# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Robbins v Skouboudis & Suncorp Metway Insurance Limited* [2013] QSC 101 |
| PARTIES: | **SALLY-ANNE ROBBINS**<br>(plaintiff)<br>**v**<br>**JOHN SKOUBOUDIS**<br>(first defendant)<br>**SUNCORP METWAY INSURANCE LIMITED**<br>(second defendant) |
| FILE NO/S: | 2087 of 2012 |
| DIVISION: | Trial Division |
| PROCEEDING: | Trial |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 22 April 2013 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 10, 11, 12, 13, 14 December 2012 |
| JUDGE: | Martin J |
| ORDER: | Judgment for the Plaintiff in the amount of $119,324.50 |
| CATCHWORDS: | TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – PARTICULAR CASES – ROAD ACCCIDENT CASES – where the plaintiff accompanied the first defendant on a motorcycle which the first defendant was driving – where the motorcycle was involved in a road accident – where the plaintiff suffered injuries as a result of being thrown from the motorcycle - where both plaintiff and first defendant were intoxicated at the time of the accident – whether the plaintiff is guilty of contributory negligence<br><br>DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – PARTICULAR CIRCUMSTANCES – where the plaintiff has suffered a 10 per cent whole person impairment – where the plaintiffs injuries have reduced her earning capacity to some extent – whether the plaintiff has discharged the burden upon her<br><br>*Civil Liability Act* (Qld) 2000<br><br>*Hawira v Connolly* [2008] QSC 4, cited<br>*Joslyn v Berryman* (2003) 214 CLR 552, considered |

*Mackenzie v Nominal Defendant* (2005) 43 MVR 315; [2005] NSWCA 180, cited
*Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALR 529, considered
*Wynbergen v Hoyts Corporation Pty Ltd* (1997) 72 ALJR 65; 149 ALR 25, cited

COUNSEL: Plaintiff unrepresented
T Matthews, with him S J Williams, for the defendants

SOLICITORS: Plaintiff unrepresented
Quinlan Miller & Treston, for the defendants

[1] On 7 October 2007 the plaintiff was a passenger on a motorcycle being driven by the first defendant. The first defendant lost control of the motorcycle, the plaintiff was thrown off and, as a result, she suffered severe injuries. She seeks damages arising from the effects of those injuries.

[2] The second defendant's case is centred on an allegation of contributory negligence based on the intoxication of both the plaintiff and the first defendant and the plaintiff's knowledge of the intoxication of the first defendant.

**The evening of 6 October 2007**

[3] On 6 October the plaintiff completed a shift as a prostitute at "Cleo's on Nile" and went to a friend's house at about 9pm with the intention that both of them would then travel into the city for a "night out". She stayed at her friend's house for some time and had a number of drinks. In evidence in chief she claimed to have had only one "Southern Comfort and Coke". She and her friend went to a bar in the Sofitel Hotel arriving at about 11pm. She says that she had about five more Southern Comfort and Cokes, together with water and "red frogs". She explained that "red frogs" were soft gelatinous lollies.

[4] While the plaintiff was at the hotel she met the first defendant. They commenced talking and, after a while, he offered to drive her to the place she next wished to visit – the Chalk Hotel at Woolloongabba. He had his motorcycle parked at the Sofitel, he gave her his helmet to wear and they drove off towards Woolloongabba.

[5] Witnesses called for the defendant recalled seeing the motorcycle as it travelled from the inner city towards Woolloongabba and said that it was being driven at a high speed and in a reckless manner.

[6] One of those witnesses, Shaun Chamberlain, was driving his car onto the Story Bridge from Fortitude Valley at the same time as the motorcycle driven by the first defendant was approaching the entrance to the Story Bridge from Gipps Street. When the motorcycle reached the northern entry to the Bradfield Highway at Kemp Place, Mr Chamberlain estimated it to be travelling at about 80 km per hour. He saw the first defendant lean the motorcycle over to the right to negotiate a curve in the road and saw the exhaust of the motorcycle scrape along the bitumen. He then said that the driver appeared to attempt to straighten the motorcycle but, in doing so, failed to avoid the median strip. When the motorcycle hit the median strip, both the

plaintiff and the first defendant were thrown off the motorcycle and onto the roadway.

[7] The first defendant's negligence, while not admitted, was never seriously in issue. He clearly owed the plaintiff a duty to take care. He breached that duty by: travelling at a speed which was too high in the circumstances, failing to control the motorcycle when entering the Bradfield Highway, failing to prevent the motorcycle from hitting the median strip, and, as I have found, driving while intoxicated.

**The *Civil Liability Act***

[8] The second defendant relies upon a number of provisions of the *Civil Liability Act* (Qld) 2000 ("CLA") with respect to its pleading against the plaintiff of contributory negligence.

