IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY

14

No. A26 of 2015

BETWEEN

ALEX ALLEN
Appellant

and

DANIELLE LOUISE CHADWICK
Respondent

APPELLANT'S SUBMISSIONS

PART I PUBLICATION

1. This submission is in a form suitable for publication on the Internet.

PART II CONCISE STATEMENT OF ISSUES PRESENTED BY APPEAL

2. Contributory negligence under s 47 of the *Civil Liability Act* 1936 (SA) (**Act**):

   2.1 In considering whether a passenger of an intoxicated driver has rebutted the presumption of contributory negligence, is the passenger's own view of the relative risks or inconvenience associated with an alternative course of action relevant to the inquiry?

   2.2 If the answer is "no", did the majority of the Full Court err in having regard to any such circumstances? If the answer is "yes", should the findings as to the passenger's perception stand?

3. Contributory negligence under s 49 of the Act:

   3.1 In assessing whether a plaintiff is presumed guilty of contributory negligence for not "wearing a seatbelt as required under the *Road Traffic Act* 1961" (**RTA**), is it open to a plaintiff to rely on the defence of "act of a stranger"?

   3.2 If the answer is "yes", did the Full Court err in finding that the erratic driving of an intoxicated driver resulting in difficulties in engaging the seatbelt can relevantly amount to an "act of a stranger"? Alternatively, did the Full Court err in overturning the judge's finding that notwithstanding the erratic driving there were reasonable opportunities to have engaged the seatbelt?

4. Given the present statutory exemptions, was it correct to 'begin' an assessment of an award for future personal care for the duration of a plaintiff's life by adopting a GST-inclusive rate?

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PART III SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

5. The appellant has considered whether a notice should be given pursuant to s 78B of the *Judiciary Act* 1903 (Cth). No such notice is required.

PART IV CITATION

6. The Full Court's first judgment is now reported: *Allen v Chadwick* (2014) 120 SASR 250 (**FC**). The Full Court's second judgment is unreported: *Allen v Chadwick (No. 2)* [2014] SASCFC 130 (**FC2**). The trial judge's reasons are unreported: *Chadwick v Allen* [2012] SADC 105 (**TJ**) and *Chadwick v Allen (No. 2)* [2012] SADC 155 (**TJ2**).

PART V NARRATIVE STATEMENT OF FACTS FOUND OR ADMITTED

10 ***Overview***

7. The respondent (**Ms Chadwick**), then aged 21 and 10 weeks pregnant, suffered serious spinal injuries[1] in a motor accident which occurred at around 2.00 am on 12 March 2007 near the township of Port Victoria on Yorke Peninsula, South Australia.

8. The appellant (**Mr Allen**), Ms Chadwick's then-partner, lost control of the vehicle in which she was a rear-seat passenger, and she was thrown from the vehicle. Mr Allen's BAC at the time of the accident was 0.229.

9. Ms Chadwick and Mr Allen, together with Ms Chadwick's 5 year old daughter, left their home in the Adelaide Hills on Saturday 10 March 2007 to spend the weekend on the Yorke Peninsula. They slept overnight in their motor vehicle in a parking bay on
20 the outskirts of Port Pirie, and on the following morning, Sunday 11 March 2007, they met a friend, Mr Martlew, and together with his two children travelled to the Yorke Peninsula. From there, the group travelled in Mr Martlew's station wagon, moving through Port Broughton to Kadina and on to Wallaroo. Following lunch at the Wallaroo Hotel, they drove to Port Victoria, where two rooms attached to the Port Victoria Hotel were booked (FC [77]).

10. Mr Allen and Mr Martlew drank a great deal of alcohol during the course of the journey. They started drinking after arriving at Kadina, if not sooner, consuming spirit mixers of 'Bundy', 'Jack Daniels' or 'Woodstock', some retrieved from an esky placed in the rear cargo area of the car earlier that morning. Mr Allen said he drank a bottle of
30 rum and possibly half a carton of rum cans. Both continued to drink steadily thereafter over the course of the journey between Kadina and Port Victoria, as well as in the Wallaroo and Port Victoria Hotels (TJ [6]). Because the men had been drinking, Ms Chadwick began driving no later than when they departed Kadina (TJ [7]).

11. On arrival at Port Victoria, Ms Chadwick and the three children went to a nearby playground, and Mr Allen joined them for a time, at one point being unable to stay on a see-saw. Later, the men retired to the front bar of the Hotel, and Ms Chadwick assumed

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[1] Ms Chadwick suffered a crush fracture and dislocation of T11-12 with acute spinal cord injury and complete sensory loss below that level (TJ [186]). She subsequently developed complications in her shoulders, wrists and hips (TJ [197]).

responsibility for readying the children for bed. She re-joined the men after the children were asleep (TJ [9], FC [78]). Although she claimed she drank no alcohol at all, the Hotel manager Ms Kneebone gave evidence, accepted by the trial judge, that she had a shot of tequila and a Jack Daniels with coke (TJ [10]).

12. All three eventually left the bar after 'last drinks' were called at 12.15 am (TJ [11]). They went to a veranda near the motel rooms but Ms Chadwick said their horseplay and wrestling was so loud she became worried they would be kicked out.

13. Between 1.30 and 2.00 am they decided to go for a drive, leaving the children alone in one of the motel rooms, "ostensibly looking for cigarettes" (TJ [12], FC [12]). The evidence concerning this expedition only came from Ms Chadwick and Mr Martlew as Mr Allen had no recollection (either in an initial police interview or at trial) (TJ [20]).

14. Importantly, the trial judge found that by the time of the drive "there can be no doubt [Ms Chadwick] was all but constantly in [Mr Allen's] company for probably 10-12 hours beforehand, during which he consumed a good deal of alcohol" (TJ [74]).

15. Port Victoria is small town bounded to the west by Spencer Gulf. The streets are set out on a square grid pattern. The "Main Street" which runs (roughly) east-west. The eastern boundary is Wilson Terrace, and immediately to the east there is an intersection into which the roads from Maitland and from Wauraltee converge, forming a single access road into the township which becomes Main Street (FC [11]). This can be seen from excerpts from a street directory tendered at trial (Exhibit P18A).

16. Although there is controversy concerning the precise detail of the events which followed, by way of brief overview, it is common ground that:

    16.1 Ms Chadwick initially drove the vehicle (with Mr Martlew in the passenger seat and Mr Allen in the rear) for a period of several minutes at least (and possibly for as much as 10 to 15 minutes), around the town and environs (TJ [14]);

    16.2 the vehicle left the township of Port Victoria itself (TJ [14]), or as the Full Court put it, the vehicle travelled to the outskirts of the town (FC [79]);

    16.3 Ms Chadwick executed a U-turn and then stopped the vehicle in an area of darkness to urinate behind some bushes on the side of the road (FC [12], [79]);

    16.4 the location of this point was on Wauraltee Road, approximately 500 metres from the Hotel (FC [95]), and probably within 10 or so metres of its junction with Urania Road (TJ [16]). This was no more than 200 metres past the limits of the township (FC [1]);

    16.5 when she returned to the vehicle, Mr Allen was in the driver's seat, and although Ms Chadwick remonstrated with him, she entered the rear passenger seat (FC [79]), and he commenced driving. The relative locations of the Hotel and the point at which Mr Allen commenced driving can also be seen in a map forming part of an expert report (Exhibit D56);

16.6 Mr Allen then drove in a loop, entering Main Street, executing a U-turn at the junction with Lawhill Street junction, doing 'burn-outs' in the process, and then returned to Wauraltee Road (TJ [168]), whereupon he lost control of the vehicle, colliding with a tree on the right hand side of Wauraltee Road, throwing Ms Chadwick from the vehicle. In total the loop was in the order of 650 metres (TJ [155], FC [135]). See also Figure 3 of Exhibit D56;

16.7 although it was functioning normally (TJ [154], [160], [161]), Ms Chadwick did not have her seatbelt fastened at the time of the accident.

Ms Chadwick's credibility

17. The trial judge recounted evidence of Ms Chadwick which was contradicted by other objective evidence in relation to some specific topics, such as her capacity to engage in independent movements and insert her own enemas (see TJ [63]-[70]). The trial judge found that many of Ms Chadwick's answers were unduly turgid, repetitive or querulous and she was a demonstrably unsatisfactory witness in relation to a number of key issues, which were so important that they reflected more widely upon her reliability and credibility as a witness of truth in general, going beyond the topics to which they related (TJ [48]). Notwithstanding his finding that she was a deceitful witness, the trial judge appeared to accept her evidence that at the time she became a passenger in the vehicle she did not in fact know how intoxicated Mr Allen was, nor that she was only 200 metres from the Main Street and approximately 500 metres from the Hotel (TJ [84], [141]-[142]).

