IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY **No. A14 of 2015**

BETWEEN:

ALEX ALLEN
Applicant

10 **and**

DANIELLE LOUISE CHADWICK
Respondent

RESPONDENT'S SUBMISSIONS

PART I PUBLICATION

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

PART II CONCISE STATEMENT OF ISSUES ON APPEAL

2. Section 47 of the *Civil Liability Act 1936* (SA) (**CL Act**):

   2.1 Whether the objective standard applied by s 47(2) of the CL Act precludes reliance by a plaintiff upon a mental response which is within the normal range of responses of ordinary individuals?

   2.2 Whether the risk of harm to the respondent as a result of riding with the appellant should take account of the expected availability of an operable seatbelt?

   2.3 Whether there was any basis to infer that if the appellant had abandoned
30 the respondent he would not have done so "completely" or whether the respondent had to make a choice in the stress of the moment between riding with the appellant and being left to find her own way?

3. Section 49 of the CL Act:

   3.1 Whether s 49 of the CL Act penalises a plaintiff by presumption of contributory negligence for failure to wear a seatbelt when it is the defendant's own conduct which unforeseeably prevents the plaintiff from engaging the seatbelt?

Mellor Olsson
Solicitors for the respondent
Level 5/80 King William Street
ADELAIDE SA 5000

Telephone: (08) 8414 3400
Facsimile: (08) 8414 3444
Ref: J Andrew

PART III SECTION 78B OF THE JUDICIARY ACT 1903

4. The respondent considers that notice under the *Judiciary Act* is not required.

PART IV CONTESTED MATTERS FROM APPELLANT'S NARRATIVE

5. The appellant draws attention to his consumption of alcohol over the hours before the accident. However, there was no direct evidence that he was exhibiting the obvious signs of intoxication during the latter part of the evening (TJ [75]). The evidence of Mr Martlew did not suggest that the appellant was obviously affected (TJ [81]). Similarly, the barmaid in the hotel did not suggest noticing any obvious signs of intoxication (TJ [82])[1].

6. While the trial judge found that the respondent spent a considerable time in the company of the appellant (as noted at AS [14]), the trial judge also found that the respondent was occupied for significant periods with the three children (TJ [5], [74]).

7. It is clear that the trial judge and the majority in the Full Court accepted the evidence that the journey to find cigarettes occupied 10 to 15 minutes and extended beyond the confines of the town (TJ [14]); FC [79], [109])[2].

8. The narration of events at AS [16] fails to mention that the trial judge accepted the plaintiff's evidence that she did not know where she was, in particular in relation to the town (TJ [138], [141])[3]. After review of the evidence, the majority in the Full Court found no error in these findings (FC [79], [96]).

9. The narration at AS [16.5] also omits reference to the appellant's "angry insistence" that the respondent "get in the fucking car" (TJ [140]).

10. As to AS [17], and the respondent's credibility, the trial judge was careful to bring to account a consideration of the general reliability of the respondent as a witness before making findings based upon her evidence[4].

11. In recounting the decisional history at AS [19], the appellant omits to mention that he did not seek by alternative contention or written submission filed in support of

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1 The BAC reading of 0.229 relied upon by the appellant (AS [8]) was the result of an attempt by Professor White to reconstruct the BAC at the time of the accident from analysis of a sample of blood taken somewhat later (exhibit P 26, statement of Professor White).

2 The map of Port Victoria and the surrounding country roads attached at AS [15] is capable of giving a misleading impression of the perception a person might reasonably have of their location relative to Port Victoria at 2.00 am in the morning in the vicinity of the stopping point. It is important to appreciate that the trial judge had the benefit of a view to assess the nature and features of the general locality, and the location of the changeover of drivers.

3 The plaintiff gave evidence that she stopped to urinate but had she realised how close she was to town, she would have waited and used a public toilet; she thought she had stopped in the middle of nowhere; she was aware of bush or scrub on the side of the road that she could hide behind; it was black and she could not see any street lights or houses: T 136-137. At trial, the appellant claimed an impaired memory of the journey. However, in his plea of mitigation on the criminal charges arising from the collision, his counsel submitted that "there was no street lighting, 'it was pitch-black and very poorly sign-posted'" (TJ [22]).

4 The respondent was in the witness box for all of 15 days and subjected to a sustained attack in cross-examination for 11 of those days (TJ [48]).

the appeal in the Full Court to challenge the finding of the trial judge that a *Norcock v. Bowey* defence was available in law to answer the claim of a failure to wear a seatbelt as required; instead, the appellant sought to support the decision of the trial judge that the defence had not been made out in point of fact[5].