[9] Section 23 of the CLA provides:

> "**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 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.

[10] Section 24 of the CLA 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."

[11] Part 4 Division 2 of the CLA contains provisions which deal specifically with intoxication. They are:

> **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 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.

(2) Subsection (1) does not affect a liability arising out of conduct happening on licensed premises.

(3) In this section—

*licensed premises* see the *Liquor Act 1992*, section 4.

**47 Presumption of contributory negligence if person who suffers harm is intoxicated**

(1) This section applies if a person who suffered harm was intoxicated at the time of the breach of duty giving rise to a claim for damages and contributory negligence is alleged by the defendant.

(2) Contributory negligence will, subject to this section, be presumed.

(3) The person may only rebut the presumption by establishing on the balance of probabilities—

(a) that the intoxication did not contribute to the breach of duty; or

(b) that the intoxication was not self-induced.

(4) Unless the person rebuts the presumption of contributory negligence, the court must assess damages on the basis that the damages to which the person would be entitled in the absence of contributory negligence are to be reduced, on account of contributory negligence, by 25% or a greater percentage decided by the court to be appropriate in the circumstances of the case.

(5) If, in the case of a motor vehicle accident, the person who suffered harm was the driver of a motor vehicle involved in the accident and the evidence establishes—

(a) that the concentration of alcohol in the driver's blood was 150mg or more of alcohol in 100mL of blood; or

(b) that the driver was so much under the influence of alcohol or a drug as to be incapable of exercising effective control of the vehicle;

the minimum reduction prescribed by subsection (4) is increased to 50%.

**48 Presumption of contributory negligence if person who suffers harm relies on care and skill of person known to be intoxicated**

(1) This section applies to a person who suffered harm (*plaintiff*) who—

(a) was at least 16 years at the time of the breach of duty giving rise to the harm; and

(b) relied on the care and skill of a person who was intoxicated at the time of the breach of duty (*defendant*); and

(c) was aware, or ought reasonably to have been aware, that the defendant was intoxicated.

(2) If the harm suffered by the plaintiff was caused through the negligence of the defendant and the defendant alleges contributory negligence on the part of the plaintiff, contributory negligence will, subject to this section, be presumed.

(3) The plaintiff may only rebut the presumption if the plaintiff establishes, on the balance of probabilities, that—

(a) the defendant's intoxication did not contribute to the breach of duty; or

(b) the plaintiff could not reasonably be expected to have avoided relying on the defendant's care and skill.

(4) Unless the plaintiff rebuts the presumption of contributory negligence, the court must assess damages on the basis that the damages to which the plaintiff would be entitled in the absence of contributory negligence are to be reduced, on account of contributory negligence, by 25% or a greater percentage decided by the court to be appropriate in the circumstances of the case.

(5) The common law defence of voluntary assumption of risk does not apply to a matter to which this section applies.

*Editor's note—*
'Voluntary assumption of risk' is sometimes stated as 'volenti non fit injuria'.

**49 Additional presumption for motor vehicle accident**

(1) This section applies to a plaintiff and defendant mentioned in section 48.

(2) If—

(a) the breach of duty giving rise to the harm suffered by the plaintiff was a motor vehicle accident; and

(b) the plaintiff was a passenger in the motor vehicle; and

(c) the motor vehicle was driven by the defendant; and

(d) either—

(i) the concentration of alcohol in the defendant's blood was 150mg or more of alcohol in 100mL of blood; or

(ii) the defendant was so much under the influence of alcohol or a drug as to be incapable of exercising effective control of the vehicle;

the minimum reduction prescribed by section 48(4) is increased to 50%.

(3) The plaintiff is taken, for this section, to rely on the care and skill of the defendant.

[12] The word "intoxicated" is defined in the Dictionary of the CLA in this way:

> "in relation to a person, [intoxicated] means that the person is under the influence of alcohol or a drug to the extent that the person's capacity to exercise proper care and skill is impaired."

**Intoxication – Plaintiff**

[13] After the accident, both the plaintiff and the first defendant were taken to the Princess Alexandra Hospital.

[14] An ambulance officer who attended at the scene saw and spoke to the plaintiff. She said that the plaintiff "smelt of liquor", and was "agitated" and "combative".

[15] At 3am a test was undertaken of the plaintiff's serum ethanol level and it was found to be 48 mmol/L. Dr Baziano, an emergency specialist, gave evidence that that reading equated to a blood alcohol concentration of approximately 0.18 per cent. That evidence was consistent with the evidence of the plaintiff's witness, Dr Wullschleger, who recalled that her blood alcohol level was about three times the legal alcohol limit for driving. That reading is also consistent with other evidence such as Dr Baziano's statement that when she examined the plaintiff at the Princess Alexandra Hospital the plaintiff was "intoxicated" and "smelt strongly of liquor". Further, the plaintiff admitted to Dr McCormack (Ex 13) that she was "drunk at the time".