Decisional history

18. The trial judge:

18.1 considered that Ms Chadwick ought to have been aware Mr Allen was intoxicated, thus engaging s 47(1)(a)(iii), but found that Ms Chadwick had rebutted the presumption of contributory negligence pursuant to s 47(2)(b), in that she had demonstrated that she could not reasonably be expected to have avoided the risk (TJ [145]);

18.2 found that Ms Chadwick had not worn a seatbelt as required under the RTA, in that despite Mr Allen's erratic driving, there were reasonable opportunities for Ms Chadwick to engage the seatbelt (TJ [159]). The 25% reduction under s 49 was therefore applied; and

18.3 assessed the notional total damages (prior to any deductions for contributory negligence or adjustments for interim payments and the like) at $2,392,486.65, of which $1,077,361.00 was attributable to "future care" (TJ2 [99], FC [72]).

19. The appellant appealed on a number of bases, including that the judge erred in acting on the appellant's subjective account of her decision-making process in deciding to be a passenger of an intoxicated driver (grounds 2 – 4), and in assessing future care costs by reference to GST-inclusive care charges, when GST was not chargeable in respect of personal care (ground 14).

20. The respondent cross-appealed, including on the bases that the trial judge erred in finding that her impatience and impetuosity in relation to fastening the seat-belt was not justified, and that he ought to have found that the "act of a stranger" defence applied (ground 1), and in understating the extent of the future care required (ground 2).

21. Both parties filed notices of alternative contentions[2].

22. The Full Court:

22.1 by majority (Gray and Nicholson JJ), rejected the appellant's appeal on whether the presumption of contributory negligence relating to travelling with an intoxicated passenger was rebutted (FC [119], cf. Kourakis CJ at [59]);

22.2 allowed the respondent's cross-appeal on whether the respondent had failed to wear a seatbelt as required by the RTA (FC [18], [158]);

22.3 accepted that the trial judge's assessment of damages was excessive in certain respects, but not in respect of GST (FC2 [20])[3].

23. By grant of special leave, the appellant challenges:

23.1 the majority's conclusion that contributory negligence was rebutted in relation to travelling with an intoxicated passenger (notice of appeal [2]), both because it wrongly had regard to the respondent's claimed lack of appreciation of the matters which bore on the reasonableness of avoiding the risk, and because Ms Chadwick's evidence to that effect ought not to have been accepted;

23.2 the Full Court's conclusion that the "act of a stranger" defence, if it applied, relevantly exonerated the respondent from her failure to wear a seatbelt (notice of appeal [3]), both because any difficulty arising from erratic driving of an intoxicated driver is not a matter which can amount to a defence to the charge of failing to wear a seatbelt, because the respondent's evidence should not have been accepted and, in any event, the Full Court should not have interfered with the judge's finding that there were in any case reasonable opportunities to engage the seatbelt;

23.3 the Full Court's finding that the trial judge did not err by basing his award of future care on hourly rates which were inclusive of GST notwithstanding a statutory exemption from GST for personal "home care" (notice of appeal [4]).

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2 The respondent filed a notice of alternative contentions in relation to the finding that contributory negligence had been rebutted for the purposes of s 47(2)(b) of the Act, contending that the provision does not involve an objective test, but, rather, a statutory test requiring considerations relevant to the particular plaintiff, including her borderline personality disorder (ground 2). This position is no longer advanced by the respondent: no notice of contention has been filed in this Court, and her position on special leave was to accept that subjective, idiosyncratic mental processes would not avail her: [2015] HCA Trans 154 at 330-480. The appellant also filed a notice of alternative contentions in response to the cross-appeal, addressing the 25% reduction for failing to wear a seatbelt (ground 1) and the elements (apart from price) of the future care award (ground 2).

3 However, because its ultimate orders did not reflect any deduction for contributory negligence, the judgment award was increased (FC2 [42]).

PART VI SUCCINCT STATEMENT OF ARGUMENT

Contributory negligence: travelling with an intoxicated driver

Construction of the provision calls for an objective analysis

24. In South Australia, as in other States, there are statutory contributory negligence presumptions which operate where an injured passenger knew or ought to have known the driver was intoxicated (s 47[4]), and where the injured passenger was not wearing a seatbelt (s 49[5]). The text of the provisions appears in an annexure to these submissions.

25. Section 47(1) of the Act was engaged because, even though the trial judge did not find that Ms Chadwick was aware that Mr Allen was intoxicated, he found that she ought to have been aware. The question therefore was simply whether the presumption of contributory negligence was rebutted by the respondent having established, in the terms of exception (b) in s 47(2) that, "the injured person could not reasonably be expected to have avoided the risk". If not, a fixed reduction applied[6].

26. Although the Ipp Committee recommended against a regime of the kind embodied in Part 7 of the Act with respect to intoxication[7], a virtually identical regime applies in Queensland[8], and the Northern Territory[9], and while there is no fixed or minimum reduction in the ACT and in NSW, a similar presumption of contributory negligence is provided for and is also subject to an exception framed in identical terms (in the case of the ACT[10]) or similar terms (in the case of NSW[11]).

27. The proper construction of the provision calls for a consideration of the common law approach to negligence and contributory negligence, and the broader statutory context in which s 47 operates. In particular, as Kourakis CJ noted (FC [33]), there is a general provision, s 44(1), which provides that the principles applicable in determining whether a person has been negligent also apply in determining whether a person who suffered harm has been contributory negligent[12].

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4 The provision was, until 2004, designated as 24K of the *Wrongs Act* 1936 (SA). Prior to that, the regime applied only to motor vehicle accidents, and included an exception where the injured passenger could not reasonably be expected to have declined to become a passenger. In 1998, that regime was amended to provide for prescribed reductions (see Kourakis CJ at FC [36]-[38], [43]).

5 Previously designated as 24M of the *Wrongs Act* 1936 (SA), having been introduced into that Act by the *Wrongs (Liability and Damages for Personal Injury) Amendment Act* 2002 (SA).

6 Where the driver's BAC is 0.08 or more, the fixed reduction for contributory negligence required by s 47 is 25%, and where, as here, the driver's BAC is 0.15 or more, a 50% reduction applies.

7 Ipp Committee Report, "*Review of the Law of Negligence: Final Report*" (September 2002) [8.19].

8 *Civil Liability Act* 2003 (Q), ss 48-49.

9 *Personal Injuries (Liability and Damages) Act* (NT), ss 15, 17.

10 *Civil Law (Wrongs) Act* 2002 (ACT), s 96.

11 In NSW, the presumption is rebutted where the injured or deceased person could not reasonably be expected to have declined to become a passenger in or on the motor vehicle: *Motor Accidents Compensation Act* 1999 (NSW) s 138(2)(b). See also s 74 of *Motor Accidents Act* 1988 (NSW).

12 Compare s 5K of the *Civil Liability Act* 2002 (WA), considered in *Town of Port Hedland v Reece William Hodder by her next friend Elaine Georgina Hodder (No. 2)* (2012) 43 WAR 383; [2012] WASCA 212.

28. At common law, contributory negligence, like negligence, is determined by reference to the powers of observation, reasoning, foresight and risk assessment of the reasonable person. In principle, any fact or circumstance which a reasonable person would know or ought to know and which tends to suggest a foreseeable risk of injury in accepting a lift from an intoxicated driver is relevant in determining whether the passenger was guilty of contributory negligence: *Joslyn v Berryman* (2003) 214 CLR 552 at [16] (McHugh J). This includes facts and circumstances which the plaintiff knew, or ought to have known, in the 12 hours or so before the relevant incident: *Joslyn* at [47] (McHugh J), at [77] (Gummow and Callinan JJ). Contributory negligence is judged objectively, eliminating the "personal equation" and independently of the "idiosyncrasies of the particular person whose conduct is in question", subject only to a well-established exception for children and, possibly, old age: *Joslyn* at [32][13].

29. As McHugh J said in *Joslyn* at [37]-[39]:

> The issue in a case like the present is not whether the passenger ought reasonably to have known of the driver's intoxication from the facts and circumstances *known to the passenger*. The relevant facts and circumstances include those which a reasonable person could have known by observation, inquiry or otherwise....
>
> Hence, the issue is not whether a reasonable person in the intoxicated person in the intoxicated passenger's condition – if there could be such a person – would realise the risk of injury in accepting the lift. It is whether an ordinary reasonable person – a sober person – would have foreseen that accepting a lift from the intoxicated driver was exposing him or her to a risk of injury by reason of the driver's intoxication....
>
> [A] plaintiff cannot escape a finding of contributory negligence by pleading ignorance of facts that a reasonable person would have known or ascertained. ...Nor does it make any difference that the pedestrian or driver had defective hearing or sight. Contributory negligence is independent of "the idiosyncrasies of the particular person whose conduct is in question". [References omitted]

30. The legislative history, traced by Kourakis CJ at FC [36]-[45], reinforces the requirement to have regard to the facts that a reasonable person would have known or ascertained. That history shows that not only is an objective approach assumed, but having regard to the dangers of travelling with an intoxicated driver, the onus of rebutting the presumption of contributory negligence is cast on the plaintiff, and provision is made for fixed reductions of damages.