PART V LEGISLATION

12. The appellant's statement of applicable legislation and regulations is accepted.

PART VI ARGUMENT

Legal Framework

13. While ss 47 and 49 of the CL Act form part of Part VII under the heading "Contributory Negligence", Part VII is clearly intended to supplement and not codify the general law principles of contributory negligence. As the appellant concedes (AS [27]), the interpretation of ss 47 and 49 will be informed by the general law of negligence, including contributory negligence, and the statutory context in which the provisions occur. Hence the Court is entitled to construe the provisions of Part VII informed by the general principles of contributory negligence unless they are necessarily excluded.

14. While the way in which the law looks at the fault of the defendant and the fault of the plaintiff is fundamentally different[6], in each case an objective standard involving the conduct to be expected of a reasonable person in the circumstances of the defendant or the plaintiff, as the case may be, is imposed.

15. Contrary to the appellant's submission (AS [27]), s 44 of the CL Act does not particularly advance matters. Its purpose was to redress a perception of a more lenient approach of the courts to an assessment of a plaintiff's departure from an accepted standard relative to a defendant's departure from an accepted standard[7], and equate the generic standard expected of a plaintiff with the generic standard expected of a defendant.

16. The provision prescribing the standard of care required of a defendant (s 31 CL Act) and hence of a plaintiff (via s 44) references "a reasonable person in the defendant's position". The CL Act says nothing about the qualities of the reasonable person. The reasonable person is a legal abstraction intended to draw on a community standard of acceptable behaviour[8] to be expected of individuals of ordinary intelligence and prudence. However, ordinary human responses fall within a normal range. The expected standard of response is not a strict, rigid and

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5 The appellant still does not in his submissions on appeal directly seek to put in issue the availability of the defence in point of law.

6 Eg, see *Nance v British Columbia Electric Railway* [1951] AC 601 at 611-612.

7 Review of the Law of Negligence Final Report [8.11] (Ipp Report).

8 Eg, see *Healthcare at Home Limited v The Common Services Agency* [2014] UKSC 49 at [1]-[2].

singular standard[9]. The hypothetical representative of ordinary members of the community may be expected to show judgement, courage, caution and the like but not to a standard of perfection or infallibility. Ordinary people are capable of errors of judgement or fear under stress and a particular response will only be unreasonable if it is excessive or abnormal[10].

17. When it is said in the authorities that contributory negligence ignores the "idiosyncrasies of the particular person whose conduct is in question"[11], this is merely to exclude reactions beyond the normal range.

18. As Barwick CJ said in *Caterson v. Commissioner for Railways,* "the question of how human beings placed in a situation of emergency will act is very much a question of fact ..."[12].

19. Under the general law, "contributory negligence is concerned with the failure of the plaintiff to protect his or her person or property against damage and not whether the failure contributes to the **accident.**"[13] (Original emphasis.) "Thus, while it is sufficient that the plaintiff's negligence contributed to the accident, this is not required. It is enough that it contribute to his or her damage."[14]

20. It is important for a consideration of both negligent breach of duty and contributory negligence that the risk to be guarded against be identified accurately and precisely[15].

21. Moreover, the assessment of the appropriateness of the plaintiff's response (or the defendant's response, as the case may be) to a risk of injury must be assessed looking forward from the time before the accident and not with hindsight[16].

Section 47

22. The appellant's submissions fail to demonstrate any error in the judgment of the majority in the Full Court. In fact there is no material difference in the approach of the majority and that of Kourakis CJ to the interpretation of the exception provision in s 47(2) of the CL Act. Both judgments interpret the provision as

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9 Eg, see *Wagner v International Railway Company* 232 NY 176 at 180 per Cardozo J.

10 "Some persons are by nature unduly timorous and imagine every path beset with lions; others, of most robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen. Here there is room for diversity of view...What to one judge may seem far-fetched may seem to another both natural and probable." *Glasgow Corporation v. Muir* [1943] AC 448 at 457 per Lord Macmillan.

11 *Joslyn v. Berryman* (2003) 214 CLR 552 at 567 [39], citing *Glasgow Corporation v. Muir* [1943] AC 448 at 457.

12 (1973) 128 CLR 99 at 102. It is quintessentially a jury question or a matter of judicial evaluation about which reasonable minds may differ.

13 *Astley v. Austrust Ltd* (1999) 197 CLR 1 at 11 [21].

14 *Fleming's The Law of Torts* (10th ed) p 319 [12.30].

15 Eg, *RTA v. Dederer* (2007) 237 CLR 330 at 351 [59]-[61].

16 Cf. *Vairy v. Wyong Shire Council* (2005) 223 CLR 422 at 461 [126].

requiring an objective approach to the assessment of the relative risks confronting the plaintiff having regard to the plaintiff's personal circumstances (FC [24], [54]; [114], [116]).

