987); Guido Calabresi, “Some Thoughts on Risk Distribution and the Law of Torts” (1961) 70 *Yale Law Journal* 499; Guido Calabresi, “Does the Fault System Optimally Control Primary Accident Costs?” (1968) 33 *Law and Contemporary Problems* 429; Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970); Richard Posner, “A Theory of Negligence” (1972) 1 *Journal of Legal Studies* 29; Richard Posner, “The Concept of Corrective Justice in Recent Theories of Tort Law” (1981) 10 *Journal of Legal Studies* 187; William Landes and Richard Posner, *The Economic Structure of Tort Law* (Harvard University Press, 1987); Richard Posner, *Economic Analysis of Law* (Little, Brown, 4th ed, 1992); Richard Posner, “Wealth Maximization and Tort Law: A Philosophical Inquiry” in David Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press, 1995).

¹¹⁰ See, eg, Anthony Kronman and Richard Posner, *The Economics of Contract* (Little Brown, 1979); Bruce Ackerman, *The Economic Foundations of Property Law* (Little Brown, 1975); Shavell, n 109; Frank Easterbrook and Daniel Fischel, *The Economic Structure of Corporate Law* (1991). For further discussion of this point, see Michael Freeman, *Lloyd’s Introduction to Jurisprudence* (Sweet & Maxwell, 7th ed, 2001) 557.

¹¹¹ Stephen Perry, “Tort Law” in Dennis Patterson (ed), *Companion to the Philosophy of Law and Legal Theory* (Blackwell Publishers, 1996).

¹¹² See Freeman, n 110, 200. This principle, derived from the writings of Jeremy Bentham and later further developed by Oliver Wendell-Holmes, holds that the function of law is to serve human interests, namely the interest in wellbeing. Bentham and Holmes were the first to apply economics to laws regulating non-market behaviour, with writers such as James Barr Ames and Henry T Terry later extending this idea. The most important theorists to apply economic principles to the law of negligence are Ronald Coase, Guido Calabresi and Richard Posner, all of whom have made significant contributions to economic tort theory which are fundamentally utilitarian in nature: see Oliver Wendell-Holmes Jr, *The Common Law* (American Bar Association, 1881) 94–96; James Barr Ames, “Law and Morals” (1908) 22 *Harvard Law Review* 97; Henry T Terry, “Negligence” (1915) 29 *Harvard Law Review* 40. For further discussion of the nature of utilitarian reasoning in applying economic principles to particular areas of law, see Landes and Posner, n 109, 4; Benjamin Zipursky, “Philosophy of Tort Law” in Martin Golding and William Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing, 2005) 128.

¹¹³ See Freeman, n 110, 557. Also see Shavell, n 109; Calabresi, “Some Thoughts on Risk Distribution and the Law of Torts”, n 109, 499; Calabresi, “Does the Fault System Optimally Control Primary Accident Costs?”, n 109, 429; Calabresi, *The Costs of Accidents*, n 109; Posner, “A Theory of Negligence”, n 109, 29; Posner, “The Concept of Corrective Justice in Recent Theories of Tort Law”, n 109, 187; Landes and Posner, n 109; Posner, *Economic Analysis of Law*, n 109; Posner, *Wealth Maximization and Tort Law*, n 109.

this kind generally regard the primary goal of the law of negligence as being the efficient management and distribution of economic resources throughout society, rather than the management of risk, per se.¹¹⁴

The key aim of economic theories of negligence, which is seemingly universal in the literature, is achieving economic efficiency in relation to the costs of accidents. However, what constitutes an “efficient” distribution of economic resources is answered differently by the various economic theorists. One concept used by economists is that of “Pareto-superiority”, according to which efficiency is measured against whether a particular arrangement will result in nobody being worse off and at least one person being better off when compared to an alternative arrangement.¹¹⁵ Another is the “Kaldor-Hicks” concept of efficiency.¹¹⁶ By this standard, a particular arrangement will be considered efficient if the winners gain more from the change than the losers lose from the change, regardless of whether there is compensation.¹¹⁷ Economic efficiency in this sense is arguably a more valuable notion than Pareto-superiority, as it recognises that although a change may result in some individuals being worse off, it may nonetheless be desirable change if society is better off overall.¹¹⁸

Deterrence

Economic theories of negligence generally argue that one of the key purposes of the law is to deter risk-causing behaviour through the imposition of liability to pay compensation on the party who has caused another to suffer loss.¹¹⁹ One of the central tenets of this position is that a rational person will generally seek to avoid engaging in risky behaviour if they are aware of the potential liability to pay compensation when that behaviour may result in another suffering injury.¹²⁰ Economic theorists argue that deterrence is desirable not simply because accidents cause people loss and suffering, but also because accidents impose costs on society and therefore result in economic inefficiencies throughout society as a whole.¹²¹

Economic theorists generally consider that accidents causing injury to others are undesirable because they result in some of the costs of the accident-causing activity being “externalised” to the person injured.¹²² An externality occurs when a third party to a particular market transaction feels the effects of that transaction in some way, but neither pays nor receives any compensation for those effects.¹²³ This is considered to be a failure of the market, resulting in an inefficient allocation of resources throughout society.¹²⁴ From the perspective of economic theorists, one of the principal functions of the

¹¹⁴ See Harold Luntz et al, *Torts: Cases and Commentary* (LexisNexis, 6th ed, 2009) 80–81.