[16] In cross-examination, the plaintiff said that she would regard herself as "intoxicated" after having "one" or "one or two" drinks. She accepted that she had a prior conviction for drink driving when she had a blood alcohol concentration of 0.11 per cent. The plaintiff said that that had resulted from her having consumed about half a bottle of Southern Comfort and Coke.

[17] A former employer, Mr Craig Deverey, gave evidence of a conversation he recalled having with the plaintiff in November 2008. According to him, the plaintiff said that:

(a) she had been drinking with the first defendant for "a fair while",
(b) she had been out "on a bender" with the first defendant, and
(c) (in response to a statement by Mr Deverey to the effect that it "was not very good getting on the back of a bike with somebody who's been drinking") she said "oh you don't think of those things at the time."

[18] The plaintiff argued that I should not accept anything that Mr Deverey said because, among other things, he owed her a day's pay on the basis that she had worked for him for five days but had only been paid for four. This, it seems, established that he was a liar, at least in the plaintiff's eyes. But, in any event, Mr Deverey gave evidence of matters about which he could not have known unless told by someone and the only person who could have told him was the plaintiff. The plaintiff's cross-examination of him was frenetic and confronting. He answered the accusations in a commendably calm way and gave what I regarded as honest evidence.

[19] Finally, in cross-examination the plaintiff said:

> "… Would you, on your understanding of the term, say that you were intoxicated when you left the Sofitel Hotel … in the early hours of the

> morning of the 7th of October 2007? – I would say that I was mildly to moderately intoxicated.
>
> …
>
> Okay? – Happy, you know, that kind of thing. I was not blind rotten drunk that I did not know what I was doing or had no judgment."

[20] The plaintiff's blood alcohol content reading together with Dr Griffin's evidence (set out below) and the other evidence referred to above satisfies me that her capacity to exercise proper care and skill was impaired and thus, that she was intoxicated within the meaning of that term in the CLA.

**Intoxication – First Defendant**

[21] Mr Chamberlain stopped his vehicle when he saw the accident take place and he went to assist the plaintiff and the first defendant. He checked on the first defendant and said that he "could clearly smell alcohol on him … he smelt like a bar mat".

[22] On 10 June 2011 the first defendant pleaded guilty in the District Court at Brisbane to a charge that he had caused grievous bodily harm to the plaintiff and, at the time, he was adversely affected by an intoxicating substance, namely, alcohol, and that the concentration of alcohol in his blood at the time equalled 134 milligrams of alcohol per 100 millilitres of blood. In other words, he had a blood alcohol concentration of 0.134 per cent. The first defendant's blood sample was taken at approximately 4am on 7 July. This is compelling evidence of the first defendant's level of intoxication.

[23] The plaintiff required that the second defendant demonstrate that the chain of custody of the blood sample taken from the first defendant was intact. I am satisfied that the evidence called from Senior Constable Reeves, Dr Imeson, Sergeant Kuskie, Ms Woolcock and Mr Buchanan demonstrated that the blood which was taken from Mr Skouboudis was the blood which was tested and the blood which showed a blood alcohol concentration of 0.134 per cent.

[24] The plaintiff challenged a number of witnesses in cross-examination about the effect that the presence of benzyl alcohol might have had on the reading, together with other matters relating to the reliability of the testing mechanism. All of those challenges were rebuffed by the witnesses and no evidence was called by the plaintiff to demonstrate that there was any reason to doubt that a true reading had been obtained of the level of alcohol in the first defendant's blood.

[25] Evidence was called from Dr Griffin, who is a clinical forensic medical officer for Brisbane and Ipswich. With respect to the effect that such a blood alcohol concentration would have, he said:

> "A person with a blood alcohol concentration of 0.134% will have depression of the higher centres of the brain, causing mood and behavioural changes leading to inappropriate driving for the prevailing conditions (driving too quickly, aggressive driving, increased risk taking). There would be marked impairment of perception, judgment, and the ability to concentrate and focus

> attention of multiple tasks at any one time. There would also be some degree of muscle incoordination."

[26] Dr Griffin had been asked by the solicitors for the second defendant to undertake a calculation which would allow for an estimation of the blood alcohol content of the first defendant at the time of the accident. After taking into account all the variables available to him, his estimate was that the first defendant's blood alcohol content at the time of the crash was in the range of 0.1515 to 0.1865 per cent. He also expressed the opinion that:

> "15. An individual with a BAC between 0.15 and 0.18 may have emotional lability or exaggerated emotions with impaired balance, a staggering gait and slurred speech.
> 16. A seasoned alcoholic while still impaired in performing complex tasks may have fewer observable signs of intoxication due to their learned ability to mask them (slowing their speech and gait, making very deliberate manoeuvres). This makes it harder for an observer to determine their indicia of intoxication.
> 17. Further, the state of intoxication of the observer may also adversely influence their ability to adequately judge another's level of intoxication."

