SUPREME COURT OF QUEENSLAND

CITATION:	*Kerle v BM Alliance Coal Operations Pty Limited & Ors* [2016] QSC 304
PARTIES:	**HAROLD FREDERICK KERLE** (Plaintiff) **v** **BM ALLIANCE COAL OPERATIONS PTY LIMITED ACN 096 412 752** (First Defendant) And **HMP CONSTRUCTIONS PTY LTD (IN LIQUIDATION) ACN 109 896 013** (Second Defendant) And **AXIAL HR PTY LTD ACN 110 799 034** (Third Defendant)
FILE NO/S:	S528 of 2011
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	16 December 2016
DELIVERED AT:	Rockhampton
HEARING DATE:	5, 6, 7, 8 April and 19, 20, 21 July 2016
JUDGE:	McMeekin J
ORDER:	**1. On or before 5pm on 23 January 2017 the parties should confer in an endeavour to agree on the appropriate orders to give effect to the relevant findings and conclusions in these reasons including orders as to costs;** **2. In the event that the parties reach agreement in relation to the orders to give effect to these reasons, short minutes of those orders are to be provided to the Associate to McMeekin J by 9am**

on 30 January 2017;

3. **In the event that the parties are unable to agree in relation to the orders to give effect to these reasons, the proceedings are adjourned to 10am on 30 January 2017.**

CATCHWORDS: TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – GENERALLY – where the plaintiff was employed as a dump truck operator at a mine – where the plaintiff was injured in a single vehicle accident on his commute home after four consecutive 12 hour night shifts – where the plaintiff suffered a significant brain injury – where the plaintiff claims damages against his employer, his host employer and the operator of the mine – where the plaintiff submits that the accident occurred because he was fatigued as a result of working four consecutive 12 hour night shifts – where damages have been agreed – whether fatigue was a significant contributing cause of the accident

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – where there was no dispute that the employer and host employer owed the plaintiff a duty of care – where the plaintiff submitted the scope and duty owed to the plaintiff extends to taking reasonable steps to protect him after his roster has ended and hundreds of kilometres from his workplace – where the plaintiff submits the mine operator owed him a duty of care – where the mine operator denies that any duty of care was owed – whether the scope and duty owed to the plaintiff extends to taking reasonable steps to protect him after his roster has ended and hundreds of kilometres from his workplace – whether the mine operator owed the plaintiff a duty of care – whether that duty was personal and non delegable

TORTS – NEGLIGENCE – BREACH OF DUTY OF CARE – where the plaintiff submits the defendants breached their duty of care – where the plaintiff submits the defendants could have minimised the risk of injury to him by placing proper limits on the length of shifts, providing a bus service to transport workers, providing a place to rest after the last shift and providing an adequate program of education about fatigue and its risks – whether the defendants' operations involved a risk of injury which was reasonably foreseeable – whether there were reasonably practicable means of obviating such risks – whether the plaintiff's injury was caused by the risk in question – whether the proposed measures would have minimised the risk of injury sufficiently to avoid the accident – whether the failure of the defendants to eliminate the risk showed a want of reasonable care for the plaintiff's safety – whether the plaintiff's conduct in continuing to drive after a

rest stop is a break in the chain of causation

TORTS – NEGLIGENCE – CONTRIBUTORY NELIGENCE – where the defendants claim the plaintiff was contributorily negligent by inter alia courting obvious risks in embarking upon the journey and failing to stop and sleep or rest – whether there should be an apportionment of liability made against the plaintiff for contributory negligence

TORTS – THE LAW OF TORTS GENERALLY – JOINT OR SEVERAL TORTFEASORS – CONTRIBUTION – where the mine operator seeks contribution from the host employer – where the host employer seeks an apportionment of liability between it and the mine operator and between it and the employer – where the employer seeks to apportion responsibility to the host employer – whether a finding of contribution or apportionment should be made

Civil Liability Act 2003 (Qld) s 5, 9 (1)(b)
Civil Liability Regulation 2003 (Qld)
Coal Mine Safety and Health Act 1999 (Qld) s 5, 6, 33, 34, 37, 38, 39, 41, 43, 47, 62
Coal Mining Safety and Health Regulation 2001 (Qld) s 42
Evidence Act 1977 (Qld) s 18, 101, 102
Law Reform Act 1995 (Qld) s 6, 7, 10
Workers Compensation & Rehabilitation Act 2003 (Qld), s 31, 32, 34, 35, 307
Workplace Health & Safety Act 1995 (Qld), s 28(3), 30(1)

Adelaide Stevedoring Co Ltd v Forst (1940) 64 CLR 538, cited
Ashrafi Persian Trading Co Pty Ltd t/as Roslyn Gardens Motor Inn & Anor v Ashrafinia [2001] NSWCA 243, cited
Atkinson v Gameco (NSW) Pty Ltd [2005] NSWCA 338, cited
Baker v Quantum Clothing Group Ltd [2011] 4 All ER 223, cited
Bankstown Foundry Pty Ltd v Braistina (1986) 160 CLR 301, cited
Barns v Parlin Pty Ltd [2010] WADC 92, cited
Barrett v Drake Personnel Limited Unreported, 20 April 1998, cited
BHP Billiton Ltd v Parker [2012] SASCFC 73, cited
Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167, cited
Bryan v Maloney (1995) 182 CLR 609, cited
Caltex Refineries (Qld) Pty Ltd v Stavar (2009) 75 NSWLR 649, considered
Cavanagh v Ulster Weaving Co Ltd [1960] AC 145, cited
Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1, considered
Czatyrko v Edith Cowan University (2005) 214 ALR 349, cited

Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588, cited
Deutz Australia Pty Ltd v Skilled Engineering Ltd & Anor [2001] VSC 194, cited
Dovuro Pty Ltd v Wilkins (2003) 215 CLR 317, cited
Duyvelshaff v Cathcart & Ritchie Ltd (1973) 47 ALJR 410, cited
Electric Power Transmission Pty Ltd v Cuiuli (1961) 104 CLR 177, cited
EMI (Australia) Ltd v Bes [1970] 2 NSWLR 238, cited
Esso Australia Pty Ltd v Victorian WorkCover Authority [2000] 1 VR 246, cited
Fennell v Supervision & Engineering Services Holdings Pty Ltd v Santos Ltd (1988) 47 SASR 6, cited
Fraser v Burswood Resort (Management) Ltd [2012] WADC 175, cited
General Cleaning Contractors v Christmas [1953] AC 180, cited
Gorris v Scott (1874) LR 9 Exch 125, cited
Green v Hanson Construction Tools Pty Ltd [2007] QCA 260, cited
Hamilton v Nuroof (WA) Pty Ltd (1956) 96 CLR 18, cited
Harris v Woolworths Ltd [2010] NSWCA 312, cited
Hodge v CSR Limited [2010] NSWSC 27, cited
Hollis v Vabu Pty Ltd (2001) 207 CLR 21, cited
James Hardy and Coy Pty Ltd v Roberts (1999) 47 NSWLR 425, cited
Jones v Dunkel (1959) 101 CLR 298, cited
Jury v Commissioner for Railways (NSW) (1935) 53 CLR 273, considered
Kemp Meats Pty Ltd v Tompkins [2014] QCA, cited
Kim v Cole [2002] QCA 176, cited
Kondis v State Transport Authority (1984) 154 CLR 672, consider
Kuhl v Zurich Financial Services Australia Ltd (2011) 243 CLR 361, cited
Kuhler v Inghams Enterprises Pty Limited [1997] QCA 386, cited
Leighton Contractors Pty Ltd v Fox (2009) 240 CLR 1, considered
Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705, cited
McKenzie v Vella's Plant Hire Pty Ltd [2013] 1 Qd R 152, cited
McLean v Tedman (1984) 155 CLR 306, cited
Medlin v State Government Insurance Commission (1995) 182 CLR 1, cited
Morris v West Hartlepool Steam Navigation Co Ltd [1956] AC 552, cited
Muller v Cherrie [2000] QSC 330, cited
Neill v NSW Fresh Food & Ice Pty Ltd (1963) 108 CLR 362, cited

Nelson v John Lysaght (Australia) Ltd (1975) 132 CLR 201, cited
Newberry v Suncorp Metway Insurance Ltd [2006] 1 Qd R 519, considered
Pacific Steel Constructions Pty Ltd v Barahona [2009] NSWCA 406, considered
Podrebersek v Australia Iron and Steel Pty Ltd (1985) 59 ALJR 492, cited
Pollard v Baulderstone Hornibrook Engineering Pty Ltd [2008] NSWCA 99, cited
Progressive Recycling Pty Ltd v Eversham [2003] NSWCA 268, cited
Queensland Corrective Services Commission v Gallagher [1998] QCA 426, cited
R v Lace [2001] QCA 255, cited
Rockdale Beef Pty Ltd v Carey [2003] NSWCA 132, cited
Samways v WorkCover Queensland [2010] QSC 127, cited
Signet Engineering Pty Ltd v Melvan [2003] WASCA 313, cited
Simon-Beecroft v Proprietors "Top of the Mark" Building Units Plan No 3410 [1997] 2 Qd R 635, cited
Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16, considered
Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd [1968] 1 WLR 1776, cited
Stuart v Kirkland-Veenstra (2009) 237 CLR 215, cited
Sutherland Shire Council v Heyman (1985) 157 CLR 424, cited
Sweeney v Boylan Nominees Pty Ltd (2006) 226 CLR 161, cited
Tabet v Gett (2010) 240 CLR 537, cited
Thomas v Sydney Training & Employment Ltd [2002] NSWSC 970, cited
Thompson v Smiths Shiprepairers (North Shields) Ltd [1984] QB 405, considered
Thompson v Woolworths (Qld) Pty Ltd (2005) 221 CLR 234, cited
Tolhurst v Cleary Bros (Bombo) Pty Ltd [2008] NSWCA 181, cited
Transpacific Industrial Solutions Pty Ltd v Phelps [2013] NSWCA 31, cited
Tunney v Midland Railway Company (1866) LR 1 CP 291, cited
Turner v South Australia (1982) 56 ALJR 839, cited
Vairy v Wyong Shire Council (2005) 223 CLR 422, cited
Voli v Inglewood Shire Council (1963) 110 CLR 74, cited
Vozza v Tooth & Co Ltd (1964) 112 CLR 316, cited
Wilkinson v BP Australia [2008] QSC 171, cited
Wyong Shire Council v Shirt (1980) 146 CLR 40, considered

COUNSEL:	G Diehm QC with A Luchich for the plaintiff R Douglas QC for the first defendant R Perry QC with J Rolls for the second defendant R Treston QC with G O'Driscoll for the third defendant
SOLICITORS:	Rees R and Sydney Jones for the plaintiff HWL Ebsworth for the first defendant Barry Nilsson for the second defendant BT Lawyers for the third defendant

INTRODUCTION

[1] **McMeekin J:** At about 6.30 on the morning of 30 October 2008 Mr Harold Kerle commenced his drive home from work. He was employed as a dump truck operator at the Norwich Park Mine. The mine is located near Dysart in Central Queensland. His home was at Monto, about 430 kilometres away. The drive would normally take about five hours. He had just completed four consecutive night shifts, the last finishing at 6am. Shortly before 10am, and nearly 300kms into his journey, his motor vehicle collided with an Armco rail on a bridge crossing at Alma Creek on the Burnett Highway. His vehicle then collided with a concrete wall at the far end of the bridge. Mr Kerle suffered injury, most significantly a brain injury.

[2] Mr Kerle seeks damages against his employer, Axial HR Pty Ltd ("Axial"), his host employer, HMP Constructions Pty Ltd ("HMP") and the operator of the Norwich Park Mine, BM Alliance Coal Operations Pty Ltd ("BMA"). He claims that they each breached duties owed to him in various ways and thereby caused his injuries.

[3] The theory underlying the claim is that the accident came about because Mr Kerle was fatigued as a result of working night shifts in the four nights leading up to the morning of the accident.

[4] Each of the defendants denies liability. The occurrence of the accident is not in dispute, nor the fact of injury. Damages have been agreed at a gross[1] amount of $1,250,000.

Assessment of Mr Kerle

[5] While it is evident that Mr Kerle was honest there is a real question mark over his reliability. He suffered a significant brain injury in the subject accident. He was shown to have a very poor recollection of the events of the day he started his four consecutive night shifts. He had no memory of completing the Axial induction although he has signed the necessary form showing that he has done so and there seems no way that the forms could have come to Axial save by him or his wife taking them there. Mrs Kerle says that she did not. Mr Kerle says that he had never been present at Axial's offices in Gladstone. The probabilities seem to favour Axial's position. It is difficult to place any great reliance on Mr Kerle's present memories.