23. As the majority noted, the assessment of what could reasonably be expected of the injured person confronted by the risk "does not directly qualify the behaviour and decision making of the injured person". It is instead a matter requiring judicial evaluation (FC [116]). It is an evaluation about which reasonable minds may differ. While the approaches of the majority and Kourakis CJ to the evaluation of the relative risks confronting the respondent are divergent, no error has been demonstrated in the approach to that evaluation by the majority. Moreover, the approach of Kourakis CJ was affected in several respects by a misapprehension of the evidence and the findings of the trial judge.

24. Section 47(2) is to be interpreted in the statutory context in which it appears. As noted above, Part VII of the CL Act addresses aspects of contributory negligence. "Contributory negligence" is defined in s 3 by reference to an objective standard, that is to say "a failure by a person who suffers harm to exercise reasonable care and skill for his or her own protection or the protection of his or her own interests"[17].

25. The imposition of an objective standard is reaffirmed by the expression "could not reasonably be expected" in s 47(2).

26. However, the application of an objective standard does not preclude a response by the plaintiff within the normal range of responses of ordinary individuals in the same circumstances.

27. Further, s 47(2) requires the evaluation to be conducted by reference to what might be expected of "the injured person". This permits the personal characteristics of the individual person to be taken into account, not so as to justify an abnormal response, but in assessing the risk calculus. Here, the respondent was relatively young, female and pregnant. It is relevant to take those characteristics into account in evaluating how a person with those particular personal characteristics would reasonably be expected to assess the relative risks. This is consistent with the approach of both the majority (FC [111], [113]) and Kourakis CJ (FC [57]).

28. Both the majority (FC [115]) and Kourakis CJ (FC [46]) eschewed reliance upon any abnormal or idiosyncratic mental reaction or condition of the injured person.

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17 See also the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), s 3. It might reasonably be supposed that Parliament intended that what might "reasonably be expected" of an injured person is informed by the principles making up the doctrine of contributory negligence as it has come to be accepted, at least since it has taken the form of a partial statutory defence.

29. Both the majority (FC [103], [116]) and Kourakis CJ (FC [54]) proceeded from the premise that the notion of avoidance of the risk implies a choice between alternative courses of action. This requires the Court to consider the evidence of the alternative course or courses open to the plaintiff instead of the course which they adopted and to evaluate what might reasonably be expected of the plaintiff.

30. The evidence justifying the finding that the injured person ought to have been aware of the other person's (in this case, the driver's) intoxicated state has a bearing on the exception question whether the injured person might reasonably have been expected to have avoided the risk. However, the CL Act does not describe the extent to which the defendant's capacity to exercise due care and skill is required to be impaired[18].

31. Further, s 47 relevantly refers to "the accident" and "the injured person" and "the risk" but "the risk" is left at large and undefined. Section 47 extends to accidents of all kinds and hence the "risk" may be one which is created in a wide variety of circumstances, provided that the negligent tortfeasor was intoxicated and the injured person relied upon them to exercise due care and skill.

32. At the least, this entails that the Court should have regard not only to the risk of an accident but also to the risk of consequential harm to the plaintiff in undertaking the evaluation required by s 47(2)(b). In the present case, the respondent expected to have the protection of an operable seatbelt to ameliorate, if not eliminate altogether, any risk she in fact exposed herself to by riding with the appellant[19].

33. The accident occurred when the appellant lost control of the car, and the rear end spun out in an anticlockwise direction colliding with a tree on the righthand side of the car (TJ [35], [42], [47])[20]. The respondent's momentum must have seen her thrown out through the rear righthand door opening (TJ [35]). The respondent sustained a fractured dislocation of the eleventh and twelfth thoracic joints through to the right transverse process of the first lumbar spine due to a "crush from retropulsion of the fractured dislocation", resulting in paraplegia (TJ [37]). While there was no expert evidence as to the precise mechanism of the injury, it had obviously occurred when the respondent was ejected from the car and suffered a sudden impact. That is an injury the risk of which the seatbelt was designed to prevent and which would have been avoided if the respondent's seatbelt had engaged.

34. The evaluation of the majority appears at FC [107]-[114]. In their evaluation, the majority observed, first, the importance of identifying with precision the actual risk which the plaintiff might have avoided. They further observed that the

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18 Section 3 defines "intoxicated" so that "a person is intoxicated if under the influence of alcohol or a drug to the extent that the person's capacity to exercise due care and skill is impaired".