[27] The plaintiff maintained that the first defendant told her that he had not been drinking. She summarised her many statements in evidence about his sobriety in her submissions in this way:

> "My driver had no observable outwardly [sic] signs of intoxication and he rejected an offer of a drink from me when I asked him – 'cause I'm a very generous person – I said, "Would you like a drink?" He said, "No. I'm not drinking because I'm riding my motorcycle.", and I took that at face value … He was a tall thick set Greek man, very very tall, fit looking man, well dressed, well groomed, and a very nice man. He wasn't at all sleazy."

[28] I do not accept that the plaintiff's account of her conversation with the first defendant is correct. She was intoxicated and, given her many references to the appearance of the first defendant, quite impressed by him.

[29] The first defendant's blood alcohol concentration reading at 4am on 7 July was 0.135 per cent. The plaintiff's challenge to that reading fails for the reasons given above. I accept, on the basis of Dr Griffin's unchallenged evidence, that at the relevant time:

(a) the first defendant's blood alcohol concentration reading would have been at least 0.15 per cent, and

(b) he would have been experiencing a "marked impairment of perception, judgment, and the ability to concentrate and focus attention of multiple tasks at any one time" and so was "incapable of exercising effective control of the vehicle".

It follows, then, that the first defendant was intoxicated within the meaning of the CLA.

**Application of the *Civil Liability Act***

[30] On the basis of the findings above, s 47 of the CLA is engaged because:

(a) the plaintiff was intoxicated at the time of the breach of duty giving rise to the claim, and

(b) contributory negligence is alleged by the second defendant.

[31] It follows, then, that pursuant to s 47(2) and (4) contributory negligence is to be presumed to an extent of at least 25 per cent.

[32] That presumption can only be rebutted if the plaintiff can establish, on the civil standard, that:

(a) the intoxication did not contribute to the breach of duty, or

(b) the intoxication was not self-induced.

[33] The evidence comfortably establishes that the plaintiff's intoxication was self-induced. That leaves the issue of whether the intoxication did not contribute to the breach of duty. The plaintiff did not pursue that argument at all. She relied wholly on the assertion that the first defendant was not intoxicated. Nevertheless, as she was not represented, I did consider this issue.

[34] Before turning to that matter, the possible application of other provisions should be noted.

[35] The second defendant argues that s 48 is also engaged because the plaintiff:

(a) was at least 16 years at the time of the breach of duty giving rise to the harm[1]; and

(b) relied on the care and skill of a person who was intoxicated at the time of the breach of duty; and

(c) was aware, or ought reasonably to have been aware, that the first defendant was intoxicated.

[36] Contributory negligence is to be presumed because:

(a) the harm suffered by the plaintiff was caused by the first defendant, and

(b) contributory negligence is alleged.

[37] It follows, then, that pursuant to s 48(2) and (4) contributory negligence is to be presumed to an extent of at least 25 per cent.

[38] That presumption can only be rebutted if the plaintiff can establish, on the civil standard, that:

(a) the first defendant's intoxication did not contribute to the breach of duty, or

(b) the plaintiff could not reasonably have been expected to have avoided relying on the first defendant's care and skill.

[39] Finally, the second defendant, assuming that s 48 applies, submits that s 49 also applies because:

(a) the breach of duty giving rise to the harm suffered by the plaintiff was a motor vehicle accident; and

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1 The plaintiff was born in March 1968

(b) the plaintiff was a passenger in the motor vehicle; and
(c) the motor vehicle was driven by the first defendant; and
(d) either—
(i) the concentration of alcohol in the first defendant's blood was 150mg or more of alcohol in 100mL of blood; or
(ii) the first defendant was so much under the influence of alcohol or a drug as to be incapable of exercising effective control of the vehicle.

[40] If those matters set out above are established, then the minimum reduction is increased to 50 per cent.

[41] The issues which arise when considering whether the sections referred to above apply are:
(a) has the plaintiff established, on the civil standard, that her intoxication did not contribute to the breach of duty – s 47(3)(a) and s 48(3)(a)
(b) has the first defendant established that the plaintiff;
(i) relied on the care and skill of the plaintiff who was intoxicated at the time of the breach of duty; and
(ii) was aware, or ought reasonably to have been aware, that the first defendant was intoxicated – s 48(1)(b) and (c)
(c) has the plaintiff established that she could not reasonably have been expected to have avoided relying on the first defendant's care and skill – s 48(3)(b)

**Has the plaintiff established, on the civil standard, that the intoxication did not contribute to the breach of duty – s 47(3)(a) and s 48(3)(a)**

[42] The persuasive onus is on the plaintiff to establish that her intoxication did not contribute to the breach of duty[2]. This did not form any part of the plaintiff's case. She relied solely on her contention that the first defendant was sober.

