SUPREME COURT OF QUEENSLAND

CITATION:	*French v QBE Insurance (Australia) Limited* [2011] QSC 105
PARTIES:	**ELIZABETH FRENCH** (plaintiff) **v** **QBE INSURANCE (AUSTRALIA) LIMITED** (first defendant) **REGENT TAXIS LIMITED (ACN 009 705 113)** (second defendant) **BRANDT LINDEN SHAMON** (third defendant) **RACQ INSURANCE LIMITED** (fourth defendant) **NOMINAL DEFENDANT** (fifth defendant)
FILE NO:	BS 7241 of 2008
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	13 May 2011
DELIVERED AT:	Brisbane
HEARING DATE:	24-26 May and 25 June 2010
JUDGE:	Fryberg J
ORDERS:	**1. Judgment for the plaintiff against the first and fifth defendants for $762,350 on her claim.** **2. Judgment for the second, third and fourth defendants against the plaintiff on her claim.** **3. Judgment for the first defendant against the fifth defendant for contribution of $152,470 on its claim against the fifth defendant.** **4. Judgment for the first defendant against the third and fourth defendants on their claim for contribution against it.** **5. Judgment for the second defendant against the third, fourth and fifth defendants on their claim for contribution against it.** **6. Judgment for the third and fourth defendants against the first and second defendants on the first and second defendants' claim for contribution against them.** **7. Judgment for the fifth defendant against the first**

defendant for contribution of $609,880 on its claim against the first defendant.

8. Judgment for the fifth defendant against the second defendant on the second defendant's claim for contribution against it.

9. Further orders to be made after a further hearing.

CATCHWORDS: Carriers – Carriage of passengers – Carriage by land – Injury to persons – Generally – Taxi driver – Duty - Intoxicated passenger – [93], [94]

– – – – – Taxi company – Duty – Control and instruction of drivers – [145]

– – – – Contributory negligence – Taxi passenger incapacitated by alcohol – [193]

Torts – Law of torts generally – Joint and several tortfeasors – Contribution – Apportionment – Principles of apportionment – [214]

– Negligence – Essentials of action – Standard of care – Generally – "likely seriousness of the harm" – Level of specificity of harm – *Civil Liability Act 2003*, s 9(2)(a) – [77]

– – – – – Intoxication - "of itself" – *Civil Liability Act 2003*, s 46(1)(c) – [104]

– – Contributory negligence – Generally – Presumption from intoxication – Concurrent claim for breach of contract – Breach of express term to drive to specified address – Not a breach of a "duty of care" – *Law Reform Act 1995*, s 5 "wrong" – Not a "breach of duty" – *Civil Liability Act 2003*, s 47(1), sch 2 – [162], [163]

– – – – – Rebuttal – Contribution to damage not contribution to breach of duty – *Civil Liability Act 2003*, s 47(3)(a) – [169]

– Negligence – Road accident cases – Liability of drivers – Generally – Breach of duty – Failure to investigate or help injured pedestrian – No knowledge of pedestrian's involvement – [43]

– – – – – Causation –"the harm" – No need for normative evaluation in every case – *Civil Liability Act 2003*, s 11(4) – [55]

– – Fatal accidents legislation – Damages – Intoxication of deceased – Presumption of contributory negligence by deceased – *Civil Liability Act 2003*, s 11 – [167]

Civil Liability Act 2003 s 9, s 11, s 23, s 24, s 46, s 47
Law Reform Act 1995 s 5, s 10, s 17(5)
Succession Act 1981, s 66
Supreme Court Act 1995, s 17
The Law Reform (Tortfeasors Contribution, Contributory Negligence, and Division of Chattels) Act 1952, s 10
Transport Operations (Passenger Transport) Act 1994
Transport Operations (Passenger Transport) Regulation 1994, s 26, s 143AG

ACQ Pty Ltd v Cook [2008] NSWCA 161; 72 NSWLR 318
Adeels Palace Pty Ltd v Moubarak [2009] HCA 48; (2009) 239 CLR 420, cited
Astley v Austrust Ltd [1999] HCA 6; (1999) 197 CLR 1, cited
Barrett v Ministry of Defence [1994] EWCA Civ 7; [1995] 1 WLR 1217
Cal (No 14) Pty Ltd v Motor Accident Insurance Board [2009] HCA 47; (2009) 239 CLR 390
Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad" [1976] HCA 65; (1976) 136 CLR 529
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258; (2009) 75 NSWLR 649, cited
Cole v South Tweed Heads Rugby Club: [2004] HCA 29; (2004) 217 CLR 469, cited
Fairchild v Glenhaven Funeral Services Ltd [2002] UKHL 22; [2003] 1 AC 32, cited
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54; (2002) 211 CLR 540; [2003] 1 AC 32, cited
Griffith v Lindsay (1998) TLR 23/10/98
Hawthorn v Hillcoat [2008] NSWCA 340, cited
Joslyn v Berryman [2003] HCA 34; (2003) 214 CLR 552 WLR 318, cited
Lawes v Nominal Defendant [2008] 1 Qd R 369; [2007] QCA 367, cited
Manley v Alexander [2005] HCA 79; (2005) 80 ALJR 413, cited
Podrebesek v Australian Iron and Steel Pty Ltd [1985] HCA 34; (1985) 59 ALJR 492, cited
South Tweed Heads Rugby League Football Club Ltd v Cole (2002) 55 NSWLR 113; [2002] NSWCA 205, cited
Staderman v Dakin [2005] ACTSC 112, cited
State Rail Authority of New South Wales v Schadel [2001] NSWCA 394, cited
Stuart Pty Ltd v Condor Commercial Insulation Pty Ltd [2006] NSWCA 334, cited
South Tweed Heads Rugby League Football Club Ltd v Cole [2002] NSWCA 205; (2002) 55 NSWLR 113, cited
Vale v Eggins [2006] NSWCA 348, cited
Woolworths Ltd v Strong [2010] NSWCA 282, cited
Wynbergen v Hoyts Corporation Pty Ltd [1997] HCA 52; (1997) 72 ALJR 65

Commonwealth of Australia, *Review of the Law of Negligence: Final Report*, September 2002
Legislative Assembly (Qld), *Record of Proceedings*, 50th Parliament, 7 August 2001
Professor Harold Luntz, *Assessment of Damages for Personal Injury and Death*, Fourth Edition, LexisNexis Butterworths, 2002

COUNSEL: R Douglas SC and C Newton for the plaintiff
K Holyoak for the 1st and 2nd defendants
D North QC and M O'Sullivan for the 3rd, 4th and 5th defendants

SOLICITORS: McDonald Balanda & Associates for the plaintiff
McInnes Wilson for the 1st and 2nd defendants
DLA Phillips Fox for the 3rd, 4th and 5th defendants

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[1] **FRYBERG J:** Ms Elizabeth French sues the defendants for damages for causing the death of her de facto husband, Stephen Crouch. She brings the action on her own behalf and on behalf of Mr Crouch's four children, Taylah; Jordan; Isaac and Naomi. Mr Crouch died as a result of injuries received when he was hit by a motor vehicle or vehicles on the evening of 31 May 2003. The defendants all deny liability and challenge the amount of Ms French's claim.

The death of Stephen Crouch

[2] On Saturday, 31 May 2003, Mr Darren Hart organised a barbecue with his then girlfriend Ms Holly West at her house at Prince Street, Southport. They invited a number of friends, and about 20 people turned up, including Ms French and Mr Crouch. That couple arrived with their son Isaac (then a two-year-old) towards the end of the afternoon. Mr Crouch brought a bottle of rum. By about 8:00 pm he was merry and jovial. Feeling tired, Ms French, who was heavily pregnant with Naomi, decided to go home with Isaac. By arrangement with Mr Crouch, she took their vehicle, leaving him to catch a taxi. That was the last time she saw him alive. She was at that time carrying his wallet for him, and she forgot to return it before she left. Consequently, he had no money or identification papers on his person.

The taxi

[3] Mr Crouch continued to drink after Ms French left and by about 9:30 pm he had become drunk. He had consumed most if not all of the bottle of rum which he had brought. He tripped over a lighted brazier. He was "making an idiot of himself". His speech was slurred, he was unsteady on his feet and his walk was swaying. Mr Hart decided it would be best if Mr Crouch went home. He rang Regent, the second defendant, and ordered a cab via that company's automated booking service. In cross-examination Mr Hart opined that Mr Crouch was so affected by alcohol that he had neither the judgment to conclude that he ought to get himself home nor the physical and mental faculties intact to make arrangements for a cab to come and collect him. He was not fit to get himself home even if dropped only half a mile from his home; it would not have been safe to leave him to find his own way home. That was obvious from his condition, at least to Mr Hart who knew him well.

[4] In due course the taxi arrived. Its driver was Mr Stephen Earea. Mr Hart and two other guests, Mr and Mrs Poole, assisted Mr Crouch from the barbecue in the backyard to the taxi, a distance of about 35 m. Mr Poole was aware that Mr Crouch had finished his bottle of rum; Mrs Poole knew that he had also had two glasses of the bourbon which the Pooles had brought to the party. It started to rain. They persuaded Mr Crouch to enter the rear seat of the taxi. Mr Poole opened the front passenger door, put his head inside the taxi and told Mr Earea an address in Yangoora Crescent, Ashmore.

[5] Mr Earea, who died a few months before the trial began,[1] claimed in a written statement to police made eight months after the fatal night that Mr Poole told him to take the passenger to 27 Yangoora Crescent, but I believe the evidence of the Pooles that Mr Poole said 37 Yangoora Crescent. I found them and Mr Hart persuasive witnesses who had reasonably good recollections of events of that evening. I am satisfied that they gave their evidence accurately and honestly. I reject the suggestion made on behalf of the taxi defendants[2] that Mr Poole was intoxicated.

[6] Mr Earea was looking at Mr Poole when the latter told him the destination, but he did not respond verbally. While Mr Poole spoke there were no distracting noises occurring. It was a quiet street and there was no music in the cab. Mr Crouch was probably not talking and Mr Poole could remember no other conversation. Mr Earea did not repeat the address, nor did he write it down. His cab was not equipped with a GPS device to record the address. After Mr Poole gave the address, Mrs Poole leaned through the front passenger window and asked Mr Earea to get Mr Crouch home safely. Again he did not say anything, but he was looking at her.

[7] Mr Crouch was obviously very drunk. His speech was slurred. Mr Poole described him as "gibbering". To Mr Hay, who saw him later in the evening, he smelt of alcohol. He was urging the others to accompany him somewhere else for another drink. Mr Hart pretended to agree to this proposal. In furtherance of the pretence, Mr Hart got into the front seat of the cab for a short time, then got out, leaving the cab to drive off with Mr Crouch.

[8] The taxi defendants submitted that "although Crouch was obviously under the influence of alcohol, and perhaps heavily so, he was not observably incapacitated". That submission draws a distinction without a difference. Mr Crouch was incapacitated precisely because he was heavily under the influence of alcohol. They submitted that he was "conversant", but did not identify what he was conversant with. He was certainly not conversational, at least not in any coherent sense. He could hear what was being said to him but could not sensibly process it. He was not "completely incapacitated" if by that expression the defendants meant completely unconscious; but it must have been obvious that there was every chance he would pass out.

[9] Most of the direct evidence of what happened next is in Mr Earea's statement. He said that Mr Crouch was intoxicated but able to get into the back of the taxi by himself. He said that on arriving at 27 Yangoora Crescent about 10 or 12 minutes later, Mr Crouch was sitting up, but asleep. Mr Earea was unable to waken him. He went and spoke to the occupant of number 27, but the lady denied knowing anything about the passenger. Mr Earea told police that she was an old lady, but that was not correct. Police subsequently discovered that she was Ms Kylie Quirk, who was babysitting for the occupants. Mr Earea called his base asking for police assistance. After 10 minutes, no police had arrived. He then opened the back door of the cab and Mr Crouch

> "fell out in what I describe as slow motion. He fell onto the footpath and I lifted him up. There wasn't any blood or anything like that, he was just very pissed and legless."

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1 The first defendant, QBE, was his insurer in respect of the present claim and consented to be substituted for him pursuant to s 51 of the *Insurance Contracts Act 1984* (Cth) in respect of the liability alleged against him.

2 By "taxi defendants" I mean QBE, which was the licensed insurer of the taxi and Regent, the second defendant.

For Mr Crouch to have fallen from a sitting position while so soundly asleep that Mr Earea could not waken him, he must have been leaning on the door and not wearing a seatbelt. Mr Earea said he asked for payment. Mr Crouch went through his pockets but was unable to find any money. He had a mobile phone. Mr Earea drove off with it. He later claimed that Mr Crouch gave it to him and that he intended to come back, get the fare and return the mobile. He said that when he left, Mr Crouch had fallen back down and was lying on the (wet) grass (it had been raining from time to time and continued to do so throughout the night). After leaving Mr Crouch, Mr Earea, told the radio operator that he had got the passenger out and had been paid. He was reprimanded for leaving the scene after having the police called and was required to drive to the Southport police station where he handed in the phone.

The credibility of Mr Earea's statement

[10] I find that although Mr Crouch was intoxicated when he entered the taxi, he entered it without physical assistance. I also accept that the time taken for the journey was about 10 or 12 minutes and that on arrival at 27 Yangoora Crescent Mr Crouch was asleep. That is consistent with Mr Earea's behaviour: he entered the premises and spoke to the occupant about his passenger. I assume that the fact that he called his base asking for police assistance was corroborated, for it was not challenged. There is no reason to doubt the description of what happened when Mr Earea opened the door of the taxi: that is consistent with the amount of alcohol Mr Crouch had drunk and with his subsequent blood alcohol reading. I am not satisfied that Mr Crouch went through his pockets himself, nor that he gave his mobile phone to Mr Earea, either as security for or payment of the fare.[3] Given his condition it seems unlikely that he could have carried out an effective search of his pockets; and a conscious decision to provide the phone as security also seems improbable, as Mr Earea would have had no way of getting back in touch with his drunken passenger. Acceptance of the phone as security is also inconsistent with Mr Earea's statement to the radio operator that he had been paid. That statement, coupled with his decision not to wait for the police leads me to infer that he simply took the phone as compensation for his lost fare.

Subsequent events

[11] At some time after Mr Earea left, Mr Crouch recovered sufficiently to become mobile. What happened thereafter is largely a matter of inference. He did not go home. At about 11:00 pm Mr Douglas Hay returned to his home in Mualla Drive, Ashmore. He encountered a drunk lying across his driveway. He described this person as "unaware of what was going on around him and unaware of where he was. He seemed to be – he was unconscious for want of a better word." At first he and his son were unable to get a response from the man. He did not identify the man but described him as "not an old man", wearing jeans and "nice looking shoes". Mr Crouch was wearing jeans that evening and liked to dress well when he was not working. I infer that it was he whom Mr Hay saw.

[12] The distance from 27 Yangoora Crescent to Mr Hay's house was about a kilometre by the shortest pedestrian route (via Tumbarumba Avenue), and that is probably the route which Mr Crouch took. It took him away from his home, not past it. It is convenient at

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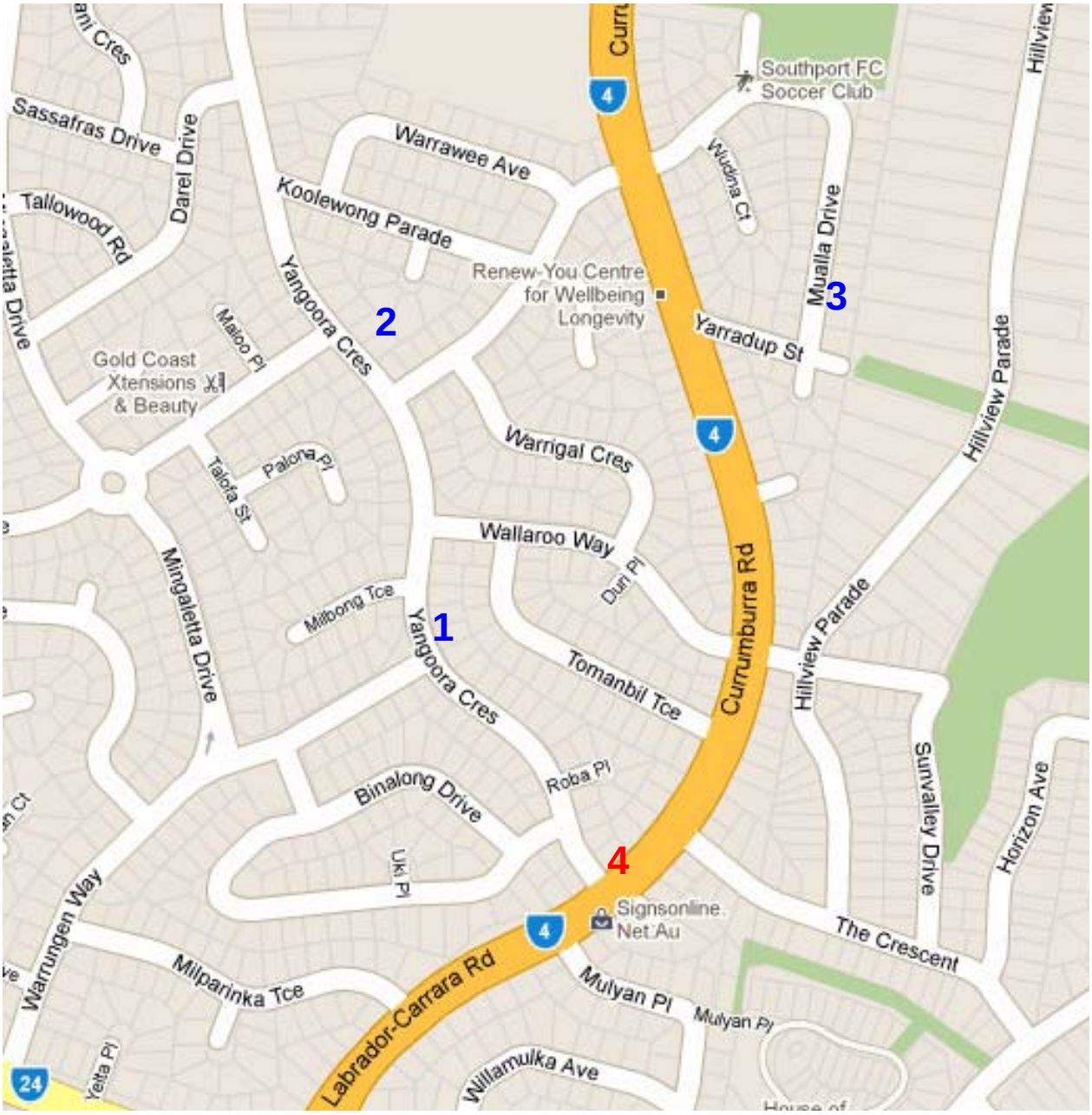
[3] Under Regent's bylaws, Mr Earea was prohibited from retaining property in lieu of a fare: bylaw 12.19.

this point to refer to a map of the area.[4] Currumburra Road is a four-lane divided sub-arterial road which runs between Labrador and Carrara. To get to Mualla Drive, Mr Crouch had to cross it. To get home he had to re-cross it. The evidence did not disclose whether the Southport Football Club in Mualla Drive had a liquor licence, nor its opening hours if it did.



Key (approximate):

1. 37 Yangoora Crescent
2. 27 Yangoora Crescent
3. Hay residence
4. Location of body

[4] Tumbarumba Avenue on the map is the unnamed street running from Yangoora Crescent to Currumburra Road.

[13] Mr Hay was concerned by his failure to get a response. He went inside and rang the police. Then he went back to the drunk who by now was making grunting and groaning noises. "Eventually", said Mr Hay,

> "he sat up on his own on his elbow and then sat up on his bum and we spoke to him. He looked dazed and looked around. When he eventually got to his feet we asked him, 'Are you all right, mate?'
>
> Did he say anything?-- He looked at us and after a while he said, 'Yes' and then I - I then asked him, 'Do you know where you are?' and he said, 'Yes'. And then at that point he started staggering off.
>
> What - in which direction did he stagger off?-- He staggered south along Mualla Drive to Yarradup Street where I had just arrived from - come from - and the very steep hill coming out of Mualla Drive into Yarradup Street and in that area there he staggered three or four times all over the place and then he went around the corner. It probably took him, I don't know, three or four minutes to travel that 50 metres.
>
> You watched him as he went?-- Yeah, he went around the corner, he disappeared. The people on the corner have a fence and once he went past that fence we didn't see him anymore."

The corner to which Mr Hay referred was that of Mualla Drive and Yarradup Street.

[14] Precisely what happened to Mr Crouch after that corner will never be known. What is known is that by just after 11:45 pm at the latest, he (or his body) was lying on the carriageway of Currumburra Road.

[15] At that time, Ms Caroline Barber was driving in a generally northerly direction on Currumburra Road with her husband and parents, Mr and Mrs McBride, as passengers. In the area relevant to this case the two carriageways of that road were separated from each other by a wide and sloping median strip. The speed limit was 60 km/h. As can be seen from the map, the road curves to the left just after its intersection with Yangoora Crescent as one proceeds in a northerly direction. At the intersection it reaches the crest of a rise. It was lit by a system of powerful street lights which were closer together than normal at the curve. The geometry of the road and some of the lighting can be seen in the following photograph, taken from that intersection, looking roughly north.

[16] Ms Barber was interviewed by a police officer later that night and signed the notes made by the officer in her notebook. She also made a statement to police some four months after the incident and gave evidence at the trial. In the vicinity of Yangoora Crescent the road was wet and as Ms Barber drove, there was a drizzle of light rain. There were no cars in front of or close behind hers. She was driving in the left-hand lane. Just past the intersection with Yangoora Crescent she went over the crest and saw what she took to be a man asleep on the road. She became aware of the man when she was several metres away from him. His body was parallel to the road with the head pointing north. As she drove past him she said, "There's someone asleep on the road." Her father suggested that they should go back. She continued to drive north to Wallaroo Way and executed a U-turn at the traffic lights at that intersection. She drove south along Currumburra Road to a point which she estimated to be opposite where she had seen the man. There she stopped and remained in the car with her mother whilst her father and her husband got out and walked across the median strip.

[17] Mr Tino Fenech was also driving north on Currumburra Road that evening. As he approached the intersection with Yangoora Crescent, Mr Fenech was driving in the right-hand lane. It had started to rain again, although not particularly heavily. When he was about at the intersection he saw what he thought was a piece of bark ahead and changed from the right lane into the left. When he was about 10 m from the object he realised it was a body. As he went past it he saw there was blood over the side of the face lying on the bitumen. The arms were spread wide with the legs together, forming a crucifix. Mr Fenech pulled to the left of the carriageway and stopped about 20 m past the body. This happened while Ms Barber was driving to Wallaroo Way and back.

[18] Some distance behind Mr Fenech, Mr Brandt Shamon[5], the third defendant, aged about 19, was driving his Toyota Camry sedan on Currumburra Road, in the same direction. He was in the right-hand lane. He was familiar with the road. He was travelling at approximately 60 km/h, although he thought the speed limit was 70 km/h. He testified that the rain had eased and his windscreen wipers were working more slowly than previously, but when interviewed by police on the night of 31 May he said that at the time of the accident it had just stopped raining. His headlights were on low beam, but the left headlight was not working. It had been damaged in a minor accident several weeks previously. Mr Shamon said in evidence that although he had inspected the damage carefully, he did not know the light was not working. He saw Mr Fenech's car in front of him, although not until after it had changed lanes. He saw it pull off to the left of the carriageway and felt a thud and his car bumped. There was no dragging sensation. He thought that happened at the same instant that Mr Fenech's car pulled to the left, but Mr Fenech told police that he heard the thud just as he was about to come to a stop. Mr Shamon thought he had run over a tree branch. He too pulled off to the left of the road and stopped some distance (he was unable to say how far) in front of Mr Fenech's car. He saw the body after he alighted.