¹¹⁵ See Freeman, n 110, 558. Note, this is measured using subjective measures, such as what the individuals involved believe: Luntz et al, n 114.

¹¹⁶ See, eg, Landes and Posner, n 109, 312.

¹¹⁷ Landes and Posner, n 109, 312. It should also be noted that Landes and Posner contend that the law of tort merely creates *incentives* for parties to behave efficiently, rather than that parties actually behave efficiently in reality.

¹¹⁸ Freeman, n 110, 558.

¹¹⁹ Perry, n 111.

¹²⁰ Carolyn Sapideen, Prue Vines and Penelope Watson, *Torts Commentary and Materials* (Lawbook Co, 11th ed, 2012).

¹²¹ See, eg, Patrick Atiyah and Peter Cane, *Atiyah's Accidents, Compensation and the Law* (Weidenfeld and Nicholson, 4th ed, 1987) 489. Accident costs can refer to both “primary” accident costs (meaning the sum of accident costs and accident prevention costs), and “secondary” accident costs (meaning those “societal costs resulting from accidents”): see Calabresi, *The Costs of Accidents*, n 109, 27.

¹²² See, eg, Calabresi, “Some Thoughts on Risk Distribution and the Law of Torts”, n 109, 499.

¹²³ Roger Arnold, *Economics* (South-Western College Publishing, 5th ed, 2001).

¹²⁴ For example, see Calabresi, “Some Thoughts on Risk Distribution and the Law of Torts”, n 109, 499. In the field of economics, externalities can either be negative or positive. Negative externalities impose some kind of cost on a third party to a transaction, whereas a positive externalities cause some kind of benefit on a third party: see Arnold, n 123. Posner argues that the shift from a no-fault standard of liability to a negligence standard of liability in the 19th century in the United States, due to the pressure of an expanding industrial sector, resulted in the externalisation of accident costs onto workers, when those costs were in fact caused by the enterprises for which they worked: see Posner, “A Theory of Negligence”, n 109, 29, 29.

law of negligence is to ensure that externalities are “internalised” – that is, absorbed into the costs of production by the party or enterprise responsible for the particular cost – thereby resulting in a more efficient distribution of economic resources throughout society as a whole.¹²⁵ An externality can be internalised by incorporating it into the cost-benefit calculations of the parties involved in the particular transaction.¹²⁶ This means that the external effects of the transaction have been taken into account by the parties involved in the particular transaction.¹²⁷ When all costs and benefits of a transaction are taken into account by the parties involved in a particular transaction, this is considered by economists as the socially optimal output.¹²⁸

One of the key contributions made by economic theories of negligence relates to the concept of the optimum allocation of risk throughout society. According to this idea, while the law regards deterrence of risky behaviours as economically desirable – that is, because accidents impose costs on society – a society in which all risk is eliminated would not be one which is economically efficient. Economic theorists recognise that not only accidents impose costs on society, but also that *avoiding* accidents imposes costs on society. Accordingly, these theories argue that the elimination of *all* accidents is not necessarily desirable in a society which aims to maximise wealth.¹²⁹ Injuries to pedestrians from car accidents could be greatly reduced by lowering the speed limit for driving to 10 km per hour, but such a measure would also have other negative economic ramifications as society would operate less efficiently.¹³⁰ Accordingly, economic theorists have argued that the aim of the law of negligence is to minimise the sum of all accident costs *plus* accident avoidance costs.¹³¹ Calabresi further breaks this goal down into three sub-goals: (1) to reduce the sum and the severity of accidents (primary accident costs), (2) to reduce the costs to society resulting from accidents (secondary accident costs) and (3) to reduce the costs of administering the accident system employed (tertiary accident costs).¹³²

The idea that the aim of negligence law is to minimise the sum of all accident costs *plus* accident avoidance costs is one of Calabresi’s most important contributions to this area, and is based on Coase’s influential article “The Problem of Social Cost”.¹³³ Coase argued that the law of tort should attempt to achieve an optimum allocation of resources, by considering not only the *private* products of harm, but also the *social* products of harm, a concept which has become known as the “Coase Theorem”.¹³⁴ Central to Coase’s argument is the idea that harm is not simply one-sided, but is instead reciprocal.¹³⁵ The traditional view of the relationship between an injurer and a victim in negligence law is that it is a

¹²⁵ See, eg, Calabresi, *The Costs of Accidents*, n 109, 244, 246, in which Calabresi discusses externalisation due to inadequate knowledge, and externalisation due to transfer. Also see Perry, n 111.

¹²⁶ Arnold, n 123.

¹²⁷ Arnold, n 123.

¹²⁸ Arnold, n 123.

¹²⁹ See, eg, Calabresi, *The Costs of Accidents*, n 109, 26–28. McHugh J discusses this example when considering how the law of negligence balances the interests of claimants and defendants in the context of claims for negligent-inflicted psychiatric injury in *Tame v New South Wales* (2002) 211 CLR 317, 358 [113]; [2002] HCA 35.