The issues

[6] The issues in dispute and my responses, in bold, are:

(a) Was fatigue a significant contributing cause of the accident? **Yes.**

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[1] I.e. Ignoring the WorkCover refund.

(b) If so:

(i) Is the claim governed by the *Civil Liability Act* 2003 (Qld)? **No**

(ii) Does the scope and content of the duty owed by Axial and HMP to Mr Kerle extend to taking reasonable steps to protect him long after his employment had ended and hundreds of kilometres from his workplace? **Yes**

(iii) Is HMP the employer *pro hac vice* of Mr Kerle? **No**

(iv) Did BMA owe any duty of care at common law – there being no dispute that Axial and HMP did owe such duties? **Yes**

(v) Was there a private right of action arising from any statutory obligation owed under the *Coal Mine Safety and Health Act* 1999 (Qld)? **No**

(vi) Did any defendant breach any duty of care owed? **Yes – each of them**

(vii) Was there any causal link between any breach of duty and the injury suffered? **Yes**

(viii) Was there a break in the chain of causation by reason of Mr Kerle's decision to continue to drive from the Dingo Roadhouse? **No**

(ix) Did the breach of the duty owed show a lack of reasonable care for Mr Kerle? **Yes**

(c) If the foregoing issues are resolved against the defendants, or any one of them, then:

(i) Should there be an apportionment for contributory negligence? **No**

(ii) What are the respective contributions of each defendant to the harm suffered? **BMA vis à vis HMP – 10%/90%; HMP vis à vis Axial -60%/40%**

The accident

[7] Mr Kerle has no memory of the accident or of events leading up to it.

[8] In order to collide with the Armco rail beside the highway it was necessary for Mr Kerle's vehicle to veer onto the right hand side of the road (ie the incorrect side of the road) given his direction of travel.

[9] The speed limit in the area was 100 kilometres per hour. The road surface was sealed and dry. There is no evidence that there was any other vehicle in the vicinity of Mr Kerle's vehicle. It was daylight. The visibility was good. The road was an undivided two lane highway. Nothing was found to explain a veering onto the incorrect side of the road, such as dead carcasses of animals or the like.

[10] Alma Creek is located nearly 300kms from the Norwich Park Mine and about 125kms from the Dingo roadhouse where Mr Kerle had taken a break for around 30 minutes.

DID FATIGUE CAUSE THE ACCIDENT?

[11] Mr Kerle says that his last reliable memory was as he left the mine site some three and a half hours before the accident. There is no direct evidence of what happened. Acceptance of his case therefore requires that an inference be drawn from the known

circumstances that more probably than not fatigue was at least a contributing cause of the accident.

[12] In my view that is shown to the necessary degree of proof. I take the test to be that laid down by Dixon CJ in *Jones v Dunkel*[2]:

> "In an action of negligence for death or personal injuries the plaintiff must fail unless he offers evidence supporting some positive inference implying negligence and it must be an inference which arises as an affirmative conclusion from the circumstances proved in evidence and one which they establish to the reasonable satisfaction of a judicial mind. It is true that "you need only circumstances raising a more probable inference in favour of what is alleged". But "they must do more than give rise to conflicting inferences of equal degree of probability so that the choice between them is mere matter of conjecture". These phrases are taken from an unreported judgment of this Court in *Bradshaw v McEwans Pty Ltd* which is referred to in *Holloway v McFeeters* by Williams, Webb and Taylor JJ. The passage continues: "**All that is necessary is that according to the course of common experience the more probable inference from the circumstances that sufficiently appear by evidence or admission, left unexplained, should be that the injury arose from the defendant's negligence. By more probable is meant no more than that upon a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood**." But the law which this passage attempts to explain does not authorise a court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others. **The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied**."

[13] I appreciate that the passage is directed to the issue of causative negligence and that at this stage I am considering the factual underpinnings of the case, but in my view the passage is apposite. To the same effect is the decision in *Tabet v Gett*[3] cited by senior counsel for Mr Kerle and for BMA. Kiefel J (with the concurrence of Hayne, Crennan and Bell JJ) wrote:

> "The common law requires proof, by the person seeking compensation, that the negligent act or omission caused the loss or injury constituting the damage. **All that is necessary is that, according to the course of common experience, the more probable inference appearing from the evidence is that a defendant's negligence caused the injury or harm. 'More probable' means no more than that, upon a balance of probabilities, such an inference might reasonably be considered to have some greater degree of likelihood; it does not require certainty.**"

[14] In the normal course of human experience one could readily accept that a person who had just completed a 12 hour shift operating machinery at his workplace, as Mr Kerle had done, would be tired. Most of us are at the end of a working day. Consistently with that observation, in a survey conducted at the Norwich Park Mine in March 2008 nearly 70% of the workforce were dissatisfied with the proposition that "I rarely feel

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[2] (1959) 101 CLR 298 at 304-305 (my emphasis and footnotes deleted).
[3] (2010) 240 CLR 537 at 578 [111] (again my emphasis and footnotes deleted).

fatigued when doing my job".[4] While different shifts were introduced by the time Mr Kerle came to work there[5] the response seems significant. The length of the shift ie the 12 hour shift, is associated with greater fatigue levels as well as increased risk of incidents of accidents and injury.[6] Professor Dawson commented that the working times at Norwich Park were "at the upper limit of what was generally considered acceptable."[7]

[15] When one adds that Mr Kerle had worked a night shift – from 6pm to 6am - the probabilities of he being affected by tiredness amounting to fatigue increase. I use fatigue here in the sense of a diminished capacity to perform at a normal level and sufficient to impair one's ability to function safely.[8]

[16] Add then that by the time of the accident there had been an extended period of wakefulness – the precise period is not known but not less than 17 hours and perhaps up to 19 hours if Mr Kerle's evidence of when he awoke on the 29th October is accepted. The accuracy of his recollections in a general sense is in doubt. But on any view, by 9.50am he had been awake a substantial time.

[17] When one further adds that Mr Kerle had completed four successive such night shifts the odds of fatigue playing a part increase again. I speak here only of ordinary human experience. The expert evidence called from Professors Dawson and Rogers (both acknowledged experts in sleep and fatigue) supports that experience. Night shift disrupts the circadian rhythm and produces a high prospect of sleep debt potentially accumulating. That is what human beings commonly experience. Some can adjust and Mr Kerle had worked night shifts before, but many months before, and he was not at all accustomed to doing so by the day of this accident.

[18] If there had been an accumulated sleep deficit then the consequences that Professor Rogers describes are of a type that can lead to a single vehicle accident – "decrements in vigilance; increased lapses of attention; increased reaction and response times; … involuntary microsleeps; … involuntary sleep attacks occur…"[9] Disruption to circadian rhythms produce a similar result.[10]

[19] While the defendants were critical of Professor Rogers' prospective risk analysis, and to the extent that it could be said to assess the subjective features of this case it obviously had significant limitations, her analysis was useful at least in showing that the objective and unchallenged facts potentially put Mr Kerle in the high risk fatigue grouping[11] – a view that Professor Dawson shared.[12]

[20] Add to the foregoing that the act of driving itself causes fatigue. That is notorious in our community. Indeed signs have been erected on our highways for many years warning drivers that "fatigue kills". Here Mr Kerle had driven for nearly two hours or thereabouts, had a 30 minute break at the Dingo roadhouse and then driven on for

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[4] Ex 13 at p 26.
[5] T3-26/45.
[6] Ex 2 tab 54, p 14, section 4.6.
[7] Ex 2 tab 55A, p 7, para 2.6.1.
[8] Ex 2 tab 54, p 15, section 4.7.
[9] Ex 2 tab 54, p 11, section 4.
[10] Ex 2 tab 54, p 13, section 4.4.
[11] Ex 2 tab 54, p 14, section 4.6; p 20, section 4.11.
[12] T5-82/15-20.

another hour or so – acknowledging that all times are merely approximates. While the break would help with any fatigue it was at least 45 minutes in the past by the time of the accident.

[21] Add then that the road itself is a monotonous one. It is typical of country roads in Central Queensland. There are few features that call on the driver for any reaction. Traffic can be relatively sparse. So the stimuli that can keep drivers alert is, more often than not, absent. The relationship between serious road accidents, fatigue and rural roads is well recognised.[13]

[22] Add then to the probabilities that there is no evident reason for the vehicle to have run onto the incorrect side of the road and into a guard rail. Various alternative possibilities were proffered by the defendants involving Mr Kerle being distracted within the vehicle (eg use of the mobile phone, changing radio stations, changing CDs) but his evidence of his habits and the phone records suggest that was highly unlikely. None were eventually pressed with any conviction as realistic possibilities.

[23] No skid marks or the like consistent with heavy braking or hard swerving were found. No dead carcasses of marsupials, birds or reptiles were found in the vicinity of the accident site suggestive of a need to take sudden avoiding action.

[24] I interpolate that even had there been a sudden appearance of some such animal the probabilities seem to favour a finding that, absent fatigue impacting on Mr Kerle's ability to navigate such a hazard, which is not an uncommon one on country roads, one would expect him to do so safely. Mr Kerle was an experienced driver, 50 years of age at the time of the accident,[14] experienced on country roads which he had driven on all his adult life, and experienced with this road to a degree. Our highways are littered with such carcasses. Most drivers cope with such hazards when they occur without disastrous accidents.

[25] Other potential causes such as excessive speed seem an unlikely explanation. The accident occurred on a bend but it is a gentle one, easily navigated. The elapsed time of the journey and the distance covered suggests Mr Kerle drove within the speed limits, at least on average. His habit seems to have been not to speed. He had had only one traffic violation for excessive speed over the previous 20 years of driving.

[26] Finally, as just mentioned, the accident occurred at a slight bend in the road that occurs at about that point. The striking of the guard rail from Mr Kerle's direction of travel is consistent with Mr Kerle failing to take that bend safely. That is what a driver not alert to his driving (or indeed asleep) because of fatigue could well do.

[27] Against that analysis are put two things - Mr Kerle's own evidence that he was, as he recalls, alert and not at all tired when he left the mine site; and Professor Dawson's view that the circumstances of this accident did not fit the classical fatigue induced accident scenario.

[28] The first submission depends on the reliability of Mr Kerle's memory and on his ability to appreciate his own level of fatigue. Several observations can be made.

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[13] Ex 2 tab 54, p. 19, section 4.11.

[14] Born 8 August 1958 – now aged 58 years.

[29] First, how Mr Kerle felt three and a half hours before the accident is not necessarily germane to how tired he had become by the time of the accident.

[30] Secondly, Mr Kerle's evidence was against the probabilities and strongly so, if taken as applying at or shortly before 10am that morning. Mr Kerle in all probability did feel reasonably rested when he left his workplace. To attempt a five hour journey if feeling a level of fatigue likely to impact on one's ability to drive safely would be foolhardy. Mr Kerle did not strike me as that sort of man. The real issue is the detail of the claim – that he was "not at all tired". That sounds improbable coming from a man who had just finished a 12 hour shift and four consecutive night shifts.

[31] Mr Kerle has admitted brain damage of uncertain degree as a result of the accident. No-one can say what impact this is having on his ability to re-call, but it clearly has caused amnesia to some extent.

[32] Against that background Mr Kerle's memory was shown not to be reliable. No-one suggests that he was dishonest but the defendants demonstrated with certainty that his recollections about his movements on the day before he started his four night shifts (ie 26 October) were plainly wrong. He thought that he arrived at his workplace at 3pm to start work at 6pm without having any significant chance to rest before hand, but the telephone records strongly indicate that he was at the mine site by 8am and he made no calls – consistent with him resting through the day - until 3pm or so given his use of his mobile phone at 3.30pm. Thus the reality is very different from his recollections.

[33] Thirdly, the capacity for any individual to accurately assess their own level of fatigue is problematical. I will return to the issue.