[19] Mr Fenech ran to the body and checked for a pulse. There was a pulse and the chest was rising and lowering. Mr McBride and Mr Barber arrived on the scene, having crossed the slippery grass on the sloping median strip. At Mr Fenech's suggestion, Mr Shamon reversed his car and positioned it to block the approach to the body in the right-hand lane, with the hazard lights flashing. He and Mr McBride tried to warn approaching traffic until the arrival of emergency services. They were too late to save Mr Crouch; he died at the scene.

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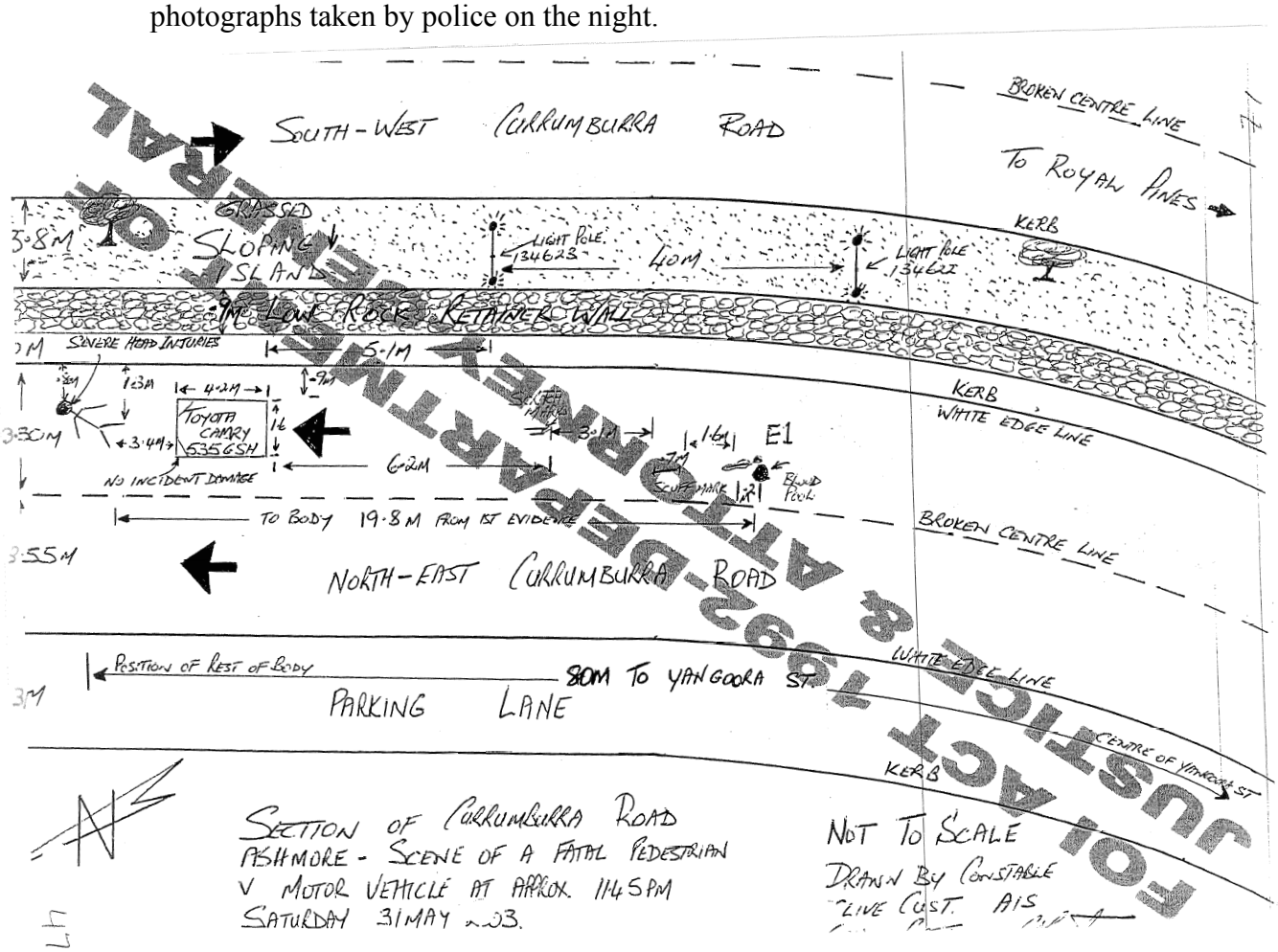
5 By the time of trial he had changed his name to Shannon.

[20] The accident scene was examined by Senior Constable Anderson, an officer with 12 years' experience in the accident investigation squad. His assistant made a sketch map depicting his findings. A copy is set out below. It depicts the position and orientation of Mr Crouch's body and Mr Shamon's car. It also shows the location of some scuff marks 6.2 m behind the car which had apparently come from Mr Crouch's shoes. A further 3.1 m south were more scuff marks and in close proximity to them was some body tissue, hair and blood.[6] The blood had flowed from its point of concentration (or "pool" as Constable Anderson described it) more than a metre downhill, becoming more diluted with distance.[7] The marks, tissue and blood were spread over a distance of some 2.5 m. The light poles and median strip were depicted on the sketch as was the 900 mm high retaining wall forming the foot of the median strip. The lights created pools of quite bright light with good visibility on the road, between which were darker shadows caused by the overhanging trees. The road was wet. There was blood on the front left tyre of the car and some small blood spots on the lower parts of the left doors and near the left taillight. Inside, there were several audiocassettes on the front passenger seat and at least one cassette in each front floor well. The body was clad in a dark green T-shirt and denim jeans. It had sustained a severe head injury and the left ear had almost been severed. There were a lot of scratches on the body, but going in different directions, consistent with the body having been tumbled, pushed or dragged on the bitumen. On the back were four substantial parallel scratches which in Constable Anderson's opinion were more consistent with having been caused by parts of the undercarriage of a vehicle than by dragging on the road. All of these features are depicted in a series of photographs taken by police on the night.



6 Point E1 on the sketch.

7 Exhibit 9.3.

[21] Constable Anderson examined the grass on the embankment of the median strip adjacent to the most southerly indicator of an accident (the blood pool). He saw no evidence to indicate that anyone had travelled through that area; there were no marks on the wet grass. He conceded that it was nonetheless possible someone had walked across the area about an hour earlier.

[22] A post-mortem examination of Mr Crouch's body was carried out. Tests revealed that his blood alcohol content at the time of death was 0.235 mg of alcohol per 100 ml of blood.

The street lights

[23] It is necessary to say a little more about the street lighting. Mr Isdale, an Energex employee described it in some detail and Constable Anderson also referred to it. The lighting was provided by a system of poles in the median strip. Two booms projected from each pole to the northbound and southbound carriageways respectively and a light or luminaire was attached to the end of each boom. Each luminaire contained a 250 W bulb. Two of the poles were of particular relevance, numbers 134622 and 134623. The police sketch shows them 40 m apart, but Mr Isdale's evidence was that they were in fact 32.5 m apart. On either figure they were much closer together than the normal 75 m, because of the curve. The lights were designed not only to illuminate directly, but also to cause reflection from the surface of the road. Reflection assisted visibility by creating silhouettes, a phenomenon particularly relevant when the road was wet and therefore acting as a mirror. A number of trees on the median strip created darker, shadowed sections on the road.

[24] In addition to the police photographs taken on the night, the plaintiff tendered a number of photographs of the scene taken by a commercial photographer shortly before the trial.[8] It was sought to rely on these as depicting the level of lighting which would have existed on the night, except for the fact that when the photographs were taken it was not raining and the road was not wet. I reject them as evidence of that fact. I do so on the basis of the evidence of several witnesses who thought them not so accurate and on the basis of my own scrutiny of them. However they are useful for some other purposes. Exhibit 8.0519 shows a punching bag on the road at approximately the same position as the point marked E1. It demonstrates that that point was not in shadow. Constable Anderson described the point as "a pool of bright light on the road".[9]

What happened to Mr Crouch?

[25] On the night he died Mr Crouch was extremely drunk. He had consumed a whole bottle of rum and two glasses of bourbon. When he entered the taxi he was very unsteady on his feet and "gibbering". His condition deteriorated on the drive to Yangoora Crescent. When Mr Earea opened the door of the taxi he was asleep. He fell out and lay on the wet ground. He was still there when Mr Earea left. When first seen by Mr Hay around 11:00 pm he was lying in a driveway despite the fact that it had been raining, at times heavily; and when roused he was unaware of his surroundings. He staggered off toward Currumburra Road. At the time of his death his blood alcohol reading was 0.235 mg/mL.

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8 Exhibit 8.

9 See also ex 8.0530.

[26] It is not possible to determine precisely the route which Mr Crouch followed from Mualla Drive to the scene of his death. Most likely he entered Currumburra Road at its intersection with Yarradup Street. At some point he must have crossed at least the southbound carriageway and the median strip, but it is not possible to say where that occurred. Constable Anderson found no evidence of anyone crossing the median strip near the point marked E1, but that is inconclusive: he did not find any such evidence near the final resting place of the body, notwithstanding the passage of Messrs McBride and Barber. Nonetheless I think it is unlikely that Mr Crouch crossed at this point. To do so would have involved walking a significantly longer distance than would be walked by crossing earlier and walking on the inside of the curve. It would also involve traversing a 900 mm high retaining wall, which would be unnecessary if one crossed further north. I do not suggest he thought it out that way. It is simply that if one looks at the median strip to the north of the retaining wall in ex 8.0519 the natural crossing point would be in the unwalled section or somewhere further north, beyond the photograph.

The first injuries

[27] The plaintiff's case is that before he was run over by Mr Shamon's Camry, Mr Crouch was hit by an unidentified vehicle near the point marked E1. That point was 19.8 m from where Mr Crouch was lying when he was hit by the Camry; that is established by the police evidence in conjunction with that of Mr Shamon and Mr Fenech. The Camry did not drag what it hit, according to Mr Shamon. Senior Constable Anderson referred to the scuff marks from Mr Crouch's shoes on the road and the nature of his wounds to support the inference that before Mr Shamon arrived on the scene, Mr Crouch was dragged that 19.8 m by another vehicle. I find that inference inescapable. Although the Nominal Defendant did not formally admit that Mr Crouch was struck by another vehicle, counsel conceded in address that this followed from Senior Constable Anderson's evidence.

[28] Mr Crouch died from head injuries.[10] Were any such injuries caused by that other vehicle? I am satisfied that some such injuries had been sustained before Mr Crouch was hit by Mr Shamon's Camry: Mr Fenech saw blood on Mr Crouch's face prior to the latter impact. Counsel for the vehicle defendants[11] submitted that there was no evidence that Mr Crouch suffered any head injuries when his body was struck by any vehicle driven by an unidentified driver or Mr Shamon. He submitted that it was at least equally likely that fatal injuries had been sustained by a drunken fall onto the bitumen before any relevant vehicle came on the scene.

[29] Mr Crouch must have suffered some head injuries near the point E1 on the sketch. The presence of human tissue, hair and a concentration of blood support that conclusion. That presence suggests a severe impact (the experienced Constable Anderson found the presence of hair unusual), and possibly a crushing one, between the head and the road. The human debris was sufficiently adherent not to be washed away on the wet road by the light rain which fell subsequently, although the blood was diluted and spread by a downhill flow over more than a metre.[12] Mr Crouch had already fallen at least once (from the taxi) and possibly three times (also on the footpath at Yangoora Crescent and

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10 Exhibit 12.

11 By vehicle defendants I refer to the third defendant (Mr Shamon), the fourth defendant (RACQ Insurance Limited, his licensed insurer) and the fifth defendant (the Nominal Defendant). By the time of the trial those parties had resolved any differences among them and were represented by the same lawyers.

12 Exhibit 9.3.

in Mr Hay's driveway), and had suffered no visible injury. In my judgment the head injuries sustained near the point E1 were caused when Mr Crouch was hit by the unidentified vehicle, not by any fall on the carriageway of Currumburra Road.

[30] I am unable to make a finding about whether Mr Crouch was standing, stooping or lying on the road at the time he was hit by that vehicle. The vehicle defendants submitted that he was unlikely to have been standing or even upright. They pointed to the absence of any evidence of lower limb, hip or similar injuries which one might expect in such an accident; the fact that his shoes were still on Mr Crouch's feet after the impact; and the absence of any vehicle debris suggestive of a front on collision. For the reasons which follow, these arguments are not persuasive. The post-mortem examination was carried out by a Dr Levy. He was not called and no report by him was tendered. The only evidence of the examination is a post-mortem examination certificate which deals only with the cause of death, not with any other injuries. I was told that Dr Levy was overseas and uncontactable and there is no suggestion that he wrote a full report of his examination. I am not prepared to draw any inference from the absence of evidence relating to other injuries. Nor do I think the fact that the shoes were still on supports such an inference. They remained on notwithstanding impact with the road which scuffed them; I infer they were securely done up. Constable Anderson gave evidence that he had seen some accidents where pedestrians lost their shoes on impact and others where they were thrown off in the flailing of the body. It appears unlikely that there was any flailing of Mr Crouch's body; if he was standing, he was immediately knocked to the ground and dragged. I do not find the presence of shoes on the body persuasive on this point. As to the vehicle debris, its presence depends entirely on the nature and size of the vehicle which hit Mr Crouch. Without knowing anything of that vehicle it is impossible to say whether one would expect debris or not.

[31] Nevertheless it is entirely possible that Mr Crouch was stooping or lying on the road when he was hit. As noted above, he had fallen or lain down two or three times a little earlier in the evening. He could have done so again. If he were lying on the road a crush injury is more likely than if he were standing; but this is too speculative a foundation for a conclusion on the point. Constable Anderson favoured the inference that Mr Crouch was lying on the road for some time in order for the pool of blood, as he called it, to have formed. He thought the amount of blood indicated that the head had been on the bitumen for a period of time. I do not find that reasoning persuasive. It is notorious that a small amount of blood spreads over a large surface area. The blood seen by Constable Anderson had not coagulated; it was still wet. However Constable Anderson did not know that there had been light rain between the time of the accident and when he examined the scene. It is apparent that this had caused the blood to flow across the road. It probably turned the blood on the road into a mixture of blood and water. In my judgment the inference favoured by Constable Anderson cannot safely be drawn. I reach that conclusion notwithstanding the plaintiff's willingness to accept Constable Anderson's inference.

[32] In any event, the liability of the Nominal Defendant must be assessed on the basis that Mr Crouch might have been lying on the carriageway. For that reason the conclusion is of little consequence.

The second injuries

[33] Mr Shamon did not see Mr Crouch before he drove over him. He did not apply his brakes and therefore, hit Mr Crouch at about 60 km/h. According to Ms Barber, Mr

Crouch was lying approximately parallel to (the direction of) the road. The impact probably reoriented the body. It caused significant blood splatter to the left side of the Camry and a concentration of blood on the front left wheel. The impact of the vehicle must have been very heavy and likely to cause severe injuries. Constable Anderson observed a considerable amount of scratching and bruising to Mr Crouch's chest, with differential striations, and these can be seen in ex 9.13. They could be wheel marks, but I would not feel confident in drawing such a conclusion. There is simply no evidence to enable a conclusion to be drawn as to what part or parts of the body were hit by the Camry. In other words, I cannot on the evidence determine whether the Camry inflicted any head injuries on Mr Crouch; although having regard to the speed of the vehicle and to the blood splatter there is a significant possibility that it did so. If it did inflict such injuries, it is more likely than not that they materially contributed to Mr Crouch's death.

Breach of duty: the driver of the unidentified vehicle

[34] The law imposes a high, although not an impossible standard of care upon drivers:

> "The standard in respect of the position a driver should be in so as to be able to take reasonable steps to react to events is itself a standard of reasonable skill and care; and although the standard of reasonable skill and care required of drivers is a high standard (because cars are so dangerous, and can so easily cause serious injuries), it is not a standard measured by success or perfection assessed with the wisdom of hindsight."[13]

Relevantly for present purposes:

> "The law does impose on drivers of motor vehicles a high standard of care for other road users, including those present for the purposes of dealing with injured persons or animals, or even obstructions, on the roadway."[14]

It matters not that the risk which eventuated was low:

> "It may readily be accepted that the possibility that someone would be found lying on a roadway like Middleton Beach Road at 4.00 am is properly to be described as remote. But the reasonable care that a driver must exercise when driving a vehicle on the road requires that the driver control the speed and direction of the vehicle in such a way that the driver may know what is happening in the vicinity of the vehicle in time to take reasonable steps to react to those events."[15]

None of the vehicle defendants raised any question under ss 9 or 10 of the *Civil Liability Act 2003*.

[35] Ms French pleaded the following particulars of breach of duty against the Nominal Defendant:

> "15.1 Failing to keep any proper lookout;
> 15.2 Failing to see Crouch on the roadway;

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13 *Hawthorne v Hillcoat* [2008] NSWCA 340 at [47].

14 *Staderman v Dakin* [2005] ACTSC 112 at [19].

15 *Manley v Alexander* [2005] HCA 79; (2005) 80 ALJR 413 at p 415 [12].

15.3 Failing to stop, slow down or steer clear so as to avoid a collision with Crouch;
15.4 Driving at a speed which was excessive in the circumstances.
15.5 Having struck Crouch, failing to stop and render him assistance and prevent him from being struck by another vehicle."

[36] One cannot infer a breach of duty by the driver of the unidentified vehicle merely from the fact that the vehicle hit Mr Crouch. The driver was presented with a difficult problem. It was night-time; visibility was impaired by light rain; Mr Crouch was wearing dark clothing; the road surface was wet, doubtless with patches of variable reflectivity; and Mr Crouch may have been lying on the carriageway, motionless and not reasonably to be expected to be there. There is no evidence that the driver was driving too fast for the conditions. On the other hand, even if Mr Crouch was not moving, he was lying in a pool of bright light. In her written statement made some four months after the accident, Ms Barber described the visibility as good while also noting that it was drizzling at the time. Mr Fenech saw him in time to take successful evasive action, and the point where he was lying when Mr Fenech saw him was no better, and quite possibly worse, illuminated than the point E1. Had Mr Crouch been seen, the driver ought to have been able to avoid him, even at the last minute.

[37] These features mean, in my judgment, that the unidentified driver breached his duty of care to Mr Crouch. He failed to keep a proper lookout and to stop or steer clear so as to avoid a collision with Mr Crouch.

[38] Ms French also submitted that the conduct of the unidentified driver in leaving the scene without stopping and helping was original evidence from which it could be inferred that he was conscious that his careless driving had caused his vehicle to collide with a pedestrian. That proposition was supported by reference to *Nominal Defendant (NSW) v Puglisi*[16], applying *Holloway v McFeeters*[17]. She submitted that in the circumstances of the case I should draw that inference. In response, the Nominal Defendant submitted that such an inference could not be drawn merely from the circumstance that a driver departed from the scene of an accident; there must also be evidence that the driver knew a pedestrian had been struck.[18] It submitted that no such knowledge could be inferred in the present case.

[39] I accept the submission that the unidentified driver must have known that he had, or at least might have, hit a pedestrian for the inference to be drawn. The inference is logically available only when the driver can be expected to have had a consciousness of guilt. So much is apparent from the cases cited. However in my judgment that driver probably did know or at least suspect that he had hit a pedestrian. His vehicle not only impacted a substantial object on the road; it dragged or pushed that object nearly 20 m forward. The driver must have been aware of the impact and the dragging and it is unlikely that he would not have investigated their cause. Speculation about the possible presence of unusual heavy vehicles or tree trunks does not detract from that conclusion.

[40] Those matters support the conclusion already reached of breach of duty by the unidentified driver.

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16 (1984) 58 ALJR 474.

17 (1956) 94 CLR 470; [1956] HCA 25.

18 *Guest v The Nominal Defendant* [2006] NSWCA 77.

[41] Particular 15.5 is of a different order from the other particulars. It does not relate to the driving of the unidentified driver but to his conduct after the impact. It assumes that the driver had a duty to stop and render assistance if he knew or ought to have known that his vehicle had hit a pedestrian. No such duty was pleaded, but the Nominal Defendant raised no objection on that count. Because it relates to post-accident conduct, it cannot be causally related to injuries sustained as a result of the first accident.

[42] Perhaps surprisingly, no case directly on point was cited to me. I was however referred to *Lawes v Nominal Defendant*[19]. In that case an unidentified vehicle collided with and killed a horse, which the driver left lying on the road without any warning to approaching motorists. The plaintiff was injured when his motorcycle collided with the horse. The trial judge held that even if the unidentified driver was not negligent in relation to the collision with the horse, he owed a duty to other road users to exercise reasonable care to prevent the horse's body from harming them. That conclusion was not challenged on appeal. Jerrard JA recorded the basis for the finding:

> "The learned judge cited authority, including *Ticehurst v Skeen* (1986) 3 MVR 307, at 310-311; Fleming '*The Law or Torts'*, 9th Ed (1998) at pp 164-166; *Clerk & Lindsell on Torts*, 19th Ed (2006), 8-43, pp 411-412; Todd (Gen Ed), *The Law of Torts in New Zealand*, 2nd Ed (1997) p 213, and several decisions in the United States."

After referring to the trial judge's findings of fact, he continued:

> "[10] The appellant Nominal Defendant did not challenge the learned judge's conclusion that the circumstances created a duty on the driver of the unidentified vehicle to exercise reasonable care to prevent the hazard posed by the dying or dead horse from harming other road users. Counsel referred this Court to the remarks of Brennan J, as His Honour then was, in *Sutherland Shire Council v Heyman* [1985] HCA 41; (1984-1985) 157 CLR 424 at 479. In *Pennington v Wolfe* 262 F Supp 2d 1254 Lungstrum J wrote (at 1260) that:
>
> > 'The rule is extrapolated from the broader principle that an actor who creates a hazardous condition has a duty to use reasonable care to warn others of the condition or to correct it.'
>
> Likewise in *Ticehurst v Skeen*, referred to by the learned judge, Wood J expressed the view that a duty existed to take reasonable steps to remove a hazard or give warning of its presence, where a motorist was connected with the creation of the hazard."[20]

[43] In my judgment the present case is *a fortiori*. The unidentified driver created or at least gravely aggravated the hazard to which Mr Crouch was exposed. He owed Mr Crouch a duty to exercise reasonable care to prevent further injury from oncoming vehicles.

[44] I have already held that the driver of the unidentified vehicle knew that he had, or suspected that he might have, hit a pedestrian. Even if that conclusion be incorrect, I am satisfied that the driver at least ought to have known that he might have hit a pedestrian. If he did not know, he ought to have been alive to the possibility and investigated it. Hitting a large object on the road feels quite different from hitting a pothole. When a driver becomes aware of the risk that he may have hit a pedestrian it behoves him to

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19 [2008] 1 Qd R 369; [2007] QCA 367.

20 *Ibid* at [7] and [10].

investigate the situation. McHugh J once wrote, "Ordinarily, the common law does not impose a duty of care on a person to protect another from the risk of harm unless that person has created the risk."[21] The converse is also true. The unidentified driver at least aggravated the risk; he ought to have done something to protect Mr Crouch from further injury and to obtain help. He did not do so. By those omissions he breached his duty of care.