[43] In these circumstances I am required by s 47(4) to reduce the plaintiff's damages by at least 25 per cent.

[44] The second defendant also relies upon s 48 and s 49. They are able to be applied either together with or alternatively to s 47. This leads me to consider the next issue.

**Has the second defendant established that the plaintiff:**
**(a) relied on the care and skill of the first defendant who was intoxicated at the time of the breach of duty; and**
**(b) was aware, or ought reasonably to have been aware, that the first defendant was intoxicated – s 48(1)(b) and (c).**

[45] The plaintiff's case is that she was offered a lift to the Chalk Hotel by the first defendant. The first defendant told her that he was driving a motorcycle before they left the bar at the Sofitel. She knew he was going to be the driver. In accepting the lift and then riding the motorcycle as the pillion passenger she relied on the care and skill of the first defendant.

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2 *Hawira v Connolly* [2008] QSC 4

[46] As has been noted above, the plaintiff maintained that, when she met the first defendant, he was sober. Given that she was already intoxicated at that stage, could she have been aware, or ought she reasonably have been aware, that he was intoxicated? Dr Griffith said: "…the state of intoxication of the observer may also adversely influence their ability to adequately judge another's level of intoxication." While that may be the case, that is not the test to be applied.

[47] In *Joslyn v Berryman*[3] the High Court considered the application of s 74(2) of the *Motor Accidents Act* 1988 (NSW). It requires a finding of contributory negligence if an injured person was a voluntary passenger in a motor vehicle and "was aware, or ought to have been aware" that the driver's ability to drive was impaired by alcohol. That section is not materially different from s 48(1)(c) of the CLA.

[48] McHugh J said "… s 74(2) directs the court to determine whether the passenger ought to have been aware of the driver's impairment. This introduces an objective test."[4] He elaborated on this later in his reasons:

> "[37] The issue in a case like the present is not whether the passenger ought reasonably to have known of the driver's intoxication from the facts and circumstances known to the passenger. The relevant facts and circumstances include those which a reasonable person could have known by observation, inquiry or otherwise. In cases of contributory negligence outside the field of intoxicated passengers and drivers, the courts take into account as a matter of course those facts and circumstances that the plaintiff could have discovered by the exercise of reasonable care …
>
> [38] Hence, **the issue is not whether a reasonable person in the intoxicated passenger's condition – if there could be such a person – would realise the risk of injury in accepting the lift. It is whether an ordinary reasonable person – a sober person – would have foreseen that accepting a lift from the intoxicated driver was exposing him or her to a risk of injury by reason of the driver's intoxication.** If a reasonable person would know that he or she was exposed to a risk of injury in accepting a lift from an intoxicated driver, an intoxicated passenger who is sober enough to enter the car voluntarily is guilty of contributory negligence. The relevant conduct is accepting a lift from a person whose driving capacity is known, or could reasonably be found, to be impaired by reason of intoxication." (emphasis added)

[49] Although they did not elaborate on it, Gummow and Callinan JJ referred to the test in s 74 as being "clearly objective"[5].

[50] The evidence of Dr Griffith establishes that the first defendant's state of intoxication was such that an "an ordinary reasonable person – a sober person**"** would have been aware that he was intoxicated.

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3 (2003) 214 CLR 552
4 Ibid at [14]
5 Ibid at [75]

**Has the plaintiff established that she could not reasonably have been expected to have avoided relying on the first defendant's care and skill?**

[51] This was not the subject of any submissions by the plaintiff. In any event, her own evidence was that her decision to go with the first defendant was entirely voluntary.

**Section 49**

[52] I am satisfied, then, that the second defendant has established all matters necessary for the operation of s 49 and that the plaintiff has not rebutted any of the presumptions in s 47 or s 48. It follows that the minimum reduction of damages under s 48(4) is increased by s 49(2) to 50 per cent.

**What should the reduction be?**

[53] The effect of s 48(4) when s 49 applies is to reduce the damages by 50 per cent "or a greater percentage decided by the court to be appropriate in the circumstances of the case."

[54] The second defendant argued that the claim should be defeated entirely by finding that the contributory negligence of the plaintiff was 100 per cent. Such a decision is permitted by s 24 of the CLA. The efficacy of such a provision has been upheld in a number of decisions including *Mackenzie v Nominal Defendant*[6], but I share the doubts expressed by the authors of *Fleming's The Law of Torts*[7]. It is not a matter upon which I need delay as I have come to the conclusion that it would not be just and equitable to decide on a reduction of 100 per cent.