[34] The second submission tends to overstate the effect of Professor Dawson's evidence. He expressed the view that this accident was not archetypal but explained his reasons for that in this passage in cross-examination:

> "Bearing in mind, if you would, that the total elapsed time between the accident and when Mr Kerle left the mine site was about three and a-half hours, including the time of the break at the Dingo Roadhouse, in assessing the archetypal features, and in making the comparison that you do to the results of laboratory studies, it would be proper to take into account not just the time since the break at the Dingo Roadhouse, but the time total sent (*sic)* on this task of driving on the highway. Would you agree? --- I agree. But I would also say I was asked about the archetypal accident, not Mr Kerle's individual circumstances. So with respect to that, most of the research literature shows that after a 30-minute break – in those circumstances you would have expected, from what we know and what the current recommendations for road safety are – is that most people are at much elevated level of risk post two hours or something approaching that. So it wasn't archetypal in the sense that they've been driving for a long time. I am not arguing that the accident was not fatigue-related.
>
> All right. And certainly from the point of view of these features – that is, all of the features that you're aware of – the circumstances are consistent with a fatigue-related accident? --- With the exception of Mr Kerle's evidence saying that he didn't feel tired at the time, and our discussion about that yesterday, which is also relatively inconsistent. But I'm not passing judgment. I think if you ask me is the accident fatigue-related or not, I'm saying it's in the grey zone. It may've been.

> There are some suggestions that it could be. There are some suggestions that say it might not be. That's all."[15]

[35] And in re-examination:

> "What are the factors that suggest it was not? --- The factors in my mind are that evidence given by Mr Kerle, saying that he did not feel fatigued at the time. And I accept that there can be some limitations to that, post-accident. I think the circumstances of the accident and the time that it happened, the time on task that – when it happened are also grey. So I'm – when I look at this I say there are some factors that suggest that it may be fatigue-related; there are others that make me less convinced that it is. But I would be hard-pressed to be definitive one way or the other. It's – as with many of these accidents, it's in the grey zone."[16]

[36] The reference to "the time that it happened" is a reference to the accident not occurring at the low point of the circadian rhythm of the general populace at around 2am – not necessarily the low point for Mr Kerle, which cannot be known.[17] And the reference to "time on task" I take to be a reference to the period driving and the evidence quoted that the studies suggest an "elevated level of risk post two hours or something approaching that", the 30 minute break having interrupted that period of driving. But in assessing all the circumstances these are relatively minor points and in my view do not go near outweighing the factors I have referred to.

[37] In any case, that experts might assess the causal link as merely possible and not probable is not determinative: *EMI (Australia) Ltd v Bes*. [18] This is a question of fact, not one that experts can determine. And the expert evidence here is not to the effect described by Dixon J in *Adelaide Stevedoring Co Ltd v Forst*[19] that "the present state of knowledge does not admit of an affirmative answer and that competent and trustworthy opinion regards an affirmative answer as lacking justification, either as a probable inference or as an accepted hypothesis."

[38] To adapt the words of Kiefel J[20] that I earlier quoted, I am comfortably satisfied that "according to the course of common experience, the more probable inference appearing from the evidence is that [fatigue] caused the injury or harm."

THE *CIVIL LIABILITY ACT* DOES NOT APPLY

[39] There is an issue as to whether the provisions of the *Civil Liability Act* 2003 (Qld) ("the CLA") apply to the claims against BMA and HMP. It is common ground that they do not apply to Axial due to the exemption in s 5 of the CLA. The issue turns on the width of that exemption.

[40] It is necessary to consider both the construction of s 5 of the CLA and ss 34 and 35 of *Workers Compensation & Rehabilitation Act* 2003 (Qld) ("WCRA"). While I will address the issue I am not persuaded that it matters a great deal. Nothing seems to turn on the differences between the common law principles applicable to the determination

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15 T6-19/24-36.
16 T6-21/21-28.
17 See Professor Dawson's opinion at Ex 2 tab 55, para 4.4(e).
18 [1970] 2 NSWLR 238.
19 (1940) 64 CLR 538 at 569.
20 *Tabet v Gett* (2010) 240 CLR 537 at 578 [111].

of liability and the liability provisions of the CLA. Whether the necessary level of risk be not "far-fetched or fanciful" (*Wyong Shire Council v Shirt*[21]) or "not insignificant" (s 9(1)(b) CLA) that level of risk pertains. And I can see no difference in the result however the tests of causation be described.

[41] Section 5 of the CLA,[22] so far as is relevant, provides:

> **Civil liability excluded from Act**
> (1) This Act does not apply in relation to deciding liability or awards of damages for personal injury if the harm resulting from the breach of duty is or includes—
> …
> (b) an injury for which compensation is payable under the *Workers' Compensation and Rehabilitation Act 2003*, other than an injury to which section 34(1)(c) or 35 of that Act applies;
> …

[42] Sections 34(1)(c) and 35 of the WCRA,[23] again so far as relevant, provided at the relevant time:

> **34 Injury while at or after worker attends place of employment**
> (1) An injury to a worker is taken to arise out of, or in the course of, the worker's employment if the event happens on a day on which the worker has attended at the place of employment as required under the terms of the worker's employment—
> …
> (c) while the worker is temporarily absent from the place of employment during an ordinary recess if the event is not due to the worker voluntarily subjecting themself to an abnormal risk of injury during the recess.
> (2) For subsection (1)(c), employment need not be a significant contributing factor to the injury.
>
> **35 Other circumstances**
> (1) An injury to a worker is **also**[24] taken to arise out of, or in the course of, the worker's employment if the event happens while the worker—
> (a) is on a journey between the worker's home and place of employment;
> …
> (2) For subsection (1), employment need not be a significant contributing factor to the injury.

[43] "Event" for present purposes is defined in s 31(1) of the WCRA to mean "anything that results in injury".

[44] Section 34(1)(c) does not apply to the facts here. On its face s 35 does apply – Mr Kerle was injured "on a journey between the worker's home and place of employment". Thus *prima facie* the CLA applies as it falls within the exception to the exclusion provided for in s 5. Senior counsel for Mr Kerle, Mr Diehm of Queens Counsel, submitted, in effect, that to adopt that prima facie view would be to take a too shallow an approach to the purpose behind s 5 of the CLA. He submitted that on a proper understanding of the effect of these provisions in the WCRA, and in order to give appropriate significance to

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[21] (1980) 146 CLR 40 at 47-48 per Mason J.
[22] Reprint 2A.
[23] Reprint 3B.
[24] Mr Diehm's emphasis.

the word "also" in s 35(1), the legislative intention was that the CLA not apply in the circumstances here.

[45] The WCRA is concerned with regulating the payment of compensation and damages to a worker (or their dependents) who suffers an "injury". But the injuries referred to are not at large - in order to qualify for compensation under the WCRA (and damages claims are caught as well) it is a necessary pre-condition that the injury the subject of the claim satisfy the definition of "injury" in the WCRA. Section 32 sets out the limits to the concept of "injury". It provided:

> **32 Meaning of *injury***
> (1) An ***injury*** is personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury.
> (2) However, employment need not be a significant contributing factor to the injury if section 34(2) or 35(2) applies.

[46] The common link between s 34(1)(c) and s 35, the two sections mentioned in s 5(1)(b), is that for the purposes of the payment of compensation under the WCRA the condition otherwise necessary to bring an injury within the ambit of the WCRA mentioned in s 32(1) – that the employment is a significant contributing factor to the injury – is expressly discarded. Their purpose is to ensure that the right to compensation is extended to injuries beyond the restriction imposed by s 32. Evidently the legislature did not want the exemption from the provisions of the CLA to so extend. In other words employment must be a significant contributing factor to the injury the subject of the proceedings to come within the exemption.

[47] Mr Diehm's point is that here the relevant "event", that is the thing that resulted in Mr Kerle's injury, were acts and omissions that relate to the workplace. He submits that for the plaintiff to succeed to an award of damages it is necessary that there be a finding that Mr Kerle's injury does satisfy the s 32(1) definition. His case is that employment is not only a significant contributing factor to the injury suffered but the principal one.

[48] The issue, again involving a motor vehicle accident away from the workplace but in a different factual context, came before the Court of Appeal in *Newberry v Suncorp Metway Insurance Limited*.[25] There Keane JA (as his Honour then was) in delivering the judgment of the Court (de Jersey CJ and Muir J agreeing) said:

> "**In short, s. 5(b) excludes from the scope of the CLA claims which involve the assertion that the personal injury caused by the breach of duty by a non-employer occurred in circumstances where the claimant's employment activities nevertheless also contributed to the occurrence of that injury in a way which is significant**. Whether the contribution of the employment activities was, or was not significant, involves a consideration of issues of causation and causal potency in the relationship between the breach of duty and the employment activities. These issues simply do not arise in the context of a determination of the simpler issue whether an injury falls within s. 32 of the WCRA. On this view, **if a claim for damages for breach of duty against a person other than an employer is to be excluded from the purview of the CLA by s. 5(b), the claim must be one where the employment and its significant contribution to the occurrence**

[25] [2006] 1 Qd R 519.

of the injury can be seen to be a material ingredient of the claim made against that person."[26]

[49] Here the claim, as is evident from the Statement of Claim, satisfies that test – it is "one where the employment and its significant contribution to the occurrence of the injury can be seen to be a material ingredient of the claim made against that person." As the reasoning in *Newberry* makes clear the eventual factual findings are not the relevant consideration in this determination but the facts pleaded.[27]

[50] In my view s 5 of the CLA has the effect of excluding this claim from the operation of the CLA.

THERE IS NO PRIVATE RIGHT OF ACTION AVAILABLE FOR BREACH OF STATUTORY DUTIES

[51] Mr Kerle contends that a private right of action is available for breach of statutory duties.

[52] Safety on coal mine sites has long been the subject of statutory controls and the risks specific to fatigue have been the subject of express provision. The relevant statute is the *Coal Mining Safety and Health Act* 1999 (Qld) ("CMSHA") and the regulations made pursuant to that Act – the *Coal Mining Safety and Health Regulation* 2001 (Qld) ("the Regulations"). The obligations thereby imposed are relevant both to informing any duty owed at common law and to determine whether any private right of action arises.

The Statutory Provisions

[53] It is not contentious that s 34 of the CMSHA imposed on each of the defendants obligations pursuant to Division 3 of that Act. BMA was the "coal mine operator", HMP was a "contractor", and Axial was a "person who supplies a service at a coal mine" as each of those terms were defined in s 33 of the CMHSA. A breach of the obligation imposed by s 34 could result in a fine or imprisonment.

[54] In determining the width of those obligations I note that the CMSHA is said to apply to "(a) everyone who may affect the safety or health of persons **while the persons are at a coal mine**; and (b) everyone who may affect the safety or health of persons **as a result of coal mining operations**; and (c) a person whose safety or health may be affected **while at a coal mine or as a result of coal mining operations**": s 5 (my emphasis).

[55] I note also that the objects of the CMSHA are similarly described – they include protecting the safety and health of "persons **at coal mines"** and "persons **who may be affected by coal mining operations"**; and requiring that the risk of injury or illness to any person "**resulting from coal mining operations"** be at an acceptable level: s 6 (my emphasis).

[56] The obligations imposed on each of the defendants is different.

[57] BMA's statutory obligations are set out in s 41(1):

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[26] Ibid at 529 [24] (my emphasis).
[27] Ibid at 527 [17].

41 Obligations of coal mine operators

(1) A coal mine operator for a coal mine has the following obligations—

(a) to ensure the risk to coal mine workers while at the operator's mine is at an acceptable level, including, for example, by providing and maintaining a place of work and plant in a safe state;

(b) to ensure the operator's own safety and health and the safety and health of others is not affected by the way the operator conducts coal mining operations;

(c) not to carry out an activity at the coal mine that creates a risk to a person on an adjacent or overlapping petroleum authority if the risk is higher than an acceptable level of risk under the *Petroleum and Gas (Production and Safety) Act 2004*;

(d) to appoint a site senior executive for the mine;

(e) to ensure the site senior executive for the mine—

(i) develops and implements a safety and health management system for the mine; and

(ii) develops, implements and maintains a management structure for the mine that helps ensure the safety and health of persons at the mine;

(f) to audit and review the effectiveness and implementation of the safety and health management system to ensure the risk to persons from coal mining operations is at an acceptable level;

(g) to provide adequate resources to ensure the effectiveness and implementation of the safety and health management system.

[58] HMP's obligations are found in s 43:

43 Obligations of contractors

A contractor at a coal mine has an obligation to ensure, to the extent that they relate to the work undertaken by the contractor, that provisions of this Act and any applicable safety and health management system are complied with.

[59] Axial's obligations are set out in s 47:

47 Obligation of provider of services at coal mines

A person who provides a service at a coal mine has the following obligations—

(a) to ensure the safety and health of coal mine workers or other persons is not adversely affected as a result of the service provided;

(b) to ensure the fitness for use of plant at the coal mine is not adversely affected by the service provided.