31. Plainly, as the Chief Justice pointed out (FC [29]-[30]), the reference in s 47(2)(b) to "the injured person", is a drafting technique intended merely to identify the party who must show he or she could not reasonably be expected to have avoided the risk, and does not suggest any analysis based on the injured person's subjective appreciation of the matters relevant to avoiding the risk.

32. In assessing whether the injured person could reasonably be expected to have avoided the risk, the analysis must proceed by reference to the knowledge, intelligence and powers of observation of a reasonable person who had hitherto been driving the vehicle and who had been in the company of Mr Allen and Mr Martlew, as Ms Chadwick had.

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[13] Citing *Glasgow Corporation v Muir* [1943] AC 448 at 457.

Just as a plaintiff who underestimates the risk avoided with intoxicated driving is held to the standard of a reasonable person, so a plaintiff who overestimates the difficulties of an alternative course of action (walking back to the Hotel) must be held to the powers of observation and reasoning of a reasonable person.

33. There may be matters specific to the injured person which are relevant to the question of whether they could reasonably be expected to have avoided the risk[14]. In the present case, the difference between the analysis of the majority and Kourakis CJ does not turn on that consideration, but upon the question of the knowledge and awareness by reference to which Ms Chadwick's decision not to avoid the risk is judged.

10 ***The distinction between the approaches of the majority and Kourakis CJ***

34. The critical difference between the approach of the majority (and the trial judge) and Kourakis CJ in the present case, is that the majority:

    34.1 conducted their analysis by accepting and having regard to Ms Chadwick's evidence that she did not appreciate how close she was to the Main Street and the Hotel, that she was in a "confusing" situation and had to make an immediate decision in the agony of the moment, that she felt vulnerable, helpless and panicked, and that a young woman may well perceive a risk that was greater than that which would be supported by a calm and rational assessment of relevant factors such as the rate of violent crime in that area (FC
20 [111]-[113]); and

    34.2 considered that the risks associated with driving were lessened by the probably absence of other vehicles on the road at the early hour of the morning (FC [113]).

35. The majority couched their observations in terms that the position of Ms Chadwick was "readily **understandable**" (FC [113]). Indeed, they considered that s 47(2)(b) "asks the question whether the conduct of the plaintiff, in choosing to expose themself [sic] to a risk of injury, which risk in fact eventuates, **can be excused**" (FC [103]). This distorted the inquiry mandated by the section.

36. In contrast, and (with respect) correctly, Kourakis CJ commenced with the perspective
30 of the reasonable person, and the matters which would have been known to or appreciated by the reasonable person (FC [50]). As the Chief Justice pointed out:

    36.1 the reasonable person would have been aware of the fact that the risk of getting into a car driven by Mr Allen was great, since she should have been aware of the fact that he had consumed alcohol pretty well continuously throughout the day, and that Mr Allen's aggressive insistence on assuming the driving of the vehicle and Ms Chadwick "get in the fucking car" (TJ [140], FC [111]) *itself exhibited a reckless attitude* (FC [50]);

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[14] That is to say, if some intrinsic or enduring characteristic of the injured person meant that they were objectively subject to a greater or lesser risk by declining to be a passenger with an intoxicated driver, that would be relevant.

36.2 the reasonable person would have taken time to survey her location and would have appreciated she was only about 200 metres from the outskirts of the township and about 500 metres away from the Hotel – a relatively short walk involving no significant danger to her personal safety in a quiet country town (FC [50]);

36.3 indeed, a reasonable person who had been driving the car as she had would not have been disoriented and could readily have judged the direction of the lights and assessed the distance from the town (FC [51]-[52]).

37. Kourakis CJ also found that the judge's finding that Ms Chadwick was disorientated was in any erroneous (FC [51]) and he found that it was probable she knew she was not far out of the township (FC [53]). For reasons which emerge from the evidence relevant to these issues (summarised below), the appellant contends that the Chief Justice was plainly correct in this respect.

Evidence bearing on assessment of risk of being a passenger

38. Ms Chadwick was all but constantly in Mr Allen's company for probably 10-12 hours before the accident, during which he consumed a good deal of alcohol (TJ [74])[15]. Although he ruled that on the evidence the appellant had failed to establish that Ms Chadwick was actually aware he was intoxicated when she got into the vehicle (TJ [84]), the trial judge found that applying an objective test it was "impossible to accept that she ought not have appreciated the extent and duration of alcohol consumption, even given the fact that for significant periods of time she might have been distracted and apart from the two men", and it was inevitable that Ms Chadwick ought to have been aware that alcohol had impaired Mr Allen's capacity to drive (TJ [85])[16].

39. Mr Martlew testified that he noticed that Mr Allen was uncoordinated when they left the Hotel (FC [10]). The publican, Ms Kneebone, gave evidence that Mr Allen skulled his last drink (Exhibit P26). Mr Martlew also gave evidence that he didn't think Mr Allen should have been driving (TJ [29])[17].

40. Apart from his drinking, there were other matters that ought to have concerned Ms Chadwick. First, it is noteworthy that the horseplay at the hotel had been a cause of concern to Ms Chadwick. Next, as the trial judge found, there was a terse exchange between Ms Chadwick and Mr Allen about his stubborn desire to drive (TJ [136]). The judge found that it was "inherently likely" that Mr Allen told her to "get in the fucking

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15 Given his BAC at the time of the accident, during a 12 hour relatively uniform drinking period, Mr Allen must have been consuming nearly two standard drinks every hour (FC [8]).

16 The expert evidence was that a person with Mr Allen's BAC would appear obviously intoxicated, and the signs would include slurred speech, impaired balance, increased sociability and raised volume of speech (TJ [25]). Why he accepted the evidence of an unreliable witness that she was not aware of his intoxication is, with respect, difficult to fathom.

17 Although his evidence at trial was that Mr Martlew did not tell Mr Allen he should not drive, his statement to the police was that he did, and the parties conducted the trial on the footing that the statement was admissible for all purposes (TJ [33]).

car" (TJ [140]). Mr Martlew also told the police he had told Mr Allen he should not drive and he should let Ms Chadwick drive (TJ [31]). The angry insistence by Mr Allen without any cogent reason that a person who had been drinking all day drive instead of the sober person who had previously driven was clearly a matter which would concern a reasonable person. This was also a powerful car Mr Allen had not previously driven[18]. Furthermore, if indeed the trip to that point had been somewhat chaotic (TJ [14]-[15]) this merely reinforced the risks. In these circumstances the majority erred in considering that the risk to Ms Chadwick "can be perceived to have been relatively low" (FC [109]).

Evidence bearing on the alternative courses open to Ms Chadwick

41. The judge found that despite her objective proximity to residential areas, Ms Chadwick was "probably somewhat disoriented and considered herself to be much further away from the town" (TJ [138]). For the reasons given by Kourakis CJ (FC [51]) that finding should not have been made, but in any case a reasonable person in her position would not have been disoriented or confused.

42. On Mr Martlew's account, they were only travelling out of town "for a short while" before they realised they were heading out of town and at that point they turned around (back towards the town) and it was then that Ms Chadwick pulled over to go to the toilet (TJ [29]). Ms Chadwick said they did so for upwards of 10-15 minutes, at one point leaving the township itself finally ending up "in the middle of nowhere" (TJ [14]), although she agreed that the point at which she pulled over so that she could urinate was the same location identified by Mr Martlew. Given her general credibility and the inherent unlikelihood of having driven a long way out of town, Mr Martlew's account should be accepted.

43. The point at which Ms Chadwick stopped driving was on the south-western outskirts of Port Victoria, some 500 metres from the Hotel, on Wauraltee Road, and probably within 10 or so metres of its junction with Urania Road (TJ [16]). This was no more than 200 metres past the limits of the township (FC [1]). Although Ms Chadwick claimed that "the only light that I could see was so far in the distance it didn't even look like a light" (Tr 136.4) (TJ [46]), the objective evidence was that there was street lighting in the distance, both in Victoria Street to the north and in the vicinity of Songvaar Street to the south east, about 200 m away from the accident site in each direction, and the evidence was that they were alight during the morning in question (TJ [46]). Mr Martlew's evidence was that he could see the streetlights of the town "ahead of us" (Tr 4565).