19 Cf. *Ferrett v Worsley* (1993) 61 SASR 234 at 236, 241-244.

20 The car did not actually roll as Kourakis CJ thought (FC [14]).

relative risks were to be assessed with foresight and not with the benefit of hindsight. They also observed that the plaintiff was not to be judged by some singular standard of a perfectly rational decision maker. Their conclusion that "the feelings of helplessness and panic are readily understandable" is quite unexceptionable (cf. AS [34]-[35]). It merely refers to stress reactions which are of a natural and probable kind or within a natural and probable range in the circumstances confronting the respondent. No error of principle or fact has been identified in that approach to the evaluation.

35. In weighing the risk of the respondent riding with the appellant, the majority fairly observed that the risk of an accident occurring on the return journey to the hotel was reasonably assessed as being "relatively low" (FC [109]). To this should be added the finding of the trial judge that there was nothing which occurred beforehand which would have led the respondent to expect the appellant would drive in the aggressive and erratic manner in which he did (TJ [83]).

36. The risk of riding in the car driven by the appellant was lessened, as the majority noted, by the probable absence of other vehicles on the road at that early hour of the morning (FC [109]). Moreover, as noted already, the respondent expected to have the protection of a seatbelt.

37. The appellant seeks to emphasise the finding of the trial judge that the respondent had been in his company for about 10 to 12 hours before the accident during which time he consumed a good deal of alcohol (TJ [74]). However the respondent spent significant periods occupied with the children (TJ [74]), the unchallenged finding of the trial judge was that there was no direct evidence that he (the appellant) was exhibiting any of the obvious signs of intoxication (TJ [75]), and the barmaid, Ms Kneebone, did not suggest noticing any obvious signs of intoxication (TJ [82]).

38. The appellant elliptically observes at AS [40] that the car was a "powerful" car. However, the respondent had driven it apparently without incident on and off during the day and she had no reason to suppose its power represented a particular risk.

39. In assessing the countervailing risk attendant upon being left at the roadside, the majority properly had regard to the fact that the respondent was young (21 years old), female and pregnant and was concerned about the three young children alone at the hotel. These were all relevant matters to consider under the rubric "the injured person". The conclusion of the majority that "any young woman in an unfamiliar, rural area would perceive a significant risk to her personal safety in walking alone along an unlit road at 2.00 am" (FC [113]), even if the perceived risk was greater than a calm and rational assessment might allow, was a proper and natural inference for a court to draw from the ordinary course of human experience.

40. The analysis of the so-called "critical difference" between the majority and Kourakis CJ in the appellant's submissions (AS [34]-[37]) does not disclose any appellable error but merely a difference in approach to the process of evaluation of the circumstances confronting the respondent. There is no distorted inquiry in the majority's reasons: the question posed is a paraphrase of the conditions, proof of which will lead to a rebuttal of the presumption of contributory negligence (that is, excusal from the presumption). It merely serves to set the scene for the analysis of the specific terms of the exception provision which follows from FC [104].To allow for reactions of confusion, helplessness and panic is not to misapply the standard of the reasonable person. To the contrary, it is a correct and proper acknowledgement that the standard allows for a range of human emotions apart from strict and dispassionate rationality[21].

41. The fact that the hotel may not have been so distant does not assist the appellant in the face of the finding of the trial judge (and affirmed by the majority in the Full Court after a careful review of the evidence) that the plaintiff did not know where she was and, in particular, that she did not appreciate how close she was to town (TJ [138], [141]; FC [79], [96])[22].

42. Although Kourakis CJ found (FC [51]) that that finding should not have been made, the trial judge had the benefit of seeing and hearing the respondent give evidence over an extended period[23] and subjected her evidence to very careful scrutiny; even if Kourakis CJ may have not reached that same finding himself at first instance, the reasons do not demonstrate that the trial judge's finding was contrary to other objective evidence or inherently improbable. Moreover, the criticism made by Kourakis CJ at FC [51] was founded upon a misapprehension that the journey up to the stopping point had simply been "around the streets of the (small) town .... for some 15 minutes" (also see FC [1], [10], [12]), whereas the evidence, and the finding, was that the journey had extended beyond the confines of the small town and therefore onto rural roads (TJ [14]; FC [79], [109]).

43. The most critical difference between the evaluative approach of the majority and that of Kourakis CJ turns on the so-called "agony of the moment" consideration. The majority held that the appellant's aggressive direction to the respondent to "get in the fucking car" created a situation in which the respondent had to make a choice, and an immediate one (FC [111], [112]; also see TJ [142]). The appellant criticises the majority's approach on the basis that "there was here no emergency" (AS [45]).

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21 Kourakis CJ at FC [58] discounted the respondent's feelings of helplessness and panic, not because they were not authentic human responses to risk or perceived danger, but because he considered they were abnormal or unreasonable responses in the circumstances of this case.

22 Kourakis CJ relied on the evidence of Mr Martlew that he could see town lights; however, his evidence was inconsistent and he also said it was dark and he could not see any lights: TJ [30] and the finding at TJ [138].