[55] The matters which should be considered when deciding upon the apportionment of fault have been considered on many occasions. The leading decision is that of the High Court in *Podrebersek v Australian Iron and Steel Pty Ltd*[8] where the following appears:

> "A finding on a question of apportionment is a finding upon a 'question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds' …
>
> …
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> 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, i.e. of the degree of departure from the standard of care of the reasonable man … and of the relative importance of the acts of the parties in causing the damage: …. 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

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6 (2005) 43 MVR 315; [2005] NSWCA 180

7 10th edition, Thomson Reuters, Sappideen and Vines (ed)

8 (1985) 59 ALR 529

> 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."[9]

[56] In referring to the effect of legislation which permitted the apportionment of liability Hayne J, in *Wynbergen v Hoyts Corporation Pty Ltd*[10], identified the following factors:

(a) there must be a comparison of the degree to which each party has departed from what is reasonable,
(b) regard must be had to the relative importance of the acts of the parties in causing damage, and
(c) the whole conduct of each negligent party in relation to the circumstances of the accident must be subjected to comparative examination.[11]

[57] The approach in *Podrebersek* is still relevant notwithstanding the changed legislative landscape[12]. The matters which are relevant to the comparison which must be undertaken include:

(a) the degree of intoxication of both parties – at the time they met and at the time of the accident their respective levels of intoxication were both high and conduced to a real reduction in the capacity to recognise and respond to threats when driving,
(b) the first defendant was more than likely exhibiting indicia of intoxication at the Sofitel,
(c) the plaintiff accepted a lift from a person who was exhibiting those indicia,
(d) the plaintiff knew that the first defendant was intoxicated – Mr Deverey's evidence supports this,
(e) the first defendant operated the motorcycle in a reckless manner,
(f) the first defendant as the driver had the greater potential to cause injury, and
(g) the plaintiff had opportunities to decline to travel with the plaintiff or to continue travelling with him.

[58] Another inquiry was identified by Giles JA in *Mackenzie v Nominal Defendant*. That was a case involving a motorcycle in which both parties were heavily intoxicated after having been drinking together for some time. He said:

> "[110] In many cases, the plaintiff's intoxication will not ameliorate his culpability or the causal potency of his contributory negligence. **The further enquiry must be into the circumstances in which the plaintiff became intoxicated**. A plaintiff who goes on a drinking spree with the driver, contemplating from the beginning that he will be a passenger in a vehicle driven by the driver, will only add to his departure from the standard of care of the reasonable man. A plaintiff who becomes intoxicated when

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9 Ibid at 532-533
10 (1997) 72 ALJR 65; 149 ALR 25
11 Ibid at 65; 29
12 See *Joslyn v Berryman* per Hayne J at [157] and *Mackenzie v Nominal Defendant* per Giles JA at [62].

> being the passenger of an intoxicated driver is not in contemplation can say that his departure from the standard of care of the reasonable man is not complete, and perhaps that his conduct was less important in causing the damage. Although in a different context, such an enquiry underlies the dicta of Macrossan CJ in *McPherson v Whitfield* and of Lee J at 484–5 in the same case." (emphasis added)

[59] The plaintiff was, most likely, intoxicated when she met the plaintiff. I find that she had been drinking with the first defendant but that was at a time when, on the evidence of Dr Griffith, both would have already have become intoxicated. While there was evidence that the plaintiff and her friend had an intention of moving from the Sofitel Hotel to the Chalk Hotel at some time there was nothing to suggest that the plaintiff contemplated travelling with the first defendant until the time he offered to take her.

[60] After taking into account the matters referred to above, I conclude that the plaintiff's damages should not be reduced by any more than the amount required by s 49, that is, 50 per cent.

**Quantum**

[61] The case for the plaintiff on quantum was unsatisfactory in many respects. I do not accept that the plaintiff was honest when she dealt with her medical specialists and, in particular, when she told them about her employment history. As the plaintiff was unrepresented and was clearly having difficulty with the presentation of her case on quantum, I decided, without any objection from the second defendant, to accept those parts of her statement of loss and damage which constituted arguments with respect to her claim.

[62] The plaintiff's credibility with respect to many of the matters raised by her on the issue of damages was severely damaged by her own conduct prior to the trial. She misreported her history to the various doctors who examined her and she presented her case in such a way that, unless there are documents or other pieces of evidence to support something she said, I would not accept it.

*General damages*

[63] The plaintiff was born in March 1968. She was 39 years old at the time of the accident. She is now 45 years old.