44. In these circumstances, a reasonable person, having driven the car to that point, and having the capacity to see the town lights in the distance, would have known and appreciated she was not far from the township and the Hotel, and the majority erred in proceeding on a different basis (FC [111]). Indeed, while her subjective appreciation is not ultimately decisive, Kourakis CJ was right to overturn the judge's findings as to Ms Chadwick's state of awareness (FC [51]).

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[18] See Exhibit P26 – Statement of Senior Constable Sheldon Lovell (containing record of interview with Allen); Exhibit P61 – Statement of Kim Martlew (the vehicle had a V8 motor).

Agony of the moment?

45. Moreover, in so far as the authorities allow a degree of latitude when, in the "agony of the moment", a person seeks to extricate him or herself from an emergency not created by her own antecedent negligence[19], there was here no emergency, and any imperative felt by Ms Chadwick to return to the children was one she had created by participating in a late-night excursion and leaving the children asleep at the Hotel.

Conclusion

46. Ms Chadwick did not demonstrate that walking approximately 500 metres to the Hotel presented such a difficulty that she could not reasonably have avoided the risk of travelling with a drunk driver who was inexplicably insisting on taking the wheel.

Contributory negligence: failure to wear a seatbelt as required under the RTA

Legislative context

47. Section 49 provided for a compulsory reduction in damages of 25% in prescribed circumstances, subject to a presently irrelevant exception. The presumption applied if it was demonstrated that "the injured person was not, at the time of the accident, wearing a seatbelt as required under the *Road Traffic Act* 1961".

48. When the predecessor to s 49 was introduced[20], the RTA itself contained provisions requiring that a person over the age of 18 years in a motor vehicle in motion not occupy a seating position equipped with a seatbelt unless he or she was wearing it and it was properly adjusted and securely fastened: RTA s 162AB(1). There was a defence to a charge under the section where the defendant could prove that there were in the circumstances of the case special reasons justifying non-compliance with the requirements under the section: s 162AB(6). Further, the Governor was empowered by regulation to exempt any person or class of person from all or any of the provisions of the section: s 162AB(7)[21].

49. At the time of the accident in this case, the RTA itself made no express provision with respect to the wearing of a seatbelt, but s 80 required compliance with the *Australian Road Rules*. Nor did the RTA itself provide any statutory defences of a generally applicable kind, although subsequent to the accident, the RTA was amended to create a "reasonable steps defence"[22] and other "further defences"[23] including a defence where the relevant offence was done in response to circumstances of emergency.

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19 *Municipal Tramways Trust v Ashby* [1951] SASR 61.

20 Section 35a of the *Wrongs Act* 1936 (SA), introduced by the *Wrongs Act Amendment Act* 1986 (SA) introduced a 15% reduction in damages where the injured person was, "contrary to the requirements of the *Road Traffic Act* 1961, not wearing a seatbelt".

21 Regulation 7.09 of the *Road Traffic Regulations* 1996 (SA) exempted, inter alia, persons with physical disabilities, persons travelling as passengers in emergency vehicles, drivers engaged in reverse, drivers of road graders, persons engaged in work requiring frequent alighting and re-entry while travelling under 30 kilometres per hour.

22 Section 173AA, introduced by the *Road Traffic (Heavy Vehicle Driver Fatigue) Amendment Act* 2008 (SA) from 29 September 2008. Where the defence applies, the defendant is required to establish that the

50. At the relevant time, Rule 265(3)[24] provided that if a passenger occupied a seating position fitted with a seatbelt, the passenger "must wear the seatbelt properly adjusted and fastened unless the passenger is exempt from wearing a seatbelt under rule 267". Rule 267 exempted various persons from the obligation to wear a seatbelt, and also provided that another law of the jurisdiction might exempt a person from the requirement[25]. None of the exemptions thereby created have any relevance to the facts of this case.

Is the "act of a stranger" defence potentially available?

51. The first question is whether the offence of failing to wear a seatbelt is one which attracts the so-called "act of a stranger" defence.

52. If the offence is one which may be characterised as creating a "strict liability" defence, the defence of "act of a stranger" may be available, just as the defence of honest and reasonable mistake of fact (*Proudman v Dayman* (1941) 67 CLR 536) may be available.

53. Although Bray CJ said in *Mayer v Marchant* (1973) 5 SASR 567 at 573 that "normally speaking it is a defence to a criminal charge ..., to show that the forbidden act occurred as the result of an act of a stranger, or as the result of non-human activity, over which the defendant had no control and against which he could not reasonably have been expected to guard", ultimately, whether such a defence is available must depend on the wording of the relevant legislation, construed in accordance with its plain purpose and the means adopted to achieve that purpose: *Boucher v G J Coles & Co* (1974) 9 SASR 495 at 505 (Wells J, Bray CJ and Sangster J relevantly agreeing)[26]. One approach to the overall question has been to ask whether by the denial of the availability of such defences "you will readily assist the object of the legislation and not merely catch a luckless victim": *Schmid v Keith Quinn Motor Co Pty Ltd* (1987) 29 A Crim R 330 at

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person did not and could not reasonably be expected to have known, of the contravention concerned, and that either (i) they had taken all reasonable steps to prevent the contravention, or (ii) there were no steps that the person could reasonably be expected to have taken to prevent the contravention. The provision was repealed with effect from 10 February 2014 by the *Statutes Amendment (Heavy Vehicle National Law) Act* 2013 (SA).

23 Section 173AB, introduced by the *Statutes Amendment (Road Transport and Compliance Enforcement) Act* 2006 (SA) from 30 April 2007. The defendant is required to establish in the case of emergency that the person reasonably believed, inter alia, that committing the offence was the only reasonable way to deal with the emergency and that the conduct was a reasonable response to the emergency.

24 The trial judge (TJ [148]), and the Full Court (FC [125]), were wrongly referred to Rule 265(2)(d), however that was not the relevant provision at the time. The reference to an exemption now appears within Rule 265(1), rather than being found within Rule 265(3), as it was at the time of the accident.

25 At the relevant time, reg 28 of the *Road Traffic (Road Rules – Ancillary & Miscellaneous Provisions) Regulations* 1999 (SA) contained exemptions with respect to historical vehicles, transportation of prisoners and persons affected by disabilities or medical conditions.

26 The availability of such a defence has been rejected, for example, in the case of s 6 of the *Sale of Food and Drugs Act* 1875 (38 & 39 Vict, c. 63): *Parker v Alder* [1899] 1 QB 20, although the reasoning in the case appeared to involve an extension of an earlier decison which dealt with concepts of vicarious liability: *Brown v Foot* (1892) 66 LT (NS) 649; 61 LMJC 110. Compare *Hearne v Garton* (1859) 2 EL & EL 66; 28 LJMC 216, Reynolds v G H Austin & Sons Ltd [1951] 2 KB 135. It has been observed that the role of the courts in discerning whether implied defences or qualifications upon strict liability offences has led to considerable uncertainty: see, eg, the observations of Jordan CJ in *Turnbull* [1943] 44 SR (NSW) 108 at 110.

339 (Bollen J), or as Bray CJ put it a "ritual scapegoat": *Kain & Shelton v McDonald* [1971] 1 SASR 39 at 45.

54. The question whether the defence arises cannot be resolved by a consideration of and assertion as to the harshness or otherwise of the operation of s 49 of the Act (cf. FC [157][27]), because that act merely picks up the RTA's provisions respecting the wearing of a seatbelt (which in turn pick up the *Australian Road Rules*). Since the RTA and *Australian Road Rules* apply in circumstances divorced from civil liability, considerations of the operation of s 49 of the Act cannot govern or control their proper interpretation.

55. It would ordinarily be appropriate to construe the Rules in the context of the RTA, being the legislation which gives them force, but since the genesis of the Rules was plainly in part a desire for uniformity between States and Territories of Australia, the question of whether a defence arises under the Rules ought not to depend upon the local legislation incorporating them[28].

56. However, that is not to say that the capacity for local legislation to prescribe general defences, illustrated by the actual existence of those defences historically, is irrelevant when considering the construction to be placed upon the Rules. It is submitted that a number of considerations point against the conclusion that the recognition of an "act of a stranger" defence would not promote the purposes to be served by the Rules as incorporated into the RTA. First, there has been a growing appreciation of the importance of seatbelts to road safety, and the factual or evidential difficulties which might attend the defence of "act of a stranger" might tend to undermine the benefits of a strict approach to such matters. Secondly, specific exemptions for particular activities lessen the harshness of the operation of the rule. Thirdly, relatively modest penalties apply so that there is less reason to read the provisions narrowly.