[60] The phrase "safety and health" is defined in s 11 of the CMHSA. It provides that a person's safety and health is the person's safety and health "to the extent that it is or may be affected by coal mining operations or other activities at a coal mine".

[61] Section 37 of the CMSHA provides how an obligation imposed by the Act may be discharged. It relevantly provides:

37 How obligation can be discharged if regulation or recognised standard made

(1) If a regulation prescribes a way of achieving an acceptable level of risk, a person may discharge the person's safety and health obligation in relation to the risk only by following the prescribed way.

[62] The balance of s 37 (ss 37(2) and 37(3)) deal with recognised standards. No recognised standard was proved. It is arguable that a regulation does prescribe a way of achieving an acceptable level of risk in relation to fatigue management as there is express provision in s 42 of the Regulations dealing with the matter. The difficulty with the argument is that s 42 does not prescribe anything but leaves it to the site senior executive to work things out with a cross-section of the workforce. I will turn to that provision in a moment. If there is no prescription by regulation then s 38 of the CMSHA becomes relevant. It provides:

> **38 How obligations can be discharged if no regulation or recognised standard made**
>
> (1) This section applies if there is no regulation or recognised standard prescribing or stating a way to discharge the person's safety and health obligation in relation to a risk.
>
> (2) The person may choose an appropriate way to discharge the person's safety and health obligation in relation to the risk.
>
> (3) However, the person discharges the person's safety and health obligation in relation to the risk only if the person takes reasonable precautions, and exercises proper diligence, to ensure the obligation is discharged.

[63] The concepts of "risk" and "hazard" are defined in the CMSHA. Section 18 provides:

> **18 Meaning of risk**
>
> (1) Risk means the risk of injury or illness to a person arising out of a hazard.
>
> (2) Risk is measured in terms of consequences and likelihood.

[64] And Section 19 CMSHA provides:

> **19 Meaning of hazard**
>
> A hazard is a thing or a situation with potential to cause injury or illness to a person."

[65] The provisions specific to fatigue appear in the Regulation which provides in s 42:

> **42 Safety and health management system for personal fatigue and other physical and psychological impairment, and drugs**
>
> (1) A coal mine's safety and health management system must provide for controlling risks at the mine associated with the following—
>
> (a) personal fatigue;
>
> (b) other physical or psychological impairment;
>
> *Example of other physical or psychological impairment—*
>
> an impairment caused by stress or illness
>
> (c) the improper use of drugs.
>
> (2) The system must provide for the following about personal fatigue for persons at the mine—
>
> (a) an education program;
>
> (b) an employee assistance program;
>
> (c) the maximum number of hours for a working shift;
>
> (d) the number and length of rest breaks in a shift;
>
> (e) the maximum number of hours to be worked in a week or roster cycle.
>
> …
>
> (5) The site senior executive must consult with a cross-section of workers at the mine in developing the fitness provisions.

> (6) In developing the fitness provisions, the site senior executive must comply with section 10, other than section 10(1)(a) and (d)(ii)(C), as if a reference in the section to a standard operating procedure were a reference to the fitness provisions.
> (6A) If the fitness provisions provide for the assessment of workers for a matter mentioned in subsection (1)(a) or (b), the site senior executive must establish the criteria for the assessment in agreement with a majority of workers at the mine.
> …
> (8) In this section—
> ***fitness provisions*** means the part of the safety and health management system that provides for the things mentioned in subsections (2) to (4).

[66] Section 42 appears in Part 6 (headed "Fitness for work") of Chapter 2 (headed "All coal mines") of the Regulation.

Discussion

[67] The fundamental difficulty with the argument that the statute imposes obligations giving rise to a private right of action actionable at the suit of the plaintiff here is that the legislation is not concerned with hazards off the mine site but rather on it.

[68] The natural meaning of the language used in s 5 and s 6 which I have emphasised above does not easily encompass the risk identified here. Nor do the phrases that define the relevant hazards in s 41(1)(a), (b), (c), (e)(ii) and (f) – "while at the operator's mine", "conducts coal mining operations", "not to carry out an activity at the coal mine", "helps ensure the safety and health of persons at the mine", "from coal mining operations". The obligations under s 43 and 47 are also restricted to the "work undertaken" or the "service provided" respectively. Neither readily encompasses the risks inherent in the drive home from work. That approach to the legislation is reinforced when regard is had to the express reference in s 41(1)(c) to "adjacent or overlapping petroleum authority". Why expressly refer to an off-site hazard if the other provisions such as s 41(1)(b) are all encompassing?

[69] Mr Kerle's safety and health was not affected while he was at the mine. Nor was it affected "by coal mining operations or other activities at a coal mine" as s 11 requires. His safety and health were affected by what he did at the mine – that is by working consecutive night shifts contributing to his fatigue. But it is stretching the language to say that "coal mining operations or other activities" per se impacted on his health or safety. To say that the injury Mr Kerle suffered was "as a result of coal mining operations" or "from coal mining operations" is to put almost no limit on the consequences of those operations.

[70] With respect to s 42 of the Regulations - it is legitimate to read the heading of a section as giving an indication of the intended meaning of a legislative provision.[28] The heading of the only provision relating to fatigue is "Fitness for work", not fitness for some other purpose such as the drive home.

[71] It is well established that breach of a legislative provision intended to achieve one purpose cannot be called in aid as justifying an award of damages for harm from a

[28] *Acts Interpretation Act* 1954 (Qld) s 35C(1).

different source. *Gorris v Scott*[29] is a well-known authority to that effect. In *Masterwood Pty Ltd v Far North Queensland Electricity Board (No 2)* McPherson JA identified the ratio of that decision as: "The loss sustained was not within the scope of the risk contemplated or provided for by the statute."[30] So here.

[72] In case I am wrong in that view I will go on to consider the issue of whether the legislation affords a private right of action assuming it covers the activity of driving home.

[73] Whether provisions such as these dealing with workplace health and safety give rise to a private right of action has proved a vexed question. My attention was not drawn to any decided case in which the issue has been resolved in respect of this legislation. In the absence of any express provision – and there is none in the legislation here – the conferring of a private right of action for breach of the obligations imposed by the Act is a matter of inference. The general principles underlying the issue here were explained by Dixon J in *O'Connor v S P Bray Ltd.*[31] The application of those principles has proved difficult even in the context of employee safety which is generally taken to be in a special category. The authorities on the inferences to be drawn from the provisions of the various guises of the workplace health & safety legislation in Queensland are conflicting: see *Schiliro v Peppercorn Childcare Centres Pty Ltd*[32]; *O'Brien v TF Woollam & Son Pty Ltd;*[33] *Percy v Central Control Financial Services Pty Ltd;*[34] *Townsend v BBC Hardware*[35]*; Heil v Suncoast Fitness;*[36] *and Henderson v Dalrymple Bay Coal Terminal;*[37] and my own decision of *Wilkinson v BP Australia Pty Ltd.*[38]

[74] Guided to the extent that I can be by those authorities the relevant features here seem to me to be against the imposition of such a private right for the following reasons:

(a) The obligations imposed are not prescriptive but general;
(b) The methodology of the working out of the necessary fitness provisions by the site senior executive in consultation with a cross-section of workers at the mine is not suggestive of a prescriptive duty;
(c) The obligations are not restricted to employees alone, although they include employees. They extend to the world at large;
(d) If the statute has the scope contended for then it extends to risks to the health and safety of persons off the mine site and long after their work there has been completed. The width of such an obligation counts against it giving rise to a private right of action.

[75] The obligations imposed by the regulation might well assist the plaintiff in his proof of what was practicable and so afford evidence that assists in his case on breach of the common law duty (and breach of contract vis-à-vis Axial). However, in my view, a breach of the provisions does not provide any private right of action.

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[29] (1874) LR 9 Exch 125.
[30] [2000] 1 Qd R 253 at 259 [8].
[31] (1937) 56 CLR 464, 477-478.
[32] [2001] 1 Qd R 518.
[33] [2002] 1 Qd R 622.
[34] [2002] 1 Qd R 630.
[35] [2003] QCA 572.
[36] [2000] 2 Qd R 23.
[37] [2005] QCA 355.
[38] [2008] QSC 171.

THE RISK OF INJURY

[76] Before turning to the duty of care issue it is necessary to say something about the risk in question here.

[77] Many might say that the risk of falling asleep at the wheel, or of fatigue impacting on one's ability to drive safely, is a hazard that not only is well understood and appreciated in our community but one that the individual concerned is in the best position to assess and guard against. To require then that employers, or host employers, or those who conduct mines, ought to be proactive in meeting the risk, it might be said, is to place an unreasonable and unnecessary burden on them.

[78] I am reminded of the observations of Kitto J in *Electric Power Transmission Pty Ltd v Cuiuli*[39] where the worker had suffered an injury to his eye when cutting up bush timber with a tomahawk: "…but when I am asked to hold that a jury may reasonably think it negligent of an employer not to give a grown man instructions in looking after himself while cutting pieces of bush timber with a tomahawk, I feel obliged to decline on the ground of common sense to do so."

[79] So it may be argued here in relation to explaining to a worker how to care for his own safety in driving home on a public highway. However I reject that view. The fallacy in applying such reasoning here lies in the assumption that the risks are equally obvious to all.

[80] As senior counsel for Mr Kerle points out in his submissions, neither BMA nor HMP argue that the subjective appreciation of fatigue by the individual worker provided a reliable yardstick for controlling the risk of injury.[40]

[81] That that concession was rightly made is evident from the expert evidence led at trial. There are three relevant observations. The first is that the full impact of fatigue is not well understood. The second lies in the fact that the fatigue produced by successive shifts, particularly night shifts involving the disruption of both the circadian rhythm and the "sleep-wake systems" spoken of by the experts called in the case, is not fully appreciated by the average lay person. The third is that individuals do not necessarily recognise when they are fatigued.

[82] As to the first point, the impact of fatigue on road safety is quite marked. Professor Rogers provided statistics on the incidence of fatigue in motor vehicle accidents. She referred to the Australian Transport Safety Bureau report of 1998 that 16.6% of fatal road accidents and 19.6% of road fatalities were fatigue related. A 2005 report indicated that the risk of dying on rural roads from a fatigue related crash is 13.5 times higher than in urban areas.[41] While any reasonably informed citizen is aware that fatigue can lead to road accidents, I at least, was not aware that the incidence was so high.

[83] As to the second point the rotating shift system used here meant that with four successive night shifts the worker does not have time to adapt to the disruption to circadian rhythms[42] and there is a likelihood of those shifts leading to accumulated

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[39] (1961) 104 CLR 177 at 180-181.
[40] Ex 41 at para 108 and see para 12A HMP Defence and para 13A BMA Defence.
[41] Ex 2 tab 54, p 19, section 4.11.
[42] Ex 2 tab 54, p 36, section 6.2.

sleep debt.[43] Added to the risks associated with shift work are the risks associated with working long shifts – here 12 hour shifts. As Professor Rogers explained, that in itself is associated with an increase in fatigue levels.[44] I have referred already to some of the effects of accumulated sleep deficit.[45] A significant effect is that of micro sleeps and involuntary sleep.

[84] As to the third point Professor Rogers pointed out in a file note made by solicitors but effectively her supplementary report:

> "… if a person has chronic and/or acute sleep deprivation they tend to lose the ability to be self-aware of that fact. She said there is a real disconnect in those circumstances between what level the person thinks they are operating at and what they are in truth operating at as well as an underestimation of subjective assessments of fatigue. That is accompanied by an overestimation of the ability to do tasks. This impacts on a persons ability to do things like risk assessments i.e. assessing how fatigued they are and what risks exist."[46]

[85] I am conscious that the foregoing opinion was expressed in contradistinction to Professor Dawson's views that the "likelihood of a person falling asleep without an awareness of increased sleepiness, reduced alertness, yawning or struggling to stay awake etc is almost zero… it is probably less than 1%".[47] The experts I think are talking about two different things. But the inability to necessarily accurately judge one's level of fatigue seems well established in the literature that Professor Rogers referred to and indeed accepted by Professor Dawson in his oral evidence.[48]

[86] These issues go to the vulnerability of someone such as Mr Kerle and are fundamental to the arguments in the case.

DUTY

Scope and Content of the Duty of Care – Axial & HMP

[87] In what follows I am cognisant of the fact that an employer, or those in a like position, is not an insurer of a worker's safety. The duty is to take reasonable care: Glass, McHugh and Douglas, *The Liability of Employers in Damages for Personal Injury* 2nd ed, 1979, p 61, and many authorities to the like effect.