[64] She was educated to a year 12 standard, obtained a Certificate IV in sign writing in about 1996 and worked in that industry for some time after that. In each financial year from 1 July 2004 she was in receipt of a Commonwealth pension. In the financial year 2004/2005 she declared earned income of $24,860 and after that her only declared income was for the year 2006/2007 in an amount of $2,765.

[65] On 15 September 2007 she commenced subcontract work as a prostitute at "Cleo's on Nile". It was her case that she intended to continue in that work until she was 42.

[66] The plaintiff remained in hospital from the date of the accident until 20 November 2007. She suffered severe injuries as a result of being thrown from the motorcycle and they included:

(a) A left pneumothorax with fractured ribs at 5-11;
(b) A splenic hematoma and retro peritoneal bleed (which required a laparotomy and splenectomy on 8 October 2007);
(c) An injury to her pancreas;
(d) A contusion to her left kidney;
(e) A pelvic ring injury with fractures of the superior and inferior pubic rami bilaterally;
(f) Concussion; and
(g) A fracture of the right transverse process at L5.

[67] In a report dated March 2009 Dr Knight said:

> "It is now about sixteen (16) months post injury and Ms Robbins described a remarkably high level of recovery except for some ongoing, variable intensity discomfort/tenderness at the outer aspect of her left hip and over the top of her right foot (especially if she wears high heeled shoes).
> … She also described her having somewhat less energy than her preinjury state, although not having any specific restrictions/limitations in day to day activities.
> …
> Regarding ADLs (activities of daily living) she has regained full independence for self care including dressing, washing, showering or bathing, toilet and personal hygiene. She is not restricted in walking. So far she has not resumed regular jogging but she expects to do so within the next few months given her excellent physical recovery thus far.
> …
> A fading 15 centimetre vertical scar was noted over her epigastrium; as expected for her splenectomy. She also displayed some permanent bluish-coloured, gravel/bitumen rash scars over her right eyebrow, bridge of nose, left upper lip, and over the front of her right knee. She explained that she is not upset by this degree of disfigurement, and she rarely resorts to wearing makeup. Her overall appearance was that of a reasonably confident and happy, trim, active, fit looking lady."

[68] A number of assessments of her whole person impairment were performed by the various doctors she consulted. They are as follows:

(a) Fracture of the sacroiliac joint – 1 per cent (Dr Fitzpatrick)
(b) Transverse fracture at L5 – 5 per cent (Dr Fitzpatrick, Dr Todman)
(c) Pelvic fracture – 0 per cent (Dr Fitzpatrick); 5 per cent (pelvic/hip injury (Dr Knight)
(d) Right foot injury – 1 per cent (Dr Fitzpatrick)
(e) Splenectomy – 1 per cent (Dr Knight)
(f) Scarring to the plaintiff's face, knees and abdomen – 3 per cent (Dr Knight)

[69] Dr Wallace assessed, generally, a 10 per cent whole person impairment as a result of the orthopaedic injuries.

[70] Dr Unwin was of the opinion that the plaintiff suffered, among other things, from post traumatic stress disorder. I accept the second defendant's submission that this opinion should be disregarded in circumstances where the plaintiff has no real recollection of the accident's occurrence, as that is a necessary ingredient for such a diagnosis. I prefer the evidence of Dr Leong so far as the psychiatric issues are concerned. Dr Unwin's assessment was, of necessity, based upon the plaintiff's self-reporting and I have formed the view that she was not reliable in the manner in which she conveyed to the doctors her own condition and her previous employment history. Dr Leong was of the opinion that the plaintiff had suffered a chronic adjustment disorder with mixed anxiety and depressed mood with the result that she incurred a 7 per cent psychiatric rating scale impairment which Dr Leong expected to reduce to 1 per cent.

[71] The dominant injury (as the term is used in the CLA) is the lumbar spine fracture. I accept the second defendant's submission that it is properly assessed within Schedule 4 of the *Civil Liability Regulation* as, either item 92 (moderate thoracic or lumbar spine injury – fracture, disc prolapse or nerve root compression or damage), or as an item 12 as a "moderate mental disorder"). Each of them should be at the upper end of the scale with an injury scale value of 10. An uplift of 50 per cent is appropriate, given that the plaintiff does have some inability or discomfort in performing ordinary tasks such as wearing high heel shoes. On that basis I accept that **general damages** of **$18,000** should be awarded. No interest is available – s 60 of the CLA.

*Economic Loss*

[72] The calculation of the sums for past and future loss is complicated by:

(a) the misinformation provided by the plaintiff to her doctors,

(b) the fact that her claimed inability to work for a year following the accident (as told to Dr Knight) was contradicted by the evidence of her 16 shifts at "Cleo's on Nile" in the period March – June 2008,

(c) the absence of evidence to support her claimed reduction in hours able to be worked as a prostitute, and

(d) her failure to provide any evidence of earnings for the 2012 financial year and after.