¹³⁰ See Luntz et al, n 114, 79–80; Harold Luntz and David Hambly, *Torts: Cases and Commentary* (LexisNexis, 5th ed, 2002) 100–101. This is also similar to an example provided by Asquith LJ in the case *Daborn v Bath Tramways Motor Co Ltd* [1946] 2 All ER 333 (CA), 336.

¹³¹ See Calabresi, *The Costs of Accidents*, n 109, 26–28, 68.

¹³² Calabresi, *The Costs of Accidents*, n 109, 26–28, 68. Also see Peter Cane, “Reforming Tort Law in Australia: A Personal Perspective” (2003) 27 *Melbourne University Law Review* 649.

¹³³ See Ronald Coase, “The Problem of Social Cost” (1960) 3 *Journal of Law and Economics* 1; Calabresi, *The Costs of Accidents*, n 109, 26–28. Also see Luntz and Hambly, n 130, 104.

¹³⁴ See Coase, n 133, 1; Perry, n 111.

¹³⁵ See Coase, n 133, 1.

one-way relationship, with A imposing harm on B. In claiming that harm is reciprocal, Coase argues that when person A is prevented from harming person B, person A is *also* being harmed.¹³⁶ Coase's primary contribution to economic theories of negligence is the idea that the outcome which achieves an optimum allocation of resources between the parties is the one that avoids the more serious costs, taking into consideration the reciprocal character of the association between the injurer and the victim, as well as the costs involved in asserting legal rights.¹³⁷

Taking Coase's Theorem into account, economic theorists consider that one of the key purposes of the law of negligence is the creation and enforcement of rules of liability which will result not in the elimination of *all* risk, but will result in the most efficient levels of accidents and accident prevention.¹³⁸ In the law of negligence, a person will be considered negligent when they have not exercised reasonable care and this has resulted in injury to another person.¹³⁹ Reasonable care, from the point of view of economic tort theorists, is the amount of care that is considered "rational" or "cost justified".¹⁴⁰ Care taken to prevent injury is considered rational or cost justified when the costs of accident prevention do not exceed the costs of injury.¹⁴¹ The "Hand formula" refers to the famous comments of Learned Hand J in *United States v Carroll Towing Co.*,¹⁴² in which it was stated that the defendant's duty of care was:

a function of three variables: (1) The probability that [an accident would occur]; (2) the gravity of the resulting injury, if [it did]; [and] (3) the burden of adequate precautions. ... [I]n algebraic terms: if the probability be called P; the injury L; and the burden B; liability depends upon whether B is less than L multiplied by P; ie whether B is less than PL.

Pursuant to the Hand formula, the defendant will be negligent where "the burden of precautions (*B*) is less than the probability of harm times the gravity of injury (*PL*), that is, if $B < PL$ ".¹⁴³ In Australia, the test to be used is as set out in *Wyong Shire Council v Shirt*,¹⁴⁴ in which Mason J stated: "[T]he reasonable man's response [to risk] calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action."¹⁴⁵ This is very similar to the Hand formula, which although expressed in slightly different wording, arguably seeks to achieve largely the same goal.¹⁴⁶

¹³⁶ Coase, n 133, 1.

¹³⁷ Coase, n 133, 1.

¹³⁸ See Posner, "A Theory of Negligence", n 109 29, 73. Posner analysed a sample of 1528 American appellate court decisions regarding accidents from the period 1875–1905, and came to the conclusion that the law seemed to be concerned with determining the most efficient levels of accidents and accident prevention.

¹³⁹ Jules Coleman and Gabriel Mendlow, "Theories of Tort Law" in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2010 Ed) <<http://plato.stanford.edu/archives/fall2010/entries/tort-theories/>>.

¹⁴⁰ Coleman and Mendlow, n 139.

¹⁴¹ Coleman and Mendlow, n 139. Economic theorists also consider the direct opposite proposition to be correct. That is, care taken to prevent injury will be considered irrational or not cost-justified when the costs of accident prevention exceed the costs of injury.

¹⁴² *United States v Carroll Towing Co.*, 159 F 2d 169 (2nd Cir, 1947).

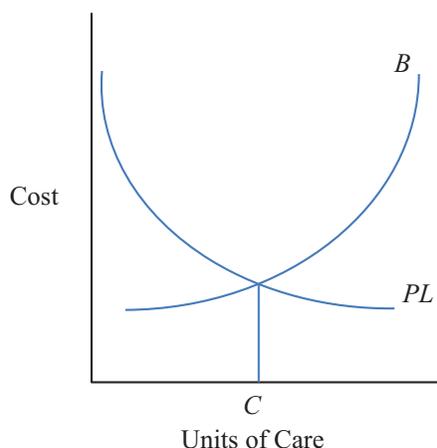
¹⁴³ See Landes and Posner, n 109, 85. According to Judge Learned Hand, this formula is an expression of what has long been the implicit meaning of negligence: Landes and Posner, n 109, 85.

¹⁴⁴ *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

¹⁴⁵ See *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47–48 (Mason J). Also see *Civil Liability Act 2002* (WA) s 5B(2); *Civil Liability Act 2002* (NSW) s 5B(2); *Wrongs Act 1958* (Vic) s 48(2); *Civil Law (Wrongs) Act 2002* (ACT) s 43(2); *Civil Liability Act 1936* (SA) s 32(2); *Civil Liability Act 2002* (Tas) s 11(2).