23 As noted above, the respondent was in the witness box for a total of 15 days.

44. The law recognises that life throws up situations requiring an immediate response, and assesses the reasonableness of a particular response in that light. The issue posed by s 47(2)(b) involving the assessment of relative risks has a close analogy in the common law doctrine of alternative dangers[24].

45. In *Caterson v. Commissioner for Railways*[25], Gibbs J (with whom Barwick CJ and Stephen J agreed, and Menzies J apparently agreed) explained the process of evaluation of the alternative courses open to the plaintiff. Gibbs J held[26]:

> "Where a plaintiff has by reason of the negligence of the defendant been so placed that he can only escape from inconvenience by taking a risk, the question whether his action in taking the risk is unreasonable is to be answered by weighing the degree of inconvenience to which he will be subjected against the risk that he takes in order to try to escape from it ...".

He added later[27]:

> "In this connexion they could have considered the appellant's evidence that he jumped instinctively and could have concluded that in the stress of the moment it was not to be expected that he would think of the possibility that the carriage would be provided with a communication cord or, alternatively, that it was not necessarily unreasonable for him to endeavour to leave the train immediately rather than to spend time looking for a communication cord, for if there had proved to be no cord the lapse of time would have increased the hazard of leaving the train, which was gaining speed."

46. Nothing in s 47(2)(b) suggests that this kind of consideration is to be excluded, and the appellant does not suggest otherwise.

47. The alternative evaluative approach of Kourakis CJ required the respondent to undertake a rational and dispassionate assessment of her location and circumstances (FC [52], [57]). The respondent contends that his Honour's approach amounts to a counsel of perfection with the benefit of hindsight. In any event, it does not demonstrate that the alternative evaluative process of the majority is wrong, merely that the evaluation is something about which reasonable minds may differ.

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24 See Kourakis CJ at FC [54]; Gray and Nicholson JJ at FC [103]-[105]; and cf. *Wagner v International Railway Company* 232 NY 176.

25 (1973) 128 CLR 99.

26 (1973) 128 CLR 99 at 111.

27 (1973) 128 CLR 99 at 112; the reasons of Gibbs J clearly acknowledge that there was a range of reasonable responses which might have been made by a person in the position of the plaintiff at 108, 109, 110, 111 and 112.

48. It can be inferred that the "angry insistence" of the appellant ("get in the fucking car") carried with it the implicit threat that if the respondent did not comply, she would be abandoned. The respondent did not have the luxury of testing the appellant's resolve. The appellant's actions required the respondent to make a choice there and then: get in the car or risk being left at the roadside. That did not allow for the kind of calm and considered reflection upon her circumstances which Kourakis CJ postulates as the reasonable response.

49. Kourakis CJ apparently conceded that the appellant's conduct entailed an implicit threat of abandonment. However, he weighed heavily in the alternative risk equation the proposition that "[s]uch risk as there might have been could be substantially discounted because there was no reason for Mr Chadwick (sic, Ms Chadwick) to think that Mr Allen would be so callous as to abandon her completely even if he had initially driven off" (FC [50]).

50. However, this is no more than conjecture. Further, it is significant that it was on this assumption that Kourakis CJ considered that the risk could be "substantially discounted". The conjectural premise also does not sit well with the earlier observation that a "reasonable person would bring to mind that Mr Allen had consumed alcohol pretty well continuously throughout the day". If a reasonable person were to bring that to mind, they might also reasonably conclude that the appellant would or may well be so disinhibited as to abandon them.

51. Finally, Kourakis CJ reasoned that it was wrong to infer that if the respondent "had not got into the car, [the appellant] would have left her alone or not checked on her progress as she walked into the township. Importantly, that was not Ms Chadwick's view" (FC [50]). The suggestion that the appellant would have checked on the respondent is also conjecture. The suggestion that the respondent was of the view that the appellant would have checked is not supported by the evidence (eg, see TJ [17][28]), and is contrary to the findings of the trial judge (TJ [139]).

Conclusion on Section 47

52. No error has been shown in the approach of the majority either to the interpretation of s 47(2) of the CL Act or to its application to the evaluation of the respondent's response to the alternative risks confronting her.

Section 49

53. Section 49, like s 47, falls to be interpreted in the context of the general law of contributory negligence and the CL Act as a whole.

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28 The respondent's evidence included at TJ [17] was that: "I didn't know what the boys would have done if I got left there." This negative statement does not support the positive proposition that she was of the view that the appellant would have checked on her progress.

54. The pre-condition in s 49(1)(a) for the operation of the presumption of contributory negligence is simply that the injured person was not wearing a seatbelt as required under the *Road Traffic Act 1961* (SA) (**RT Act**).