This case did not involve the "act of a stranger"

57. In any event, it is submitted that even accepting the Full Court's findings (to the extent that they differed from those of the trial judge), those findings did not relevantly make out the defence of "act of a stranger". Although there is a dearth of authority on the defence[29], it is submitted that the "act of a stranger" involves an incalculable and

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27 Gray and Nicholson JJ also referred (FC [128]) to *Police v Barber* (2010) 108 SASR 520 in relation to traffic expenses but the case concerned the defence of voluntariness.

28 The same or relevantly similar Rules relating to seat belts are picked up by legislation in each law area: see *Road Transport Act* 2013 (NSW) s 23 (*Road Rules* 2014 rr 265, 267), *Road Safety Act* 1986 (Vic) s 95 (*Road Safety Road Rules* 2009 rr 265, 267), *Transport Operations (Road Use Management) Act* 1995 (Q) s 146 (*Transport Operations (Road Use Management – Road Rules) Regulation* 2009 rr 264, 265, 267), *Road Traffic Act* 1974 (WA) s 111 (*Road Traffic Code* 2000, rr 233, 235, 284), *Traffic Act* 1925 (Tas) s 31A (*Road Rules* 2009, rr 265, 267), *Traffic Act* (NT) s 53 (*Traffic Amendment (Australia Road Rules) Regulations* 2011, rr 265, 267), *Road Transport (Safety and Traffic Management) Act* 1999 (ACT) s 34 (*Road Transport (Safety and Traffic Management) Regulation* 2000 rr 5, 6) and various State legislation also 'picks up' these requirements for contributory negligence purposes: *Motor Accidents Compensation Act* 1999 (NSW) s 138(2)(c), *Motor Accidents (Liabilities and Compensation) Act* 1973 (Tas) s 22, *Civil Law (Wrongs) Act* 2002 (ACT) s 97(1)(a), *Motor Accidents (Compensation) Act* (NT) s 11.

29 The defence was referred to but without analysis in *He Kaw Teh v R* (1985) 157 CLR 523. There is also relatively little academic treatment of the defence. An exception is Gillies, *Criminal Law* (1985) at 83.

unforeseeable external intervention which directly brings about the commission by the defendant of the offence. It is not made out by pointing to the conduct of another party being a cause of the commission of the offence, particularly where the defendant has placed him or herself at the risk of such conduct. It is insufficient merely to demonstrate that the defendant has taken "reasonable care".

58. *Norcock v Bowey* [1966] SASR 250 concerned a provision that "if any cattle are found straying ... in any street or public place, the owner thereof shall be liable to a penalty not exceeding five pounds". Napier CJ found (at 266) that while it was no answer to the charge to allege and prove that the owner took reasonable care to ensure that his animal was not on the road[30], there would be a defence if the owner had been able to prove how the animal came upon the road, and had shown that it was due to circumstances beyond his control, including some wrongful[31] act of a stranger whom the owner had no means of controlling or influencing. Hogarth J referred to an act "entirely the result of something over which [the accused] had no control" (at 268).

59. *Boucher v G J Coles & Co* (1974) 9 SASR 495 involved a prosecution of a supermarket operator for having "kept for sale" an "unsound" can of peas intended for human consumption. Bray CJ said that "a stranger is a person whose intrusion, or the manner of whose intrusion, into the situation under consideration is something **not reasonably to be expected or foreseen**" (at 497)[32]. While the surreptitious and malevolent substitution by an intruder of a defective can of peas would amount to a good defence, here, where the can of peas was of the type ordered but only half full and of defective quality, this was something that was "an ordinary chance of commercial life which the retailer ought to take into account in the course of conducting the business of a supermarket" and not "an **incalculable intervention from outside**" which qualified as the 'act of a stranger' (at 497-498)[33]. The defence failed on the facts, even though there was nothing about the can that suggested there was something wrong with it (at 500).

60. It is submitted that if an "act of a stranger" defence is to be recognised, the observations in *Boucher v G J Coles & Co* represent appropriate limitations upon the nature of the defence. They recognise that the defence must not be permitted to become a free-

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The origins of the defence are difficult to identify, and the concept has also been recognised in a civil law context by way of exception to what might otherwise be strict liability: see, eg, the discussion of act of a stranger in the context of the rule in *Rylands v Fletcher* in Heuston and Chambers (ed), *Salmond and Heuston on the Law of Torts* (1981, 18th ed) at 308. See also *Benning v Wong* (1969) 122 CLR 249 at 298, 305-306 (Windeyer J) and compare *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 545 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

30 In *Boucher v G J Coles & Co* (1974) 9 SASR 495, Wells J was emphatic saying (at 504) that there could not be a shred of justification for importing a construction sometimes contended for that there is an exemption to a strict liability provision where the defendant has acted without negligence unless the language of the enactment made clear reference to it.

31 A majority in *Mayer v Marchant* (1973) 5 SASR 567 considered the defence available to a charge of being the owner of an articulated motor vehicle driven on a road with excessive weight on the axles, and it was held that the stranger's act did not need to be wrongful.

32 As to this, he expressed doubt as to whether he had been correct in holding that the supplier of unusually heavy distillate in *Mayer v Marchant* (1973) 5 SASR 567 was a stranger. See also Wells J at 509.

33 As Wells J put it, if a jealous trade rival had deliberately substituted the defective product, the "keeping" of the product contrary to the prohibition would not have been initiated by the act of shopkeeping, and would have no conceivable connection with his regular course of trading (at 509).

ranging inquiry into whether the defendant's failure to comply with the law is explicable having regard to the acts of another. The defence arises where an uncontrollable and not foreseeable external intervention causes the commission of the offence. Just as the supermarket operator does not avoid liability for a risk squarely within the scope of its normal operations (arising from the sale of a spoiled item), a person who elects to travel with a drunk driver does not avoid liability for a failure on their part which might follow from that election. Approaching the defence in this way would accommodate the extreme example given by Gray and Nicholson JJ (at FC [130]), but would not avail the respondent on the very different facts of this case.

61. Accordingly, even if, as the Full Court found, Ms Chadwick's difficulties in seeking to engage the belt, and failure to do so on the two straight stretches down Main Street, is explicable by and understandable having regard to the erratic driving of Mr Allen, since erratic driving was a reasonably foreseeable consequence of travelling with a drunk driver[34], the defence cannot be made out. There was no "incalculable intervention from outside". Moreover, the relevant act of a third party relied on here was not, in a relevant sense, an event over which Ms Chadwick had no control[35]; she chose to be a passenger of an intoxicated driver.

In any event, there were reasonable opportunities to fasten the belt

62. The trial judge rejected any suggestion that the seatbelt malfunctioned (TJ [154], [161], and the Full Court did not interfere with that finding: FC fn 53). He went on to find (TJ [159]) that:

    62.1 although the driving at various points was erratic, especially at the two junctions at either ends of Main Street, there was insufficient evidence from which to conclude that the car was always out of control or travelling at such a speed it precluded the plaintiff from engaging the seatbelt; and

    62.2 there must have been several reasonable opportunities to fasten the seat belt if Ms Chadwick had tried, including at least two reasonable opportunities to engage the seat belt along the straight sections of Main Street.

63. He found that she had tugged at the belt too quickly (consistent with her own account that "I remember grabbing the bloody seatbelt and yanking and yanking and trying to pull this bugger") (TJ [162])[36].

64. Accordingly Ms Chadwick was not prevented from fastening her seatbelt in the critical moments before impact, the objective facts indicated to the contrary (TJ [167]), and any

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34 The analysis of whether the third party's act was not reasonably to be expected or unforseen involves a consideration also of the gravity of the relevant risk: *Curry v Clarke* (1982) 29 SASR 443 at 445, *Howie v Sutcliffe* (1988) 49 SASR 225 at 233.

35 Compare s 10.1 of the Criminal Code which applies by virtue of the *Criminal Code Act* 1995 (Cth). That defence operates where the physical elements are brought about by another person over whom the defendant has "no control".

36 That evidence was consistent with the expert evidence of Mr Hall as to surface scratching and parallel striations caused by seatbelt webbing passing through the slot of the latch plate on the right rear seatbelt (TJ [163]).

potential defence based on the "act of a stranger" was not established. Her failure to fasten the seatbelt on the straight sections of Main Street was not due to driving conditions or malfunction but impatience and impetuosity on her part, causing her to pull it too quickly and then to give up; she had sufficient opportunity to fasten the seatbelt had she taken her time (TJ [170]).