¹⁴⁶ The *Wyong* formula has now effectively been adopted in the civil liability legislation in most Australian jurisdictions (Northern Territory excluded): see *Civil Liability Act 2002* (WA) s 5B(2); *Civil Liability Act 2002* (NSW) s 5B(2); *Wrongs Act 1958* (Vic) s 48(2); *Civil Law (Wrongs) Act 2002* (ACT), s 43(2); *Civil Liability Act 1936* (SA) s 32(2); *Civil Liability Act 2002* (Tas) s 11(2).

Richard Posner explains the Hand formula in a graphical form, in which the horizontal axis represents units of care, and the vertical axis represents cost in dollars.¹⁴⁷ See below:



In this graph, the line titled *PL* represents the costs of accidents compared with care, and we can see that there is roughly an inversely proportionate relationship between these two factors. As the units of care taken increases, so the costs of accidents decreases. We can also see that this relationship diminishes as the units of care taken increases, such that each unit of care taken decreases the costs of accidents slightly less than the previous unit of care taken. The line titled *B* represents the costs of taking care, and we can see that as more units of care are purchased, so the cost of accidents goes up. We can also see that as the units of care purchased increase, so the costs of these units increase, explained by Posner as resulting from the scarcity of input of care.¹⁴⁸

Reasonable care is the point at which these two lines intersect (*c*), and any amount of care taken to the right of point *c* will amount to reasonable care being taken in the circumstances. The burden of taking precautions in this area of the graph is greater than the probability of an accident occurring multiplied by the likely magnitude of loss that would thereby be suffered. There is little economic incentive for actors to purchase units of care beyond point *c*, considering that that is the point at which he or she will be held to have exercised reasonable care and therefore not be negligent. This then theoretically incentivises only a rational amount of units of care being purchased, which is particularly important given the rising costs of units of care. Even if the units of care purchased by the actor to the right of point *c* successfully prevents an accident, the costs of taking care may have been so high as to result in a less economically efficient outcome overall had that care not been taken, and an accident thereby allowed to occur.¹⁴⁹

Any amount of care taken by the actor which is to the left of point *c* will not amount to reasonable care, and the actor will be held to be negligent. In this area of the graph, the burden of taking care is less than the probability of an accident occurring multiplied by the likely magnitude of loss that would thereby be suffered. To hold an actor negligent in these circumstances will be more economically efficient.¹⁵⁰ While using an individual standard of care may be more accurate, use of the aggregate

¹⁴⁷ See Richard Posner, *Economic Analysis of Law* (Little, Brown, 1986) Figure 6.1, 149.

¹⁴⁸ Posner, n 147.

¹⁴⁹ Posner, n 147.

¹⁵⁰ Posner, n 147. It should be noted that Scott Hershovitz argued that the claim that the Hand formula automatically resulted in economically efficient outcomes should be treated with scepticism. This was primarily because the Hand formula failed to take into consideration all of the collateral costs and benefits of the tort system; Scott Hershovitz, "Harry Potter and the Trouble with Tort Theory" (2010) 63 *Stanford Law Review* 67, 84.

“reasonable man” and the so-called “Hand formula” when determining the standard of care and whether a duty of care has been breached has been argued to reflect the recognition of economic principles in the law of negligence.¹⁵¹

Loss Spreading

This takes us to the second economic effect of the law of negligence according to economic theories. Some economic theorists have argued that the economic burden on society caused by accidents is reduced by spreading accident losses throughout society, and that therefore one of the important effects of the law of torts is achieve loss spreading.¹⁵² While the notion of deterrence is aimed at reducing “primary” accident costs, meaning the sum of accident costs and accident prevention costs, the primary function of loss spreading is to reduce “secondary” accident costs, meaning those “societal costs resulting from accidents”, which are suffered after the accident has taken place.¹⁵³ Secondary costs relate to the “social and economic dislocations which [occur when] the initial cost burden is left un-spread”.¹⁵⁴ Despite describing such costs as secondary, Calabresi states that secondary accident costs are no less a burden to society than primary accident costs.¹⁵⁵

The spreading of losses justification is based on the notion that losses will be least harmful to society if they are spread as broadly as possible throughout society, among as many people and over as much time as possible.¹⁵⁶ Underlying this idea are two further propositions, namely: that taking many small sums from many people is less likely to lead to economic and social dislocation than taking one large sum of money from just one person, and that people will generally suffer less if many of them are to lose a small amount when compared to just one person losing a large amount.¹⁵⁷

Calabresi contends that secondary accident losses can also be decreased by spreading them onto those in society “least likely to suffer substantial economic or social dislocations” by bearing such losses,