Breach of duty: Mr Shamon

[45] The breaches of duty alleged against Mr Shamon were:

> "17.1 Failing to keep any proper lookout;
> 17.1A Driving his vehicle when he knew, or ought to have known, the front passenger side headlight thereof was not illuminated, and thereby affording him diminished forward vision in the wet conditions he was driving in, per se and contrary to s 215(1)(a) of the *Transport Operations (Road Use Management – Road Rules) Regulation 1999*, that headlight damaged in another motor vehicle accident that occurred on 22 April 2003;
> 17.2 Failing to see Crouch on the roadway;
> 17.3 Failing to stop, slow down or steer clear so as to avoid a collision with Crouch;
> 17.4 Driving at a speed which was excessive in the circumstances."

[46] I did not find Mr Shamon a satisfactory witness. Firstly, I thought in his evidence he was inclined to exaggerate or minimise in order to exculpate himself. For example he described visibility at the relevant time as "Quite poor. Very poor." I reject that evidence. Earlier that evening Mr Shamon had decided to go driving for pleasure; he was not deterred by the conditions, which were worse at that time because the rain was heavier. In his interview with police shortly after the accident, he said the rain had stopped. The evidence of Senior Constable Anderson and Ms Barber's initial statement also suggest that "very poor" was an exaggeration. Second, I am not satisfied that Mr Shamon had his mind fully on his driving. He was enjoying the process of driving (he described himself as "relaxed"), probably listening to audiocassettes and paying no particular attention to events before his car hit Mr Crouch. He claimed that his memory was that Mr Fenech's car was in the left lane and almost next to him (he was in the right lane) as they drove up the hill towards the accident scene. In that respect his memory was wrong. Moreover, shortly after the accident he told police that in Currumburra Road, before he got to the top of the hill, he saw no vehicles travelling ahead of him in the same direction. Third, he evaded questions in cross-examination, although perhaps from an inability to focus his mind rather than from deceptive intent.

[47] The left side headlight of Mr Shamon's Camry had been broken in a minor accident several weeks earlier. Mr Shamon claimed that he did not know the headlight was not working. He admitted that he had looked at it, he said reasonably carefully, and knew it had been damaged. He said he didn't have much money at that time, so he didn't want to get it fixed quickly. It suffered no additional damage when he ran over Mr Crouch – he looked at it after that accident. The condition of the light at that time is apparent from ex 9.20 and ex 9.21. At first Mr Shamon claimed in cross-examination to believe that after the first accident he "tested everything"; when pressed he admitted he could not

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[21] *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; (2002) 211 CLR 540 at p 575-6 [81].

recall whether he tested the headlight. Mr Shamon regularly parked in undercover parking facing a wall or solid surface. Over the several weeks between the light being damaged and the death of Mr Crouch he "had done a fair bit of night-time driving to friends' places", so he would have parked facing the wall with his lights on a number of times. I do not believe that he was unaware of the condition of the headlight before the accident on 31 May. I find that he knew it was not working. His initial claim to believe that he had tested everything and found it safe was a self-serving evasion.

[48] Mr Shamon did not see Mr Crouch. It is unclear whether Mr Crouch was lying in shadow or not. If he was in an area directly illuminated by the street lighting, Mr Shamon should have seen him for the same reasons that the driver of the unidentified vehicle should have seen him. If he was in a shadowed area that task was more difficult. His dark clothing and motionless body would have made it difficult to see him from any distance. Nonetheless he was seen, albeit somewhat belatedly, by Ms Barber. Mr Fenech also saw him, and in time to change lanes to avoid him, although he thought at first that Mr Crouch was a piece of bark. The difference between them and Mr Shamon was that they had both headlights working and, it may be inferred, were concentrating on their driving. In an area illuminated directly by street lighting the broken headlight of the Camry would probably have made little difference; that seems to follow from Mr Isdale's evidence. In an area of shadow the existence of two working headlights became important. I infer that had Mr Shamon been concentrating on his driving, two functional headlights would have enabled him to see Mr Crouch in sufficient time to avoid him, by the same manoeuvre as that executed by Mr Fenech. There was no traffic in the left-hand lane to prevent Mr Shamon from steering around Mr Crouch. If he could not have done that then he was going too fast for the conditions.

[49] For these reasons I am satisfied that Mr Shamon breached his duty of care to Mr Crouch.

Causation: the vehicle defendants

[50] The plaintiff's damage derives directly from the death of Mr Crouch. That death was caused by head injuries. I have already found that the impact of the unidentified vehicle caused some serious head injuries to Mr Crouch;[22] that the driver of the unidentified vehicle failed to remain at the scene to protect and assist Mr Crouch; that the impact of Mr Shamon's vehicle may have caused further head injuries to him, but has not been proved to have done so;[23] and that Mr Crouch died of head injuries.[24] Some further findings are necessary.

- The vehicle defendants submitted that the evidence does not explain which collision caused the fatal injury. There is a degree of truth in that submission. The head injuries inflicted in the first collision were serious, but their precise nature and extent have not been established, nor has it been shown that they would have caused death in the absence of the second collision. However their severity is such that I am satisfied that they made a material contribution to that death.
- I have no hesitation in finding that the failure of the driver of the unidentified vehicle to remain at the scene of the collision to protect Mr Crouch and obtain

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22 Paragraph [29].

23 Paragraph [33].

24 Paragraph [28].

aid for him was a cause of (in the sense of being a material contributor to)[25] whatever injuries were inflicted in the second collision. Had he positioned his vehicle as Mr Shamon subsequently positioned his Camry, he would, on the balance of probabilities, have averted further injury to Mr Crouch.

- The second collision doubtless caused severe injuries to Mr Crouch, but it has not been proved what they were, nor that those injuries included head injuries, nor that they would have killed Mr Crouch anyway, had he not died from head injuries.
- Finally, while Mr Crouch may have fallen on Currumburra Road, any injuries from such a fall would not have been serious, and certainly would not have been fatal.

[51] The starting point for a consideration of the issue of causation is s 11 of the *Civil Liability Act 2003*:[26]

> "**11 General principles**
>
> (1) A decision that a breach of duty caused particular harm comprises the following elements—
>
> (a) the breach of duty was a necessary condition of the occurrence of the harm (*factual causation*);
>
> (b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused (*scope of liability*).
>
> (2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty—being a breach of duty that is established but which can not be established as satisfying subsection (1)(a)—should be accepted as satisfying subsection (1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party in breach.
>
> …
>
> (4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party who was in breach of the duty."

[52] "[I]t is necessary to observe that the first of the two elements identified in s 5D(1)[27] (factual causation) is determined by the 'but for' test: but for the negligent act or omission, would the harm have occurred?"[28] In examining that element it is necessary to distinguish among the defendants; the question is whether individual defendants are to be found liable.[29]

The unidentified driver

[53] I have already found that the unidentified driver materially contributed to Mr Crouch's death by means of the severe head injuries resulting from his breaches of duty while

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25 Compare *Bonnington Castings Ltd v Wardlaw* [1956] UKHL 1; [1956] AC 613 at p 621.

26 *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420 at p 440 [44].

27 In Queensland, s 11(1).

28 *Adeels* at p 440 [45].

29 *Amaca Pty Ltd v Ellis* [2010] HCA 5; (2010) 240 CLR 111 at p 130 [42].

driving his vehicle.[30] However, I have also found that it has not been proved that those injuries alone would have caused Mr Crouch's death. I have found that there is a significant possibility that further head injuries were caused by Mr Shamon's Camry, and that if any such injuries were inflicted, they would have materially contributed to Mr Crouch's death. It is a possibility that the further injuries would have been enough to kill Mr Crouch. If the matter rested there, it would be difficult to find that the unidentified driver's driving breaches were a necessary condition for the occurrence of Mr Crouch's death. But the matter does not rest there. The unidentified driver further breached his duty by failing to protect Mr Crouch. Had he protected Mr Crouch the further injuries would not have happened. In short, if the driver had breached no duty, Mr Crouch would not have died. His breaches of duty were a necessary condition for the occurrence of the death.[31]

[54] It is plainly appropriate for the scope of his liability to extend to the harm he caused.

[55] I do not understand s 11(4) to require a trial judge to reinvent the wheel in every case. I find no obligation in that provision to reconsider by way of normative analysis whether or not and why responsibility for the harm inflicted in this motor vehicle accident should be imposed on that driver. In an ordinary case it suffices for the purpose of deciding the scope of liability to observe that liability should be imposed because the case law requires it.

[56] I find that the breaches of duty of the driver of the unidentified vehicle caused Mr Crouch's death.

Mr Shamon

[57] I have already found that no conclusion can be drawn as to what part or parts of the body were hit by Mr Shamon's Camry; that it cannot be determined whether the Camry inflicted any head injuries on Mr Crouch; that having regard to the speed of the vehicle and to the blood splatter there is a significant possibility that it did so; and that if it did inflict such injuries, it is more likely than not that they materially contributed to Mr Crouch's death.[32] It has not been proved that Mr Shamon's breaches of duty were a necessary condition for the occurrence of Mr Crouch's death. The first element of a decision that those breaches caused that death has not been proved.

[58] The second element has been proved. It is plainly appropriate for the scope of Mr Shamon's liability to extend to Mr Crouch's death.

[59] Ms French submitted that this was an exceptional case which fell under s 11(2). The Act gives no indication of what constitutes an exceptional case, save that it implies by the reference to "established principles" that such cases are recognised by common law. The High Court has written:

> "54. Section [11](2) makes provision for what it describes as 'an exceptional case'. But the Act does not expressly give content to the phrase 'an exceptional case'. All that is plain is that it is a case where negligence cannot be established as a necessary condition of

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30 Paragraph [50].

31 No party submitted that if the unidentified driver had not collided with Mr Crouch, Mr Shamon would still have done so.

32 Paragraph.[50].

> the harm; the 'but for' test of causation is *not* met. In such a case the court is commanded 'to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party'. But beyond the statement that this is to be done 'in accordance with established principles', the provision offers no further guidance about how the task is to be performed. Whether, or when, s [11](2) is engaged must depend, then, upon whether and to what extent 'established principles' countenance departure from the 'but for' test of causation.
>
> 55. At once it must be recognised that the legal concept of causation differs from philosophical and scientific notions of causation. It must also be recognised that before the Civil Liability Act and equivalent provisions were enacted, it had been recognised **(***Bennett v Minister of Community Welfare*[33]*; Chappel v Hart*[34]*)* that the 'but for' test was not always a *sufficient* test of causation. But as s [11](1) shows, the 'but for' test is now to be (and has hitherto been seen to be) a *necessary* test of causation in all but the undefined group of exceptional cases contemplated by s [11](2).
>
> 56. … .
>
> 57. It may be that s [11](2) was enacted to deal with cases exemplified by the House of Lords decision in *Fairchild v Glenhaven Funeral Services Ltd*[35] where plaintiffs suffering from mesothelioma had been exposed to asbestos in successive employments. Whether or how s [11](2) would be engaged in such a case need not be decided now."[36]

[60] Ms French submitted that s 11(1) was satisfied in respect of both the unidentified driver and Mr Shamon. In the alternative, she submitted that in the event that sub-s (1) was not satisfied in respect of both drivers, this was a case covered by s 11(2). She submitted: "To the extent that it may be difficult to know what further injuries were caused in the second collision, the events occurred close together in circumstances where derivation is impossible but both the unidentified driver and Mr Shamon were at fault." She did not expressly deal with the position which would arise on the findings which I have made.

[61] The vehicle defendants submitted that the reference to *Fairchild* was a red herring, apparently on the basis that the case applied only to employment-related injuries. (They further submitted that it was to be distinguished because in the present case the plaintiff had failed to prove that either driver had breached his duty, but that submission fails in the light of my earlier findings.)

[62] The question in *Fairchild* was formulated by Lord Bingham this way:

> "If
>
> (1) C was employed at different times and for differing periods by both A and B, and

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33 [1992] HCA 27; (1992) 176 CLR 408 at 413 [9].

34 [1998] HCA 55; (1998) 195 CLR 232 at 257 [66] - [67].

35 [2002] UKHL 22; [2003] 1 AC 32.

36 *Adeels* at p 443 [54] – [57] (some citations omitted).

> (2) A and B were both subject to a duty to take reasonable care or to take all practicable measures to prevent C inhaling asbestos dust because of the known risk that asbestos dust (if inhaled) might cause a mesothelioma, and
> (3) both A and B were in breach of that duty in relation to C during the periods of C's employment by each of them with the result that during both periods C inhaled excessive quantities of asbestos dust, and
> (4) C is found to be suffering from a mesothelioma, and
> (5) any cause of C's mesothelioma other than the inhalation of asbestos dust at work can be effectively discounted, but
> (6) C cannot (because of the current limits of human science) prove, on the balance of probabilities, that his mesothelioma was the result of his inhaling asbestos dust during his employment by A or during his employment by B or during his employment by A and B taken together,
>
> is C entitled to recover damages against either A or B or against both A and B?"[37]

The House of Lords held that in the circumstances, each defendant was liable despite the fact that the one whose fault caused the damage could not be identified due to the limitations of scientific knowledge.

[63] It is unnecessary to analyse the various judgments in *Fairchild*. The case has no application here not because it is restricted to mesothelioma cases or more generally to employment-related injuries, but because this is not a case where there is no defendant who satisfies the "but for" test.[38] *Fairchild* imposed liability on defendants who, on the facts, could not be shown to have caused the plaintiff's disease, where all were in breach of their duty and the plaintiff was unable, by reason of the limitations of science, to prove which breach of duty was causally potent. Any resulting unfairness to defendants was outweighed by the unfairness to the plaintiff should he recover against none of them.

[64] It is also unnecessary for me to determine what sort of case is exceptional within the meaning of s 11(2).

[65] I find that the plaintiff has not proved that Mr Shamon's breaches of duty caused Mr Crouch's death. He and RACQ, his insurer, are therefore entitled to judgment against Ms French.

The negligence claim against QBE (Mr Earea)

[66] Ms French claimed against Mr Earea in tort (negligence) and in contract.

Duty and standard of care

[67] Ms French pleaded that the taxi defendants:

> "owed to Crouch a duty to exercise reasonable care in and about, and incidental to the conveyance of Crouch as a taxi passenger in respect of

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37 [2002] UKHL 22; [2003] 1 AC 32 at p 40 [2].

38 It would be otherwise if my finding in para [53] were wrong, but I do not think I am obliged to examine the law applicable in that contingency.

> any reasonably foreseeable, in the sense of not far fetched or fanciful, or alternatively not insignificant risk of injury to Crouch arising out of the conveyance".

They denied that allegation, but by the end of the trial conceded the existence of a duty to exercise reasonable care. Presumably they meant reasonable care for the safety of Mr Crouch. It has long been the law that carriers owe their passengers such a duty.[39] As the parties framed their submissions, issue was joined on the standard of care owed to Mr Crouch, or as the defendants sometimes put it, the content of the duty. The defendants also relied on s 46 of the *Civil Liability Act 2003*; that provision may be put to one side for the moment.

[68] In *Caltex Refineries (Qld) Pty Ltd v Stavar*, Allsop P listed a number of "salient features" by reference to which the facts bearing on the relationship between the plaintiff and a putative tortfeasor might be analysed in order to identify the possible existence of a novel duty of care. The first use of the quoted words in this context in the High Court seems to have been in the judgment of Stephen J in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"*[40]. They were adopted by Gummow J in *Perre v Apand*[41] and have been used in a number of cases since then.[42] These features are equally applicable in assessing the content of the duty or standard of care. Allsop P wrote:

> "103 These salient features include:
>
> (a) the foreseeability of harm;
> (b) the nature of the harm alleged;
> (c) the degree and nature of control able to be exercised by the defendant to avoid harm;
> (d) the degree of vulnerability of the plaintiff to harm from the defendant's conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself;
> (e) the degree of reliance by the plaintiff upon the defendant;
> (f) any assumption of responsibility by the defendant;
> (g) the proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant;
> (h) the existence or otherwise of a category of relationship between the defendant and the plaintiff or a person closely connected with the plaintiff;
> (i) the nature of the activity undertaken by the defendant;
> (j) the nature or the degree of the hazard or danger liable to be caused by the defendant's conduct or the activity or substance controlled by the defendant;
> (k) knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff;
> (l) any potential indeterminacy of liability;
> (m) the nature and consequences of any action that can be taken to avoid the harm to the plaintiff;
> (n) the extent of imposition on the autonomy or freedom of individuals, including the right to pursue one's own interests;

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39 *Crofts v Waterhouse* (1825) 3 Bing 319; [1825] ER 809.

40 [1976] HCA 65; (1976) 136 CLR 529 at p 576-577.

41 [1999] HCA 36; (1999) 198 CLR 180 at p 253.

42 See the cases cited by Allsop P in *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258; (2009) 75 NSWLR 649 at p 677.

(o) the existence of conflicting duties arising from other principles of law or statute;
(p) consistency with the terms, scope and purpose of any statute relevant to the existence of a duty; and
(q) the desirability of, and in some circumstances, need for conformance and coherence in the structure and fabric of the common law."[43]

[69] To the extent that they are relevant in the present case, those factors are reflected in the following discussion. I shall not deal with them seriatim; the passage quoted is not an act of Parliament and should not be applied as if it were. His Honour identified the proper use of the list in the paragraph which followed it:

> "104 There is no suggestion in the cases that it is compulsory in any given case to make findings about all of these features. Nor should the list be seen as exhaustive. Rather, it provides a non-exhaustive universe of considerations of the kind relevant to the evaluative task of imputation of the duty and the identification of its scope and content."[44]

[70] The social utility of taxis for the conveyance of the inebriated can hardly be denied. The taxi defendants did not attempt to do so; indeed they relied upon it:

> "MR HOLYOAK: … Those of us that have had too much to drink rely on taxis and a taxi driver, unless you're going to cause a nuisance to the taxi driver or other passengers, your state of intoxication is not a ground for refusal, and we know that from personal experience, and that's an important statutory context in which Mr Earea found himself, the deceased driver of the taxi.
>
> HIS HONOUR: An important social one too. It keeps drunks off the road.
>
> MR HOLYOAK: Quite so, your Honour, and I will - that's a very important matter when one comes to talk about the nature of the duty that's owed here and where it stops, and you'll see in my written submissions I make a lot of submission about the social utility and - versus autonomy, which is important about whether or not a duty is owed in these circumstances."

As counsel submitted, the relevant Act and regulation reflected that value. Mr Earea could not lawfully have refused the hiring merely on the ground of intoxication of the passenger.[45] He could however lawfully have directed Mr Crouch not to enter the taxi if he was likely to cause him nuisance or annoyance.[46]

[71] The standard of care which Mr Earea was required to exercise is a matter which depends upon issues of fact. Importantly, at all material times he must have been aware that Mr Crouch was intoxicated. Mr Crouch did not nominate the address to which he was to be taken; Mr Poole did that. Mr Crouch was in no condition to articulate his address; later,

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43 *Ibid* at p 676 [103]. Plus ça change, plus c'est la même chose: cf *Maloney v Commissioner for Railways (NSW)* (1978) 52 ALJR 292 at pp 292-3 per Barwick CJ.

44 *Ibid* at p 676.

45 *Transport Operations (Passenger Transport) Regulation 1994*, s 26.

46 *Transport Operations (Passenger Transport) Act 1994*, s 143AG.

when the taxi arrived at Yangoora Crescent he did not, and I infer could not do so. Indeed, Mr Crouch's wish to party on elsewhere was overridden by his friends. Knowing this, Mr Earea accepted the instruction to take Mr Crouch to Yangoora Crescent. He did not demur to Mrs Poole's injunction to take Mr Crouch home safely. Mr Crouch was vulnerable if his taxi driver did not take reasonable care for his safety and was reliant upon Mr Earea to do this. The latter and only he was in control of the situation at all material times. He did not suggest that Mr Crouch's condition was likely to make him a nuisance.

[72] It follows that in my judgment Mr Earea took some responsibility for Mr Crouch's safety. That was not inconsistent with his duty under Regent's bylaws. They required that all members of the public be treated with all due care, courtesy and consideration by him,[47] and that he comply with all reasonable requests by passengers.[48] Mrs Poole's request that Mr Earea get Mr Crouch home safely answers that description. Nor was it inconsistent with Regent's Code of Conduct for Drivers, which obliged Mr Earea to be courteous and helpful to Mr Crouch and not to "unload" him "in an uncaring manner".[49]

[73] It is necessary to say a little more about vulnerability. The taxi defendants submitted that reliance and an assumption of responsibility are indicators of a plaintiff's vulnerability to harm. They submitted that in many cases there was no sound reason for imposing a duty to protect a plaintiff where it was reasonably open to the plaintiff to take steps to protect himself. If a plaintiff could have taken steps to protect himself from the defendant's conduct and was not induced by defendant into *[semble: not]* taking those steps, there was no reason why the law should step in and impose a duty on the defendant to protect the plaintiff from the risk. In this instance the harm did not arise from any reliance or assumption of responsibility; it arose from Mr Crouch's intoxication. His death was his own fault – he should not have got drunk. He was not relevantly vulnerable.

[74] There is a tension between that submission and the taxi defendants' earlier submission that the expression of a duty of care "should be left in general terms to take reasonable care". In that context the defendants pointed out how the High Court has emphasised that questions of duty and breach of duty should not be conflated lest the merger result in the vice of retrospective over-specificity of a breach.[50] That submission is in my judgment correct. It is a mistake to define duty in terms of specific breaches alleged to have occurred. In my judgment it is equally a mistake to define duty to exclude cases where specific causal (in the "but for" sense) events not alleged to constitute a breach have occurred. That is particularly so where such an event is not the product of environmental factors or the conduct of third parties, but the result of the plaintiff's own actions. Such an approach to the definition of duty would lead to the reintroduction by the back door of contributory negligence as a complete defence.

[75] A person who is inebriated is vulnerable, regardless of whether his condition is self-induced. His vulnerability remains a factor to be taken into account in assessing the existence of a duty and the standard of care owed to him. The submission on

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47 Bylaw 12.3.

48 Bylaw 12.12.

49 Exhibit 16, p 13.

50 *Cal (No 14) Pty Ltd v Motor Accident Insurance Board* [2009] HCA 47; (2009) 239 CLR 390 at p 418 [68] per Hayne J.

vulnerability conflates causation and duty. Exclusory over-specification is to be avoided just as much as inclusory over-specification.

[76] Section 9(2) of the *Civil Liability Act 2003* deals with general principles relating to the standard of care; it refers to some of Allsop P's salient features:

> "**9 General principles**
>
> (1) …
> (2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among other relevant things)—
> (a) the probability that the harm would occur if care were not taken;
> (b) the likely seriousness of the harm;
> (c) the burden of taking precautions to avoid the risk of harm;
> (d) the social utility of the activity that creates the risk of harm."

[77] I do not think that, viewed at the time Mr Earea drove off, it was more likely than not that Mr Crouch would be hit by two vehicles on Currumburra Drive. However notwithstanding its use of the definite article to qualify "harm", s 9(2)(a) does not refer to the precise mechanism of harm which in fact arose. It suffices if harm of the same general sort would occur. There was a reasonable possibility that, left beside the road in his inebriated condition, Mr Crouch would wake up, wander onto the road and be hit by a vehicle.

[78] Plainly, the likely seriousness of the possible harm was extreme.

[79] It would not have been burdensome for Mr Earea to have verified and recorded his destination, nor (on the evidence in this case) unduly burdensome to have remained with Mr Crouch in his vehicle until the police arrived. There was no reason to suppose that they would not respond promptly. The alternatives open to Mr Earea, taking Mr Crouch to a police station or back to Prince Street, were also not unduly burdensome.