[73] The plaintiff commenced work on a Certificate III in Aged Care and a Diploma of Nursing after the accident. I find that her purpose in attempting this study was not to advance her prospects but to satisfy Centrelink requirements in order that she might continue to receive benefits. This became conflated with her change of claim during the trial when she amended her Statement of Claim to assert that it had been her intention to work either as graphic designer or a graduate nurse. The latter claim was new – it was unsupported by any evidence of capacity to work in that role or of the possible earnings in that position.

[74] As might be expected by a person unfamiliar with the field, the technicalities of establishing past and future economic loss have not been satisfied by the plaintiff. As a result of the misreporting of her pre-accident work, none of the expert opinion evidence on her capacity is of substantial assistance. Dr Knight thought that she would be fit to return to her pre-accident work – he was only aware of the sign writing part of her employment. Dr Fitzpatrick, after being made aware of the work of a sign writer, said that her injuries were such that she could easily accommodate

that job. While Dr Todman opined that the plaintiff would be restricted to light or sedentary duties, he appears not to have been fully aware of the different roles able to be played out in sign writing which would not require heavy lifting and the like.

[75] I am satisfied that the second defendant, through its analysis, has demonstrated that the plaintiff was earning money in the year following the accident while working as a prostitute. It is impossible to arrive at any figure which would provide absolute assurance, but something of the order of $30,000 to $40,000 is within range. Her past earnings are referred to above. She was able to return to that work as a sign writer and would have continued, she told Dr Knight, had she not been the subject of an assault by her former husband.

[76] The plaintiff is not unemployable. She has some physical constraints but they can be accommodated, even in the sign writing industry in which she was previously engaged. She is qualified and experienced in that field and I see no reason to conclude that her injuries would result in any substantial reduction of her earning capacity in that regard.

[77] I am satisfied, though, that her injuries did reduce her earning capacity. In the absence of any reliable sets of figures concerning earnings, doing the best I can, I assess that her reduction in earning capacity was of the order of $15,000 a year. This head of damage, then, amounts to **$82,500** ($15,000 x 5.5 years).

[78] The plaintiff is 22 years away from a notional retirement. Factors which need to be considered for future loss, once again, can only be dealt with in a global fashion. In all the circumstances the manner of calculation I have decided upon is to work on a notional loss of capacity of $175 a week for 22 years which, after discounting by 10 per cent for contingencies, results in a sum of **$110,848.**

[79] A loss of superannuation will ensue as a result of the loss of earning capacity in the future. The second defendant submitted that this amount should be reduced if the damages were premised upon any findings concerning self-employed work in the past or future. I have proceeded on the basis under this heading that future earnings would be as a result of employment. The lost superannuation calculated at the rate of 12 per cent, is **$13,301**.

*Past gratuitous care*

[80] A claim under this heading is made by the plaintiff. No evidence was given of any past care needed or afforded. I am satisfied that she would have required assistance for some 7 to 8 months following the accident but there was no evidence called to allow any quantification of that. In the absence of such a quantification, s 59 of the CLA prevents any award being made.

*Future gratuitous care*

[81] There was no evidence to support any need for any domestic or other type of care in the future. No award under this head will be made.

*Special damages*

[82] A refund of $619 to Medicare Australia will be allowed and the plaintiff will require, from time to time, some pain relief and other medication. A global figure of $**1,500** is appropriate.

*Future special damages*

[83] The plaintiff sought an award which would allow for ongoing hydrotherapy treatment. There was no evidence to support the need for this.

[84] There was evidence which would support the requirement of a particular type of vaccine on a regular basis as a result of the splenectomy. There was also evidence from Dr Fitzpatrick that she may require further surgery on her right foot. The evidence of Dr Leong concerning future psychiatric counselling satisfies me, and in light of all the other matters referred to above, that it is appropriate that there be an award which reflects this need. Once again, it is not possible to arrive at any precise figure but a sum of **$12,500** is awarded.

| | |
|---|---|
| General damages | 18,000.00 |
| Future economic Loss ($15,000 x 5.5 years). | 82,500.00 |
| Loss of future earning capacity superannuation | 110,848.00 |
| Loss of superannuation at rate of 12% | 13,301.00 |
| Special damages | 1,500.00 |
| Future special damages | 12,500.00 |
| **Total** | **$238,649.00** |

**Order**

[85] The calculation of damages, then, amounts to $**238,649.** That needs to be reduced by 50 per cent in accordance with my findings on liability.

[86] There will be judgment for the plaintiff in the sum of $**119,324.50**.