¹⁵¹ For further discussion regarding the structural features of the law of tort which reflect economic principles, see Landes and Posner, n 109. Also see Winand Emons, “An Introduction to the Legal and Economic Theories of Torts” (1993) 129 *Swiss Journal of Economics and Statistics* 625. It should be noted that the notion of deterrence as a goal of tort law has been criticised on a number of grounds, however, it is unnecessary for the purposes of this paper to analyse these criticisms in any great depth. The first such criticism relates the effect of insurance on the deterrent effect of the law, with some academics suggesting that the existence and popularity of insurance dilutes and perhaps even totally nullifies ability of the law of negligence to deter risky behaviour, as the insurer ultimately pays compensation, with the negligent party merely paying their insurance premiums: see, eg, Gary Schwartz, “Reality in the Economic Analysis of Tort Law: Does Tort Really Deter?” (1994) 42 *University of California Law Review* 377; Stapleton, n 5, 820; Prue Vines, “Tort Reform, Insurance and Responsibility” (2002) 25 *University of New South Wales Law Review* 3, 842; Richard Lewis, “The Relationship Between Tort Law and Insurance in England and Wales” in Gerhard Wagner (ed), *Tort Law and Liability Insurance* (Springer, 2005); Sapideen, Vines and Watson, n 120, 16; Des Butler, “An Assessment of Competing Policy Considerations in Cases of Psychiatric Injury Resulting from Negligence” (2002) 10 *Torts Law Journal* 1, 13, 25. Another criticism of the notion of deterrence as a goal of tort law is that such a notion rests on unrealistic assumptions about how people behave, as people in reality are not really able to make perfectly rational decisions: see, eg, Landes and Posner, n 109, 11–13; Des Butler, “An Assessment of Competing Policy Considerations in Cases of Psychiatric Injury Resulting from Negligence” (2002) 10 *Torts Law Journal* 1, 13, 25; Atiyah and Cane, n 121, 492; Perry, n 111, 66–68.

¹⁵² See, eg, Calabresi, “Some Thoughts on Risk Distribution and the Law of Torts”, n 109, 499; Calabresi, *The Costs of Accidents*, n 109; Perry, n 111.

¹⁵³ See Calabresi, *The Costs of Accidents*, n 109, 27.

¹⁵⁴ Calabresi, “Does the Fault System Optimally Control Primary Accident Costs?”, n 109, 429, 429; Guido Calabresi, “Changes for Automobile Claims, Views and Overviews” (1967) *University of Illinois Law Forum* 600, 602–603; Guido Calabresi, “Fault, Accidents and the Wonderful World of Blum and Kalven” (1965) 75 *Yale Law Journal* 28; Calabresi, “Some Thoughts on Risk Distribution and the Law of Torts”, n 109, 499.

¹⁵⁵ See Calabresi, *The Costs of Accidents*, n 109, 27.

¹⁵⁶ Referred to as interpersonal loss spreading, and inter-temporal loss spreading, respectively: see Calabresi, “Some Thoughts on Risk Distribution and the Law of Torts”, n 109, 499, 517; Calabresi, *The Costs of Accidents*, n 109, 39–40.

¹⁵⁷ See, eg, Calabresi, “Some Thoughts on Risk Distribution and the Law of Torts”, n 109, 499, 517.

namely, the wealthy.¹⁵⁸ This is a concept described as “deep pockets”, the theoretical basis for which is the economic theory known as the “diminishing marginal utility of money” theory.¹⁵⁹ The diminishing marginal utility of money theory holds that a wealthy person will suffer less pain from losing \$1 than a poor person will from suffering the same loss.¹⁶⁰ This is based on the idea that the effect of taking a smaller sum from a larger number of people will have a lesser effect overall because it represents a smaller proportion of each person’s total property.¹⁶¹ Accordingly, the deep pockets concept provides that if secondary accident losses are spread to the most wealthy, then this will result in less social and economic dislocation throughout society, as the amount of loss suffered by those bearing it will represent a smaller proportion of their total wealth than if the loss is to remain where it lays.¹⁶²

The principal method by which accident losses are spread is through insurance.¹⁶³ A finding of negligence against a defendant will result in the plaintiff not having to bear the costs of the accident. However, those costs will not be spread unless the defendant is insured. With this in mind, there is an economic impetus to insure when engaging in risky activities, either against loss which may be suffered by oneself which may need not be able to be spread to another, or against injury to another caused by one’s own actions, known as third-party insurance.¹⁶⁴ Calabresi notes that private risk pooling generally involves a combination of inter-temporal spreading, interpersonal spreading and a degree of concentration of losses according to involvement.¹⁶⁵ When individuals engage in activities which carry a risk of injury, they may choose to insure themselves against loss that may occur, or they may be forced to insure in the case of compulsory insurance schemes.¹⁶⁶

Of course, the provision of insurance must be an economically viable proposition for professional insurers, or they simply will not choose to provide such insurance. Therefore, if it is accepted that loss spreading is a desirable effect of the law of negligence, a healthy insurance market is likely to be required. Particularly risk-averse individuals may choose to self-insure, but reliance on self-insurance will by no means result in any near as efficient spreading of accident losses as through professional insurers.¹⁶⁷ Individuals may also be required to insure where engaging in particular activities, such as in the case of compulsory third-party insurance for motorists in Australia. Compulsory third-party insurance schemes for motorists in Australia are an effective means of spreading losses, as a result of which the costs of motor accidents are generally spread to the deep pockets of insurers, rather than on motorists themselves, save for the imposition of insurance premiums.¹⁶⁸ However, whether it be through compulsory or voluntary insurance, professional insurers are best placed to efficiently pool risks and to

¹⁵⁸ Calabresi, *The Costs of Accidents*, n 109, 40.