[80] There was no social utility in omitting to verify and record the address, nor in putting Mr Crouch on the footpath and leaving him there. Freeing up the taxi for other passengers might have been important at a busy time, but there was no evidence to suggest a shortage of taxis on this particular night.

[81] On this aspect of the case, the first submission on behalf of the taxi defendants was:

> "The autonomous decision of an adult to be in such a state of intoxication does not impose or extend a duty of care. Consequences which follow from that decision to be intoxicated are the personal responsibility of the intoxicated person."

It is not easy to see how that submission has any application in the present case. There is no evidence that Mr Crouch deliberately set out to get drunk or otherwise made an "autonomous decision" to that effect. Moreover, the notion that a person who intends to get drunk and who makes consequential arrangements with another for his subsequent well-being and safety cannot hold that other responsible for negligently failing to carry out the arrangement smacks of Calvinism. The common law has had some odd doctrines throughout its history, but it has never made outlaws of alcoholics.

[82] The first case cited in support of the submission was *M'Cormick v Caledonian Railway Co*[51]. I do not find it persuasive. It was a contract case; it is more than a century old; and it long predates *Donoghue v Stevenson*.

[83] Second, the taxi defendants relied on *State Rail Authority of New South Wales v Schadel*[52]. In that case the plaintiff alighted from a train at Central Railway Station, Sydney, in an extremely intoxicated condition. He and his companion made their way toward the platform exit. The authority's employee on the platform observed them walk, obviously intoxicated, up to 60 m towards two exits, keeping a relatively straight line side-by-side as if they were conversing, about 2 m or 3 m from the train. He signalled that it was clear for the train to depart when they were fairly close to or at the first exit. The train moved off. It took about 25 seconds to clear the platform. At some point during that time the plaintiff unexpectedly moved to the end and the edge of the platform, possibly to urinate, and came in contact with the last carriage of the train. The issue in the case was whether the employee breached his duty of care, not whether there was a duty of care. It was held that there was no breach of duty. The Court of Appeal wrote:

> "57 This is a conclusion on the facts of the present case. It does not mean that a railway authority has unbridled licence to send its trains on their way. A passenger still getting off or getting on the train, a child skylarking near the edge of the platform apparently heedless of the danger of a moving train, or an intoxicated person on the platform obviously unable to control himself and so in a position of danger, all these can be expected to preclude immediately sending the train on its way."[53]

The case does not support the taxi defendants' submission and the passage quoted demonstrates the inapplicability of the Scottish decision.

[84] The third case relied on was *Portelli v Tabriska Pty Ltd*[54]. The decision in that case was one on its facts; it was held that the trial judge's conclusion that there was no evidence of an apparent danger to the plaintiff was clearly correct. There are dicta in the case regarding the duty of a publican to protect intoxicated patrons from wrongful acts of third parties after they leave the hotel, but they do not in my judgment affect the taxi defendants.

[85] The first submission accords with neither principle nor authority. I reject it.

[86] The taxi defendants founded their second submission on the decision of the High Court in *Cal (No 14) Pty Ltd v Motor Accident Insurance Board*[55]. They relied particularly on the High Court's approach to the issue of intoxication. They submitted that central importance was given to autonomy, coherence with other torts (e.g. assault and false imprisonment) and coherence with relevant legislative regimes; and that those salient features pointed to a conclusion that any risks which flowed from intoxication were the consequences of Mr Crouch's own voluntary choices. In places the submission seemed

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51 (1904) 6 F 362, Ct of Sess.

52 [2001] NSWCA 394.

53 *Ibid*.

54 [2009] NSWCA 17.

55 [2009] HCA 47; (2009) 239 CLR 390.

to go as far as saying that no duty was owed in the circumstances "because of the autonomous intoxication of the deceased".

[87] The first fallacy in the submission is that it equates Mr Crouch's voluntary intoxication with the autonomy of which the High Court spoke in *Cal (No 14)*. The discussion of autonomy in that case arose in the context of a submission that the defendant owed a duty of care which required it to prevent the deceased from riding his motorcycle in circumstances where he was not afflicted by an incapacity to make sensible judgments. Ordinarily speaking, individuals who are not under a disability have the right to determine their own course of conduct. The deceased had the right to decide whether or not to ride his motorcycle. The present case is very different. Mr Earea was not accused of failing to do something which would have impeded any of Mr Crouch's autonomous rights. Mr Crouch had probably passed beyond the stage of making autonomous decisions by the time Mr Earea arrived at Prince Street; certainly he had done so by the time the taxi reached Yangoora Crescent.

[88] Nor is it correct that acceptance of Ms French's case involves a lack of coherence with other torts. In that respect the defendants' submission is based on attribution to Ms French of a claim which she did not make. They submit that she contended that Mr Earea should have taken custody of Mr Crouch. She made no such submission. She did not contend that he should have been driven back to Prince Street or to a police station against his will, or kept in custody at Yangoora Crescent until police arrived. Her case was that he should not have been tipped out onto the footpath and left there "pissed and legless". Mr Earea's duty was to exercise reasonable care. It is unnecessary to determine what that duty would have entailed had he awoken and expressed the wish or intention to get out of the vehicle and "wander off". That simply did not happen. By waiting for the police while Mr Crouch slept, Mr Earea would have not acted inconsistently with any other law.

[89] The defendant submitted that Ms French's case lacked coherence with the relevant legislative regime. The only part of the legislative regime identified was s 26 of the *Transport Operations (Passenger Transport) Regulation 1994*.[56] The lack of coherence was attributed to the fact that "the contentions of the Plaintiff would impose significant duties of care, not imposed by the legislature which have chosen not to address the issue." The fact that the regulation did not address an issue of tortious liability in my judgment gives rise to no such incoherence. It simply means that it does not modify the common law.

[90] The taxi defendants sought to demonstrate incoherence this way:

> "A person who is apparently sober enough not to be refused entry to the cab may quickly succumb to the intoxicating effects of liquor once the vehicle moves off. Then the taxi driver is burdened with an obligation to take custody of a person and could be liable for any number of possibilities for their health. What if the person began to choke? Should he divert and head to a hospital? Taxi drivers may become less inclined to collect intoxicated persons. Taxis are a chief means of intoxicated persons travelling and people are in fact encouraged to call a cab or take a cab instead of driving their vehicles for social reasons. The social utility of taxi drivers having this role but then having such burdens imposed

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[56] See para [69].

> upon them tell against the imposition of such a duty. Further, the imposition of such duties on a taxi driver would have to be taken into account in fee structures if the taxi driver is to effectively nursemaid intoxicated persons in the vehicle and, in this case, once they have left a vehicle."

There was more of the same.

[91] Floodgates arguments like those have had limited success in the law of negligence. In this example there is nothing appalling in the idea that a taxi driver should take a choking passenger to hospital and/or use his radio to call for help, nor is there any reason to think that drivers are so callous as to find such an obligation an unreasonable burden. There is no reason to think that such an obligation would have a significant impact on fee or fare structures, nor that any impact is not already incorporated in those structures. The demonstration fails.

[92] Whether Mr Earea could have refused Mr Crouch entry to his taxi under s 143AG of the *Transport Operations (Passenger Transport) Act 1994* was not a question which was addressed in the evidence. I am prepared to assume that he could not have done so. The obligation to accept the hiring did not relieve Mr Earea of responsibility for Mr Crouch's safety. On the contrary, it obliged him to accept that responsibility. The submission quoted above[57] recognised the social utility of taxi drivers having the role of transporting intoxicated persons. The law may impose responsibility for the welfare of another independently of any question of reliance.[58] It does so in this case.

[93] In these circumstances the duty to use reasonable care for Mr Crouch's safety required more of Mr Earea than that he drive carefully and have a roadworthy vehicle. To a limited extent he became responsible for delivering Mr Crouch to a place of safety or to another person who would look after him. That was part of the content of his duty of care.

[94] And the circumstances had another dimension. They made it important to get the destination right in the first place. It would have been easy for Mr Earea to have confirmed the address by repeating it to Mr Poole; confirmation would have minimised the risk of a misunderstanding. It would have been easy for him to have written it down; that would have avoided the risk of his forgetting the address or becoming muddled. In my judgment, the standard of care which his duty demanded required him to confirm and record the address.

Section 46 of the Civil Liability Act 2003

[95] Section 46 provides:

> "**46 Effect of intoxication on duty and standard of care**
>
> (1) The following principles apply in relation to the effect that a person's intoxication has on the duty and standard of care that the person is owed—
>
> (a) in deciding whether a duty of care arises, it is not relevant to consider the possibility or likelihood that a person may be

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57 Paragraph [70].

58 *Barrett v Ministry of Defence* [1994] EWCA Civ 7; [1995] 1 WLR 1217; approved in *South Tweed Heads Rugby League Football Club Ltd v Cole* [2002] NSWCA 205; (2002) 55 NSWLR 113 at p 144 [184].

> intoxicated or that a person who is intoxicated may be exposed to increased risk because the person's capacity to exercise reasonable care and skill is impaired as a result of being intoxicated;
>
> (b) a person is not owed a duty of care merely because the person is intoxicated;
>
> (c) the fact that a person is or may be intoxicated does not of itself increase or otherwise affect the standard of care owed to the person."

[96] The taxi defendants submitted that in the circumstances of the effect of s 46:

> "… is that the mere fact that the deceased was intoxicated which may have put him at greater danger, for example, for wandering off, as in fact happened, did not create any greater duty or impose a duty for that reason alone, any more than it created a duty in respect of Mrs. Cole in *Cole* who was in a known intoxicated state and allowed to depart wandering from the rugby league club, or the deceased in *Cal (No. 14)* who was permitted to leave by means of motorcycle in an intoxicated state."

They did not identify which paragraphs of the section support that submission, but from its terms it would appear that they rely upon paras (c) and (b) respectively. Paragraph (a) applies in deciding whether a duty of care arises. As noted above, that question was by the end of the case not really in dispute.

[97] Paragraph (b) may be disposed of summarily. Ms French did not contend that Mr Crouch was owed a duty of care merely because he was intoxicated. Her case was that he was owed a duty of care because he was a passenger in the taxi.

[98] Paragraph (c) creates greater complexity. The defendants conceded that if there was a reasonable risk of danger because of Mr Earea's behaviour regardless of intoxication, s 46 would not assist. Paragraph (c) does not operate to reduce the standard of care which must be exercised by someone owing a duty of care.[59] But that is not enough for Ms French to overcome the obstacle posed by the paragraph.

[99] Two related issues of interpretation appear on the face of the paragraph: first, how does one identify the standard which is not to be increased or affected; and second, what significance is to be attributed to the words "of itself".

[100] Some assistance on the first question can be derived from dicta in *Vale v Eggins*. (The actual decision in that case was that there had been no negligence by the defendant.) There an inebriated pedestrian was observed from a distance of about 100 m by the defendant driver to be stumbling on the carriageway of the road on which the driver was travelling. He reduced his speed to between 50 and 55 km/h. The road contained three lanes for vehicles travelling in the driver's direction. The driver, who was in lane three, saw the pedestrian turn to observe him and stumble out of his line of travel to the boundary between lane one and lane two. The driver then increased his speed. When it was too late for the driver to do anything, the pedestrian suddenly reversed his direction of travel and stumbled into the path of the vehicle.

[101] Beazley JA, with whom McColl JA agreed, wrote:

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59 *Vale v Eggins* [2006] NSWCA 348.

> "26 The one point of reservation I have in relation to the observations of Bryson JA is his statement at [68], where he said:
>
> 'Before turning to address s.49 her Honour made (Judgment [53] Red 34) a statement which I have no difficulty with. Her Honour said 'The result is that the defendant owes the same standard of care to a plaintiff who is drunk that he would owe if the plaintiff was *walking normally* across the roadway'. This, in my view, was correct, and made exposition of s.49(1)(c) unnecessary for deciding the issues. Whatever difficulties the construction or the application of s.49(1)(c) presents, it does not appear to me to present any real difficulty for disposition of this appeal. (The statement about walking normally was not a statement or finding about the facts of the present case.)'
>
> 27 I do not understand his Honour to mean in this paragraph that a driver in the position of the respondent in this case could ignore that which he saw in front of him, that is, a person stumbling, on the assumption that that person might be intoxicated, and thereby control the speed and direction of his vehicle on the basis that the person was not intoxicated. If that is what is meant, I do not agree with his Honour's observations. However, as I have said, I do not consider that that is what either the trial judge or Bryson JA intended. Rather, as I understand it, no more is meant than that the standard of care is that of the ordinary prudent driver, acting reasonably, having regard to the circumstances as they occur."[60]
>
> Those circumstances included the possible incapacity of the stumbling pedestrian.

[102] That passage seems to suggest that the paragraph operates by reference to the standard of care owed to a person behaving in the same way and in the same condition as the plaintiff, albeit not by reason of intoxication. The passage seems to accept that a higher standard of care must be observed in such a situation, and the fact that the stumbling is or may be due to intoxication does not operate to reduce that standard.

[103] In the present case Mr Crouch was at all material times incapable of looking after himself. It happened that this was due to intoxication but it might equally have been due to some other condition. The standard of care owed to such a person would on this approach not be reduced simply because the incapacity was the consequence of voluntary intoxication.

[104] That approach is consistent with the presence in the section of the words "of itself"; but in my judgment those words do add a little to the position in the circumstances of the present case. I would accept that the standard of care postulated by the common law in the circumstances of this case was different from and was affected by Mr Crouch's incapacity. The immediate cause of that difference was the fact that by accepting the hiring Mr Earea became responsible for Mr Crouch's safety, with knowledge of his incapacity. As I have already held, it makes no difference whether Mr Earea was obliged by law to accept the hiring or not. The fact that he was responsible for Mr Crouch's safety in circumstances where his passenger was incapacitated was what affected the standard of care, not the mere fact of intoxication by itself.

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60 *Ibid*, emphasis added.

[105] For these reasons I conclude that the principles set out in s 46 do not affect the duty and standard of care which the law imposed on Mr Earea.

Breach of duty[61]

[106] Mr Earea neither confirmed nor recorded the address given to him by Mr Poole. He drove to the wrong address. He knew his task was to take Mr Crouch home. In the course of the drive Mr Crouch quite predictably fell asleep. Mr Earea must have known this at the latest by the time the taxi arrived at Yangoora Crescent. At first he did exactly what it was appropriate for a taxi driver to do in the circumstances: he went into the house which he believed was Mr Crouch's home to find someone who could look after him. When he found out Mr Crouch was unknown at number 27, he asked his base to call the police. That was not the only option then open to him. He could have taken Mr Crouch to a police station or returned him to Prince Street. Possibly there were other options open to him. But to that point, what he did was appropriate.

[107] When the police did not arrive in 10 minutes Mr Earea decided to rid himself of the incubus asleep in his back seat. He must have observed Mr Crouch's position and condition. He probably realised what would happen if he opened the door while Mr Crouch was leaning on it. If he did not, he ought to have done. It was perhaps fortunate that Mr Crouch was not injured when he fell to the ground through the open door.[62] Mr Earea lifted him up, took his mobile phone, then let him fall back on to the wet grass, exposed to the elements. In that state he left him.

[108] Section 9 of the *Civil Liability Act 2003* provides:

> "**9 General principles**
> (1) A person does not breach a duty to take precautions against a risk of harm unless—
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
> (b) the risk was not insignificant; and
> (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions."

[109] Mr Earea ought reasonably to have known that if he failed to deliver Mr Crouch to his home or otherwise to a situation of safety, but left him lying on the footpath, there was a risk that Mr Crouch would wake up, wander onto the carriageway (not necessarily in Yangoora Crescent) and be hit by a vehicle. In other words, the risk was foreseeable. That risk was not insignificant. Yangoora Crescent intersected and was a shortcut to Currumburra Road. That route avoided a set of traffic lights. By 11:00 pm traffic density in Yangoora Crescent had usually fallen to the occasional vehicle, but sometimes "hoons" would use it; Currumburra Drive was a busy major road. In the circumstances a reasonable person in Mr Earea's position would have confirmed and recorded the address and would not have left Mr Crouch as Mr Earea did. Such a person would have allowed Mr Crouch to remain in the taxi until the police arrived or taken one of the other reasonable courses open in the circumstances.

[110] The case against Mr Earea is not one of failure to rescue Mr Crouch. As McHugh J wrote in *Graham Barclay Oysters Pty Ltd v Ryan*, ordinarily, "the common law does not

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61 See also the findings recorded in paras [9]-[10].

62 Would Mr Crouch's intoxication then have formed even an arguable ground of defence?

impose a duty of care on a person to protect another from the risk of harm unless that person has created the risk."[63] Mr Earea did not encounter someone lying by the road. He put him there. If a biblical analogy is to be drawn, his position was more akin to that of those who left their victim for dead on the road to Jericho than to that of those who passed by on the other side.

[111] I find that Mr Earea breached the duty of care which he owed to Mr Crouch.

Causation

[112] It is convenient to defer consideration of the issue of causation until after examination of the claim in contract.

The contract claim against QBE (Mr Earea)

[113] Ms French pleaded a contract between Mr Crouch and Mr Earea. She alleged that it was an express term of that contract that Mr Crouch be driven to 37 Yangoora Crescent and an implied term that Mr Earea would exercise due care and skill or reasonable care in, about and incidental to his conveyance. The implication was alleged to arise either as a matter of law having regard to the nature of the agreement as one for the provision of services or "ad hoc as a matter of business efficacy". An allegation that the services would be fit for purpose was abandoned. Ms French pleaded that Mr Crouch's death was caused by a breach of the express term and by breach of the implied term. Her claim for loss of dependency was the result of the death.[64]

[114] The taxi defendants denied the existence of the express term. They pleaded an agreement between Mr Earea and Mr Crouch for the former to transport the latter to 27 Yangoora Crescent but alleged that this had the qualification that if the passenger agreed to leave and could be safely set down close to rather than at a destination, the obligation came to an end. They denied the implied term alleged by Ms French but admitted an implied term that Mr Earea would exercise reasonable care in conveying Mr Crouch, or as they expressed that in their final submissions, that he would exercise reasonable care to carry Mr Crouch safely. They alleged that the obligation ended after Mr Crouch safely left the taxi. Breach, causation and damage were denied.

[115] There is a high degree of artificiality about the identity of the parties to the contract. The plaintiff and the taxi defendants have agreed upon the existence of a contract and the parties to it, and doubtless each side has its tactical reasons for doing so. Questions of legal theory relating to the formation of the contract have therefore not been addressed before me. Were the matter not foreclosed by the agreement of the parties, I doubt I would find on the evidence that any contract came into existence between Mr Crouch and Mr Earea. The evidence strongly suggests that the contract was between Mr and Mrs Poole and Mr Hart (or one or more of them) on the one hand and Mr Earea on the other. In view of the parties' agreement, I shall proceed on the assumption that they were acting as Mr Crouch's agents.[65]

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63 [2002] HCA 54; (2002) 211 CLR 540 at pp 575-6 [81].

64 *Woolworths Ltd v Crotty* [1942] HCA 35; (1942) 66 CLR 603.

65 Presumably no issue of contractual capacity in Mr Crouch arises, because even if capacity were lacking, the contract was never avoided.

The express term

[116] The taxi defendants identified two issues arising from the claim relating to an express term of the contract. The first depended upon a question of fact: did Mr Poole direct Mr Earea to take Mr Crouch to number 27 or 37? It was common ground that whatever was said became a term of the contract. The second issue was whether, even if the direction was to number 37, "the term was absolute in nature".[66]

[117] I have already referred to the evidence of what happened when Mr Crouch got into the taxi. I have found that Mr Poole directed Mr Earea to take Mr Crouch to 37 Yangoora Crescent, not 27 Yangoora Crescent and that Mrs Poole asked him to get Mr Crouch home safely. That means that there was no term for Mr Crouch to be taken to number 27, whatever Mr Earea may have thought he heard. I have held that there was no distracting noise when the Pooles gave the directions which Mr Earea must be taken to have accepted by his conduct. Even if that conclusion be wrong, it simply points out the need for Mr Earea to have confirmed the address before proceeding. Implicitly I have rejected the submission that it can be inferred from the fact that Mr Earea went to number 27 that this was what Mr Poole said.

[118] As to the second issue the defendants proffered examples of traffic jams, roadworks, diversions and police blockades as matters which in practice supported the existence of an implied limitation. They submitted that exact performance of any express term was not required but that the term was subject to an implied qualification that the driver's obligation was to use his best endeavours to take the passenger to, or close to, the destination, citing *Griffith v Lindsay*[67]. They sought comfort from cases about deviation in shipping law.

[119] That raises the question, what exactly was the express term. It points out the fact that the term under discussion is in reality partly an express term and partly an implied term. The taxi defendants submitted that the term should be expressed as requiring the driver to use his best endeavours to get the passenger as close to the destination as is reasonably possible. There is considerable force in that submission and I shall revert to it later.[68] For present purposes it does not matter how the term is expressed or what limitations are placed on the term. Nothing occurred in this case which could trigger the operation of any limitation which might reasonably be implied. Mr Crouch did not ask to be let out short of his destination. No roadblock or police blockade impeded access to it. The reason why Mr Crouch was not taken there was that Mr Earea either misheard or became confused about the destination. The defendants cannot rely upon his negligent performance of the contract to avoid liability.

[120] I hold that there was an express term in the contract for Mr Crouch to be taken home safely to 37 Yangoora Crescent and that Mr Earea breached that term.

The implied term

[121] The parties agreed that there was an implied term, but differed as to its wording. I see no material difference between the two versions. That favoured by the taxi defendants

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66 Liability submissions, para 52.

67 (1998) TLR 23/10/98.

68 Paragraph [122].

substantially coincides with the duty owed in tort and I am content to proceed on the basis that the contract contained such an implied term.

[122] I reject any submission (I am not sure that the taxi defendants so submitted) that this duty terminated once Mr Crouch was outside the taxi. The duty to use reasonable care for his safety extended to exercising reasonable care in delivering Mr Crouch safely at his destination.

[123] For the reasons which I have given in relation to the tort claim, I hold that Mr Earea breached that term.

[124] The principles set out in s 46 of the *Civil Liability Act 2003* apply to a duty arising under the implied term.[69] However for the reasons given above,[70] they do not affect the standard of care under the implied term in this case.

Causation and remoteness: Mr Earea

[125] In relation to Mr Earea's breach of the express term, the issue of causation falls to be determined at common law.[71] In relation to his breaches of the implied term and his tortious duty, it must be determined under s 11 of the *Civil Liability Act 2003*. I reject the submission on behalf of the taxi defendants that the Act applies in both cases. That submission is not supported by the authority cited.[72] It was not suggested that the negligence of the two drivers broke the chain of causation.[73]

Breach of the express term

[126] It is more than probable that Mr Crouch would not have died had Mr Earea performed his duty under the express contractual term. Had he driven to the correct address he would have found Ms French at home. She would not only have paid him but also have ensured Mr Crouch's safe reception into the house. I reject the taxi defendants' submission that it was equally likely that he would have wandered off, wherever he was dropped. That submission was based on the incorrect assumption that after he left the vicinity of 27 Yangoora Crescent, Mr Crouch walked past his own home on his way to Mualla Drive.[74]

[127] In *Stuart Pty Ltd v Condor Commercial Insulation Pty Ltd*, Ipp J[75] summarised the law relating to remoteness of damage in contract:

> "114 The appeal turns on whether Stuart was entitled to the claimed loss of profits on the basis of the well-known test laid down in *Hadley v Baxendale*[76].