65. In the Full Court, Gray and Nicholson JJ[37] considered that the act of a stranger defence was available on a charge of contravening Rule 265 (FC [130]) and, overturning the trial judge on this point, concluded (FC [156]-[158]) that:

> [O]ne has to consider all the circumstances that confronted Ms Chadwick. ... On any view, Mr Allen's driving was erratic and involved acceleration and swerving from time to time. Such movements were likely to cause the seatbelt mechanism to lock. **In these circumstances, one can understand panic and distress.** ... It can be readily understood that, in these circumstances, a passenger would yank or pull at a seatbelt in an effort to free it, **even more so an anxious and distressed 21 year old pregnant woman** who was desperate to fasten her seatbelt. ... [Emphasis added]

66. The Full Court did not impugn the trial judge's finding that there were two opportunities when the motion of the car did not prevent the seatbelt being fastened[38], and that any difficulty Ms Chadwick encountered was due to the way in which she was pulling on the belt. Rather, they considered that, in all the circumstances, it was not unreasonable that Ms Chadwick did not avail herself of those opportunities, because her panic and anxiety was understandable. In so concluding they overturned the trial judge's finding that the way in which she was trying to operate the belt was due to her impatience and impetuosity, holding that there was no basis for that finding and that it was not put in cross-examination (FC [20], [136]). With respect, the conclusion was supported by Ms Chadwick's own evidence, as summarised by the trial judge (TJ [17]), and the objective evidence regarding the two straight stretches of driving (FC [153]).

Damages: future care

67. Damages under this head were assessed using an hourly rate inclusive of GST, based on the rates currently paid to care agencies on behalf of Ms Chadwick (TJ2 [8]). The judge rejected the submission that the rate applied in respect of personal care and critical event care should be reduced by the GST component (TJ2 [24]). Applying the hourly rate to the projected hours over the life expectancy of the respondent, the judge's assessment of the amount allowable in respect of future care (assuming no deduction for contributory negligence) was $1,077,361 (TJ2 [99]).

68. In the Full Court, the appellant's complaint was that the trial judge had misunderstood the submission made at trial respecting the calculation of "future care" payments and

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37 Kourakis CJ also considered that Ms Chadwick's actions (in tugging at the seatbelt) were a direct and natural response to Mr Allen's bad driving and that she did not act unreasonably in impatiently and hurriedly attempting to engage the seatbelt (FC [19]). Accordingly, the act of the stranger defence was available.

38 There was evidence from Mr Griffiths, an expert called by the appellant, that assuming an average speed of approximately 70 – 80 kmph, there were two opportunities of approximately 6.75 – 7.7 seconds to have extended and latched her seatbelt, and these opportunities occurred essentially along the two 120 m straight stretches of the main street, in and out bound (TJ [155]).

GST. The trial judge appeared to consider that the submission that a GST-exclusive amount should be used hinged upon the identity of the manager of the damages award, whereas the submission is simply that the provider of such care is not able to charge GST (TJ2 [8]-[12], FC2 [10]).

69. Under s 38.30(3) of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth), a supply of home care[39] is GST-free if the supply is of services that are provided to disabled persons and are of a kind covered by item 2.1 (daily living activities assistance) of Part 2 of Schedule 1 to the Quality of Care Principles. The relevant definition of daily living activities assistance includes assistance with respect to bathing, hygiene, grooming, continence assistance, eating and eating aids, dressing etc. and mobility assistance.

70. Gray and Nicholson JJ considered that while it may prove to be the case that some or all future personal care would attract the GST exemption, it might also prove to be the case that some or all such services obtained by Ms Chadwick will not (FC2 [16]). Further, they considered that it ought not to be assumed over 50 years or so that the exemption would remain the same (FC2 [17]), and that it was correct therefore to 'begin' with a GST-inclusive figure and treat the potential applicability of an exemption as but one of a number of contingencies (FC2 [18]).

71. In the appellant's respectful submission, as a matter of principle, any assessment of damages should commence with an assessment of the actual cost of services to be compensated, and on the assumption that the law will not change. The potential for some change to the nature of care to be provided in the future, or for the law to change, ought to be treated as the relevant contingency, rather than treating the possible exemption as itself a contingency.

72. The trial judge found that Ms Chadwick was able to transfer without assistance, attend to her own toileting requirements and shower independently ([TJ 230]) but accepted that she would likely experience the onset of wrist and shoulder problems later in life, particularly with transfers, which would reduce her mobility and necessitate a greater amount of personal assistance from age 40 (TJ [232], [234], [240], [247], [248]). In that context, the trial judge found that Ms Chadwick required the following forms of care, which fell within the scope of the GST exemption:

    72.1 2 hours per day for personal care each morning for the dual purpose of reducing the risks of aggravating her shoulder and wrist problems and attending to the children, of which one hour was for Ms Chadwick's needs and one hour for the needs of her children ([TJ 244], [246])[40];

    72.2 10 hours per week for combined domestic assistance (TJ [246]);

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39 "Home care" is defined by s 45.3 of the *Aged Care Act* 1997 (Cth) as "care consisting of a package of personal care services and other personal assistance provided to a person who is not being provided with residential care".

40 The trial judge ultimately excluded the 1 hour per day he had allocated on account of childcare pursuant to *CSR Ltd v Eddy* (2005) 226 CLR 1 (TJ [263]).

72.3 1 week per year of personal care for critical events (including further injury, hospitalisation or pregnancy) until the age of 40 (TJ [244]) and four weeks per year of personal care for critical events from the age of 40 (TJ [244]); and

72.4 6 hours per week of hydrotherapy care from the age of 40 (TJ [248]).

73. It is one thing to recognise that the final figure awarded for a matter as conjectural as future care over a long period may be rounded (FC [220]), but that does not deny that there must be some logical basis for the analysis which might then result in rounding. At all events, whatever the range of permissible approaches, it is essentially flawed to adopt a mathematical approach but on the footing that the critical integer should include an allowance for GST which is not (presently) payable on the underlying services.

74. The impact of GST on the judge's assessment of damages is set out at the end of these submissions (Annexures A and B).

PART VII APPLICABLE STATUTORY PROVISIONS

75. The relevant provisions are set out in an annexure hereto (Annexure C).

PART VIII THE ORDERS SOUGHT

76. The appellant's appeal be allowed.

77. The orders of the Full Court be set aside, and in lieu thereof, it be ordered that:

77.1 the appeal to that Court be allowed in part;

77.2 the cross-appeal to that part be dismissed in part; and

77.3 paragraph 1 of the orders of the trial judge dated 19 November 2012 are set aside and in lieu thereof there by judgment for the respondent in such lesser sum as the Court determines[41].

PART IX ESTIMATE OF TIME REQUIRED TO PRESENT ARGUMENT

78. The appellant estimates that the presentation of his oral argument will require 2.5 hours.

24 July 2015

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41 The respondent was awarded 100% of $2,210,379.48. If the GST component is excluded from the award for future care, the judgment will become $2,153.562.58. If both contributory negligence reductions for which the appellant contends are made the respondent will be entitled to $401,109.85 plus costs [being 37.5% of $2,153.562.58 (the original judgment sum less the GST component) less s 124AC credit of $339,476.12 and less interim payments totalling $67,000.00], see s 50 of the Act.

ANNEXURE A: FUTURE CARE AWARD AT TRIAL

To age 40 *(annual multiplier 9.48)*			
Personal (1 hour per day)			
Weekdays	$38.17/hr x 245 days	=	$88,654.00
Saturday	$52.47/hr x 51 days	=	$25,368.00
Sunday	$61.05/hr x 51 days	=	$29,516.00
Public holidays	$81.13/hr x 11 days	=	$8,460.00
Sub Total:			**$151,998.00**
Domestic			
$38.17 per hour x 10 hours x 51 weeks		=	**$184,544.00**
Critical Event			
Weekdays	16 hours x $42.46 x 5 days	=	$32,202.00
Weekday (passive overnight)	4 hours x $43.89 + $49.50 x 5 days	=	$10,668.00
Saturday	16 hours x $52.47 x 1 day	=	$7,959.00
Saturday (passive overnight)	4 hours x $52.47 + $49.50 x 1 night	=	$2,459.00
Sunday	16 hours x $61.05 x 1 day	=	$9,260.00
Sunday (passive overnight)	4 hours x $61.05 + $49.50 x 1 night	=	$2,784.00
Sub Total:			**$65,332.00**
From age 40 to death *(annual multiplier 9.39)*			
Personal (1 hour per day)			
Weekdays	$38.17/hr x 230 days	=	$82,436.00
Saturday	$52.47/hr x 48 days	=	$23,649.00
Sunday	$61.05/hr x 48 days	=	$27,516.00
Public holidays	$81.13/hr x 11 days	=	$8,379.00
Sub Total:			**$141,980.00**
Domestic			
$38.17 x 10 hours per week x 48 weeks		=	**$172,040.00**
Hydrotherapy			
$38.17 x 6 hours per week x 48 weeks		=	**$103,224.00**
Critical Event			
Weekdays	16 hours x $42.26 x 20 days	=	$126,983.00
Weekdays (passive overnight)	4 hours x $43.89 + $49.50 x 20 nights	=	$42,266.00
Saturday	16 hours x $52.47 x 4 days	=	$31,532.00
Saturday (passive overnight)	4 hours x $52.47 + $49.50 x 4 nights	=	$9,742.00
Sunday	16 hours x $61.05 x 4 days	=	$36,689.00
Sunday (passive overnight)	4 hours x $61.05 + $49.50 x 4 nights	=	$11,031.00
Sub Total:			**$258,243.00**