¹⁵⁹ Calabresi, *The Costs of Accidents*, n 109, 40–41; Perry, n 111.

¹⁶⁰ Calabresi, *The Costs of Accidents*, n 109, 40–41.

¹⁶¹ Perry, n 111, 68.

¹⁶² Perry, n 111. It should be noted that the diminishing marginal utility of money theory had fallen out of favour with economic theorists by the time Calabresi articulated these propositions. However, Calabresi argues that this does not detract from the basic justification for loss spreading: Calabresi, “Some Thoughts on Risk Distribution and the Law of Torts”, n 109, 499; Calabresi, *The Costs of Accidents*, n 109. Indeed, Calabresi comments that despite the theoretical problems besetting the diminishing marginal utility of money theory, there is generally political support for this concept, particularly in relation to tax systems which increase the percentage of income tax taken from workers the more money they earn: see Calabresi, “Some Thoughts on Risk Distribution and the Law of Torts”, n 109, 499, 527.

¹⁶³ Calabresi, *The Costs of Accidents*, n 109, 37; Perry, n 111, 69; Luntz and Hambly, n 130, 22–30; Sapideen, Vines and Watson, n 120.

¹⁶⁴ Calabresi, *The Costs of Accidents*, n 109, 47.

¹⁶⁵ Calabresi, *The Costs of Accidents*, n 109.

¹⁶⁶ See Luntz and Hambly, n 130, 22–30.

¹⁶⁷ See Mendelson, n 17, 221, in which Mendelson discusses the competitive advantage of professional insurers.

¹⁶⁸ See *Kars v Kars* (1996) 187 CLR 354, 365 (Toohey, McHugh, Gummow and Kirby JJ).

set their premiums to a point which is at least equal to the amount of money they expect to pay out on claims in a given year.¹⁶⁹

Effect of Civil Liability Legislation on Deterrence

With this general overview of economic theories in mind, we can now move on to consider the potential economic effects of the civil liability legislation on the ability of the law to achieve deterrence and loss spreading, and thereby achieve economically efficient levels of accident costs and accident-prevention costs throughout society. If it is accepted that the law of negligence deters risky behaviour which results in more efficient levels of accidents and accident prevention being achieved,¹⁷⁰ then it may be argued that any limitation of the ambit of liability by means which does not reflect such economic considerations will reduce the ability of the law to achieve this goal. If the economic effects of accident are being considered, it stands to reason that all costs of accidents ought to be taken into account, including the secondary costs of psychiatric injuries.¹⁷¹ These include the loss suffered by the injured individual – including financial losses such as medical costs, loss in earning potential etc – and losses to society – such as increased costs to the medical system, greater burden on welfare systems etc. If these significant costs are not taken into account, for example, by limiting or excluding liability in relation to specific classes of claimant, they will not be considered by defendants in their rational calculation of the expected benefits and expected losses of their risk-taking behaviour.¹⁷² Accordingly, defendants may not be deterred from engaging in risky and economically inefficient behaviour causing such secondary losses, this ultimately leading to more inefficient levels of accidents and accident prevention.¹⁷³

As a result of the limitation of liability according to the civil liability legislation, there are many circumstances in which negligence will likely not be imposed on defendants despite the costs of accident prevention perhaps not exceeding the costs of injury when considered in combination with the likelihood of its occurrence. As such, the restriction of the ambit of liability by the civil liability legislation will likely result in some cases being excluded from consideration by courts altogether which, according to the common law, may well have resulted in a finding of liability. Such restrictions in liability will likely result in the costs of accident-causing activities being more often externalised to the persons injured, rather than being taken into account by the creators of the risk as a cost of production.¹⁷⁴ This is likely to result in less efficient levels of accidents and accident prevention.¹⁷⁵

¹⁶⁹ See Mendelson, n 17, 221. Some academics have argued that a strict liability standard of liability in negligence – based on the notion of “enterprise liability” – results in more efficient loss spreading than a negligence standard: see, eg, Calabresi, “Some Thoughts on Risk Distribution and the Law of Torts”, n 109, 499, 500–514. The concept of enterprise liability refers to the notion that losses should be borne by enterprise, rather than be distributed on the basis of fault, so that the full cost to society of accidents is accurately reflected in the prices of goods. Manufacturers of goods, if held liable for all losses caused by those goods regardless of fault, would theoretically then factor the costs of accidents into the prices of their goods, thereby providing a form of insurance against any losses caused by their goods, and spreading those losses when they occurred. According to this concept, the activities which cause accidents should bear the costs of those accidents, regardless of whether fault is involved. It has also been argued that social insurance schemes, which involve the government effectively insuring all individuals against loss by raising taxes, are a better mechanism to achieve loss spreading than the law of negligence. It should also be noted that one of the limitations of enterprise liability relates to the theory underpinning it, namely, resource allocation theory, which presupposes an all-knowing, all-rational economic world, which does not exist in reality. As a result of this, economic theorists such as Calabresi concede that in some circumstances, enterprise liability will still result in a misallocation of resources: see Calabresi, “Some Thoughts on Risk Distribution and the Law of Torts”, n 109, 499, 500–514; Calabresi, *The Costs of Accidents*, n 109, 46–54. Also see the comments of McHugh in *Perre v Apand Pty Ltd* (1999) 198 CLR 180; [1999] HCA 36, in which he stated that loss spreading had not been, nor ought it be, accepted by the Australian courts as a guiding rationale for the law of negligence: *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 230; [1999] HCA 36.