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69 *Civil Liability Act 2003*, sch 2, definition of "duty".

70 Paragraph [104].

71 *Ibid.*

72 *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420 at p 440 [41], [44].

73 QBE pleaded that the voluntary autonomous conduct of Crouch while heavily intoxicated constituted a *novus actus interveniens*, but did not pursue that argument at the trial. For the reasons which follow it has no substance.

74 Compare para [12].

75 [2006] NSWCA 334 at [114]–[118].

76 [1854] EWHC Exch J 70; (1854) 9 Ex 341 at 354; 156 ER 145 at pp 151-2.

115 This test was explained in *C Czarnikow Limited v Koufos*[77], *Czarnikow* is regarded as representing the law in Australia: *Wenham v Ella*[78]*; Burns v M.A.N. Automotive (Aust) Pty Limited*[79]*; The Commonwealth v Amann Aviation Pty Limited*[80]. See also *Alexander v Cambridge Credit Corporation Limited*[81] where McHugh JA remarked[82] that the High Court appears to have accepted Lord Reid's speech in *Czarnikow* as correctly stating the law.

116 In *Baltic Shipping Company v Dillon* Brennan J[83] said that the rules in *Hadley v Baxendale* had been merged in a single principle expressed by Lord Reid in *Czarnikow* 'and [had been] adopted in this Court'. The merged principle stated by Lord Reid[84] is:

> 'The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation.'

117 The phrase 'make it proper' in the passage quoted is to be understood in the light of the criteria expressed by Walsh J in *Wenham v Ella*[85] when he said that the object is 'to achieve a result which provides reasonable compensation for a breach of contract without imposing a liability upon the other party exceeding that which he could fairly be regarded as having contemplated and been willing to accept'.

118 In *Czarnikow*, Lord Reid emphasised that being within the contemplation of the parties is not the same as being reasonably foreseeable. It is a far more restrictive test. His Lordship pointed out[86] that:

> 'A great many extremely unlikely results are reasonably foreseeable...'.

And at 390 that:

> 'It has never been held to be sufficient in contract that the loss was foreseeable as "a serious possibility" or a "real danger" or as being "on the cards" '."

[128] The very reason that Mr Crouch was in the taxi, the reason that he was in Mr Earea's care, was that he was not capable of looking after his own safety or finding his own way

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77 [1967] UKHL 4; [1969] 1 AC 350.

78 [1972] HCA 43; (1972) 127 CLR 454 at p 471.

79 [1986] HCA 81; (1986) 161 CLR 653 at p 667.

80 [1991] HCA 54; (1992) 174 CLR 64 at pp 92, 99.

81 (1987) 9 NSWLR 310.

82 *Ibid* at pp 363-4.

83 [1993] HCA 4; (1993) 176 CLR 344 at p 368.

84 [1967] UKHL 4; [1969] 1 AC 350 at p 385.

85 [1972] HCA 43; (1972) 127 CLR 454 at p 466.

86 [1967] UKHL 4; [1969] 1 AC 350 at p 389.

home. Mr Earea must have realised this when he accepted the hiring. Had he turned an objective mind to the question he would have realised that if he delivered Mr Crouch to the wrong address (and not into anyone's care), there was a substantial likelihood that Mr Crouch would wander onto the carriageway and be hit by a vehicle. I am satisfied that the likelihood was sufficient to make it proper (in the sense referred to) to hold that his death flowed naturally from the breach of the express term. Such an event should have been within his contemplation.

[129] I hold that Mr Crouch's death was not too remote a consequence of Mr Earea's breach of the express term of the contract.

The implied term and the tortious duty

[130] As was the case in relation to the vehicle defendants, the starting point is s 11 of the *Civil Liability Act 2003*.

[131] I have no doubt that had Mr Earea allowed Mr Crouch to remain in his taxi or even remained with him after he fell onto the footpath until the police arrived, Mr Crouch would not have been killed. Had he confirmed and recorded the correct address and taken Mr Crouch to it, he would not have been killed. Had he taken the sleeping Mr Crouch to a police station or back to Prince Street, he would not have been killed. His breach of duty was a necessary condition of the occurrence of Mr Crouch's death.

[132] I turn to s 11(1)(b). There has been some debate, at least in New South Wales, as to the relationship between the equivalent of s 11 and the common law. I respectfully agree with Allsop P that "what its statutory content is and the extent of any continuity with developing common law concepts awaits judicial elucidation."[87] I acknowledge the force of the view that the section was not intended to change the common law. That seems to have been the view expressed in the Ipp Report,[88] out of which the Act was developed. It should however be noted that at common law there are different tests for remoteness of damage in negligence and in contract. Whether that means there must be different tests under s 11(1)(b) when the same facts give rise to separate cause of action would have to be considered. It is unnecessary to do so here.

[133] Sub-section (4) indicates two factors which must be taken into account, but they are explicitly not the only factors. Foreseeability/reasonable contemplation must surely be another. Proximity (or lack of it) in time, place and relationship I take to be another. It is unnecessary to consider to what extent the range of factors here relevant might overlap or duplicate those considered in relation to the existence of a duty.

[134] Applying those factors: the risks to which Mr Crouch was exposed by Mr Earea's conduct[89] were obvious. One of those risks, his death, eventuated. It did not happen at the very place of Mr Earea's default, but it was not far away - less than 10 minutes walk. It did not happen immediately; there was an interval of 1½ hours or perhaps a little more. In some contexts that might not be significant, but that cannot be said in the present context. Mr Earea assumed some responsibility for Mr Crouch's welfare and his conduct involved an abdication of that responsibility. Responsibility for his death should also in

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87 *Zanner v Zanner* [2010] NSWCA 343 at [11].

88 Commonwealth of Australia, *Review of the Law of Negligence: Final Report*, September 2002, p 111 [7.33].

89 Paragraph [131].

my judgment be imposed upon him. Why? Taxi drivers perform an important social role in relation to inebriated persons, a role which must carry with it some responsibility for such persons. They are invariably insured against liabilities arising as an incident of their work and insurers such as QBE can safely be taken to know the nature of a taxi driver's work. They invariably have radio and mobile phone communications to call for help and by definition they have mobility. They are in the best position to control the risks.

[135] I hold that Mr Crouch's death was not too remote a consequence of Mr Earea's breach of the implied term of the contract and of his duty in tort.

The position of Regent

[136] Contrary to Ms French's allegation, Regent did not employ Mr Earea; nor did it own or operate the taxi which he drove. That vehicle was owned by one Brereton, who held the necessary licence[90] to operate it as a taxi. He was an accredited operator of a public passenger service.[91] He must have made some sort of contract with Mr Earea (who held a driver's authorisation),[92] but it is not in evidence. It is not suggested that this case is affected by whether Mr Earea operated as an employee or contractor vis-à-vis Mr Brereton. Regent provided a central telephone answering service to customers seeking a taxi on the Gold Coast and a central booking service performed by computer which allocated jobs to available cars through an in-car computer. It carried out these functions under a contract made by it with the Chief Executive of the Queensland Department of Transport. That contract granted it a right to provide a taxi booking service in the Gold Coast area and obliged it to do so. It required Regent to have in place procedures to ensure the maintenance of specified vehicle standards and to ensure that maximum taxi fares were not exceeded. It did not require Regent to train drivers; that was done by the State Department of Transport which ran a driver training course called Taxiplus. However the contract obliged Regent to ensure that all drivers received "appropriate ongoing structured training to accommodate changes to basic entry training requirements" and its own bylaws required bailee-drivers to complete a training course with the company. The contract conferred no right to own or operate a taxi.

[137] On 24 January 2003, Regent made a contract with Mr Earea. By that contract it agreed to "provide training … necessary to successfully complete appropriate locality examinations" and "to provide training in relation to operations of Company equipment, including two-way radio and on-board computer". It undertook no other training obligation under the agreement. It agreed to provide Mr Earea with access to the company's operational and ancillary facilities. In return he agreed to observe and comply with the bylaws, rules and regulations from time to time and to be bound by the disciplinary procedures in the bylaws. There were a number of other provisions aimed at ensuring his compliance with various statutory obligations.

[138] Regent also had a fairly rudimentary contract with Mr Brereton requiring him to provide his vehicle as a taxi. It is unnecessary to consider that contract further.

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90 Under the *Transport Operations (Passenger Transport) Act 1994*, ch 7.

91 *Ibid*, ch 3.

92 *Ibid*, ch 4.

[139] Neither Regent's bylaws nor its Drivers Handbook contained any provision dealing specifically with the care of incapacitated or inebriated passengers. The bylaws seem concerned to reinforce statutory requirements of various descriptions.

The liability of Regent

[140] At the trial Ms French abandoned a number of the claims which she had pleaded against Regent:

- a claim that Regent was vicariously liable for the conduct of Mr Earea as its employee;
- a claim that Regent was liable as principal for the conduct of its agent Mr Earea;
- a claim pursuant to an agreement allegedly entered into between Mr Crouch and Regent;
- a claim pursuant to a term allegedly implied in the agreement pursuant to s 74(1) of the *Trade Practices Act* 1974 (Cth);
- a claim pursuant to an implied term of fitness of services for a specified purpose; and
- a claim in tort allegedly arising from breach of a duty of care allegedly imposed because the character of the agreement, being in the nature of carriage of transport, was nondelegable.

Duty of care

[141] What remained was a tortious duty of care allegedly arising in the following circumstances:

> "10C Further or in the alternative, by reason of the matters pleaded in paragraphs 8, 10, 10A and, or in the alternative 10B.1 to 10B.9 hereof:
>
> 10C.1 Each of Regent and Earea owed to Crouch a duty to exercise reasonable care in and about the safety of Crouch given his physical state;
>
> 10C.2 The content of the duty of care pleaded above, owed by each of Regent and Earea to Crouch, extended to taking steps to obviate or minimise the risk, to which Crouch was exposed, referred to in paragraph 10B.8."

[142] It is unnecessary to set out the paragraphs referred to in the opening words of that section. Counsel for Ms French did not explain, either in written or oral submissions, how Regent was supposed to know about Mr Crouch or what it should have done on the night of his death even if it had known. With the utmost respect I am quite unable to see how this claim could be maintained.

[143] But without objection from the taxi defendants, another argument was raised in address. It was submitted that having made bylaws prescribing measures for the safety of passengers in some respects, Regent came under a duty to passengers to prescribe bylaws or directions for dealing with ill or indisposed passengers. The following facts, it was submitted, gave rise to such a duty:

> "• Regent conducting a radio taxi service.
>
> • Transportation of a passenger puts him or her in the immediate physical control of the taxi driver, often in parts unknown to the passenger.

- The taxi service necessarily operated by night from time to time and in circumstances whereby prospective passengers may be disabled or indisposed.
- Express acknowledgement in such documents that the conduct of the driver, by act or omission, can in some way (and not just by the manner of driving) injure a passenger.
- Drivers are performing a repetitive role at a lower level or organization. Addressing not uncommon circumstances which may afflict passengers, and which drivers may confront would be apt.
- Regent's ability (and easily) to include a bylaw or direction expressly dealing with or a driver's response to an indisposed passenger.
- Regent's control over the driver, in the sense of being able to lay down bylaws which must be accorded with by the driver in the conduct of his driving, and in the absence of agreement no penalizing or withdrawing of the license to drive.
- Saliently, Regent embarking on stipulating in such bylaws various matters going to passenger safety (as essayed above) but not in this lastmentioned respect, presumably leaving it to the driver to exercise some discretion on the issue."

[144] I pass over without consideration the question whether such a precisely formulated duty would accord with principle. Essentially the argument seems to be that because Regent could have made such a bylaw, it was under a duty to have done so. Certainly, capacity and control are relevant factors in identifying whether a duty should be found. However they are not sufficient in circumstances such as the present. The only relationship between Regent and passengers arises through Regent's service as a booking agency. There is no suggestion that it held itself out as ensuring that its drivers would behave in any particular way if a passenger should be or become incapacitated, nor any evidence that Mr Crouch or those who booked the taxi for him in any way relied upon Regent to ensure Mr Crouch's safety. It may be that to the extent that Regent came under statutory duties in relation to drivers some parallel tortious duty to members of the public exists. If it does, it is the legislation which provides the link between Regent and the public. The fact that some safety matters were dealt with in bylaws does not mean that members of the public who are totally ignorant of that fact are owed a duty in respect of matters not dealt with in the bylaws. I note that the statutory standard for operators' accreditation made under the *Transport Operations (Passenger Transport) Act* 1994 contains no such provision, despite the fact that it is required to take into account national and international benchmarks and best practices.[93]

[145] I hold that Regent owed no duty to Mr Crouch to promulgate bylaws or instructions relating to the care of incapacitated or inebriated passengers. For that reason alone it is entitled to judgment against Ms French.

Causation

[146] In any event, I doubt very much whether the making of such a bylaw would have made any difference to Mr Earea's behaviour. He ignored bylaws 12.3 and 12.12[94] and there

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93 See ss 92, 94, 14.

94 See paragraph [72].

is no evidence that he was even aware of the terms of the bylaws. It is unnecessary to decide this point.

Conclusion on liability

[147] It follows that QBE and the Nominal Defendant are liable to Ms French, but the other defendants are not.

Contributory negligence

[148] The taxi defendants pleaded that Mr Crouch caused or contributed to his death. They pleaded that he is presumed by s 47 of the *Civil Liability Act 2003* to be guilty of contributory negligence and that consequently his damages are to be reduced by not less than 25%. They further pleaded that in the circumstances of the case damages should be reduced by 100% under that section read with s 24. The vehicle defendants pleaded the same point, in slightly different words. Their submissions reflected that pleading.[95]

[149] In her reply Ms French simply joined issue with the vehicle defendants. However as against the taxi defendants she also pleaded in response to the reliance on s 47 that Mr Crouch's intoxication did not contribute to the breach of duty by those defendants alleged in the statement of claim.

[150] Her position was elaborated in closing submissions on her behalf. First, she submitted that contributory negligence was not available as a defence to the claim based upon breach of the express term of the contract to take Mr Crouch to 37 Yangoora Crescent. Second she submitted that s 47 did not apply to a claim under Lord Campbell's Act. Third, she submitted that on the facts of the case, it was plain that Mr Crouch's intoxication did not contribute to the breach of duty of any of the defendants. Finally, she submitted that any reduction of damages for contributory negligence should be limited to 30%.

QBE: the express term claim

[151] Ms French submitted that neither s 10 of the *Law Reform Act 1995* nor s 47 of the *Civil Procedure Act 2003* applied in a case where the relevant duty arose under a contract and was not conduct concurrent and coextensive with a duty of care in tort. That submission raises questions of statutory interpretation.

Law Reform Act 1995, s 10

[152] Ms French's cause of action arose under s 17 of what is now the *Supreme Court Act 1995*:

> "**17 Liability for death caused wrongfully**
>
> Whensoever the death of a person shall be caused by a wrongful act neglect or default and the act neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof then and in every such case the person who would have been liable if death had not ensued shall be liable to an

[95] The taxi defendants also pleaded *volenti non fit injuria*, but they did not address on that pleading and sought no findings to sustain it.

> action for damages notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to crime."

It is trite law that this provision created a new and independent cause of action, not a derivative action. If it stood alone, carelessness by the deceased contributing to his own death would not be material.

[153] That issue was dealt with by s 17(5) of what is now the *Law Reform Act 1995*. That subsection and sub-s (1) to which it refers provide:

> "**10 Apportionment of liability in case of contributory negligence**
>
> (1) If a person (the *claimant*) suffers damage partly because of the claimant's failure to take reasonable care (*contributory negligence*) and partly because of the wrong of someone else—
>
> (a) a claim in relation to the damage is not defeated because of the claimant's contributory negligence; and
>
> (b) the damages recoverable for the wrong are to be reduced to the extent the court considers just and equitable having regard to the claimant's share in the responsibility for the damage.
>
> …
>
> (5) Where any person dies as the result partly of his or her own failure to take reasonable care and partly of the wrong of any other person or persons, and accordingly if an action were brought for the benefit of the estate under the *Succession Act 1981*, section 66 the damages recoverable would be reduced under subsection (1), any damages recoverable in an action brought for the benefit of the dependants of that person under the *Supreme Court Act 1995*, section 17 shall be reduced to a proportionate extent."

"Damage" is defined in s 5 to include loss of life.

[154] It was common ground that if an action were brought for the benefit of Mr Crouch's estate under s 66 of the *Succession Act 1981*, the damages recoverable would be reduced under s 10(1) if he were found to have suffered damage in the circumstances postulated by that subsection. However, Ms French submitted that even if the damage would be partly because of his failure to take reasonable care, it would not be partly because of the wrong of someone else; so the postulated circumstances did not arise. That conclusion followed, it was submitted, from the definition of "wrong":

> "***wrong*** means an act or omission that—
>
> (a) gives rise to a liability in tort for which a defence of contributory negligence is available at common law; or
>
> (b) amounts to a breach of a contractual duty of care that is concurrent and coextensive with a duty of care in tort."

Ms French submitted that the contractual duty arising under the express term was not one which was "concurrent and coextensive with the duty of care in tort". She relied on *BHP Coal Pty Ltd v O and K Orenstein & Coppel AG (No 2)*[96].

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[96] [2008] QSC 141.

[155] The taxi defendants, the only ones affected by this issue, submitted:

> "The claims in contract would equally be subject to the application of contributory negligence by reason of sections 5 (definition of 'wrong') and 10 of the *Law Reform Act 1995*. Any attempt to overcome the application and its provision by reliance upon an express term or a term of fitness for purposes indicates, with respect, the artificial nature of the contention. It would be a remarkable situation if a passenger in a taxi, who may for example failure to wear a seatbelt, could escape contributory negligence because of either an express term or a term relying upon fitness for purposes if a vehicle was not driven according to that standard. It is submitted that such an outcome points strongly in favour of the submission made above that there was no such term in the circumstances."

[156] That submission fails to address the point. There is nothing odd about the outcome of the example the submission proposes. Until the introduction of apportionment, contributory negligence was a complete defence in an action for negligence. It was never a defence to one in contract,[97] although in some situations the facts might have allowed the defendant to plead failure to mitigate damage. Apportionment was introduced by *The Law Reform (Tortfeasors Contribution, Contributory Negligence, and Division of Chattels) Act of 1952*, to do away with contributory negligence as a complete defence: "The sub-section was designed to remedy the evil that the negligence of a plaintiff, no matter how small, which contributed to the suffering of damage, defeated any action in tort in respect of that damage."[98] Section 10(1) of that Act provided:

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

"Fault" was defined to mean:

> "negligence, breach of statutory duty, or other act or omission which gives rise to a liability in tort or would apart from this act, give rise to a defence of contributory negligence."

That remained the statutory position for nearly 50 years.

[157] At a time when that version of the statute held sway, attempts were made to apply the legislation in cases where a claim was made in contract but where there also existed a concurrent and coextensive duty of care in tort. The High Court overruled those attempts in *Astley v Austrust Ltd*. It did not see the result as artificial:

> "84. It seems likely that those judges who have held that apportionment legislation applies to contract claims have regarded the contrary view as either anomalous or unfair or both. But when the nature of an action for breach of a contractual term to take reasonable care and the nature of an action in tort for breach of a general law duty of

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97 *Astley v Austrust Ltd* [1999] HCA 6; (1999) 197 CLR 1 at p 34 [80] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

98 *Ibid* at p 19 [41].

> care are examined, it is by no means evident that there is anything anomalous or unfair in a plaintiff who sues in contract being outside the scope of the apportionment legislation."[99]

[158] In 2001 the Act (which by then had been relocated into what is now the *Law Reform Act 1995*) was amended to its present form for the express purpose of addressing that decision.[100] The definition of "fault" was omitted and all references to it were removed from the Act. Two new concepts replaced it in the operative section. Both were expressed in causative language.

[159] The first referred to damage suffered "partly because of the claimant's failure to take reasonable care". I shall return to this below.[101]

[160] The second referred to damage suffered "partly because of the wrong of someone else". "Wrong" was given the definition set out above.[102] Paragraph (a) of the definition arguably narrowed the range of tortious liabilities covered. On the other hand para (b) extended coverage to "a breach of a contractual duty of care that is concurrent and coextensive with a duty of care in tort". Plainly it was not intended to include all contractual liabilities. It was limited to those which have two characteristics: the liability arose from breach of a duty of care; and that duty was concurrent and coextensive with the duty of care in tort.

[161] In those circumstances arguments based on perceptions of artificiality have no substance.

[162] I have found that in the circumstances the express term included the duty to take Mr Crouch safely to his home at 37 Yangoora Crescent, albeit possibly with some qualifications or limitations.[103] In my judgment that duty is not correctly described as a contractual "duty of care" within the meaning of para (b) of the definition of "wrong" in the *Law Reform Act 1995*. I did not understand the taxi defendants to submit otherwise. It follows that damages awarded for breach of that term are not to be reduced for contributory negligence.

Civil Liability Act 2003, s 47

[163] In the alternative, the taxi defendants relied on the presumption of contributory negligence arising under s 47(2) of the *Civil Liability Act 2003*. That submission fails because that section applies only where there has been a "breach of duty giving rise to a claim to damages"[104]. "Duty" is defined to mean:

> "(a) a duty of care in tort; or
>
> (b) a duty of care under contract that is concurrent and coextensive with a duty of care in tort; or
>
> (c) another duty under statute or otherwise that is concurrent with a duty of care mentioned in paragraph (a) or (b)."

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99 *Ibid* at p 36.

100 Legislative Assembly (Qld), *Record of Proceedings*, 50th Parliament, 7 August 2001 at p 2253.

101 Paragraph [171].

102 Paragraph [154].

103 Paragraph [120].

104 Section 47(1).

"Duty of care" is defined to mean "a duty to take reasonable care or to exercise reasonable skill (or both duties)". That does not cover the claim based on the express term, so para (b) has no application. The taxi defendants did not submit that the case was covered by para (c) and it would seem unlikely that the words "another duty … otherwise" would be construed to cover a contractual duty, that having been dealt with in para (b).[105] Even if that be wrong, Ms French has rebutted the statutory presumption by establishing that Mr Crouch's intoxication did not, for the reasons below, contribute to the breaches of duty by Mr Earea and the unknown driver.[106]

The express term: conclusion

[164] Ms French is entitled to judgment against QBE for full amount of the loss by reason of Mr Earea's breach of the express term in the contract of carriage. The amount of her damages is not to be reduced by reason of Mr Crouch's responsibility for the damage.

Claims other than the express term claim: s 47

[165] Ms French conceded that her award of damages on the other claims may be reduced because of the contributory negligence of Mr Crouch. She denied the applicability of s 47. Before dealing with the assessment of the reduction it is necessary to resolve the latter issue.

[166] Ms French submitted first that s 47 has no application to a dependency claim; and second, that if it has, the statutory presumption has been rebutted because the evidence establishes that Mr Crouch's intoxication did not contribute to the unknown driver's breach of duty.

[167] There is ambiguity in the first of these submissions. It is no doubt correct that s 47 does not in terms apply to Ms French's claims. Neither she nor her children were intoxicated at the time of the relevant breach of duty, and they are the persons who suffered the relevant harm (ie loss of support from Mr Crouch). "Person" in s 47 cannot refer to Mr Crouch: see sub-ss (3) and (4). However in my judgment, that is not the point. Section 10(5) of the *Law Reform Act 1995* applies. It mandates the reduction of Ms French's damages if damages would be reduced in an action brought for the benefit of Mr Crouch's estate under s 66 of the *Succession Act 1981*. That section provides for the cause of action which Mr Crouch had against the driver of the unknown vehicle to survive Mr Crouch's death. That cause of action is a derivative action; in other words it has all the attributes which it would have had were Mr Crouch alive to bring it. Were he alive to bring it, s 47 would apply to it. Therefore it applies to the notional action under s 66. Consequently, unless the statutory presumption could be rebutted in the notional action, there would be a reduction of the damages recoverable in that action. It follows therefore that unless that presumption could be rebutted in the notional action, there must be a proportionate reduction in the damages awarded to Ms French.