55. The subsection says nothing, in terms, about the circumstances in which the failure itself occurred. Rather, the provision incorporates by reference a *"requirement"* under the RT Act. It is common ground that that requirement springs from s 80 of the RT Act. Section 80 does not explicitly impose any requirement. Instead, it permits the promulgation of *Australian Road Rules.*

56. The *Australian Road Rules* so promulgated include ARR 265[29]. At the time of the accident, ARR 265(2) provided that a non-exempt passenger of 16 years or older in or on a motor vehicle that is moving must occupy a seating position that is fitted with a seatbelt and must wear the seatbelt properly adjusted and fastened. The rule carried the designation "offence provision" which, by virtue of ARR 10, denoted that contravention was an offence[30].

57. The intention of the incorporation by reference may simply have been to transpose the norm or standard of conduct in relation to seatbelts prescribed by the *Australian Road Rule* into the context of tortious liability; alternatively, the intention may have been to incorporate into the concept of contributory negligence the *Australian Road Rule* as an offence provision together with any associated defences under the criminal law.

58. In either case, it is unlikely that Parliament intended that a person might breach the seatbelt rule and therefore commit contributory negligence in circumstances devoid of fault on their part. It is even more unlikely that this should have been intended in circumstances where it is the conduct of the defendant themselves which has caused the plaintiff not to comply.

59. A literal application of ARR 265 can result in absurd consequences; for example, the defendant, while driving the vehicle in which the plaintiff is riding, may drive off before the plaintiff has had any opportunity to engage the seatbelt; the defendant as driver and owner of the car in which the plaintiff is riding may have allowed the seatbelt to become inoperable without the plaintiff knowing; the defendant may drive in such a way as to render the seatbelt inoperable or, in an act of by-play, may prevent the plaintiff from engaging the seatbelt; the plaintiff may even have been abducted and forced into the passenger compartment of the car under duress.

60. In all such cases (and others), the plaintiff may have no practical capacity to engage the seatbelt locking catch while riding in the car. In a number of such cases, this will be due to the fault of the driver who is also the defendant. The

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29 The *Australian Road Rules* were introduced as subordinate legislation by regulation no. 219 of 1999.

30 The *Road Traffic (Miscellaneous) Regulations 1999* provided for the penalty.

plaintiff may not have been able to require the driver to stop or been able to exit the vehicle before an accident occurred. It is not consistent with the ordinary operation of the law of negligence to hold a party responsible for an event over which they have no control nor to impose a finding of contributory negligence where the immediate and operative cause of the plaintiff's default and damage is the defendant's own act.

61. A legislative provision which adopts by incorporation another legislative provision cannot alter the meaning of the incorporated provision. That is not to say, however, that if s 49 is to be taken simply as adopting a norm or standard of conduct in the application of the law of contributory negligence, that standard should not be applied in the legislative context in which the incorporating provision operates. In that case, it is open to interpret s 49 of the CL Act as imposing a qualified "requirement", being one which the plaintiff is reasonably capable of meeting. The alternative construction is that s 49 incorporates ARR 265 as an offence provision accompanied by any defences available under the criminal law. On this construction, it is reasonable to suppose that Parliament was aware of the nature and effect of defences available under the general framework of the criminal law[31] and intended that they be available to the plaintiff, albeit in the context of a civil adjudication.

62. In *Norcock v. Bowey,*[32] the defendant was charged with a summary offence of being the owner of cattle (actually a sheep) found straying in a street or public place. In the Full Court, where a conviction was upheld, it was held that the offence in question was one of strict liability not absolute liability, therefore accommodating an inherent defence. Napier CJ relevantly held[33]:

> "But I desire to add that, in my opinion, it would have been a good answer to the charge if the owner had been able to prove how the animal came to be upon the road, and had shown that it was due to circumstances beyond his control, that is to say to the Act of God or to some wrongful act of a stranger whom the owner had no means of controlling or influencing."

Hogarth J held[34]:

> "[The provision] does not require him to ensure against the result of acts or occurrences which he has no power to control."

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31 Cf. *Kain & Shelton v. McDonald* [1971] SASR 39 at 46 per Bray CJ.

32 [1966] SASR 250.

33 [1966] SASR 250 at 266; subsequent authority makes clear that it is not necessary that there be any wrongful act.

34 [1966] SASR 250 at 268.

Walters AJ held[35]:

> "It seems to me that before penal liability can rightly be imposed, the thing falling within the prohibition of the statute must be something done or omitted to be done by the person himself or those who are within his influence or control, and that he cannot be accounted responsible for acts of a stranger or for events independent of human activity altogether."