¹⁷⁰ See Posner, “A Theory of Negligence”, n 109, 29, 73.

¹⁷¹ See Peter Bell, “The Bell Tolls: Toward Full Tort Recovery for Psychiatric Injury” (1984) 14 *University of Florida Law Review* 333, 349.

¹⁷² Bell, n 171.

¹⁷³ Bell, n 171.

¹⁷⁴ See, eg, Calabresi, “Some Thoughts on Risk Distribution and the Law of Torts”, n 109, 499; Posner, “A Theory of Negligence”, n 109, 29, 29.

¹⁷⁵ See Posner, “A Theory of Negligence”, n 109, 29, 73.

Effect of Civil Liability Legislation on Loss Spreading

The question also arises as to what effect the contraction in the ambit of liability pursuant to the civil liability legislation may have on the spreading of secondary accident losses. It is arguable that as a result of limitations on liability imposed by the civil liability, many secondary losses will remain un-spread, with the burden of those losses remaining with the injured. More injured parties will go uncompensated, and the losses, which if compensated would likely have been borne by the relatively “deep pockets” of insurers and then spread interpersonally and inter-temporally, will instead be borne in their entirety by injured parties. This gives rise to the possibility that leaving secondary accident losses un-spread may itself lead to an increase in the overall social costs resulting from accidents.

Reduction in Deterrence and Loss Spreading Justified?

It should be noted that a reduction in the deterrence and loss spreading effect of the law as a result of restrictions on the ambit of liability described above may well be justified on economic grounds. It may well be that a contraction of the ambit of liability leading to a reduction in economic efficiency from less deterrence and less loss spreading being achieved by the law is nonetheless desirable when compared to the reduction in economic efficiency that may result from the failure of insurance markets which may result if liability is to remain unchecked. Indeed, as mentioned previously, the ability of the law of negligence to achieve loss spreading specifically relies heavily on healthy insurance markets and a ready pool of willing insurers to insure defendants.

Therefore, in relation to the goal of loss spreading, it may not be as simple as trading off one method of increasing economic efficiency for another, as the case may be in relation to the goal of deterrence. Healthy insurance markets seem to be a prerequisite condition for the ability of the law to achieve this goal, as without healthy insurance markets, very little loss spreading will be able to be achieved. Consequently, a reduction in loss spreading from a restriction in the ambit of liability may well be justified on economic grounds in order to protect the health of insurance markets. If the underlying reasons for limiting the common law identified in the Ipp Report were accurate, namely that public liability insurance was becoming less affordable and less available due to the unpredictability of the law of negligence,¹⁷⁶ then the ability of the law of negligence to achieve loss spreading will have been compromised in any event. What may in effect have been chosen therefore is a small reduction in the loss spreading ability of the law as a result of the enactment of the civil liability legislation in order to prevent a much larger reduction in loss spreading from a decline in the number of insurers willing to offer public liability insurance. Accordingly, the question that may need to be asked is, which option will be more economically efficient? Or perhaps, more appropriately, which option will be least economically inefficient? What is clear is that these questions require detailed consideration before any firm conclusions can be reached.

It is worth noting that many of the assumptions underlying the commonly held view that the common law ought to be limited prior to the legislation being enacted have long been called into question.¹⁷⁷ The Ipp Panel completed its report without any empirical evidence from the insurance industry to support the proposition that there was, in fact, an insurance crisis, and it has been suggested that such evidence is not as strong as was initially believed.¹⁷⁸ Significantly, it has been suggested that the common law may actually not have been the fundamental cause of the sharp rise seen in insurance premiums at the turn of the 21st century, particularly in light of the observation that the common law duty of care had by that time been expanding for many years without any gradual corresponding rise in insurance

¹⁷⁶ See Introduction, Ipp Report, n 21, 25.

¹⁷⁷ For example, see Underwood, n 14, 39, 47–54; Kylie Burns, “Distorting the Law: Politics, Media and the Litigation Crisis: An Australian Perspective” (2007) 15 *Torts Law Journal* 195, 196; Edmund Wright, “National Trends in Personal Injury Litigation: Before and After ‘Ipp’” (2006) 14 *Torts Law Journal* 223, 266; Butler, “Gifford v Strang and the New Landscape for Landscape for Recovery for Psychiatric Injury in Australia”, n 18, 1, 14.