[168] There is more force in the second submission. It cannot be said that Mr Crouch's conduct contributed in any way to the breaches of duty of Mr Earea or the unknown driver. Whatever may be the position in relation to its contribution to the damage which he suffered, Mr Crouch's conduct was causally unrelated to the actions of either person.

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105 However I note that para (c), unlike para (b), contains no requirement for the duty to be "coextensive with" the duty of care in tort.

106 Section 47(3).

Each acted or omitted to act in the way he or she did without any aiding, abetting, counselling or procuring on Mr Crouch's part.

[169] As counsel for Ms French submitted, the language of s 47(3)(a) in relation to the relevant conduct ("breach of duty") contrasts with that of s 10(1) of the *Law Reform Act 1995* ("damage"). The defendants did not suggest that the difference was insignificant. There seems no reason not to give the words of the section their ordinary meaning and effect. It is not a case where that leaves them with no work to do. I accept the submission.

[170] On the evidence before me the presumption in s 47 would be rebutted in the notional survivorship proceedings. Consequently there is no occasion for a proportionate reduction under s 47 in the present case.

Cases on the Law Reform Act 1995, s 10: "damage partly because of the claimant's failure to take reasonable care"

[171] I begin by identifying a number of discrete propositions of law which seem relevant in the present case.

[172] In *ACQ Pty Ltd v Cook* the New South Wales Court of Appeal wrote:

> "[158] Section 5R[107] and 5S *Civil Liability Act* presuppose that someone has been contributorily negligent. They operate to modify the way in which the law of contributory negligence operates under the *1965 Act* rather than create by themselves any particular rights or defences. Thus, the scope within which section 5R and 5S can operate must be ascertained by first considering the *1965 Act*."[108]

The 1965 Act to which the court referred was the New South Wales equivalent of s 10 of the *Law Reform Act 1995*, the text of which is set out above.[109] Accordingly, I turn first to that provision.

[173] Consideration of s 10(1) begins with the opening words, particularly those relating to contributory negligence quoted in the heading to this section of my reasons. Those words provide the preconditions which must be established before apportionment is considered. The obvious question which springs to mind on reading the opening words is, failure to take reasonable care for or of what. That question was answered by the same court in *Woolworths Ltd v Strong*:

> "The relevant type of 'failure to take reasonable care' is still [after the *Civil Liability Act*] that described in *Astley v Austrust Ltd* (1999) 197 CLR 1 at [30], in explaining the pre-2000 version of the statute, namely: 'failing to take reasonable care of his or her person or property.' In the context of the present case, it is the First Respondent failing to take reasonable care for her own safety."[110]

[174] In the paragraph cited from *Astley*, the High Court was discussing factors to be taken into account in determining whether a plaintiff had suffered damage as the result partly

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107 Equivalent to s 23 of the Queensland Act.

108 [2008] NSWCA 161; 72 NSWLR 318.

109 Paragraph [153].

110 [2010] NSWCA 282 at [37]; see also *Caterson v Commissioner for Railways* NSW [1973] HCA 12; (1973) 128 CLR 99 at p 110.

of his own fault. By reason of the definition of the fault, that required a determination of whether the plaintiff was guilty of negligence which would have given rise to a defence of contributory negligence at common law. "At common law", wrote McHugh J in *Joslyn v Berryman*:

> "A plaintiff is guilty of contributory negligence when the plaintiff *exposes himself or herself to a risk of injury* which might reasonably have been foreseen and avoided and suffers an injury within the class of risk to which the plaintiff was exposed. In principle, any fact or circumstance is relevant in determining contributory negligence if it proves, or assists in proving, a reasonably foreseeable risk of injury to the plaintiff in engaging in the conduct that gave rise to the injury suffered."[111]

That was written in a case involving an intoxicated plaintiff.

[175] The passage just cited did not deal with whether the question of foreseeability was to be resolved subjectively or objectively. His Honour dealt with that later in the judgment. Following the House of Lords,[112] he held:

> "The test of contributory negligence is an objective one. Contributory negligence, like negligence, 'eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question'."[113]

The plurality agreed on that point.[114]

[176] Intoxication is a common feature in litigation, and not just in negligence law. Referring to it, Gleeson CJ pointed out in *Cole v South Tweed Heads Rugby Club*:

> "The significance of the need for coherence in legal principle and values, when addressing a proposal for the recognition of a new form of duty of care, was stressed by [the High] Court in *Sullivan v Moody*[115]."[116]

In the same case His Honour referred to a matter of principle which bore upon the imposition of a duty. The need for coherence in the law suggests that the same principle should inform decisions on contributory negligence.

> "There is a further question of principle bearing upon the reasonableness of the imposition of a duty of the kind for which the appellant contends. Most adults know that drinking to excess is risky. The nature and degree of risk may be affected by the extent of the excess, or by other circumstances, such as the activities in which people engage, or the conditions in which they work or live. A supplier of alcohol, in either a commercial or a social setting, is usually in no position to assess the risk. The consumer knows the risk. It is true that alcohol is disinhibiting, and may reduce a consumer's capacity to make reasonable decisions. Even so, *unless intoxication reaches a very high degree* (higher than that

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111 [2003] HCA 34; (2003) 214 CLR 552 at p 558 [16] (citation omitted, emphasis added).

112 *Glasgow Corporation v Muir* [1943] UKHL 2; [1943] AC 448.

113 [2003] HCA 34; (2003) 214 CLR 552 at p 564 [32].

114 *Ibid* at p 575 [70] per Gummow and Callinan JJ. An exception in the case of children has been recognised at least in New South Wales; see the cases cited in *Kain v Mobbs* [2008] NSWSC 383 at [131], where McHugh J's view has also been questioned.

115 [2001] HCA 59; (2001) 207 CLR 562 at p 581 [55].

116 [2004] HCA 29; (2004) 217 CLR 469 at p 477 [14].

> achieved by the appellant in this case), the criminal and the civil law hold a person responsible for his or her acts. If, in the present case, the appellant, deliberately or negligently, had damaged the respondent's property, or caused physical injury to some third party, she would have been liable for the damage. There is no suggestion that she lacked the mental capacity to form the necessary intent. *Save in extreme cases*, the law makes intoxicated people legally responsible for their actions. As a general rule they should not be able to avoid responsibility for the risks that accompany a personal choice to consume alcohol."[117]

[177] A similar view was expressed at greater length by Ipp AJA (with whom Heydon and Santow JJA agreed) when that case was before the New South Wales Court of Appeal. It is sufficient if I refer to three paragraphs from what his Honour wrote:

> "182 The recognition that, generally speaking, adult persons must assume responsibility for their own actions while intoxicated (*provided that they are sufficiently in control of themselves to be able to exercise their will and to know what they are doing*) underlies the treatment of such actions by the law and principles of equity relating to contract and the criminal law. There is no reason why the law relating to negligence should not adopt a similar approach.
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> …
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> 196 In my opinion, as a general proposition, considerations of personal responsibility, autonomy, practicality and certainty override those factors such as foreseeability, proximity, control and vulnerability which have persuaded some courts, in similar circumstances, to extend the scope of the general duty of care.
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> 197 There may, however, be circumstances which bring about a different result."[118]

[178] The 2001 amendment to the *Law Reform Act 1995*, by omitting the word fault, disposed of a problem which had caused difficulty from time to time in the ascertainment of contributory negligence. In ordinary usage that word carried moral connotations. It did not do so under the Act. Section 10 was

> "not concerned, as such, with moral culpability. Courts are not authorised under the 1965 Act to punish a claimant because he or she became intoxicated by consumption of alcoholic liquor or because courts regard that state as morally reprehensible. The focus of the sub-section is different, and more limited."[119]

That remains the position.

[179] At one time there seemed to be a view that in cases where the plaintiff had engaged the services of the defendant, contributory negligence could not be found when the damage which occurred resulted from the very event to protect against which the defendant had been employed. That view was wrong:

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117 *Ibid* at pp 476-7 (emphasis added).

118 *South Tweed Heads Rugby League Football Club Ltd v Cole* [2002] NSWCA 205; (2002) 55 NSWLR 113 at pp 142-6 [176] – [197] (emphasis added).

119 *Joslyn* at p 592 [126] per Kirby J.

"29 … There is no rule that apportionment legislation does not operate in respect of the contributory negligence of a plaintiff where the defendant, in breach of its duty, has failed to protect the plaintiff from damage in respect of the very event which gave rise to the defendant's employment. A plaintiff may be guilty of contributory negligence, therefore, even if the 'very purpose' of the duty owed by the defendant is to protect the plaintiff's property. … .

30 A finding of contributory negligence turns on a factual investigation of whether the plaintiff contributed to his or her own loss by failing to take reasonable care of his or her person or property. What is reasonable care depends on the circumstances of the case. *In many cases, it may be proper for a plaintiff to rely on the defendant to perform its duty.* But there is no absolute rule. The duties and responsibilities of the defendant are a variable factor in determining whether contributory negligence exists and, if so, to what degree. *In some cases, the nature of the duty owed may exculpate the plaintiff from a claim of contributory negligence*; in other cases the nature of that duty may reduce the plaintiff's share of responsibility for the damage suffered; and in yet other cases the nature of the duty may not prevent a finding that the plaintiff failed to take reasonable care for the safety of his or her person or property. Contributory negligence focuses on the conduct of the plaintiff. The duty owed by the defendant, although relevant, is one only of the many factors that must be weighed in determining whether the plaintiff has so conducted itself that it failed to take reasonable care for the safety of its person or property.

31 Courts, including this Court, accept that contributory negligence can be made out in non-contractual situations, notwithstanding that the defendant was under a duty to protect people in the class of which the plaintiff was a member. … .

32 There is no reason in principle or policy for distinguishing duties arising from contract from those arising from statutes. In each category, the existence of a duty to protect the plaintiff from the kind of loss suffered is a relevant, but not decisive, factor."[120]

[180] Two other points may be made briefly. First, whatever may be the doubtful origins of the rule,[121] it is now settled that the onus of proving contributory negligence lies on the defendant. Second, contributory negligence is a question of fact.[122]

[181] To complete this brief and selective review of the relevant law it is necessary to refer to s 23 of the *Civil Liability Act 2003*, which provides:

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120 *Astley v Austrust Ltd* [1999] HCA 6; (1999) 197 CLR 1 at pp 14-15 per Gleeson CJ, McHugh, Gummow and Hayne JJ (emphasis added).

121 *Joslyn* at p 559 [17]-[18] per McHugh J.

122 *Liftronic Pty Ltd v Unver* [2001] HCA 24; (2001) 75 ALJR 867 at p 885 [90] per Kirby J (dissenting, but not on this point), citing *McLean v Tedman* [1984] HCA 60 at [19]; (1984) 155 CLR 306 at 315; *SS Heranger (Owners) v SS Diamond (Owners)* [1939] AC 94 at 101; *Hicks v British Transport Commission* [1958] 2 All ER 39; Balkin and Davis, *Law of Torts*, 2nd ed (1996) at 338, n 37; followed by Hayne J in *Joslyn v Berryman* at p 602 [158].

"**23 Standard of care in relation to contributory negligence**

(1) The principles that are applicable in deciding whether a person has breached a duty also apply in deciding whether the person who suffered harm has been guilty of contributory negligence[123] in failing to take precautions against the risk of that harm.

(2) For that purpose—

(a) the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person; and

(b) the matter is to be decided on the basis of what that person knew or ought reasonably to have known at the time."

The principles referred to in sub-s (1) are presumably those set out in ss 9 and 10 of the Act.

Law Reform Act, s 10: contributory negligence on the facts?

[182] I embark upon this question with some trepidation because Ms French has explicitly conceded that Mr Crouch was guilty of contributory negligence (ie would be held guilty of contributory negligence in the notional proceedings under the *Succession Act*). Nevertheless the question whether it is open on the evidence to find contributory negligence is one of law. The parties cannot by agreement bind the court to apply what is not the law.[124] That is why I have exposed my understanding of the law in the previous section of these reasons.

[183] The taxi defendants pleaded the following particulars of contributory negligence:

"(i) Failed to keep any or any proper lookout.

(ii) Failed to stop, step aside or otherwise avoid the said collisions.

(iii) Failed to give the unidentified motorist and Brandt Linden Shamon any or any proper adequate or timely warning of his presence on the roadway when a reasonably prudent person would have done so.

(iv) Failed to remove himself from the roadway when a reasonably prudent person would have done so.

(v) Crossed or attempted to cross the roadway, or walked upon it, when grossly intoxicated when a reasonably prudent person would not have done so.

(vi) Caused permitted or allowed himself to become and remain motionless on the trafficable surface of the roadway when it was unsafe to do so and when a reasonably prudent person would have done so.

(vii) Lay on the roadway and/or crossed the roadway and/or walked along the roadway while wearing dark clothing which, in the prevailing conditions of drizzling rain and nightfall, gave the unidentified motorist and Shamon inadequate warning of his presence when a reasonably prudent person would not have done so.

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123 The definition of contributory negligence simply refers the reader to s 10 of the *Law Reform Act 1995*.

124 *GAS v The Queen* [2004] HCA 22; (2004) 217 CLR 198 at p 211 [31].

(viii) Is presumed by Section 47 of the Civil Liability Act 2003 to be guilty of contributory negligence by reason of his gross, voluntary and self-induced intoxication which the Defendants plead in support of this application and any damages are to be reduced under subsection 47(4) of the CLA by 100% or no less than 25% in the circumstances having regard to section 24 of the CLA.

(ix) Elected to walk from a safe position in proximity to his residence for a purpose or purposes unknown to the Defendants when it was unnecessary for him to do so, and when he knew or ought to have known that he was not in a physical condition to so safely."

[184] The vehicle defendants pleaded these:

"10.1 Failing to take reasonable care for his own safety.
10.2 Lying on a public road when it was unsafe to do so.
10.3 Failing to keep a proper lookout for oncoming traffic.
10.4 Wearing dark clothing while lying on the dark bitumen of a public road at night.
10.5 Any damages awarded are to be reduced pursuant to section 47 of the Civil Liability Act 2003 on the basis that Crouch was intoxicated at the time of the incident."

[185] The findings of fact which I have already made uphold those particulars insofar as they allege primary facts, save that there is insufficient evidence to determine whether Mr Crouch was lying on the road. Is it open to find contributory negligence on those facts? Alternatively, is it open to hold Mr Crouch guilty of contributory negligence *only* from the fact that he became voluntarily intoxicated?

[186] In my judgment the latter question must be answered in the negative, for three reasons.

[187] First, the defendants did not plead it, nor was the trial conducted in such a way as to raise it. They pleaded intoxication only in relation to the s 47 presumption. They did not plead it as a cause of Mr Crouch's death, notwithstanding the introductory words of the paragraphs alleging contributory negligence. But perhaps that is too technical; let it rest on one side.

[188] Second, the evidence does not sustain a conclusion that the event which happened (getting hit by a vehicle) was objectively a reasonably foreseeable consequence simply of getting drunk at a party at a friend's house. It is true that Mr Crouch ought to have known that he did not have his wallet. However that was not a problem; money was available on his arrival home and it is reasonable to assume that had the matter been raised by Mr Earea in advance, one of Mr Crouch's friends would have covered the fare for the short trip home. It was foreseeable that if he became intoxicated Mr Crouch would be unable to get himself home. That in turn made it foreseeable that he might spend the night at Prince Street; or be driven home by someone at the party; or, as happened, be sent home in a taxi. It did not make it foreseeable that he might be walking the streets incapacitated by alcohol. The evidence does not suggest that he was an aggressive or recalcitrant drunk. His initial urges to party on were easily overcome. There is no suggestion in the evidence of previous alcoholic misbehaviour: Mr Poole testified that he did not drink a great deal, he was not a big drinker. Ms French had previously seen him become "merry", but only once. Only by hypothesising that he would be deserted both by his friends and by anyone to whose care he was entrusted

could wandering on the road be foreseen. Viewed in advance, the chance of that happening was insignificant.

[189] Third, it cannot be said that Mr Crouch (to use the words of McHugh J quoted above) exposed himself to a risk of injury of the nature of that which occurred. Had he been burned by coals from the brazier he could not have complained about a finding against him. That was within the scope of the risk which he ran by getting drunk. The events which happened were not. It is not the law that if you get drunk, you must put up with the consequences whatever their nature and however remote they may be. Of course the contrary view reflects a moral judgment with which many in our society would agree; but contributory negligence does not equate with moral delinquency. The alternative submission[125] is rejected.

[190] But the defendants did not rest their case only, or even principally, on the mere fact that Mr Crouch became voluntarily intoxicated. The taxi defendants relied on his decision "to walk from a safe position in proximity to his residence … when it was unnecessary for him to do so, and when he knew or ought to have known that he was not in a physical condition to do so safely". I do not accept that the point where Mr Crouch was left can, having regard to his condition, reasonably be described as in proximity to his residence. It was common ground that that point was about 150 m from Mr Crouch's home and it involved his crossing Tumbarumba Avenue to get home. More importantly, Mr Crouch had no insight into his condition nor, objectively, could he be expected to have had such insight. It cannot sensibly be found that he "elected" to leave the position where Mr Earea left him on the footpath.

[191] The remaining primary facts relate to Mr Crouch's conduct at the scene of his death. There is of course no doubt that such conduct would ordinarily amount to contributory negligence. Principles of individual responsibility described above mean that mere intoxication does not in law alter that position. But did he lack the mental capacity to intend his actions? The question is whether this was the extreme case referred to by Gleeson CJ[126] where the level of intoxication reached a very high degree. Was Mr Crouch, in the words of Ipp JA[127], "sufficiently in control of [himself] to be able to exercise [his] will and to know what [he was] doing"?

[192] I have no doubt that he was not so when Mr Earea left him in Yangoora Crescent "pissed and legless" about two hours before his death. Mr Hay saw him at about 11:00 pm; his description of Mr Crouch is set out above.[128] He obviously remained extremely intoxicated.

[193] We cannot know his precise condition about three quarters of an hour later when he died. We do know that at the time of death his blood alcohol content was 0.235 mg per 100 ml. In my judgment it is more likely than not that at that time he remained extremely intoxicated. He was not sufficiently in control himself to exercise his will and know what he was doing. Certainly, the defendants have not satisfied the onus of proving it was otherwise.

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125 Paragraph [185].

126 See para [176].

127 See para [177].

128 Paragraph [13].

[194] In my judgment, a finding of contributory negligence is not as a matter of law open on the evidence before me.

A digression on apportionment

[195] In the absence of any particular findings of contributory negligence, it is not possible to make a hypothetical apportionment. However some observations on the relevant law may be in order. Section 10 of the *Law Reform Act 1995* mandates the reduction of damages to the extent the court considers just and equitable having regard to the claimant's share in the responsibility for the damage. It is accepted that in cases decided under that section, the proper approach to apportionment is that stated in *Podrebesek v Australian Iron and Steel Pty Ltd*[129].

[196] In *Wynbergen v Hoyts Corporation Pty Ltd* the High Court held that a reduction of 100% "cannot be justified as 'just and equitable having regard to the claimant's share in the responsibility for the damage' for it is an outcome which holds the claimant wholly responsible, not partly so".[130] Section 24 of the *Civil Liability Act 2003*, enacted after that decision, provides:

> "**24 Contributory negligence can defeat claim**
> In deciding the extent of a reduction in damages by reason of contributory negligence, a court may decide a reduction of 100% if the court considers it just and equitable to do so, with the result that the claim for damages is defeated."

[197] There is considerable difficulty in ascertaining the correct operation of that section, as it does not identify to what regard is to be had in assessing what is just and equitable. At first sight it appears that the section is intended simply to operate in tandem with s 10. The problem with such an approach is that it cannot have been intended that the section have no effect, yet that is the result of applying the statutory condition ("if the court considers it is just and equitable to do so") literally in conjunction with s 10. I am inclined to think that s 24 was intended to modify s 10. It hypothesises consideration by the court of what reduction is just and equitable; so that aspect of s 10 remains unchanged (or possibly mirrored). Being 100% responsible for the damage is inconsistent with being partly responsible for the damage, which is the precondition for contributory negligence ("partly *because of* …") under s 10. Presumably Parliament did not intend to require apportionment where the plaintiff was 100% responsible for his own damage; in such a case there would be a verdict for the defendant in any event and no need to apportion. The best conclusion seems to be that apportionment under s 24 is not to be assessed having regard (or perhaps having regard solely) to the claimant's share in the responsibility and that the omission of any reference to responsibility was deliberate. At least this must be so where an apportionment of 100% is to be made.

[198] That begs the question of how apportionment is to be assessed. In *Mackenzie v the Nominal Defendant*[131] the New South Wales Court of Appeal had to apply s 138 of the *New South Wales Motor Accidents Compensation Act 1999*. That Act contained a separate regime for apportionment in cases to which it applied. They included the following:

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129 See para [209].

130 [1997] HCA 52; (1997) 72 ALJR 65 at p 68.

131 [2005] NSWCA 180.

"**138 Contributory negligence—generally**

(1) The common law and enacted law as to contributory negligence apply to an award of damages in respect of a motor accident, except as provided by this section.

(2) A finding of contributory negligence must be made in the following cases:

…

(3) The damages recoverable in respect of the motor accident are to be reduced by such percentage as the court thinks just and equitable in the circumstances of the case."

It will be noticed that s 138(3) is wider than the equivalent provision in s 10 of the *Law Reform Act 1995*. There also existed in New South Wales a section equivalent to s 24 of the *Civil Liability Act 2003*. Notwithstanding those matters the court seems to have applied the *Podrebesek* approach. It does not seem to have considered a more wide ranging approach.

[199] A question might arise if that line of enquiry were pursued as to whether it is open in cases of intoxication to make an apportionment of 0% to the plaintiff.

[200] It would also be necessary to assess contributory negligence having regard to Mr Crouch's share in the overall responsibility for his death. It is not to be assessed separately as against each defendant.[132]

[201] Enough of digression. I turn to the proceedings among the defendants.

Cross claims for contribution

[202] Under r 208 of the *Uniform Civil Procedure Rules*, the taxi defendants on 21 May 2010 filed a joint notice claiming contribution from the vehicle defendants pursuant to s 6 of the *Law Reform Act 1995*.[133] The vehicle defendants did not file reciprocal notices until 5 April 2011, after an enquiry from my associate. They had previously delivered notices to the taxi defendants and no party opposes my deciding the issues raised by both notices.

[203] That Act relevantly provides:

"**6 Proceedings against, and contribution between, joint and several tortfeasors**

Where damage is suffered by any person as a result of a tort (whether a crime or not) the following apply—

… ;

(c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise … .

7 Amount of contribution and power of the court

In any proceedings for contribution under this division the amount of the contribution recoverable from any person shall be such as may be

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132 *Johns v Cosgrove* [2000] QCA 157; [2002] 1 Qd R 57 at pp 90 [85] ff.

133 They did not claim contribution inter se, nor did the vehicle defendants do so.

> found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity."