TOTAL VALUE OF CARE PACKAGE: $1,077,361.00

ANNEXURE B: IMPACT OF GST ON FUTURE CARE AWARD

(future care award at first instance[42], no GST on personal care or critical event care, using agreed care provider rates and fee structure[43])

***To age 40** (annual multiplier 9.48)*			
Personal (1 hour per day)			
Weekdays	$34.70/hr x 245 days	=	$80,594.22
Saturday	$47.70/hr x 51 days	=	$23,062.00
Sunday	$55.50/hr x 51 days	=	$26,833.14
Public holidays	$73.75/hr x 11 days	=	$7,690.65
Sub Total:			**$138,180.01**
Domestic			
$38.17 per hour x 10 hours x 51 weeks per year		=	**$184,544.00**
Critical Event (one week per year) (annual multiplier 9.48)			
Weekdays	16 hours x $38.60 x 5 days	=	$29,274.24
Weekday (passive overnight)	4 hours x $38.60+ $45.00 x 5 days	=	$9,451.56
Saturday	16 hours x $47.70 x 1 day	=	$7,235.14
Saturday (passive overnight)	4 hours x $47.70 + $45.00 x 1 night	=	$2,235.38
Sunday	16 hours x $55.50 x 1 day	=	$8,418.24
Sunday (passive overnight)	4 hours x $55.50 + $45.00 x 1 night	=	$2,531.16
Sub Total:			**$59,145.72**
From age 40 to death (annual multiplier 9.39)			
Personal (1 hour per day)			
Weekdays	$34.70/hr x 230 days	=	$74,941.59
Saturday	$47.70/hr x 48 days	=	$21,499.34
Sunday	$55.50/hr x 48 days	=	$25,014.96
Public holidays	$73.75/hr x 11 days	=	$7,617.64
Sub Total:			**$129,073.53**
Domestic			
$38.17 x 10 hours per week x 48 weeks per year		=	**$172,040.00**
Hydrotherapy			
$38.17 x 6 hours per week x 48 weeks per year		=	**$103,224.00**
Critical Event (four weeks per year)			
Weekdays	16 hours x $38.60 x 20 days	=	$115,985.28
Weekdays (passive overnight)	4 hours x $38.60 + $45.00 x 20 nights	=	$37,447.32
Saturday	16 hours x $47.70 x 4 days	=	$28,665.79
Saturday (passive overnight)	4 hours x $47.70 + $45.00 x 4 nights	=	$8,856.65
Sunday	16 hours x $55.50 x 4 days	=	$33,353.28
Sunday (passive overnight)	4 hours x $55.50 + $45.00 x 4 nights	=	$10,028.52
Sub Total:			**$234,336.84**

TOTAL VALUE OF CARE PACKAGE: $1,020,544.10

[42] TJ [349]; TJ2 [18], [22]
[43] Exhibit D91

ANNEXURE C: PART VII APPLICABLE STATUTORY PROVISIONS

A Extracts from *Civil Liability Act* 1936 (SA)

3 – Definitions

"contributory negligence" means a failure by a person who suffers harm to exercise reasonable care and skill for his or her own protection or for the protection of his or her own interests;

"duty of care" means a duty to take reasonable care or to exercise reasonable skill (or both);

"intoxicated" – a person is intoxicated if under the influence of alcohol or a drug to the extent that the person's capacity to exercise due care and skill is impaired;

"negligence" means failure to exercise reasonable care and skill, and includes a breach of a tortious, contractual or statutory duty of care.

31 – Standard of care

(1) For determining whether a person (the ***defendant***) was negligent, the standard of care required of the defendant is that of a reasonable person in the defendant's position who was in possession of all information that the defendant either had, or ought reasonably to have had, at the time of the incident out of which the harm arose.

(2) The reasonable person in the defendant's position will be taken to be sober unless—

(a) the defendant was intoxicated; and

(b) the intoxication was wholly attributable to the use of drugs in accordance with the prescription or instructions of a medical practitioner; and

(c) the defendant was complying with the instructions and recommendations of the medical practitioner and the manufacturer of the drugs as to what he or she should do, or avoid doing, while under the influence of the drugs, and, in that event, the reasonable person will be taken to be intoxicated to the same extent as the defendant.

44 – Standard of contributory negligence

(1) The principles that are applicable in determining whether a person has been negligent also apply in determining whether a person who suffered harm (the ***plaintiff***) has been contributorily negligent.

(2) This section is not to derogate from any provision of this Act for reduction of damages on account of contributory negligence.

47 – Presumption of contributory negligence where injured person relies on care and skill of person known to be intoxicated

(1) If –

(a) the injured person –

(i) was of or above the age of 16 years at the time of the accident; and

(ii) relied on the care and skill of a person who was intoxicated at the time of the accident; and

(iii) was aware, or ought to have been aware, that the other person was intoxicated; and

(b) the accident was caused through the negligence of the other person; and

(c) the defendant alleges contributory negligence on the part of the injured person,

contributory negligence will, subject to this section, be presumed.

(2) Subject to the following exception, the presumption is irrebutable.

Exception –

The injured person may rebut the presumption by establishing, on the balance of probabilities, that –

(a) the intoxication did not contribute to the accident; or

(b) the injured person could not reasonably be expected to have avoided the risk.

49 – Non-wearing of seatbelt etc

(1) If the injured person was injured in a motor accident, was of or above the age of 16 years at the time of the accident and—

(a) the injured person was not, at the time of the accident, wearing a seatbelt as required under the *Road Traffic Act 1961*; or

(b) one of the following factors contributed to the accident or the extent of the injury:

(i) the injured person was not wearing a safety helmet as required under the *Road Traffic Act 1961*;

(ii) the injured person was a passenger in or on a motor vehicle with a passenger compartment but was not in the passenger compartment at the time of the accident,

contributory negligence will, subject to this section, be presumed.

(2) Subject to the following exception, the presumption is irrebutable.

Exception—

In the case mentioned in subsection (1)(b)(ii)—the injured person may rebut the presumption by establishing, on the balance of probabilities, that the injured person could not reasonably be expected to have avoided the risk.

(3) In a case in which contributory negligence is to be presumed under this section, the court must apply a fixed statutory reduction of 25 per cent in the assessment of damages.

50 – How case is dealt with where damages are liable to reduction on account of contributory negligence

(1) If damages are liable to reduction on account of actual or presumed contributory negligence, the court is to proceed in accordance with this section.

(2) First, the court is to assess the damages to which the injured person would be entitled if there were no reduction for contributory negligence.

(3) Secondly, the court is to—

(a) determine the extent of the injured person's contributory negligence, leaving out of the account factors for which a fixed statutory reduction is prescribed by this Part but taking into account the injured person's intoxication (if relevant) and factors that would, apart from this Part, amount to contributory negligence; and

(b) determine a percentage reduction to be made on account of these forms of contributory negligence (which cannot be less in a case involving intoxication than the relevant minimum prescribed by this Part); and

(c) then reduce the amount assessed under subsection (2) by the percentage determined under this subsection.

(4) Thirdly, the court is to apply any applicable fixed statutory reduction to the amount assessed under subsection (2) and reduced, if required, under subsection (3), and, if 2 or more fixed statutory reductions are required, the court is to make them in series.

Example—

Suppose that an amount of $100 000 is subject to 2 fixed statutory reductions of 25 per cent. In this case, the amount is first reduced to $75 000 and then reduced to $56 250.

(5) There is no necessary correlation between a finding of contributory negligence in relation to a cause of action under this Part and an apportionment of liability in relation to a different cause of action arising from the same facts.