63. Those statements of principle in *Norcock v. Bowey* were anticipated by the earlier decision of Napier CJ in *Snell v. Ryan*[36] in which he adopted the following statement of principle of Griffith CJ in *Hardgrave v. The King*[37]:

> "The general rule is that a person is not criminally responsible for an act which is done independently of the exercise of his will or by accident. It is also a general rule that a person who does an act under a reasonable misapprehension of fact is not criminally responsible for it even if the facts which he believed did not exist. I do not think the first rule has ever been excluded by any Statute."[38]

64. Subsequent authorities have endorsed the *Norcock v. Bowey* defence[39] which, in *Boucher v. G.J. Coles & Co*[40], was restated in terms of "an act over which the respondent had no control and against which it could not reasonably be expected to guard"[41]; meaning that it must be "reasonably within their [the defendant's] power, either by their own direct conduct, or by controlling or influencing the conduct of others, to uphold the standards ordained."[42]

65. The rationale or principle underlying the rule was stated by Wells J to be that identified as the basis for interpreting a provision as imposing strict liability in the advice of the Privy Council in *Lim Chin Aik v. The Queen*[43]:

> "It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no

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35 [1966] SASR 250 at 269.

36 [1951] SASR 59 at 60.

37 (1906) 4 CLR 232 at 237.

38 Cited in *The Queen v. O'Connor* (1980) 146 CLR 64 at 97; *Peters v. The Queen* (1998) 192 CLR 493 at 551; see also *He Kaw Teh v. The Queen* (1985) 157 CLR 523 at 573.

39 Eg, *Samuels v. Centofanti* [1967] SASR 251 at 260, 275; *Kain & Shelton v. McDonald* (1971) 1 SASR 39 at 45, 52; *Mayer v. Marchant* (1973) 5 SASR 567 at 573, 579; also see *Kruger v Kidson* (2004) 182 FLR 440.

40 (1974) 9 SASR 495.

41 Per Bray CJ at 497.

42 Per Wells J at 503.

43 [1963] AC 160 at 174.

reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim."

66. The same principle is reflected in the passage from the joint judgment in *The Queen v. Falconer*[44] cited in the reasons of Gray and Nicholson JJ at FC [129].

67. The appellant's submissions seek unduly to restrict the principled basis of the defence by relying on particular examples or applications of the principle. The true touchstone is simply want of control whether or not that is to be characterised as a result of the act of a stranger. The respondent concurs in the appellant's submission (AS [57]) that it is not sufficient "merely to demonstrate that the defendant has taken 'reasonable care'". The defence obviously requires more than that. The appellant then appears obliquely to suggest (AS [57]) that it was the respondent who placed herself at the risk of driving with him without an operable seatbelt.

68. This would be completely to mischaracterise the events. The respondent expected to apply her seatbelt. Expert review of the seatbelt after the action concluded that it was properly functioning[45]. The expert evidence was also to the effect that the seatbelt mechanism involved two safety locking devices; one was operated by the effect of rapid acceleration and deceleration (including around curves) of the car on the inertia of a ballbearing which could block the retractor mechanism; the other involved the operation of a locking device on the retractor mechanism if the belt was pulled too hard.

69. Both experts agreed, and the trial judge found, that each safety locking mechanism operated to prevent engagement of the seatbelt at times during the course of the appellant's driving up to the point of final impact (TJ [156], [166]).

70. The first mechanism was engaged by the rapid forces of acceleration and deceleration applied by the appellant's extreme manner of driving. The second mechanism was engaged by the respondent "yanking" or "tugging" at the seatbelt too forcefully to fasten it[46]. This the trial judge found was due to the respondent's impatience and impetuosity which arose out of her anger at the appellant's decision to take over driving[47] (a proposition not actually put to the respondent at trial), but a reaction which, as Kourakis CJ found, was itself also a direct and natural response to the appellant's bad driving[48].

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44 (1990) 171 CLR 30.

45 TJ [160].

46 TJ [162], [166].

47 TJ [170].

48 FC [19].

71. The appellant's submission that the Full Court did not impugn the trial judge's finding that there were two opportunities when the motion of the car did not prevent the seatbelt being fastened (AS [66]) cannot be sustained.

72. There were police statements of two witnesses recounting that they heard the car as it drove through the town accelerating heavily, spinning tyres and spraying gravel before the thud of the collision[49]. Neither was able to say how fast the car was travelling at any given time or what part of the journey the car was on at the time they heard it. There was also a police statement of Mr Martlew as to the circumstances of the driving[50].

10 73. The two experts relied upon this evidence to locate the sections and times of the trip in which the gravitational forces on the car were not so excessive as to allow the seatbelt to engage[51]. The respondent's expert estimated that there was limited opportunity of as little as 4.5 to 5 seconds. The appellant's expert estimated that there were two such periods or opportunities of about 6.75 to 7.70 seconds each (FC [150]). The trial judge accepted the latter evidence and found that the plaintiff had at least two reasonable opportunities (TJ [159]).