[88] It is necessary to address the scope and content of the duty contended for at common law (and in Axial's case also under contract). In doing so I bear in mind the observations of French CJ and Gummow J in *Kuhl v Zurich Financial Services Australia Ltd*[49] of the "inherent danger in an action in negligence to look first to the cause of damage and what could have been done to prevent that damage, and from there determine the relevant duty, its scope and content."[50] Whether a duty is owed at all and the scope and content of it are to be "determined by considering reasonable

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[43] Ex 2 tab 54, p 37, section 6.2.
[44] Ex 2 tab 54, p 37, section 6.2.
[45] At [18].
[46] Ex 2 tab 54, p 72-73.
[47] Ex 2 tab 55, p 9, para 4.7.
[48] T5-92/30 – 93/30.
[49] (2011) 243 CLR 361.
[50] Ibid at 370 [19].

foreseeability and the 'salient features' of the relationship between the plaintiff and defendant."[51] Their Honour's concluded with an observation pertinent here:

> "But where the relationship falls outside of a recognised relationship giving rise to a duty of care, or **the circumstances of the case are such that the alleged negligent act or omission has little to do with that aspect of a recognised relationship which gives rise to a duty of care**, a duty formulated at too high a level of abstraction may leave unanswered the critical questions respecting the content of the term 'reasonable' and hence the content of the duty of care. These are matters essential for the determination of this case, for without them the issue of breach cannot be decided. The appropriate level of specificity when formulating the scope and content of the duty will necessarily depend on the circumstances of the case."[52]

[89] The plaintiff effectively contends for a duty in these terms: a duty to take reasonable care to avoid or minimise the risk of injury to a worker resulting from foreseeable fatigue consequent upon the worker engaging in four consecutive 12 hour night shifts and then undertaking long distance commuting to his home. The defendants each contend that no such duty was owed.

[90] In my view such a duty was owed. I acknowledge that, so expressed, the level of abstraction is not informative of the content of the duty. The plaintiff's contention is that there were four specific measures that ought to have been adopted – control shift lengths, provide a place to rest, provide suitable advice and warning of the risks, and provide a bus service. I will deal with each proposal later when I consider the question of breach.

[91] I appreciate too that this risk was not the only risk that Axial, HMP and, as will be seen, BMA had to contend with and that it is necessary to look prospectively at the risks, not with the benefit of hindsight and the knowledge that the risk of injury has here come to pass.[53] But complaint can hardly legitimately be made by the defendants that this is too narrow a focus given the statutory reference to fatigue as a relevant issue that I have dealt with above and the comprehensive treatment of the issue in BMA's safety policies to which I will come.

[92] Those policies have come about for good reason. The way in which mining work is carried out has undergone somewhat of a transformation in more recent years. Speaking generally, in the 20th century the mining workforce was housed in locations not so distant from the mines. On occasions towns were built in relatively close proximity to mines to accommodate miners and their families. Or miners lived on camps adjacent. When that was so the working of night shifts and the impact of fatigue was not so much of a concern. But with the opening of mines not so located the concept of long distance commuting from home to mine became more common. Motor vehicle accidents whilst undertaking long distance commuting from remote mine sites after completing successive night shifts became a matter of concern. There have been

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[51] Ibid at 371 [20].

[52] Ibid at 371, 372 [22] (citation of authorities omitted – my emphasis).

[53] See generally the cautionary comments of French CJ and Gummow J in *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at 370-371.

fatalities in such accidents. A coroner's inquest in Queensland into three such deaths in 2005 and 2007 identified fatigue as a potential cause.[54]

[93] But this is to say little more than that the risk of injury was foreseeable and indeed foreseen. Foreseeability of injury alone is never enough to result in the imposition of such a duty to care for others although it is a necessary starting point: *Bryan v Maloney*.[55]

[94] The problem is particularly acute where the argument is not that the defendant harmed the plaintiff by some positive action but that the defendant is liable for the harm that befell the plaintiff because of an omission to act. The common law is traditionally reluctant to impose a duty to act to save another from harm. McHugh J discussed the point in *Pyrenees Shire Council v Day*:[56]

> "Absent consideration or its equivalent, the common law generally imposed no obligation on a person to protect or help another. As Windeyer J pointed out in *Hargrave v Goldman*, 'the common law does not require a man to act as the Samaritan did'. For that reason in most cases, the occupier of property owes no duty to a neighbour to secure the property so as to prevent thieves gaining access to the property for the purpose of robbing the neighbour's premises. The 'general rule' said Dixon J in *Smith v Leurs*, 'is that one man is under no duty of controlling another man to prevent his doing damage to a third'. Nor does the common law generally impose any duty on a person to take steps to prevent harm, even very serious harm, befalling another. ... The careless or malevolent person, who stands mute and still while another heads for disaster, generally incurs no liability for the damage that the latter suffers. Harsh though the common law may seem to be, there are nevertheless strong political, moral and economic arguments that justify its approach, as Lord Hoffmann pointed out in *Stovin v Wise*.
>
> In the absence of a contract, fiduciary relationship or statutory obligation, the common law makes a person liable in damages for the failure to act only when some special relationship exists between the person harmed and the person who fails to act. By a person's failure to act, I mean that person's failure to act divorced from positive conduct by that person that causes damage such as the failure to brake while driving a car. A special relationship may arise from the ownership, occupation or control of land or chattels, from the receipt of a benefit or from an undertaking, assumption of responsibility or invitation which might induce the person harmed to act or to refrain from acting."

[95] However that reluctance in cases of omission does not apply with so much force where it is the defendant who has created the risk. As Heydon JA said in *Ashrafi Persian Trading Co Pty Ltd t/as Roslyn Gardens Motor Inn & Anor v Ashrafinia*,[57] after referring to the above passage in *Pyrenees Shire Council v Day:*

> "To be rendered liable for having created a source of danger, of course, is to be rendered liable for more than mere inaction. Indeed the category of 'special

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[54] Inquest into the deaths of Malcolm Mackenzie, Graham Peter Brown and Robert Wilson – delivered 23/02/11– Coroner Hennessy.

[55] (1995) 182 CLR 609 at 617-618, 634.

[56] (1998) 192 CLR 330 at 368-369 [101]-[102] (citations omitted).

[57] [2001] NSWCA 243 at [66].

> circumstances' or 'a special relationship' can obviously overlap with cases where liability is found because of 'a high degree of certainty that harm will follow from lack of action'."

[96] The relationship between each of the defendants and the plaintiff arises in one way or another out of his employment at the Norwich Park Mine. If there is to be such a duty imposed it can only arise out of that relationship. The issue here is whether the scope of the duty undoubtedly owed by the employer or host employer can extend to protect workers from injury sustained hundreds of kilometres from the workplace and hours after any work task has ended. Does the traditional employment relationship, and the duties consequent upon it, justify the imposition as an incremental addition?

[97] The employer's duty is often described in terms that limit the obligations owed to meeting the dangers involved in the tasks undertaken – for example see *Vozza v Tooth & Co Ltd*[58] per Windeyer J. But it is not always so limited. It is sometimes described as extending to not exposing employees to "unnecessary risks of injury" – for example see *Crimmins v Stevedoring Industry Finance Committee*[59] per Hayne J echoing what was said 40 years before in *Hamilton v Nuroof (WA) Pty Ltd.*[60] A succinct statement appears in *Czatyrko v Edith Cowan University*[61] where the Court described the duty as follows (citations omitted):

> "An employer owes a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury. If there is a real risk of an injury to an employee in the performance of a task in a workplace, the employer must take reasonable care to avoid the risk by devising a method of operation for the performance of the task that eliminates the risk, or by the provision of adequate safeguards. The employer must take into account the possibility of thoughtlessness, or inadvertence, or carelessness, particularly in a case of repetitive work."

[98] A submission made on behalf of HMP[62] is that, whatever its duty, it can extend no further than relating to tasks undertaken "in the course of his employment" citing the judgment of Kitto J in *ACI Metal Stamping & Spinning Pty Ltd v Boczulik*[63] when referring to the employer's duty*:*

> "It may exist (though what is required for its performance may be very little) even in a case where the servant is exercising his right as a member of the public to pass along a public highway, for he may be performing an errand for his master or travelling to or from his place of work in a manner provided for by an express or implied term of the contract of employment. **On the other hand it is clear that where the servant is using the highway simply as a means of getting to or from his place of work in such circumstances that the journey is either preliminary or subsequent to, and not in the course of, the employment, the master, as such, owes him no duty of care.** The point to be observed is that the question upon which the existence of the duty depends is not in what character has the

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[58] (1964) 112 CLR 316 at 319.
[59] (1999) 200 CLR 1 at 98 [276].
[60] (1956) 96 CLR 18 at 25.
[61] (2005) 214 ALR 349 at 353 [12].
[62] Ex 38, para 155.
[63] (1964) 110 CLR 372.

servant the right of passage, but whether the master is master in relation to the journey."[64]

[99] HMP submitted that this accident had no relation to any employment task, and did not happen in the course of Mr Kerle's employment, and so the duty cannot extend so far.[65] Axial takes a similar position.[66] I think that it is evident that Kitto J did not have the present factual circumstances in mind in making the observation relied on. Indeed his remark is entirely conventional.

[100] Nonetheless I think it is true to say that for a duty to be owed in the character of employer, or the like, as the plaintiff contends for, it is necessary that there be an extension of the recognised limits on the duty as it is usually described. I think the extension is warranted here, being both incremental and logical.[67] It is also consistent with what authority there is. The duty postulated by the plaintiff has been advanced in cases over the years: *Kuhler v Inghams Enterprises Pty Limited*[68]; *Thomas v Sydney Training & Employment Ltd*[69]; *Fraser v Burswood Resort (Management) Ltd*[70]. The plaintiff failed in each case but not on the ground that the duty contended for could not go so far. In *Fraser* the duty was found to be limited to a duty to warn of the risks. For present purposes *Kuhler* is of particular significance – a decision of the Queensland Court of Appeal and a strong court[71] – not so much in what was said but what was not said. If the duty contended for was untenable it is odd that no judge thought to mention that.

[101] It has long been recognised that an employer's duty can extend beyond the workplace. However the cases that have previously so decided have depended on some aspect of the employment relationship that cannot be said to be present here.

[102] *Tunney v Midland Railway Company*[72] is an early example. There a worker was injured when a train in which he was travelling home from work collided with another train. It was held that the accident occurred because of the negligence of a fellow worker in moving the points on the tracks. The doctrine of common employment resulted in the injured worker being denied relief. For present purposes the relevant point is that the character of employment was not lost because the work had ended for the day, nor because the injury occurred at a place distant from the worksite. However there the contract expressly provided for the provision of travel by train ie travel by train was provided as an incident of the employment. That distinguishes that case from this one.

[103] *Jury v Commissioner for Railways (NSW)*[73] provides another example. There a worker was killed by a passing train at night on land remote from his worksite and long after work had finished. He had come from his campsite, which had been provided by his employer. The campsite was adjacent to the railway line. The employer controlled both

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[64] Ibid at 379.
[65] Ex 38, para 156.
[66] Amended Defence of the Third Defendant to the Third Further Amended Statement of Claim para 7.
[67] See Brennan J's comments in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 481.
[68] [1997] QCA 386.
[69] [2002] NSWSC 970.
[70] [2012] WADC 175.
[71] McPherson, Davies JJA, Derrington J.
[72] (1866) LR 1 CP 291.
[73] (1935) 53 CLR 273.

the campsite and the adjacent land on which the railway line was located. The workers were in the habit of walking on the land on which the railway line was located in getting to and from a nearby town. It was argued that the liability of the employer lay in failing "to provide for the safe passing of the said employees over the said land, and to light the said land in proper places and in sufficient manner for the use of the said employees during the hours of darkness."[74]

[104] Rich and Dixon JJ described the relevant relationship in these words:

> "It thus appears that the Commissioner accommodated the men with a camp as a condition of the employment. No doubt the men were not obliged to live in it, and when living in it had complete liberty of action outside hours of labour. But it remains true that in camping the men on railway premises, the Commissioner was acting under the contract of service, and in dwelling there the deceased was responding to the demands of the employment."[75]

[105] They concluded:

> "A wide view has always been taken of the activities or matters to which the character of employee extends. Whenever the employee is upon the employer's premises in connection with or in furtherance of his employment, he goes there in that character. The result has often been that liabilities which his employer would otherwise incur to him have been destroyed by the doctrine of common employment — see *Tunney v Midland Company*, *Coldrick v Partridge*. If he had used a facility provided by his master to bring him to work, should he choose to avail himself of it, the fellow-servant doctrine applied. When that doctrine is abolished, the increase in the responsibility of the employer to his servant converts the wide application of that character into a benefit to the servant.
>
> The consequence in the present case is that, in providing a camp on his premises for the deceased to inhabit in his character of employee, the Commissioner incurred to the deceased a duty of reasonable care for his safety. It was incumbent upon him to take all reasonable precautions in providing a place for a camp, including approaches and means of access."[76]

[106] Again, the provision of the camp in that location was an incident of the employment. Of present interest is their Honour's comment that "in dwelling there the deceased was responding to the demands of his employment." In travelling long distances to and from his home to the workplace so, in a sense, was Mr Kerle.