¹⁷⁸ This is not a criticism of the Ipp Panel, who performed their task very well considering the very short period of time they were given to undertake the review of the law: see Butler, “Gifford v Strang and the New Landscape for Landscape for Recovery for Psychiatric Injury in Australia”, n 18, 1, 14; Butler, Damages for Psychiatric Injuries, n 18, 122–124; Burns, n 177, 195, 196.

premiums.¹⁷⁹ Furthermore, statistical evidence at the time regarding rates of injury litigation indicate that while there had been a steady increase in litigation in the 1990s, there was no evidence of “an explosion” in litigation during this time.¹⁸⁰ It has been suggested that a number of insurance companies in the 1990s were maintaining premiums at unsustainably low levels for reasons of competition, and that the insurance industry in Australia at this time was making losses.¹⁸¹ It was for this reason that the Australian Competition and Consumer Commission reported in 2002 that there was a need for insurance companies to raise premiums.¹⁸² It has also been argued that the necessity to raise premiums sharply at the turn of the 20th century was a consequence of insurance companies’ over-reliance on investment incomes to offset underwriting losses, a failure to maintain adequate reserves and a failure to maintain sufficient reinsurance contracts. When global investment incomes declined, insurance companies were not able to offset their underwriting losses, nor were they able to rely on sufficient reserves to sustain them.¹⁸³

This places a significant question mark over the suitability of the “insurance crisis” as a justification for the restriction in the ambit of liability through the enactment of the civil liability legislation. Given that the civil liability legislation with respect to claims for mental harm may well have a negative impact on the efficient management of the costs of accidents, it raises the question as to whether it might be appropriate to review the legislation in order to determine whether it is justified on economic grounds.

CONCLUSION

It was apparent that attempting to maintain the health of insurance markets was a key goal underpinning the enactment of the civil liability legislation in many state and territory jurisdictions in Australia in the early 21st century. Without necessarily being supported by empirical evidence, a view had become particularly prevalent in the Australian community in the last decade of the 20th century that the ongoing expansion of the common law posed a threat to the ongoing health of insurance markets, and that the failure of insurance markets would pose significant economic and social burdens on Australian society. Despite the enactment of laws with respect to pure psychiatric injury in many jurisdictions in Australia, the High Court decision in *Wicks* caused concern to some that the economic goals underpinning the civil liability legislation would be threatened. In particular, there was some concern expressed that the decision in *Wicks* was not economically sustainable, as it left liability unpredictable and uncertain in relation to rescuers, and thereby threatened the professional insurers’ competitive advantage.

In this article, the economic sustainability of the law has been considered in light of three particular issues, namely, the 2015 decision of the High Court in *King*; the threat to the health of insurance markets posed by the lack of consistency between jurisdictions in relation to provisions relating to pure mental harm; and the threat posed to the economically efficient management of accident and accident-prevention costs by statutory limitation of the common law. It has been argued that while the High Court’s decision in *King* may assuage some of the economic concerns previously raised regarding the decision in *Wicks*, there are significant aspects of the civil liability legislation which ought to cause concerns regarding the economic efficiency of the law. In particular, it has been argued that due to the inconsistencies in pure mental harm provisions from jurisdiction to jurisdiction, the civil liability legislation itself is a source of significant unpredictability and uncertainty in the law. As such, the legislation in this way itself poses a significant threat to the insurer’s professional advantage in being able to predict the likelihood and seriousness of risk in order to set premiums at an efficient level.

¹⁷⁹ Which might have been expected if there was a strong association between changes in the ambit of liability at common law and insurance premiums: see Underwood, n 14, 39, 50.

¹⁸⁰ See Trowbridge Consulting and Deloitte Touche Tohmatsu, *Public Liability Insurance: Practical Proposals for Reform* (Canberra, 2002) <https://www.finity.com.au/wp-content/uploads/2014/12/PLI_Practical-Proposals-for-Reform-300502.pdf>, cited in Underwood, n 14, 39, 50–51. Also see Wright, n 177, 223, 266; Burns, n 177, 195, 206–208.

¹⁸¹ See Underwood, n 14, 39, 52; Wright, n 177, 223, 230.

¹⁸² Australian Competition and Consumer Commission, *Insurance Industry Market Pricing Review* (Canberra, 2002) <<https://www.accc.gov.au/system/files/Insurance%20industry%20market%20pricing%20review%20-%20March%202002.pdf>> 55, cited in Underwood, n 14, 39, 52.

¹⁸³ Underwood, n 14, 39, 52; Wright, n 177, 223, 230.

It has further been argued in this article that the limitation of the common law by statute itself threatens the ability of the law to achieve economically efficient levels of accidents and accident prevention. Underpinned by a review of economic theories of negligence, the basis of this contention is that by limiting the ambit of liability by statute, the civil liability legislation threatens the ability of the law to deter economically inefficient risks, and spread secondary accident losses over people and over time. With this in mind, it has been contended that rather than resulting in more efficient levels of accident and accident-prevention costs, the civil liability has attempted to ensure health of insurance markets at the expense of those potential claimants who can no longer bring claims. To borrow the language of the economic theorists, the costs of accidents as a result of the legislation may have simply been externalised onto accident victims who can no longer claim in relation to pure mental harm. And these secondary losses are significant, threatening not only the ongoing functioning of the individuals concerned, but also overall societal wealth. With this in mind, it seems appropriate that the civil liability legislation should be reviewed with respect to whether the legislation has achieved the economic goals it was enacted to achieve, and also with respect to whether it has caused any other unforeseen negative economic consequences which might counterbalance or even outweigh those goals.