Example—

Suppose that A and B are both drivers of motor vehicles that come into collision as a result of the negligence of both with resultant personal injuries to each other and also to C, a passenger in B's vehicle. Suppose that B's damages are reduced by 60 per cent under this Part as a result of actual or presumptive contributory negligence causally related to the occurrence of the accident. This is not to imply that, in A's action against B, no reduction beyond 40 per cent can be made on a similar basis. In C's action against A and B, responsibility will be apportioned between A and B without regard to the provisions of this Part.

B Extracts from Road Traffic Act 1961 (as in force at date of accident)

80 – *Australian Road Rules* and ancillary or miscellaneous regulations

The Governor may make-

(a) rules (*Australian Road Rules*) to regulate traffic movement, flows and conditions, vehicle parking, the use of roads, and any aspect of driver, passenger or pedestrian conduct; and

(b) regulations to deal with matters ancillary to this Part and the *Australian Road Rules* and to make miscellaneous provisions relating to matters of a kind referred to in paragraph (a).

C Extracts from Australian Road Rules (as in force at date of accident)

265 – Wearing of seatbelts by passengers 16 years old, or older

(1) A passenger in or on a motor vehicle that is moving, or is stationary but not parked, must comply with this rule if the passenger is 16 years old, or older.

Offence provision.

Note—

Motor vehicle and ***park*** are defined in the dictionary.

(2) The passenger must occupy a seating position fitted with a seatbelt if:

(a) there is a seating position fitted with a seatbelt that is not already occupied by someone else who is not exempt from wearing a seatbelt; and

(b) the passenger is not exempt from wearing a seatbelt under rule 267.

(3) If the passenger occupies a seating position fitted with a seatbelt, the passenger must wear the seatbelt properly adjusted and fastened unless the passenger is exempt from wearing a seatbelt under rule 267.

(4) If the motor vehicle has 2 or more rows of seats, the passenger must not sit in the front row of seats unless:

(a) the passenger is occupying a seating position fitted with a seatbelt; or

(b) there is not a seating position available for the passenger in another row of seats; or

(c) the passenger is permitted to sit in the front row of seats under another law of this jurisdiction.

Note—

Another law of this jurisdiction may prohibit the carrying of passengers for whom seatbelts are not available.

267 – Exemptions from wearing seatbelts

(1) A person is exempt from wearing a seatbelt if:

(a) the person is exempt from wearing a seatbelt under another law of this jurisdiction and is complying with the conditions (if any) of the exemption; and

(b) if the person is a passenger in a motor vehicle with 2 or more rows of seats and there is not another law of this jurisdiction permitting the person to sit in the front row of seats – the person is not in the front row of seats.

Note—

Motor vehicle is defined in the dictionary.

(2) A person in or on a motor vehicle is exempt from wearing a seatbelt if:

(a) the person is engaged in the door-to-door delivery or collection of goods, or in the collection of waste or garbage, and is required to get in or out of the vehicle, or on or off the vehicle, at frequent intervals; and

(b) the vehicle is not travelling over 25 kilometres per hour.

(3) A person is exempt from wearing a seatbelt if:

(a) the person (or, for a passenger, the driver of the vehicle in which the person is a passenger) is carrying a certificate, issued under another law of this jurisdiction, stating that the person is not required to wear a seatbelt; and

(b) the person is complying with the conditions (if any) stated in the certificate.

(4) However, a person is not exempt under subrule (3) from wearing a seatbelt if the person (or, for a passenger, the driver of the vehicle in which the person is a passenger) does not immediately produce the certificate mentioned in the subrule for inspection when a police officer or

authorised person asks the person (or the driver) whether the person is exempt from wearing a seatbelt.

Note—

Authorised person and ***police officer*** are defined in the dictionary.

(5) A person is exempt from wearing a seatbelt if:

(a) the person is a passenger in a police or emergency vehicle; and

(b) if the vehicle has 2 or more rows of seats—the person is not in the front row of seats or there is not a seating position available for the person in another row of seats.

Note—

Emergency vehicle and ***police vehicle*** are defined in the dictionary.

D **Extracts from *Road Traffic (Road Rules – Ancillary & Miscellaneous Provisions Regulations* 1999 (SA) (as in force at date of accident)**

28 – Exemptions from wearing seatbelts

(1) For the purposes of rule 267(1) (Exemptions from wearing seatbelts), a person is exempt from wearing a seatbelt if –

(a) the vehicle is a historic vehicle (as defined in schedule 1 of the *Motor Vehicles Regulations 1996*) that is registered under section 25 of the *Motor Vehicles Act 1959* and being driven in accordance with the conditions of that registration as prescribed in that schedule; or

(b) the vehicle is being used on behalf of the Crown for transporting prisoners or other persons in lawful custody.

(2) For the purposes of rule 267(3), a certificate stating that a specified person is not required to wear a seatbelt, indefinitely or for a specified period, may be issued–

(a) by the Minister on any ground the Minister considers appropriate; or

(b) by a medical practitioner on the ground of physical disability or any medical ground.

E **Extracts from *A New Tax System (Goods and Services Tax) Act* 1999 (Cth)**

38.30(3) – Home care etc.

(1) A supply of home care is ***GST-free*** is home care subsidy is payable under Part 3.2 of the *Aged Care Act 1997* or Part 3.2 of the *Aged Care (Transitional Provisions) Act 1997* to the supplier for the care.

(2) A supply of care is ***GST-free*** if the supplier receives funding under the Home and Community Care Act 1985 in connection with the supply.

(3) A supply of home care is ***GST-free*** if the supply is of services:

(a) that are provided to one or more aged or disabled people; and

(b) that are of a kind covered by item 2.1 (daily living activities assistance) of Part 2 of Schedule 1 to the Quality of Care Principles.

(4) A supply of care is ***GST-free*** if:

(a) the supplier receives funding from the Commonwealth, a State or a Territory in connection with the supply; and

(b) the supply of the care is of a kind determined in writing by the Aged Care Minister to be similar to a supply that is GST-free because of subsection (2).

195.1 – Dictionary

"Home care" has the meaning given by section 45-3 of the *Aged Care Act* 1997.

F Extracts from *Aged Care Act* 1997 (Cth)

45.3 – Meaning of home care

(1) ***Home care*** is care consisting of a package of personal care services and other personal assistance provided to a person who is not being provided with residential care.

(2) The Subsidy Principles may specify care that:

(a) constitutes home care for the purposes of this Act; or

(b) does not constitute home care for the purposes of this Act.

96.1 – Principles

(1) The Minister may make Principles, specified in the second column of the table, providing for matters:

(a) required or permitted by the corresponding Part or section of this Act specified in the third column of the table to be provided; or

(b) necessary or convenient to be provided in order to carry out or give effect to that Part or section.

Principles Minister may make		
Item	**Principles**	**Part or provision**
1	Accountability Principles	Part 4.3
2	Accreditation Grant Principles	Part 5.4
3	Advocacy Grant Principles	Part 5.5
4	Allocation Principles	Part 2.2
5	Approval of Care Recipients Principles	Part 2.3
6	Approved Provider Principles	Part 2.1
7	Assessment Grant Principles	Part 5.3
8	Certification Principles	Part 2.6
9	Classification Principles	Part 2.4
10	Committee Principles	section 96-3
11	Community Care Grant Principles	Part 5.2
12	Community Care Subsidy Principles	Part 3.2
13	Community Visitors Grant Principles	Part 5.6
14	Extra Service Principles	Part 2.5
15	Flexible Care Subsidy Principles	Part 3.3
16	Information Principles	Part 6.2
17	Other Grants Principles	Part 5.7
18	Quality of Care Principles	Part 4.1
19	Records Principles	Part 6.3
20	Residential Care Grant Principles	Part 5.1
21	Residential Care Subsidy Principles	Part 3.1
22	Sanctions Principles	Part 4.4
23	User Rights Principles	Part 4.2

(2) Principles are disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*.

G Extracts from Quality of Care Principles 2014 (Cth)

Schedule 1, Part 2.1 – Daily living activities assistance

Personal assistance, including individual attention, individual supervision, and physical assistance, with the following:

(a) bathing, showering, personal hygiene and grooming;

(b) maintaining continence or managing incontinence, and using aids and appliances designed to assist continence management;

(c) eating and eating aids, and using eating utensils and eating aids (including actual feeding if necessary);

(d) dressing, undressing, and using dressing aids;

(e) moving, walking, wheelchair use, and using devices and appliances designed to aid mobility, including the fitting of artificial limbs and other personal mobility aids;

(f) communication, including to address difficulties arising from impaired hearing, sight or speech, or lack of common language (including fitting sensory communication aids), and checking hearing aid batteries and cleaning spectacles.

Excludes hairdressing.