[107] However, here Mr Kerle was not on the highway in his character as servant. His employer was not exercising any control over him as his employer. Nor was HMP. Some additional factor must be relied on here for Mr Kerle to succeed in his submission.

[108] In my view what distinguishes this case from those that Kitto J had in mind in *ACI Metal Stamping & Spinning*,[77] and attracts the duty here, is the interaction of the following four factors.

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[74] Ibid at 280.
[75] Ibid.
[76] Ibid at 282-283 (citation ommitted).
[77] (1964) 110 CLR 372.

[109] The first is that it is the employer, and those like HMP, who have created the risk by the insistence on consecutive 12 hour night shifts with its consequent, and inevitable, fatigue. The risk thus emanates from the work activities. The risk of injury on the drive home is appreciably greater than it would otherwise have been but for the fatigue consequent on those activities.

[110] The second is the matter previously mentioned - that expert studies on the impact of fatigue have long shown that the worker's subjective experience of fatigue is not necessarily a reliable guide to the individual's capacity to function safely. In other words the worker might think that they are fine but they are not. The worker is relevantly vulnerable.

[111] The third is that the workforce must perforce come from places remote from the mine site – long distance commuting was inevitable. In a survey conducted in March 2008 nearly one-half of those who responded travelled more than three hours to get to the Norwich Park mine site.[78] As noted above the worker is responding to the demands of his employment.

[112] The fourth is that the only practicable way of minimising the risks thereby created required a response from persons in control of the workplace and work systems. To adopt the phrase used by Heydon JA that I have quoted, I am satisfied to "'a high degree of certainty that harm will follow from lack of action" [79] from the defendants.

[113] I am satisfied that the duty I have identified was owed by both the employer and HMP whose relationship to Mr Kerle was analogous to that of the actual employer.[80] The duty was personal and non-delegable. I note that my decision on that last point is consistent with that of Mason P in *TNT Australia Pty Ltd v Christie*.[81] Mason P determined that the host employer there owed a non-delegable duty of care to the worker injured through defective plant.[82] Foster AJA agreed.[83] In my view the relevant reasoning is applicable here.[84]

[114] As each defendant stressed they are not in a position, and cannot reasonably have been expected, to control the risks inherent in highway travel. The duty cannot extend so far. But that cannot mean that no duty is owed in circumstances where the risk emanates from the workplace, the risk was created for the profit of the defendants, and significant means to minimise the risk lies in the workplace practices and facilities. Those means fall within the areas traditionally controlled by employers and those in analogous positions – the education of workers concerning risks of injury inherent in what they are called on to do, the control of shift lengths, the use of the premises (here to enable workers to rest), and the provision of transport to and from the mine site.

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[78] Ex 13 at p 12.

[79] *Ashrafi Persian Trading Co Pty Ltd t/as Roslyn Gardens Motor Inn & Anor v Ashrafinia* [2001] NSWCA 243 at [66].

[80] *TNT Australia Pty Ltd v Christie* (2003) 65 NSWLR 1 at 9 per Mason P.

[81] Ibid.

[82] Ibid at 10-13 [46]-[53].

[83] Ibid at 30 [176]-[178].

[84] The second defendant's submissions assumed that the decision in *Christie* was to the contrary: see para 144 of Ex 38. The submission is wrong.

HMP is not the employer of Mr Kerle *pro hac vice*

[115] Axial submits that because of the transfer of the plaintiff's services from Axial to HMP, and HMP's effective control and supervision of the plaintiff, HMP became the employer *pro hac vice* of the plaintiff. Axial referred to *Barrett v Drake Personnel Limited*,[85] an unreported decision of the District Court, and *Deutz Australia Pty Ltd v Skilled Engineering Ltd*,[86] a single Judge decision of the Victorian Supreme Court.

[116] It is clear that the onus lies on the employer to show the transfer of services and that the "burden is a heavy one and can only be discharged in quite exceptional circumstances": *Mersey Docks Harbour Board v Coggins & Griffiths (Liverpool) Ltd* per Lord Simon.[87] Lord Porter in that case said that it could only be proved when the "entire and absolute control over the workman had passed".

[117] Mason P rejected the argument when advanced by the labour hire company, Manpower, in *TNT Australia Pty Ltd v Christie*[88] in these terms:

> "I would reject this submission. It is contrary to authority, in that ***Kondis*** and the cases that follow it proceed on the basis that the employment **relationship** creates the relevant non-delegable duty.
>
> On analysis, Manpower's submission boils down to the fallacious argument that the non-delegable duty can be delegated by abdication.
>
> Manpower's concession (properly made) that it was and remained the plaintiff's employer and the facts showing a continuing relationship of that nature negated the possible application of the qualification described by Gibbs CJ in ***Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd***:
>
> > Where the services of the servant of one employer are temporarily used by another, both employers will not be liable; prima facie the liability will usually remain with the general employer who may, however, `show, if he can that he has for a particular purpose or on a particular occasion temporarily transferred the services of one of his general servants to another party so as to constitute him *pro hac vice* the servant of that other party with consequent liability for his negligent acts': **Mersey Docks and Harbourboard v Coggins and Griffith (Liverpool) Ltd** at 13.
>
> In my view, it would be contrary to principle to enable or even to encourage an employer that operates a labour hire business to treat the normal incidents of the employment relationship as modified simply because its employees are sent off to work for a client. Indeed, the very fact that employees are dispatched to external venues and placed under the de facto management of outsiders will, in some cases, have the practical effect of requiring the employer to adopt additional measures by way of warning or training in order to discharge its continuing common law duty of care to its employees. (Footnotes omitted)"

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[85] Unreported, McLauchlan DCJ, 20 April 1998.
[86] [2001] VSC 194.
[87] [1947] AC 1.
[88] [2003] NSWCA 47 at 15 [64-67].

[118] With respect I agree with those views and think they are applicable here. In my view it is clear that the "entire and absolute control over the workman" had not passed from Axial to HMP. As HMP submits there is compelling evidence of the continuation of the relationship of employment between Axial and Mr Kerle. Certainly Mrs Rogers thought so. She apparently was the main point of contact.[89] Axial required by its offer of employment that Mr Kerle report to both a site supervisor of HMP and an Axial supervisor and provided the contact details of both.[90] One of the conditions of employment was that the employee contact an Axial supervisor if they were unable to work on any day or if any accident or injury occurred. Axial's handbook included "at any time you are employed by Axial and living on site or at accommodation provided by us or our client, you are required to abide by our code of conduct at all times, not just during work hours" and "it is the policy of Axial to monitor and control the fatigue levels of employees at work, particularly when working extended hours".[91]

[119] In my view Axial has not discharged the "heavy" burden of proof which can only be discharged in "quite exceptional circumstances" that the "entire and absolute control over the workman had passed to [HMP]."

BMA owes a duty of care

[120] The claim against BMA is in a different category to the claims against Axial and HMP. BMA is not in a relationship with Mr Kerle where the courts have previously determined that a relevant duty of care is necessarily owed. I refer here to a duty at common law. Employers have long been held to owe such a duty and so too have host employers in the position of HMP. But BMA is in a different relationship with Mr Kerle.

[121] BMA conducts a coal mine. It entered into a contract with HMP whereby HMP came under an obligation to carry out the work necessary to remove overburden and so assist in the extracting of coal from the mine. At the time of contracting BMA intended that HMP employ workers to, amongst other things, operate machinery. No doubt it anticipated that those workers could be directly employed or hired by HMP under some form of labour hire arrangement. That is how Mr Kerle comes onto the mine site and into a relationship with BMA.

Submissions

[122] Senior counsel for Mr Kerle advanced the following features as justifying an imposition of a duty of care on BMA to avoid or minimize the risk to Mr Kerle of suffering injury from fatigue in the course of commuting to his home:

(a) BMA was the "coal mine operator" under the CMSHA and pursuant to that Act owed obligations to persons, including the plaintiff as a coal mine worker;

(b) BMA in the operation of the Norwich Park Mine assumed for itself a responsibility for, inter alia, management of the risks to coal mine workers associated with fatigue;

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[89] T6-39/15-16.

[90] Ex 2 tab 21.

[91] Ex tab 16, p 13 and 25.

(c) BMA sought to manage that risk by including in the contract prescriptively with HMP detailed policies that the latter was required to follow about how fatigue and the risk of fatigue was to be managed;
(d) BMA expressly reserved to itself the right to audit compliance by contractors with such policies to ensure enforcement;
(e) BMA had the power to regulate and did in fact regulate the hours of work at the mine. It prescribed 12 hour shifts. BMA also had the power to modify or shorten such shift lengths;
(f) The plaintiff had no such power and was required to work the hours prescribed for him;
(g) BMA was in a position of having the resources to know of the nature of the risk and the proper tools to manage it;
(h) The expert evidence showed that the plaintiff was placed in a position where he was at a material risk of not appreciating an impairment of his performance due to fatigue. Thus the plaintiff was vulnerable.
(i) It was known by BMA that the recognised fatigue risk to coal mine workers could not be left to self-regulation. Thus it had to be managed at a "corporate level".
(j) BMA had the capability to effectively provide alternative transport for the plaintiff that meant he was not required to drive substantial distances after concluding his roster. The plaintiff did not have the capability.

[123] Finally it was submitted that the duty was non delegable relying on the statement of principle to be found in the judgment of Mason J in *Kondis v State Transport Authority*.[92]

[124] BMA denies that any duty of care was owed. It points to the following features:
(a) The mining contract[93] between it and HMP carried a high degree of specificity as to the kind and quality of services to be provided by HMP, and the responsibility for how those services were to be so provided;
(b) That contract included provisions on how the risks involved with fatigue were to be managed and placed those responsibilities on HMP (see the clauses 1, 5 and 26), as well as dealing with many other risks involved in the work. HMP needed to address such issues in selection, training and supervision of staff;
(c) HMP was obliged, and permitted to come onto the mine site to work, only on condition that it complied with that stipulation;
(d) It is of significance that under that contract BMA was the service recipient and HMP the service provider.
(e) Under the mining contract BMA assumed no service obligation concerning any HMP contracted third party, including the staff (such as the plaintiff) engaged in HMP's contract works.
(f) No case is pleaded or proved of BMA knowing of any inability or unwillingness on HMP's part to abide these obligations.
(g) Absent BMA being on notice of some fact derogating from the following (and there was no pleading of such notice) BMA was entitled to proceed on the footing that any employee such as Mr Kerle:

[92] (1984) 154 CLR 672 at 687-688.
[93] Ex 2 tab 8.

(i) had implicitly contractually agreed with HMP and was willing to undertake work in the geographically isolated mine on the basis of 4 consecutive 12 hour shifts;
(ii) was aptly remunerated for agreeing and being so willing to undertake that work;
(iii) had been trained, instructed and supervised in accordance with HMP's mining contract obligations.

[125] BMA submitted that the highest the argument could be put is that the effect of the authorities was that, absent some special features, a principal only became liable to co-ordinate activities amongst independent contractors and no more.

Discussion

[126] The mere fact of the existence of "the relationship between principal and independent contractor is not one which, of itself, gives rise to a common law duty of care, much less to the special duty resting on employers to ensure that care is taken": *Leighton Contractors Pty Ltd v Fox*.[94] There may, however, be particular circumstances in which the principal does owe a duty of care to an employee of an independent contractor. BMA argued that the circumstances were restricted to those identified by the High Court in *Stevens v Brodribb Sawmilling Co Pty Ltd*[95], in a passage adopted in *Leighton Contractors*[96]*:*

> "The circumstances may make it necessary for the entrepreneur to retain and exercise a supervisory power or to prescribe the respective areas of responsibility of independent contractors if confusion about those areas involves a risk of injury. But once the activity has been organised and its operation is in the hands of independent contractors, liability for negligence by them within the area of their responsibility is not borne vicariously by the entrepreneur."