[204] The application of those sections is subject to the *Civil Liability Act 2003*.[134] Part 2 of the latter Act establishes a regime of proportionate liability and in particular s 32A prevents requiring a concurrent wrongdoer to contribute to the damages recovered or recoverable from another concurrent wrongdoer in the circumstances to which that section applies. It was common ground among the parties that the proportionate liability provisions have no application in the present case. On the face of things, it is not clear beyond a peradventure that this is so:

- Although pt 2 has effect only on and from 1 March 2005,[135] s 32A is addressed to the date of trial and arguably applies to trials occurring after that date.[136]
- Although pt 2 does not apply to a claim "arising out of personal injury",[137] a claim under Lord Campbell's Act may arguably not be one such.
- Although pt 2 can relevantly apply only if Ms French's claim is one "for economic loss"[138], it may arguably be so described.
- Although the definition of concurrent wrongdoer in pt 2 applies only to persons whose acts or omissions caused, "independently of each other"[139], the loss or damage that is the subject of the claim, it may be arguable that the circumstances of the present case meet that requirement.

It is unnecessary to examine these questions. Perhaps not surprisingly, I am content to abide by the parties' common assumption.

[205] Regent, Mr Shamon and RACQ are not liable to Ms French. Consequently their claims for contribution against each other and the other defendants must be dismissed, as must the claims of the other defendants against them. It remains to determine the reciprocal claims of QBE and the Nominal Defendant. The conditions for the application of s 6 to them have been satisfied: Ms French and the children have suffered damage as the result of a tort; QBE stands in the position of Mr Earea, one tortfeasor; and the Nominal Defendant stands in the position of the driver of the unknown vehicle, another tortfeasor. Both are liable in respect of that damage. It follows that each may recover contribution from the other. No party submitted otherwise.

[206] The vehicle defendants submitted that in the event that findings were made against at least one defendant in each set of defendants, the overwhelming contribution would be in favour of the vehicle defendants. That, it was submitted, was because Mr Earea's actions in abandoning Mr Crouch in the condition he was in were the substantial cause of the disaster which befell him.

[207] The taxi defendants submitted that any breach by Mr Earea was remote from the circumstances of the death of Mr Crouch. It followed that the causative potency of any

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134 *Law Reform Act 1995*, s 4A.

135 *Civil Liability Act 2003*, s 82.

136 The same may be true of s 31(1).

137 Section 28(3)(a).

138 Section 28(1)(a).

139 Section 30(1).

breach was minor. Likewise the culpability could not be considered significant; a series of events unfolded distant from the breach. In the circumstances Mr Earea should bear no more than 25% of the damages.

[208] There was no submission regarding the effect if any which a finding that Mr Earea was liable in contract might have on contribution proceedings. I therefore proceed on the basis that the finding of such liability which I have made makes no difference to the operation of s 7.[140] That approach accords with authority in the Supreme Court of New South Wales and Federal Court of Australia.[141]

[209] In *Podrebersek v Australian Iron & Steel Pty Ltd*, the High Court said:

> "10. The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man (*Pennington v Norris* [1956] HCA 26; (1956) 96 CLR 10, at p 16) and of the relative importance of the acts of the parties in causing the damage: *Stapley v Gypsum Mines Ltd* [1953] UKHL 4; (1953) AC 663 at p 682; *Smith v McIntyre* [1958] Tas.SR 36, at pp 42-49 and *Broadhurst v. Millman* [1976] VicRp 15; [1976] VR 208, at p 219 and cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance."[142]

[210] That was said in relation to the equivalent of what was then s 10(1) of the 1952 Act,[143] ie in relation to the assessment of the reduction of damages for contributory negligence. It has been assumed in a number of cases that the passage also applies to the assessment of contribution between tortfeasors.[144] The question whether the considerations appropriate for the latter assessment are the same as those for the former has received little explicit judicial consideration. In *Kim v Cole*, McPherson JA wrote:

> "There are analogies between the legislation facilitating apportionment between tortfeasors and the legislation providing for reduction of recoverable damages for contributory negligence; but a fundamental difference between the two is, as I have said, that in the case of the former, s 6(c) of the Act envisages that the apportionment will take place against the matrix of the contractual rights and obligations, if any, of the parties that bear upon that process."[145]

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140 *Law Reform Act 1995*.

141 See *Hampic Pty Ltd v Adams* [1999] NSWCA 455 at [62] and the cases there cited.

142 [1985] HCA 34; (1985) 59 ALJR 492 at pp 493–4.

143 *Law Reform (Tortfeasors Contribution, Contributory Negligence, and Division of Chattels) Act 1952*.

144 See *Roads and Traffic Authority v Ryan* [2005] NSWCA 34; (2005) 62 NSWLR 609 at p 651 [105] per Bryson JA; *Rowan v Cornwall (No 7)* [2003] SASC 49 at [17] per Debelle J; *Union International (WA) Pty Ltd v Mazurak* [1999] WASCA 272 at [35] per curiam.

145 [2002] QCA 176 at [33].

In the present case, of course, there was no contractual relationship between Mr Earea and the driver of the unidentified vehicle.

[211] It is not immediately obvious that the considerations relevant to the assessment processes under the two sections are identical. The wording of the two is not identical. Section 10(1) required (and s 10(1) of the 1995 Act now requires) reduction of damages for contributory negligence "to such extent as the court thinks just and equitable having regard to the claimant's *share* in the responsibility for the damage". Section 7 of the 1995 Act requires that the contribution to be recovered "be such as may be found by the court to be just and equitable having regard to the *extent* of that person's responsibility for the damage". More importantly, in *Wynbergen v Hoyts Corporation Pty Ltd*, the High Court held that under the New South Wales equivalent of s 10 it was not possible to say that the damages recoverable could be entirely eliminated by a reduction of 100%.[146] The same logic would apply to s 7.[147] However the terms of that section make it plain that contribution amounting to a complete indemnity may be recovered. The sections therefore arguably have fundamentally different conceptual foundations.

[212] The question has been considered by Miles CJ sitting at first instance in the Supreme Court of the Australian Capital Territory. His Honour said:

> "5. It is notorious that the decision as to the assessment of contribution is in the nature of a discretion so wide that, apart from requiring the Court to weigh all relevant considerations, the Act gives virtually no guidance as to the exercise of the discretion.
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> 6. Most authoritatively for the purposes of this Court, the majority judgment in *Nominal Defendant v Australian Capital Territory* lays down the following principles:
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> '16 The discretion under s 12 of the Act is a broad one and one which requires that considerable latitude be given to the Court in arriving at a judgment as to what is just and equitable: *Pennington v Norris* [1956] HCA 26; (1956) 96 CLR 10 at 16; *James Hardie & Co Pty Limited v Seltsam Pty Ltd* [1998] HCA 78 at 79 per Kirby J with whom McHugh J agreed. Within the exercise of that broad discretionary judgment the Court is required to compare the culpability of each of the negligent parties, the relative importance of the acts of the negligent parties causing damage and to subject to comparative examination the whole conduct of each party in relation to the circumstances of the events giving rise to the negligently caused loss: *Covacevich v Thomson* [1988] Aust Torts Reports 80-153 (Queensland Full Court) at 67,373. The discretion is not limited to such factors alone. It involves consideration of all relevant matters which go to the issue of what is the just and equitable sharing of responsibility for the damage suffered by the plaintiff: *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport* [1955] HCA 1; (1955) 92 CLR 200 at 212-213.'

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146 See para [196].

147 *Croston v Vaughan* [1938] 1 KB 540 at p 565.

> 7. Apportionment between a plaintiff and a defendant is made on similar but not identical principles."[148]

[213] It is with respect open to question whether there is any substantial difference between the expression of principle in *Nominal Defendant v Australian Capital Territory* and that in *Podrebersek*. However it is unnecessary to decide in the present case whether the relevant principles are identical. It is sufficient to observe that the considerations identified by the High Court in *Podrebersek* are required to be taken into account. In *Covacevich v Thomson*, Shepherdson J, for a full court of this court wrote:

> "In my respectful view, the learned trial Judge was, as this Court is, obliged to follow the view of the High Court in *Podrebersek*.
>
> In the passage above cited, 'blame-worthiness' does not appear, but it seems to me that what is important is that a Judge on making an apportionment under sec. 6 is required to compare culpability of each of the negligent parties, the relative importance of the acts of the negligence parties causing damage and to subject to comparative examination the whole conduct of each negligent party in relation to the circumstances of the events giving rise to the negligently caused loss."[149]

[214] I approach the assessment on the basis that I must take into account not only comparative culpability and relative causal importance, but also the whole of the circumstances of the case.

[215] The negligence of the unknown driver was more immediately causative of Mr Crouch's death than was that of Mr Earea. His vehicle hit Mr Crouch, then he failed to protect his victim, exposing him to further injury shortly afterwards. In other words, in terms of time and place, his conduct was a more proximate cause of death than Mr Earea's. However proximity, although relevant, is not a measure of causal importance. This is not a case where the wrongful conduct of each tortfeasor had a separate impact on the victim or caused damage which was in any way notionally divisible. The death could not have happened but for the conduct of both tortfeasors.

[216] Both were also culpable in the sense referred to in *Podrebersek*. Mr Earea left Mr Crouch helpless on the footpath, knowing of his condition. His conduct was deliberate. Save in one respect he was much more culpable than the unknown driver, whose negligent driving occurred on a wet night when driving conditions were difficult. But that driver also was negligent in leaving Mr Crouch injured and unprotected on the road when, as I have found,[150] he probably knew or at least suspected that he had hit a pedestrian; and when he certainly ought to have known or suspected that fact. To the extent that his conduct occurred on the spur of the moment it may be regarded as less culpable than that of Mr Earea.

[217] Of the other relevant circumstances, one stands out: Mr Earea was specifically engaged to take a drunk man home. His friends wanted to protect him from the risk of what eventually happened. Mr Earea's conduct rendered their efforts nugatory.

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148 *Arthur Fatur v IC Formwork Services Pty Ltd and Civil & Civic Pty Ltd* [2000] ACTSC 110.

149 (1988) Aust Torts reports ¶ 80-153 at p 67,373.

150 Paragraph [44].

[218] I find him to be 80% responsible for the dependants' damage and the driver of the unidentified vehicle 20% responsible.

The dependants

[219] Mr Crouch was born in England on 1 May 1967. In the late 1980s (presumably) in Australia he formed a relationship with Ms Kerri Gordon, who bore his first two children. The relationship terminated in early 1993. He met Ms French in about August 1994 and in early 1995 she became his de facto wife. It was a stable relationship. In October 1997 they purchased the house at 37 Yangoora Crescent, Ashmore as joint tenants. They extensively renovated it over the years until his death. They were still living there when he died.

[220] At the time of his death Mr Crouch's dependents were:

DEPENDANT	MOTHER	DOB
Elizabeth French	N/A	4 February 1969
Taylah Jade Crouch	Kerri Ann Gordon	17 April 1990
Jordan Mason Crouch	Kerri Ann Gordon	4 October 1993
Isaac Crouch	Elizabeth French	3 February 2001
Naomi Crouch	Elizabeth French	14 July 2003 (posthumous)

Ms French was employed as a social worker at a sexual assault support service (she had completed a four-year university course). She was 33 weeks pregnant with Naomi and was planning to take six months maternity leave a fortnight later. The extent to which she would then return to work had not been decided. I infer that she would not have done so for a least a couple of years unless obliged by economic necessity.

[221] Mr Crouch had a good relationship with his first two children. They had come for access visits every second weekend and for two weeks at Christmas time. In 2001 he took them to England on the occasion of his brother's wedding. He paid regular maintenance for them and provided additional money for things like school fees, uniforms and books, sport, bicycles and so on. Taylah, who was 13 when her father died, subsequently suffered depression, which affected her study and results. She left school at 17, having completed grade 12. At the time of trial she was doing a business administration course and working part-time at Target, but hoped to go to TAFE or university. Jordan continued in school after the death and was in grade 12 at the time of trial. His academic performance had improved. He wanted to study sports management after he left school, at either Griffith or Bond University. Ms Gordon estimated that Mr Crouch provided on average $150-$200 per week for their support.

[222] By the time of trial both Isaac and Naomi were at school, in grades four and one respectively. Isaac was an above average student; Naomi was too young to have been tested. Mr Crouch was close to them, he made time to play with them and, of course, with Ms French he supported them.

[223] The general principles applicable to the assessment of quantum were not in dispute. I take the following short summary from the submissions of the taxi defendants. The damages which may be awarded are those "proportioned to the injury resulting from … death."[151] They include nothing for grief and suffering.[152] They are given for the loss of

[151] *Supreme Court Act 1995*, s 18(1).

[152] *Blake v Midland Railway* (1852) 18 QB 93.

support which the deceased would have provided. That support is valued by determining "the net loss, on a balance of losses and gains."[153] The loss is sometimes described as pecuniary loss, although that word is not used narrowly. It includes the value of lost gratuitous domestic services which are or will be replaced at pecuniary cost.[154]

[224] In the present case the two aspects of loss claimed were loss of financial support and loss of services

Loss of financial support

[225] Mr Crouch was a self-employed painter/decorator; but he was self-employed in form only. With minor exceptions he worked as if he were an employee, for only one contractor at a time. He did not tender for jobs but received a regular weekly payment of the same amount, albeit based on an hourly rate for his services. He worked a 35 hour week. He had no life insurance or superannuation and minimal savings. It was common ground that the first step in determining the value of the loss of financial support is estimating his earnings. There was some divergence in the approaches which the parties adopted in determining the value of the financial support.

Mr Crouch's lost earnings

[226] A major factor in the former estimation is the deceased's earnings in the years immediately prior to his death. Conventionally, those earnings are based on the deceased's records, including his income tax returns. Controversially, Ms French's submission is that using such a basis in this case would lead to error, because Mr Crouch was also earning substantial undeclared amounts through the cash or black economy.

[227] In calculating the value of the lost financial support Ms French relied principally on a report by Mr Michael Lee, a forensic accountant. Mr Lee did calculations of lost earnings for two factual scenarios. The first was based on the deceased's declared earnings in the last full year before his death increased in subsequent years to the date of trial by reference to movement in the data for residential housing in Queensland outside Brisbane prepared by the Construction Forecasting Council.[155] The second assumed that in addition to his declared earnings the deceased was earning a substantial amount in cash which was not declared. It attempted to identify his total earnings by reference to evidence of average figures for the industry.

Cash earnings?

[228] Unsurprisingly, the defendants challenged the second scenario. They did so on the basis that there was no evidence that Mr Crouch was in fact earning significant undeclared cash amounts. Ms French submitted that it was an inference which could be drawn from some direct evidence of cash earnings, from the magnitude of the support which he provided to his two oldest children and from the evidence of Mr Lee that the declared earnings did not reflect Mr Crouch's full earning capacity.

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153 *Public Trustee v Zoanetti* [1945] HCA 26; (1945) 70 CLR 266 at 271.

154 *Nguyen v Nguyen* [1990] HCA 9; (1990) 169 CLR 245 at pp 253-4.

155 Mr Crouch worked in the area covered by the figures, ie residential housing outside Brisbane.

[229] The direct evidence is sparse. Ms French testified only that Mr Crouch occasionally did cash jobs but they were infrequent. Ms Gordon testified only that he did occasional cash jobs. Both women were aware of the supplementary support which he provided to the older children, but neither quantified it. Mr Lee was not in a position to give evidence of what was in fact the explanation for that the disconformity which he sought to demonstrate. However Ms French testified that he worked a 35 hour week by choice, in order to spend time with his family.

[230] In my judgment Ms French has failed to prove that Mr Crouch was earning significantly more than his records disclosed. It would be surprising if he were to have been doing so without the knowledge of either of the two women with whom he had lived. Ms French, who was in a position to know, explicitly said in her evidence-in-chief that he declared the majority of his income for tax purposes; cash jobs were infrequent and to the best of her knowledge everything which he earned was given to the accountant for the purposes of the tax returns. The descriptions which they gave of the supplementary support do not suggest the presence of significant amounts of additional income. The most likely explanation for the disconformity between earnings and earning capacity was Mr Crouch's work on the renovations and his choice to work a 35 hour week, not the fact that he was working additional hours for cash.

[231] I am not satisfied that Mr Crouch's records do not disclose a fair picture of his earning pattern in the years leading up to his death. The factual foundation for Mr Lee's second scenario to has not been proved.

Projected increase in earnings

[232] The defendants challenged Mr Lee's use of the Construction Forecasting Council data as a basis for determining projected increases in earnings after Mr Crouch's death. They did so on the ground that the figures reflected increases in prices, not wages or earnings; and they reflected not only such increases but also increases in volume/demand. They submitted that there was no evidence that Mr Crouch had the capacity to take on employees or otherwise to handle additional work. They pointed out that Ms French had not called any evidence from someone engaged in the industry or an associated industry (say a similar painter/decorator) of actual increases in earnings from 2003 to 2010 and had not led any evidence from Mr Poole, a carpenter who had worked with Mr Crouch, of work availability or income potential. Moreover, there were no CFC data for the period covered by Mr Crouch's tax returns, so it was not possible to compare the increase in his earnings over that period with that data. However the increase in earnings over the period of six years was just under 30%. The projected increase based on CFC data for the six years after Mr Crouch's death was 120%.

[233] Ms French submitted that the use of the CFC data was appropriate, because it made allowance for Mr Crouch’s capacity to increase the amount of work which he undertook. She submitted that I should find that he would probably have exercised that capacity, having regard to the lifestyle which the family adopted and the uncertainty about her resuming work after the end of her maternity leave in relation to the birth of Naomi.

[234] In my judgment the CFC data is of indicative value, but no more than that. Nonetheless, it stands alone and its accuracy was unchallenged. I am satisfied that Mr Crouch chose to work only 35 hours a week and that he could have worked longer hours had he so desired. The home renovations were nearing completion; when that happened he would have had more free time. I find that he probably would have worked longer hours

following Naomi's birth. He would have had little choice but to do so. He had an extra mouth to feed and a wife who, I am satisfied, felt she ought to stay home to look after the two infants. The difficulty is determining the extent of those longer hours and the impact which that would have had on Mr Crouch's earnings.

[235] Over the seven years prior to his death, Mr Crouch's "trading" results were as follows:

YEAR ENDED	GROSS INCOME	EXPENSES	NET PROFIT
30 June 1996	$26,928	$5,177	$21,751
30 June 1997	$33,757	$4,672	$29,085
30 June 1998	N/A	N/A	N/A
30 June 1999	$21,667	$3,430	$18,237
30 June 2000	$28,500	$4,773	$23,727
30 June 2001	$34,057	$8,148	$25,909
30 June 2002	$34,814	$7,746	$27,068

[236] It is noteworthy, as counsel for the vehicle defendants submitted, that over the six year period covered by that table the gross income increased by 29% and the profit by 24%. The difference reflected the acquisition of a new utility vehicle in 2001. That vehicle was used for private purposes as well as for business purposes (for example, Mr Crouch drove it to the barbecue on the night he died and Ms French drove it home). Vehicle expenses and depreciation dominated Mr Crouch's expenses: about 65%. Doubtless that was the reason the vehicle defendants submitted that I should disregard the CFC data but assess damages on the basis that Mr Crouch's declared earnings (net after tax) would have increased by 30% in the period after death.

[237] The logic of that approach is correct, as far as it goes. However it makes no allowance for any increase in the number of hours worked. The CFC data suggests that Mr Crouch's skills would have been in high demand. On the other hand, he was no workaholic. He cared about his family and put considerable time and effort into it. Conscientious though he was, I do not think he would have increased his working hours a great deal beyond a 40 hour week. In my judgment it is reasonable to calculate Ms French's damages on the basis that for the fiscal years 2004 onwards, Mr Crouch would have worked an average of 42 hours per week. That represents an increase of 20%.

[238] Mr Crouch's taxable income for the 11 months preceding his death was $24,863 and tax on that amount was $3,838. His net income after tax was therefore $21,025. That amount should be divided by 11 to make it applicable to one month (June 2003), viz $1,910. For the purposes of calculation, that represents a notional annual net income for 2002-3 of $22,920.

[239] Over the six year period to the end of 2008-9, that amount would have increased by 20% by reason of additional hours worked and 30% by reason of other factors. The notional income net after tax for 2008-9 is therefore:

$$\$22,920 \times 1.2 \times 1.3 = \$35,755.$$

[240] For the sake of simplicity (although perhaps a little artificially) I assume that the increase would have been evenly distributed over the six-year period and would have continued at the same rate until 31 March 2011. For ease of calculation I select that date as the date to which past items are to be calculated and from which future items are referable.

[241] I find that Mr Crouch's net earnings for the period from the date of his death to 31 March 2011 would have been:

2002-3 (annual $22,920)	$ 1,910
2003-4	$25,059
2004-5	$27,198
2005-6	$29,337
2006-7	$31,477
2007-8	$33,615
2008-9	$35,755
2009-10	$37,895
9 months to 31 March 2011	$30,025

Table 1 – Past earnings after tax

By way of comparison with the 2009-10 figure of $37,895, the indicative figure resulting from the use of the CFC data for 2009-10 was $49,005. I am not persuaded that that figure should be adopted or that any reason has been shown for increasing the figures which I have calculated.

The combined pecuniary dependency

[242] Two broad approaches were identified in the submissions. One was the inaptly named conventional approach, which attempts to ascertain the value of the dependency by the use of average figures. The other is the individual circumstances approach, which attempts to estimate the value of the dependency on the basis of the best available evidence in the particular case, regardless of the reliability of that evidence and the cost and time involved in obtaining and processing it. The taxi defendants favoured the former approach; the vehicle defendants the latter. Ms French had an each way bet: the submissions on her behalf left it up to me to decide.

[243] The so-called conventional approach has not been considered explicitly by the High Court of Australia, although it appears to be popular in the United Kingdom. It may have had some validity when applied in a situation where the deceased was the sole breadwinner for the family and the dependants were his wife and one child. I doubt its suitability in a case such as the present. The taxi defendants sought to justify its use by citing Professor Luntz:

> "Theoretically, the individual circumstances of each case should be taken into account, since the proportion of a breadwinner's income available to the other members of the family is influenced by many variable matters other than the number of children, such as the size of the income, the deceased's personal habits and attitudes, and the possible earnings of the other family members themselves. Nevertheless, the evidence given on such matters is often unreliable and the time spent in investigating it may not be worthwhile when the whole process is so fraught with contingencies, so that averages do provide a better starting point."[156]

That may be so in cases where there is a dearth of available evidence, but in my view in a situation as complex as the present, it should be an approach of last resort. In any event, there is no such dearth of evidence in this case. I prefer the orthodox approach

[156] Professor Harold Luntz, *Assessment of Damages for Personal Injury and Death*, Fourth Edition, LexisNexis Butterworths, 2002 at p 499 [9.3.2].

favoured by the vehicle defendants. However it probably does not matter a great deal which approach is chosen in this case. As counsel for the taxi defendants observed:

> "I've approached it one particular way using dependency tables, and the like, and future calculations, which are always enjoyable to participate in, and I've come up with a particular figure after some discounting by 15 per cent. I noted with some interest that the co-defendants have approached it another way and we've come very close … ."

Mr Crouch's expenditure on himself

[244] In cross-examination on behalf of the vehicle defendants, Ms French conceded that Mr Crouch would have spent in the period leading up to his death about $100-$130 per week on his own needs. Cigarettes constituted the largest single item in that figure. That was less than the amount of $180 per week estimated by Mr Lee. I find Mr Lee's reasons for increasing the estimate unpersuasive. I prefer the figure proposed by the vehicle defendants, $115 per week, as the starting point.