74. While the Full Court obviously accepted the expert evidence as to the safety locking mechanisms of the seatbelt, Gray and Nicholson JJ made it clear that they did not accept the efficacy or reliability of the evidence of the two experts as to
20 (one or two) "reasonable opportunities for the respondent to have engaged the seatbelt" (FC [154]). Although the evidence of Mr Martlew, the witnesses who heard the car's travel, and police reconstruction evidence permitted the confident conclusion that there were periods of very considerable acceleration and deceleration during the short journey through the town and back to the crash site[52], those observations were clearly insufficiently precise to enable any brief period of steady or constant motion to be identified with any confidence (FC [154]-[155]).

75. The majority found (at FC [156]), in effect, that it was the appellant's driving which caused the gravitational forces to engage the inertia locking mechanism
30 (for most of the trip) which in turn caused the respondent to pull forcefully on the seatbelt; in substance, they found it was unrealistic to attempt to unravel the two causes or to expect that the respondent should have been sufficiently calm and collected "to wait for an opportunity to fasten the seatbelt if it were to arise and to seize upon that opportunity immediately before it was lost again".

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49 Exhibit P 26, statements of Ware and Baker.

50 Exhibit P 61.

51 Both experts conceded that their conclusions were indicative only and dependent upon the points at which aggressive driving occurred, a fact about which they each made different assumptions: Hall at T 1866; Griffiths at T 4346.

52 The distance was about 650 metres and the time taken somewhere between an estimated 33 to 46 seconds: FC [154].

76. The appellant's attempt to avoid the consequences of his own actions seeks to torture a meaning out of the *Norcock v. Bowey* principle which it will not bear (AS [61]). The appellant suggests that the cause of the malfunction was his own erratic driving and that erratic driving is a reasonably foreseeable consequence of travelling with an intoxicated driver and hence the defence cannot be made out. However, erratic driving is one thing but driving with such force as to lock a seatbelt mechanism (the workings of which the average person would be unaware of) is a very different thing and the two cannot be conflated as the appellant would have it. Even if erratic driving might have been reasonably foreseeable (and the respondent says it was not[53]), it does not follow that an untutored lay person should reasonably understand let alone foresee the effect of such driving on the inertia locking mechanism.

77. The appellant goes on to invoke a test close to the true *Norcock* principle ("an event over which Ms Chadwick had no control"; on the *Boucher* formulation, "no reasonable control"), but suggests that the respondent does not qualify because she chose to be a passenger of an intoxicated driver. This involves several unjustifiable steps of logic.

78. First, it ignores the way in which the choice came about. Secondly, it assumes that intoxication (of whatever degree) predicts extreme reckless or hooligan driving. Thirdly, it relies on a causa sine qua non argument. Fourthly, it fails to offer any explanation as to why the respondent should have known or expected the likely inoperability of the seatbelt. Finally, and most fundamentally, it fails to acknowledge that it was the appellant himself who rendered the seatbelt inoperable by his driving (or, as Kourakis CJ observed at FC [19], by the respondent's direct and natural response to that driving).

79. Additionally, to treat a want of control defence as defeated by the driving of an intoxicated driver is, in effect, to seek a double deduction under s 47 of the CL Act.

80. In the circumstances, however the onus of proof is cast (FC [18]; [158]), the *Norcock v. Bowey* or want of control defence was made out. The appellant should not be heard to say that the respondent has failed to eliminate any possibility of an opportunity to apply the seatbelt, and therefore not discharged the civil onus of proof, when it is his very conduct which rendered precise proof impossible (cf. FC [156]).

Conclusion on Section 49

81. No basis has been demonstrated for challenging the interpretation or application of s 49 of the CL Act by the Full Court.

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53 The trial judge found that nothing that had occurred beforehand could have led the respondent to think that driving of the kind that eventuated would occur (TJ [83]).

Goods and Services Tax

82. This aspect of the appeal has been compromised. This is on the basis that the notional award of damages for the cost of future care has been reduced by agreement between the parties to the sum of $1,040,000 by reference to GST considerations.

PART VII ESTIMATE OF ORAL ARGUMENT

83. The respondent estimates no more than 2 hours for her oral argument.

Dated 13 August 2015.

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	R J Whitington QC	J M Atkins	B Krupka
Phone:	(08) 8212 6022	(08) 8371 4674	(08) 8231 2344
Fax:	(08) 8231 3640	(08) 8351 6927	(08) 8212 3232
Email:	mcphee@hansonchambers.com.au	josephinematkins@bigpond.com	bkrupka@jeffcottchambers.com.au

Counsel for the respondent