[127] It is useful to quote more extensively from the judgments of Mason CJ and Brennan J in *Stevens*, judgments which were referred to with approval in *Leighton Contractors Pty Ltd v Fox*.[97] The risk of personal injury in *Stevens* arose at the worksite and out of the potential for confusion in the organising of activities between multiple contractors. So the factual background was quite different to that here. It was held that the entrepreneur who had engaged the various contractors owed a duty of care akin to, but more limited than, that of an employer. Mason J said:

> "Although the obligation to provide a safe system of work has been regarded as one attaching to an employer, there is no reason why it should be so confined. **If an entrepreneur engages independent contractors to do work which might as readily be done by employees in circumstances where there is a risk to them of injury arising from the nature of the work and where there is a need for him to give directions as to when and where the work is to be done and to co-ordinate the various activities, he has an obligation to prescribe a safe system of work.** The fact that they are not employees, or that he does not retain a right to control them in the manner in which they carry out their work, should not affect

[94] (2009) 240 CLR 1 at 22 [48].
[95] (1986) 160 CLR 16 at 12 [20].
[96] (2009) 240 CLR 1 at 22 [47]-[48].
[97] (2009) 240 CLR 1 at 11 [20]; 21 [46].

> the existence of an obligation to prescribe a safe system. Brodribb's ability to prescribe such a system was not affected by its inability to direct the contractors as to how they should operate their machines …"[98]

[128] Brennan J said:

> "… **An entrepreneur who organizes an activity involving a risk of injury to those engaged in it is under a duty to use reasonable care in organizing the activity to avoid or minimize that risk,** and that duty is imposed whether or not the entrepreneur is under a further duty of care to servants employed by him to carry out that activity. **The entrepreneur's duty arises simply because he is creating the risk** (Sutherland Shire Council v Heyman) and **his duty is more limited than the duty owed by an employer to an employee. The duty to use reasonable care in organizing an activity does not import a duty to avoid any risk of injury; it imports a duty to use reasonable care to avoid unnecessary risks of injury and to minimize other risks of injury**. It does not import a duty to retain control of working systems if it is reasonable to engage the services of independent contractors who are competent themselves to control their system of work without supervision by the entrepreneur. The circumstances may make it necessary for the entrepreneur to retain and exercise a supervisory power or to prescribe the respective areas of responsibility of independent contractors if confusion about those areas involves a risk of injury. But once the activity has been organized and its operation is in the hands of independent contractors, liability for negligence by them within the area of their responsibility is not borne vicariously by the entrepreneur. If there is no failure to take reasonable care in the employment of independent contractors competent to control their own systems of work, or in not retaining a supervisory power or in leaving undefined the contractors' respective areas of responsibility, the entrepreneur is not liable for damage caused merely by a negligent failure of an independent contractor to adopt or follow a safe system of work either within his area of responsibility or in an area of shared responsibility."[99]

[129] It was submitted that a need to co-ordinate the activities of various contractors was the key point in *Stevens*, that there was no need for co-ordination here, and that the injury did not arise out of any failure to co-ordinate. That is so. The issue then is whether the scope of the duty owed by a principal extends further than that identified in *Stevens*? In my view, while various authorities do refer to co-ordination, that is so only because the context of the facts in the various cases required that emphasis.

[130] First, I observe that the statements of principle by Brennan J and Mason J in *Stevens* support the imposition of the duty here. BMA brought the risk into existence - Brennan J held that was a sufficient trigger for the imposition of the duty. Alternatively BMA could just as well have employed staff such as Mr Kerle had it wished and there existed circumstances where there was a risk to them of injury arising from the nature of the work – two of the three necessary qualifications identified by Mason J. Senior counsel for BMA argues that the need for co-ordination, Mason J's third requirement, is an essential one. I disagree.

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[98] *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 31 (emphasis added).
[99] Ibid at 47-48 (my emphasis and citations omitted).

[131] In a series of cases decided before *Leighton Contractors* it was held that scope of the duty owed was not so confined. That was the view of Ipp JA (with whom Mason P and McColl JA agreed) in *Rockdale Beef Pty Ltd v Carey*.[100] In that case the plaintiff was an independent contractor. His duties for Rockdale Beef included rounding up cattle that had managed to escape the feed pens. That was not an uncommon occurrence. The plaintiff was injured when he attempted to herd an escaped steer back to its pen. He galloped past the steer in order to get behind it, but the steer swung into the path of his horse. The horse fell and the plaintiff was severely injured. Ipp JA stated that a business enterprise (the entrepreneur) may owe a duty of care to an independent contractor:

> "… where there is no need for the entrepreneur to give directions as to when and where the work is to be done and to co-ordinate the various activities, but where, for other reasons, reasonable care on the part of the entrepreneur affects the way in which the work is to be undertaken and the safety of the work site, and where other considerations … such as vulnerability, inequality of bargaining power, control, and the other manifold factors that the law recognises as being relevant to the existence of a duty of care, are present."[101]

[132] The Court held that Rockdale was under a duty to use reasonable care to avoid, or minimise, the risk they had created by their configuration of the races in such a way as to constitute a safety risk in the work Mr Carey was directed to carry out.

[133] Similarly in *Tolhurst v Cleary Bros (Bombo) Pty Ltd*[102] Giles JA (with whose reasoning on this Beazley and Tobias JJA agreed) accepted that co-ordination was not essential to the imposition of a duty of care:

> "That there may be a duty of care although there is not interdependence of contractors' activities calling for coordination was recognised in *Sydney Water Corporation v Abramovic*; (2007), see at [33] per Santow JA (who dissented in the result) and at [71]–[72] and [98] per Basten JA (with whom Mason P agreed). In that case, as in the present case, the putative duty of care was owed not to the independent contractor but to an employee of the independent contractor. That may affect the power to direct and control the independent contractor's discharge of the duty it owes to the employee, but an entrepreneur with overall control of the operations of which the contractor's activities, and thus the employee's work, are part may have an important role to play in the safety of the system of work which the contractor/employer can not fulfil."

[134] That a duty can be owed by a principal to an independent contractor in the absence of a need to co-ordinate the activities of various contractors follows from *Thompson v Woolworths (Qld) Pty Ltd*[103] where the High Court held that notwithstanding the plaintiff's status as an independent contractor, the supermarket (Woolworths) owed her a duty of care in circumstances where she was required to conform to a delivery system established by Woolworths and was subject to its direction.

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[100] [2003] NSWCA 132.
[101] Ibid at [84].
[102] [2008] NSWCA 181 at [66] (citations omitted).
[103] (2005) 221 CLR 234.

[135] The decision in *Leighton Contractors* however is against the proposition that "a general law obligation… of a more extensive kind than that recognised in *Stevens*" should be imposed on principal contractors.[104] If applicable that decision would prevent any extension of the principle to the case here. That was said where the issue concerned the safety of the work methods employed by a concrete pumping contractor of which the Court said: "… there is nothing unreasonable about subcontracting the work of concrete pumping. It is an activity that requires specialised equipment and which lends itself to being carried out by independent contractors."[105] The Court said:[106]

> "*No justification for recognising a duty to train.* If Leighton owed a duty to Mr Fox and Mr Stewart to provide induction training to them in the safe method of line cleaning, it owed a duty to provide training in the safe method of carrying on every trade and conducting every specialised activity carried out on the site to every worker on the site. There is no reason in principle to impose a duty having this scope on a principal contractor. The latter is unlikely to possess detailed knowledge of safe work methods across the spectrum of trades involved in construction work. And a duty to provide training in the safe method of carrying out the contractor's specialised task is inconsistent with maintenance of the distinction that the common law draws between the obligations of employers to their employees and of principals to independent contractors.[107]

[136] In my view both *Stevens* and *Leighton Contractors* can each be distinguished from the situation pertaining here. First, Mr Kerle was not injured when carrying out a specialised task that fell within the expertise of HMP or Axial. Secondly, BMA had detailed knowledge of the safety issues surrounding managing workplace fatigue. Thirdly, it needs to be recognised that this is not a case of making a principal liable for an injury caused by the negligent acts of an independent contractor (or an employee of one) employed by the principal. The risk here does not arise from the physical exigencies of the workplace or directly from the manner in which work was performed either by Axial's employees or any other contractor. Both *Stevens* and *Leighton Contractors* fall into that category. Because of these distinguishing features neither the decision nor the reasoning in *Leighton Contractors* stands in the way of a finding that a duty was owed here by BMA. And as I said earlier *Stevens* supports the imposition.

[137] Nonetheless reference to these various decisions does not determine the issue of whether a duty is owed in this novel situation. If the duty is owed here, as Mr Kerle contends it is, then it must be on a basis not previously adopted in the authorities dealing with the duty of care owed by principals to employees of independent contractors. As Beasley JA observed in *Bostik Australia Pty Ltd v Liddiard:*[108]

> "There comes a point where reference to the multitude of decided cases ceases to provide assistance in the determination of the question in issue and it is necessary to return to principle. As Gummow and Hayne JJ observed, at [145], in *Graham*

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[104] *Leighton Contractors Pty Ltd v Fox* (2009) 240 CLR 1 at 25 [59].
[105] Ibid at 26 [62].
[106] Ibid at 23 [52].
[107] Citing *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161.
[108] [2009] NSWCA 167 (citations omitted) at [88].

> *Barclay Oysters Pty Ltd v Ryan*, the "totality of the relationship between the parties … is the proper basis upon which a duty of care may be recognised."

[138] To like effect is the judgment of Allsop P (as his Honour then was) in *Caltex Refineries (Qld) Pty Ltd v Stavar*[109] where his Honour held that the "proper approach is to undertake a close analysis of the facts bearing on the relationship between the plaintiff and the putative tortfeasor by references to the 'salient features' or factors affecting the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury."[110] His Honour then listed 17 such salient features. In my view the salient features here justify the imposition of the duty contended for.

[139] The first and most important point is that BMA brought the risk into being by its insistence on the consecutive 12 hour night shifts.[111] The risk is that of personal injury, even death, from driving long distances home after work because of significant fatigue brought on by working consecutive night shifts.

[140] The second special feature is in the nature of the risk. One of the peculiarities of this case is that the injury occurred far from the workplace and long after the work shift came to an end. Because of that neither Axial nor HMP was in a position to command Mr Kerle as to what he must do at the point in time when the accident occurred or for a long time before. Neither of course was BMA. But given this peculiarity BMA should have appreciated that the risk of personal injury or death from commuting after leaving the workplace was not in the nature of the typical risk that employers deal with vis-á-vis their employees.

[141] Allied to that feature is that this is not a case where it could be said that the management of the risks created by the insistence on 12 hour night shifts fits comfortably within the skills or expertise of HMP or Axial. Axial was not employed because it had special expertise in handling fatigue management issues. Nor was HMP. While these independent contractors may have been engaged because of special skills to perform the work of removing overburden or finding staff, the risks here fall outside any supposed area of expertise and so neither could be expected merely by reason of that presumed expertise to manage the risks thereby created competently.

[142] The third feature is the degree of control exercised by BMA. It is of significance that of the various measures advanced as minimising the risk one was under the complete control of BMA – the length and timing of the shift. HMP was contractually bound to have the workers work a 12 hour night shift. Mr Kerle had no power to vary that condition of his employment. As well BMA controlled the premises and at least the basics of the induction process required. In short, BMA controlled not only the work shifts, but HMP and Axial through the contract it put in place. Because of this control there is a strong argument that it was in a better position than either to manage the risk in question.

[143] The fourth feature is that BMA had organised things so that machinery operators were employed by someone else to do their work. BMA could well have employed people such as Mr Kerle itself. That was a material factor in Mason J's formulation of the duty owed by a principal to employees of independent contractors in *Stevens*. As the Court

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[109] (2009) 75 NSWLR 649 at 676-677 [102]-[105].
[110] Ibid at 676 [102].
[111] See submissions by Mr Douglas QC at T7-52/34-43.

(Allsop ACJ, Beazley JA, Giles JA) observed in *Pacific Steel Constructions Pty Ltd v Barahona*[112] there are legal and practical advantages to principals in so arranging for activities to be carried out. BMA is entitled to so organise its affairs. But in so far as the duties that might be owed are concerned the situation is markedly different to that which pertains when an independent contractor is engaged to carry out work within the contractor's area of expertise such as the steelworkers in *Pacific Steel*, or the concrete pumping contractors in *Leighton Contractors*.