[245] The vehicle defendants applied that figure without any increase during the years between the date of death and the date of judgment. However they did so on the basis that there should be no allowance for an increase in Mr Crouch's earnings during that period either. To maintain the comparison of like with like I shall apply annual increases to the amount which Mr Crouch is taken to have spent on himself.

[246] Mr Lee calculated increases using the movement in the consumer price index for the alcohol and tobacco group, rather than the (smaller) index for all groups. He did so because he was instructed that "Ms French primarily handled the family finances" and Mr Crouch "got $50 a week which he spent primarily on cigarettes". That is less than half the total spent on himself. I shall discount the amounts of the increases[157] slightly to take that into account. For convenience I include in the table figures for the nine months to 31 March 2011.

YEAR ENDED	MOVEMENT	PERSONAL EXPENDITURE	
		PW	PA
2003 (4 weeks)	1.000	$115.00	$ 460
2004	1.038	$119.37	$6,210
2005	1.069	$122.94	$6,390
2006	1.110	$127.65	$6,640
2007	1.141	$131.22	$6,820
2008	1.197	$137.66	$7,160
2009	1.239	$142.49	$7,410
2010	1.263	$145.25	$7,550
31 Mar 2011	1.319	$151.69	$5,915

Table 2 - Amount of personal expenditure

Past loss of support

[247] Following the methodology of the vehicle defendants, past loss of support is determined by subtracting the amount for personal expenditure from the amount of after-tax income.

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[157] Taken from Exhibit 14, tab 2, p 34, table 15. The result is still significantly higher than the "All Groups" index.

YEAR ENDED	TABLE 1	TABLE 2	SUPPORT
2003	$ 1,910	$ 460	$ 1,450
2004	$25,059	$6,210	$18,849
2005	$27,198	$6,390	$20,808
2006	$29,337	$6,640	$22,697
2007	$31,477	$6,820	$24,657
2008	$33,615	$7,160	$26,455
2009	$35,755	$7,410	$28,345
2010	$37,895	$7,550	$30,345
31 Mar 2011	$30,025	$5,915	$24,110
TOTAL			**$197,716**

Table 3 - Amount for past pecuniary support[158]

[248] The parties were agreed that interest should be paid on that amount at 2.88% per annum. However that was a number of months ago, and the rate mandated by s 60(3) of the *Civil Liability Act 2003* is to be determined as at 1 April 2011; it is 2.755%.[159] Interest is therefore:

$197,716 x 2.75% x 7.8 ≈ $42,400.

Future loss of support

[249] As at 1 April 2011 the value of the weekly loss of dependency was:

$24,110 / 39 ≈ $618.

[250] The vehicle defendants submitted that future loss should be calculated on the basis that the weekly loss of dependency would continue unabated until Naomi, the youngest child, reached the age of 21 on 14 July 2024. I accept that submission, although I have not found that the weekly loss was the amount for which they contended. The amounts of money with which we are concerned are not large, and there is no reason to think that Mr Crouch would have increased his spending on himself until all his children ceased to be dependents. I also accept their submission that from that time, it may reasonably be expected that Mr Crouch's income would be divided equally between him and Ms French until he reached retirement age, 65. There was a suggestion on behalf of Ms French that at least one child, Taylah, should be regarded as likely to have continued as a dependent beyond the age of 21, but I do not think the evidence supports such a finding.

[251] The task then is to determine the present value of:

$618 per week for 13.25 years

plus the present value[160] of:

$30,025[161] / 39 / 2 ≈ $385 per week for another 7.8 years thereafter.

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158 Rounded figures in two columns.

159 Figure from the 'Capital Market Yields—Government Bonds—Daily—F2' table from http://www.rba.gov.au/statistics/tables/. My calculations were done during March, using the rate of 2.75% which was then appropriate. I have not changed them to reflect the additional 0.005% and will not do so unless requested by one of the parties.

160 At 5%: *Civil Liability Act 2003*, s 57.

161 Table 1, 31 March 2011.

Using the program PICalc[162] I find those amounts to be $314,500 and $68,250 respectively, a total of $382,750.

Loss of services

[252] Mr Crouch performed a number of household services for his family. Such services which are or will be replaced at pecuniary cost can found a head of compensation. In the present case Ms French and Mr Crouch were particularly dependent on each other's help as both their families lived in Europe and America. Ms French described what he did:

> Could you tell his Honour in your own words the sort of jobs and things that Stephen did around the house?-- He did all the renovations of our home and was continuing to do that. So, I mean, as I said, we had to gut the place, really, and put in new kitchens, bathrooms and he did all the decorating, of course, and the tiling and so, I mean - you want me to talk hourly terms or?
>
> We will come to hours, but first of all just what are the mundane tasks that needed to be done around the house that he did and avoided you having to do them?-- Right. Well, he did do a fair bit of cleaning because we had this - this arrangement that I would make his sandwiches if he cleaned the toilet and the shower, and often he would clean the kitchen sink as well because he was, I suppose, more house proud than me maybe in terms of how - what state the kitchen sink was in and I mean he cleaned the cooker mainly especially when I was pregnant with Naomi and just before she was born anyway, so he did things like that. He did cleaning of the windows, cleaning of the cars, the guttering, you know, cleaning the gutters which -----
>
> What about the garden?-- Sorry?
>
> What about the garden?-- He did the mowing of the lawns and pruning of the bushes we had there and planting some of the plants we had in there, yes, stuff like that.
>
> Did you share that or was that his territory?-- No, I couldn't even start up the trimmer let alone the mowing machine, so.
>
> I mean, since his departure, have you done those sort of tasks?-- No, I pay someone to do it.
>
> And you still are?-- Yes.
>
> And that's to do what, to do the -----?-- The mowing of the lawn and the pruning of the bushes, actually, yeah.
>
> All right?-- He also - we shared the cooking, although I did the majority of the cooking he would probably cook a couple of meals a week. He - talked about the cleaning. He did the shopping especially when I was pregnant with Naomi, and when Isaac was young he did the majority of the shopping. He also, I mean, also, liked, pick up Isaac from daycare when I was working, the five days that I was working a fortnight he would pick up Isaac because he finished earlier than me. I mean, he would put Isaac to bed. We took that in turns, but occasionally he took him to bed and read him stories and play with him and take him for walks

[162] Published by M Howard, Brisbane. I have not verified the accuracy of this calculator and ask that counsel check the calculations before the order is taken out.

through the park with the dog and I mean he was also involving in taking Taylah and Jordan to sports at the weekends. Jordan still plays hockey to this day and was back playing hockey then and as I said, Taylah played netball.

All right. So he was a fairly involved father with his children?-- Yes, yes.

Let's talk about times. You've been asked to address your mind to how long you think in an average week he contributed services to the household?-- Mmm.

And his children?-- Yes. I mean, so I would have said that maybe an hour of cleaning a week. Maybe shopping two hours. I mean he used to go down every hour when he went shopping as well, so he'd take a lot longer than I would - every week for the shopping and then if we needed extra things like milk or bread, I mean he would go and get those things. It was easier for him to go to the shops-----

HIS HONOUR: Could you slow down a little bit, please. You're really a bit too fast for everyone?-- Sorry. So, yes, he would do the majority of the shopping of the week especially as I said when Isaac was a baby and young, and the heavier pregnant I got as well, and get other things like the milk or bread if it needed be. It was easier for him to go down than me to drag Isaac down, really.

That's included in the two hours a week you've nominated for shopping?-- Yes.

What else?-- We have the cooking, as I said, maybe a couple of hours a week. With the gardening, I - depending on the season, he would need to mow the lawn every week especially because I've got quite a big back garden and the grass seems to grow quicker at the back garden so he would be doing it weekly in the summer or the hotter seasons and maybe fortnightly in the winter seasons.

Do you know how long it took him to mow the lawn?-- As I said, we've got quite a big back garden, maybe an hour and a half.

All right?-- And that might be every week or two. And then I suppose with Isaac as I said he was picking him up from daycare so that would have been like five days a fortnight that maybe would have taken him half an hour on those five days and, as I said, I mean, maybe half an hour each day during the week he might, as I say, either read to him, play with him, bath him or have a shower with him and then maybe at the weekends, I mean, if he wasn't working a Saturday, maybe have more time to, you know, as I say walk the dog with him or take him out to give me a break and stuff like that so maybe an hour and a half, and I could see that increasing the older our children got when they got more into sports and stuff because Isaac played soccer for a while and Naomi used to go to dance. I mean, we were always keen to get them into nippers and stuff like that which I plan to do this year with them as well. Maybe that would have been increased by up to three hours at the weekends when they were in sports. I suppose that was the time he would have taken with Jordan and Taylah taking them to sports at the weekend.

All right. And was the house renovation you've mentioned a needling sort of on-going thing or did he do that in fits and stuff?-- Yes, that was, I

> think the bane of his life that he could see the future jobs and again he repainted the whole of the inside, and I mean now it is getting to the stage where it would have been needed repainting again or he would have because he had the access to the paint and all that sort of thing. He would have maybe done it more often than I do. I don't do it, and then there was the outside as I said, the plans to spraypaint the roof and finish off painting the guttering and rendering the house and then painting that, and as I said by the end when we got a carport and stuff he would have painted all and that stuff, yes.
>
> Are you able to help us out with a time estimate for the amount of time he actually spent doing house renovations on an averaging type basis?-- I suppose there would have been times when he worked on it more when we first moved in and stuff like that, so maybe two or three hours a week.
>
> On average?-- Yes, I would say so, because as I said, he was maintaining it as well.
>
> All right. You mentioned window cleaning?-- Yes.
>
> How often did he do that?-- Maybe every three months.
>
> All right. Do you know how long that took?-- Maybe an hour and a half.
>
> All right. And on those access periods, where he was spending time taking his other children to sporting events -----?-- Yes.
>
> ----- how much time was involved?-- I would say that would take like a good two or three hours a weekend.
>
> And that was -----?-- Over other weekend.
>
> That was every second weekend?-- Yes. Sometimes, I suppose, if Kerri wasn't available we would take them to sports to.
> When you didn't have access but to assist her?-- Yes, and at one stage when Taylah was younger she was going to art lessons and then she did music lessons on a keyboard which he bought her the keyboard when she was showing an interest in playing a keyboard and stuff like that, so."

[253] I have set out that evidence at length because there was little effective challenge to it in cross-examination. Counsel for Ms French summarised the weekly averages as follows:

Cleaning	1 hour
Shopping	2 hours
Cooking	2 hours
Gardening/mowing	1.75 hours
Picking up Isaac	1.25 hours
Older children sport	1.5 hours
Renovations	2.5 hours
TOTAL	12 hours

As counsel observed, these figures take no account of window cleaning, cleaning gutters and cleaning cars, nor of the likely impact of an additional child.

[254] The defendants challenged the total. The vehicle defendants described the time claimed as "expansive". They submitted that if one had regard to the time which Mr Crouch spent at work and travelling one could only find a weekly loss of 4.5 hours which would be offset by 2 hours per week for services that no longer had to be provided to him by Ms French. The resulting net estimate of two hours per week was less than that proposed by the taxi defendants, three hours per week for parental services and nothing

for services to her. The basis for this figure was not identified but it was submitted that parental services would diminish over time as the children became more independent and Mr Crouch aged. They urged that as the estimates were broad estimates, I should approach them with a broad axe.

[255] I accept that as the children grew up, it was likely that services provided to them would change and be redistributed. I reject the idea that the number of hours applied to them would reduce before they left school. Common experience suggests that if anything the opposite is the true position. While I accept that I must approach the calculations broadly, I reject the suggestion that I must necessarily attack the figures with an axe. The proper approach is to have regard to the evidence.

[256] I have already found that Mr Crouch would have been obliged to increase the number of hours per week which he worked. I think that would inevitably have had an impact on services which he provided around the home. Probably it would have meant delay in completion of the renovations. For a few years the load on Ms French would have increased; it would have contributed to her not returning to work immediately after her maternity leave finished. Two hours per week for cooking, a generous estimate, was unlikely to be maintained. And it must be borne in mind that what is characterised as provision of services in a litigious context (for example attending the children's sporting fixtures) might more accurately be described as recreation or part of the interchange between members of the family in other contexts.

[257] Using a broad brush rather than an axe or a pressure pump, I assess the loss of services at nine hours per week until July 2021 (when Naomi will turn 18) and six hours a week and thereafter.

[258] The vehicle defendants submitted that the allowance for loss of domestic services should be calculated on the basis that the services would cease at age 70. That was justified on the ground that it gave "due recognition to the advancing years of the deceased reducing his ability to perform such services", and to an allowance for contingencies. Perhaps that submission should have been saved for a younger judge. There is no evidence to suggest that Mr Crouch would have descended into decrepitude at 70 and ageist assumptions are anathema. I adopt the approach of the taxi defendants and will allow the claim for the balance of Mr Crouch's life expectancy at the time of his death (49.3 years). Contingencies are dealt with elsewhere.

[259] The parties agreed that the value of the services was $15 per hour for past services and $18 per hour for the future.

[260] I assess compensation for loss of past services over 7.8 years (409 weeks to the end of March 2011) as:

$$\$15 \times 9 \times 409 \approx \$55{,}200.$$

Interest should be calculated on that amount at 2.75% to the end of March 2011:

$$\$55{,}200 \times 2.75\% \times 7.8 \approx \$11{,}850.$$

[261] As to loss of future services, the deceased's life expectancy at the time of death was approximately 49.3 years, of which 41.5 years should now be regarded as in the future. Of that, 10.3 years (the period to when Naomi turns 18) should be assessed on the basis of nine hours ($162) per week and the balance (31.2 years) on the basis of six hours ($108) per week. Present values are:

$162 pw for 10.3 years @ 5%	≈	$ 68,400

$108 pw for 31.2 years after 10.3 years @ 5%	≈	$ 54,650
Total	≈	$ 123,050[163]

Contingencies

[262] Conventionally amounts awarded in respect of future earnings are discounted for contingencies. The same applies to amounts awarded for future loss of support. Presumably the theoretical basis for doing this is that the method of calculation assumes more favourable factors than unfavourable ones; so a discount must be applied to restore balance. There is no evidence that Mr Crouch faced any abnormal contingencies in the future. Balance will be adequately restored by discounting the future awards by 10%.

Total

[263] Collecting the foregoing, I assess Ms French's claim as follows:

Past (to 31 March 2011) pecuniary loss[164]		$197,700	
Interest thereon[165]		$ 42,400	
Future pecuniary loss[166]	$382,750		
less: discount @ 10%	$ 38,270		
		$344,480	
Total pecuniary loss (rounded)			$584,600
Past loss of services[167]		$ 55,200	
Interest thereon[168]		$ 11,800	
Future loss of services[169]	$123,050		
less: discount @ 10%	$ 12,300		
		$110,750	
Total loss of services			$177,750
TOTAL			**$762,350**

[264] I ask counsel to check my calculations before this judgment is perfected.

Distribution among dependants

[265] Assessing the matter of distribution of the compensation is a complex exercise. The defendants quite reasonably made no submissions on this issue. The plaintiff submitted that mathematically it should be done as follows:

Ms French	51.5%
Taylah	6.0%
Jordan	8.5%
Isaac	16.0%
Naomi	18.0%.

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163 See note 162.

164 Paragraph [247], Table 3.

165 Paragraph [248].

166 Paragraph [251].

167 Paragraph [260].

168 *Ibid.*

169 Paragraph [261].

The submission did not indicate what mathematical process had been followed to determine those percentages.

[266] The defendants' calculations in other respects were based on acceptance of the proposition that all of the children would remain dependent until they turned 21. I have already rejected a suggestion on behalf of Ms French that a later age should be accepted for one child. I shall apportion on the basis of dependency to age 21. The periods of putative dependency of the children were:

01/06/2003 to 13/07/2003	3 children
14/07/2003 to 16/04/2011	4 children
17/04/2011 to 03/10/2014	3 children
04/10/2014 to 02/02/2022	2 children
02/02/2022 to 13/072024	1 child
13/07/2024 to 01/05/2032	no children.

[267] The bulk of the support for Taylah and Jordan was paid as child support and for this reason, that should be treated as a "first charge" on the available funds.

[268] Perhaps not surprisingly, the evidence does not reveal any substantial non-financial services provided to Taylah and Jordan. Such services as there were are adequately catered for by adopting a starting figure at the top of Ms Gordon's range for financial support, that is, $200 per week for the two children. There is no reason not to apportion it to them at an equal rate.

Taylah

[269] Taylah's dependency ends on 16 April 2011. For simplicity I shall treat all payments in respect of her as having occurred in the past. Her loss of support lasted 411 weeks, which makes her loss $41,100.

[270] Interest on that sum calculated at 2.75% over 7.9 years amounts to $8,950. Consequently, Taylah's share of the award is $50,050.

Jordan

[271] Jordan is entitled to an award of the same amount plus future financial support calculated at $100 per week to 3 October 2014, a period of 3.5 years. Using the program referred to above, I calculate the latter figure to be $16,800. After discounting for contingencies that becomes $15,100.

[272] Thus, the total allocated to Taylah and Jordan is $115,200. Of that, $100,100 is for past loss of support plus interest.

Ms French, Isaac and Naomi: past loss

[273] The allocation of funds to support Taylah and Jordan leaves the following amounts available for distribution to the other three dependents:

	Past loss of support + interest	**Past loss of services + interest**
Total	$240,100[170]	$67,000[37]
Less Taylah + Jordan	$100,100[171]	-
Balance	$140,000	$67,000

[274] Apart from the six weeks or so before the birth of Naomi, all three would have been dependants throughout the period for which past loss has been calculated (1 June 2003 to 31 March 2011).

[275] Distributing those amounts is largely a matter of guesswork. During Mr Crouch's lifetime the financial support came mainly in the form of shared support: housing, food and transport. My best estimate of a just outcome is to allocate 50% of the award for past loss of support and interest to Ms French and 25% to each child.

[276] The award for loss of services presupposes that Ms French has replaced that part of the services which would have been provided to the children. In practical terms the loss was hers. I shall allocate 80% of the award for past loss of services and interest to her and 10% to each of the two children.

[277] Past loss is therefore distributed as follows:

	Ms French	**Isaac**	**Naomi**
Loss of support + interest	$ 70,000	$ 35,000	$ 35,000
Loss of services + interest	$ 53,600	$ 6,700	$ 6,700
TOTAL	**$ 123,600**	**$ 41,700**	**$ 41,700**

Ms French, Isaac and Naomi: future loss in general

[278] Future losses are more complicated. They fall into four distinct periods:

1/4/11 to 3/10/14	three dependent children
4/10/14 to 2/2/22	two dependent children
2/2/22 to 13/7/24	one dependent child
13/7/24 to 1/5/32	no dependent children.

[279] The amount available before discounting but after allocation to Jordan is:

	Future loss of support	**Future loss of services**
Total	$382,750[172]	$123,050[173]
Less Jordan	$ 16,800[174]	-
Balance	$ 365,950	$ 123,050

[280] After discounting by 10% of those amounts become $329,350 and $110,750.

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170 Paragraph [263].

171 Paragraph [272].

172 Paragraph [251].

173 Paragraph [261].

174 Paragraph [271].

Ms French, Isaac and Naomi: future loss of support

[281] For each of the four periods above the amount available for allocation to these dependants is:

1/4/11 to 3/10/14	$518 pw[175]
4/10/14 to 2/2/22	$618 pw
2/2/22 to 13/7/24	$618 pw
13/7/24 to 1/5/32	$380 pw.[176]

[282] For the reasons already given,[177] half of the amount available after allocation to Jordan should be allocated equally (after deduction for contingencies) to the two dependent children during the first two periods. Using the same broad brush, one third of the amount should be allocated to Naomi during the third period. The balance should be allocated to Ms French. The amounts to be determined are:

Isaac	$518/4 pw for 3.47 years plus $618/4 pw for 7.34 years
Naomi	as for Isaac plus $618/3 pw for 2.44 years
Ms French	$518/2 pw for 3.47 years plus $618/2 pw for 7.34 years plus $618/3*2 pw for 2.4 years plus $68,250.[178]

[283] I calculate the rounded amount as before discounting to be:

	Isaac	**Naomi**	**Ms French**	**TOTAL**
1/4/11 to 3/10/14	$ 21,550	$ 21,550	$ 43,100	$ 86,200
4/10/14 to 2/2/22	$ 42,000	$ 42,000	$ 84,000	$ 168,000
2/2/22 to 13/7/24	-	$ 14,600	$ 29,200	$ 43,800
13/7/24 to 1/5/32	-	-	$ 68,250	$ 68,250
	$ 63,550	$ 78,150	$224,550	**$366,250**

[284] After discounting is applied, the allocations for future loss of support are as follows:

Isaac	$ 57,200
Naomi	$ 70,350
Ms French	$ 202,100
TOTAL	$ 329,650

The total approximates the available funds.[179]

Ms French, Isaac and Naomi: future loss of services

[285] I have held above that the amounts required for replacement of services have the following present values (before discounting for contingencies):

10.3 years to 14 July 2021	$ 68,400
31.2 years to about September 2052	$ 54,650.[180]

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175 Paragraph [249] less $100 pw for Jordan.

176 Paragraph [251].

177 Paragraph [275].

178 Paragraph [251].

179 Paragraph [280].

180 Paragraph [261].

[286] For simplicity these amount should be allocated on the same basis as was adopted for the allocation of past loss of services. After discounting the allocation becomes:

	Discounted amount	**Isaac**	**Naomi**	**Ms French**
1/4/11 to 14/7/2021	$ 61,550	$ 6,150	$ 6,150	$ 49,250
14/7/2021 to 30/9/2052	$ 49,200	-	-	$ 49,200
TOTAL	$ 110,750	$ 6,150	$ 6,150	$ 98,450

Summary of allocations

[287] To summarise, the damages awarded are allocated as follows:

	Past loss of support plus interest	**Future loss of support**	**Past loss of services plus interest**	**Future loss of services**	**TOTAL**
Taylah	$ 50,050[181]	-	-	-	$ 50,050
Jordan	$ 50,050[182]	$ 15,100	-	-	$ 65,150
Isaac	$ 35,000[183]	$ 57,200[184]	$ 6,700[185]	$ 6,150[186]	$105,050
Naomi	$ 35,000	$ 70,350	$ 6,700	$ 6,150	$118,200
Ms French	$ 70,000	$202,100	$53,600	$ 98,200[187]	$423,900
TOTAL	**$240,100**	**$344,750**	**$67,000**	**$110,500**	**$762,350**

Orders and costs

[288] I shall hear the parties on the calculations, the form of the appropriate orders and on costs. Subject thereto, I propose the following orders for the disposition of the various claims:

1. Judgment for the plaintiff against the first and fifth defendants for $762,350 on her claim.
2. Judgment for the second, third and fourth defendants against the plaintiff on her claim.
3. Judgment for the first defendant against the fifth defendant for contribution of $152,470 on its claim against the fifth defendant.
4. Judgment for the first defendant against the third and fourth defendants on their claim for contribution against it.
5. Judgment for the second defendant against the third, fourth and fifth defendants on their claim for contribution against it.
6. Judgment for the third and fourth defendants against the first and second defendants on the first and second defendants' claim for contribution against them.

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181 Paragraph [270].

182 Paragraph [271].

183 Paragraph [277].

184 Paragraph [284].

185 Paragraph [277].

186 Paragraph [286].

187 Rounded down.

7. Judgment for the fifth defendant against the first defendant for contribution of $609,880 on its claim against the first defendant.
8. Judgment for the fifth defendant against the second defendant on the second defendant's claim for contribution against it.