[144] The fifth feature is that the actual employer, Axial, did not appear to have a very sophisticated approach to issues of workplace safety generally, let alone to issues presently under consideration. This was not hard to discover. A Mrs Rogers was called by Axial. She was Axial's business development manager from 2002 to 2010. She was the person charged with the responsibility of attending at the Norwich Park Mine and assessing the workplace and the relevant safety considerations. She was asked about Axial's workplace health and safety policies and in response suggested documents existed. None had been disclosed and none were produced despite the plaintiff calling for them. Presumably Mrs Rogers was mistaken as to their existence. The only relevant document was a basic handbook. Mrs Rogers considered herself as having expertise in workplace health and safety. That was not demonstrated as the following exchange in cross examination shows:

> "All right. Mrs Rogers, this isn't a question that's meant as any personal criticism of you? Mmm.
>
> But would you agree that having regard to your role and your qualifications, that you were not in fact qualified to assess the quality of these particular documents in terms of how effective they might be? No, I disagree.
>
> You never worked as a coal miner? No.
>
> And you had no qualifications in workplace health and safety, did you? No.
>
> All right. But because you had undertaken a – sorry the BMA induction, and the generic course is that what you say qualified you to have an opinion about the quality of these documents? No, not at all. The fact that I knew – I knew a lot about mining. I know what a shovel looks like, I knew what an excavator looked like, I know what a dump truck looks like. I know what they can carry, I know what coal is. So I believe – like I've been on a lot of mine sites, I believe that I could – in my judgment – be able to look at a document and know if it's crap or not."[113]

[145] With all due respect, familiarity with the appearances of shovels, excavators, dump trucks and coal is not a sound basis to claim expertise. Mrs Rogers' claimed knowledge of mining remained unexplored. She had completed generic and site inductions but she was not shown to have any expertise that would fit her for the role of a safety officer. Her answer strongly suggests that she had no appreciation of the intricacies involved.

[146] Added to that evident unfitness are features of Axial itself. One of the submissions made by Axial was that its response to the duty of care undoubtedly placed on it was

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[112] [2009] NSWCA 406 at [81].
[113] T6-59/39 – 60/10.

affected by the fact that it was a relatively small company with its head office a long distance (slightly longer than Mr Kerle's commute home) from the Norwich Park Mine site. Whether relevant or not to the scope of the duty owed – and I think not[114] – those factors were relevant to the likelihood of Axial performing its function and ought to have been relevant to BMA's prospective consideration of obligations that it needed to attend to. I note that the inadequacies of the employer in meeting the risk, either prospective or in fact, was a relevant factor in Callinan J's judgment in *Crimmins*.[115] By the organisation it had put in place BMA seeks to remove the responsibility of the risk that it has created to a company far less qualified to meet it. In making that comment I note that BMA is described in the contractual documents as an alliance of BHP Billiton and Mitsubishi – two of the largest corporations in Australia.

[147] The sixth feature is that workers such as Mr Kerle were relevantly vulnerable. Without access to the expert knowledge of people such as Professors Rogers and Dawson they could not be expected to appreciate the full extent of the risk that they ran in commuting home – particularly the insidious onset of unappreciated fatigue – nor meet that risk without assistance.

[148] I mentioned the judgement of Allsop P in *Caltex Refineries (Qld) Pty Ltd v Stavar*[116] where his Honour listed 17 "salient features … affecting the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury". His Honour's list is not meant to be exclusive of other factors but it is sufficiently comprehensive for my purposes. Bearing in mind the six factors I have identified and applying those considerations to his Honour's list is instructive. I will consider each of those factors in turn so far as they are relevant (the feature being in bold and my response following):

(a) **the foreseeability of harm** – the risk of harm from fatigue in commuting to distant home bases was an act foreseen by BMA and well before the material time;

(b) **the nature of the harm alleged** – here personal injury and potentially death;

(c) **the degree and nature of control able to be exercised by the defendant to avoid harm** – BMA had complete control over the mine site and length, timing and frequency of shifts worked and a statutory duty to exercise that control;

(d) **the degree of vulnerability of the plaintiff to harm from the defendant's conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself** – it was recognised that employees such as the plaintiff may not appreciate the effects of fatigue. Further, measures adequate to meet the risk were within the control of BMA, not the plaintiff;

(e) **the degree of reliance by the plaintiff upon the defendant** – the plaintiff had no option but to rely on those in control of the mine site. Whether he appreciated that entity was BMA is not shown;

(f) **any assumption of responsibility by the defendant** – see (c) above. While BMA had responsibility over the mine site it had contracted with HMP for HMP to put in place measures to meet the perceived risk. BMA retained the power to audit HMP's performance;

(g) **the proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant** – Mr Kerle was relevantly proximate. He was

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[114] See *TNT Australia Pty Ltd v Christie* [2003] NSWCA 47 at [67] per Mason P.

[115] (1999) 200 CLR 1 at 117 [360].

[116] (2009) 75 NSWLR 649 at 676-677 [102]-[105].

a worker on the mine site brought there at BMA's request and to perform work to the profit of BMA;

(h) **the existence or otherwise of a category of relationship between the defendant and the plaintiff or a person closely connected with the plaintiff** – Mr Kerle was a member of a class that BMA should clearly have had in contemplation as being potentially affected by the risks created by insisting on the performance of four consecutive 12 hour night shifts;

(i) **the nature of the activity undertaken by the defendant** – probably not relevant here in the sense intended. Mr Kerle was not injured directly by some activity undertaken by BMA. Assuming causation, his injury was sustained as a result of the fatigue brought about by his involvement in those activities which were connected directly with BMA's mining operations;

(j) **the nature or the degree of the hazard or danger liable to be caused by the defendant's conduct or the activity or substance controlled by the defendant** – see (b) above;

(k) **knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff** – see (a) above;

(l) **any potential indeterminacy of liability** – not relevant here. Liability is argued to apply in respect of personal injury suffered by those brought to the mine site as workers not in respect of some undefined form of harm or caused to the world at large;

(m) **the nature and consequences of any action that can be taken to avoid the harm to the plaintiff** – while the subject of dispute the case advanced by Mr Kerle was that better education regarding the risks, the provision of alternative means of transport home, and making known the provision of facilities to rest before travelling all would have obviated the risk. Each was within the power of BMA to bring about. No evidence was led that considerations of expense and inconvenience were relevant;

(n) **the extent of imposition on the autonomy or freedom of individuals, including the right to pursue one's own interests** – looked at from BMA's perspective an imposition of the proposed duty of care on BMA will have no impact on its right to pursue its own interests;

(o) **the existence of conflicting duties arising from other principles of law or statute** – not relevant as a disqualifying factor and see (p);

(p) **consistency with the terms, scope and purpose of any statute relevant to the existence of a duty** – a fact in favour of the imposition of the suggested duty; and

(q) **the desirability of, and in some circumstances, need for conformance and coherence in the structure and fabric of the common law** – perhaps not of great significance, but see the passage from Brennan J's judgment in *Stevens v Brodribb Sawmilling Co Pty Ltd*[117] set out above.

[149] In summary every factor save one favours the imposition of a duty of care or is neutral. That one is at para (f) above and it is that issue BMA principally relies on. The task of course is not a mechanistic one. Full weight needs to be given to those factors that are neutral or against the imposition of the duty. Essentially BMA's response is two-fold.[118] First, its contract with HMP prevents any duty to HMP's workers arising. It expected HMP to protect its own workers and had no reason to think it wouldn't or

[117] (1986) 160 CLR 16.

[118] See [124] above.

couldn't. Secondly, the workers knew what they were doing and were paid accordingly.

[150] The second point is met by the factors in paras (c), (d) and (e) above. The plea is essentially that Mr Kerle voluntarily assumed the risk. Equality of both knowledge of the risk and of the ability to meet the risk might well be a complete answer but that is not this case. Mr Kerle was at a significant disadvantage in relation to both his knowledge of the risk and his ability to meet it.

[151] As to the first point, where, as here, it is BMA who has created the risk, and it is for its profit that the risk is incurred, does entry into a contract with HMP whereby HMP is to manage that risk mean that no duty of care is owed to persons affected by the risk? I think that the short answer is that entry into a contract cannot operate to discharge BMA from a duty of care to persons who are strangers to that contract: *Voli v Inglewood Shire Council*.[119] The issue is whether a duty was antecedently owed.

[152] As Windeyer J observed of the architect in *Voli* a duty was cast upon him by law not because he made a contract but because he entered upon the work. That is, it was the architect who created the risk that resulted in injury to the entrant, and it was his action in creating the risk that exposed him to a tortious a duty of care. So here. BMA created the risk by its insistence on consecutive 12 hour night shifts.

[153] In my view, engagement of HMP, and reasons to think it is performing its functions under the contract (if that was so), may satisfy a duty of care (more of that later) but it cannot prevent it arising.

[154] The argument was put that no duty of care was owed as it was not shown that HMP was not competent, and that BMA had no notice of any inadequacy in HMP's systems of work and fatigue risk management. But that is to put the cart before the horse. In other words BMA asserts that it is for the claimant to show that HMP was in some way an unsatisfactory choice as the organiser and manager of the workforce before a duty of care to its, HMP's, workers can arise. That may be a complete answer to the breach issue but not to the antecedent question of whether a duty of care was prospectively owed by BMA to workers brought to BMA's site to work for its ultimate profit under work systems that it had put in place, where it was BMA who controlled the workplace.

[155] BMA stressed that it was a service recipient, not provider, and argued that fact was a material one. Reference was made to *Voli v Inglewood Shire Council*.[120] The case is not authority for the proposition advanced. The Court did not hold that the Council, the service recipient, owed no duty of care to the person injured when its hall collapsed because it had a contract with its service provider, the architect. To the contrary, despite that contract the Council was held liable and equally so with the negligent architect.

[156] The facts here are much more analogous to those in *Crimmins v Stevedoring Industry Finance Committee*.[121] It was there held that the Australian Stevedoring Industry Authority had or should have had knowledge of the special risks to which the workers

[119] (1963) 110 CLR 74 at 85 per Windeyer J.
[120] (1963) 110 CLR 74.
[121] (1999) 200 CLR 1.

were subject and could control (or at least minimise) those risks by the exercise of its statutory powers, albeit they were employed by independent stevedores. It was the Authority that put the workers at risk of harm because it was the Authority that assigned the workers to particular stevedores. The Authority was held to control the source of the risk of harm to the workers. It followed that the Authority owed a waterside worker a common law duty to take reasonable care to protect him from reasonably foreseeable risks of injury arising from his employment by registered stevedores.

[157] While this is not a case concerned with the exercise of statutory power it is about controlling the source of the risk of harm. And it is BMA's involvement in both the creation of the risk and its control that is at the heart of the case brought against it. BMA complains that the plaintiff effectively equates its position to that of HMP. That is true. Normally the complaint would be a good one. An occupier of a site who brings onto the site a contractor skilled in performing work can normally expect to be allowed to let the contractor to protect its own workers. The peculiarity here is that the risk does not arise out of some aspect of the work within HMP's expertise. It is BMA who creates the risk, and it is BMA who is arguably in the best position to control it. That also provides an answer to BMA's submission that if BMA had to guard against this risk it had to guard HMP's employees and contractors against all risks emanating from the work. That is not so. Some risks, probably most, were inherently those HMP would be expected to control and manage.

[158] In his judgment in *Caltex Refineries (Qld) Pty Ltd v Stavar*[122] Allsop P went on:

> "There is no suggestion in the cases that it is compulsory in any given case to make findings about all of these features. Nor should the list be seen as exhaustive. Rather, it provides a non-exhaustive universe of considerations of the kind relevant to the evaluative task of imputation of the duty and the identification of its scope and content.
>
> The task of imputation has been expressed as one not involving policy, but a search for principle: see especially *Sullivan v Moody* at 579 [49]. The assessment of the facts in order to decide whether the law will impute a duty, and if so its extent, involves an evaluative judgment which includes normative considerations as to the appropriateness of the imputation of legal responsibility and the extent of thereof. Some of the salient features require an attendance to legal considerations within the evaluative judgment."

[159] To the extent the decision involves "an evaluative judgment which includes normative considerations as to the appropriateness of the imputation of legal responsibility and the extent of thereof" I am satisfied that it is appropriate to impute legal responsibility to BMA to take reasonable care to manage the risk created by its insistence on the consecutive 12 hour night shifts.

Personal and Non Delegable

[160] That leaves for consideration Mr Kerle's claim that the duty was personal and non-delegable or, to use Mason J's phrase in *Kondis v State Transport Authority*[123] whether

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[122] (2009) 75 NSWLR 649 at 676-677 [104]-[105].
[123] (1984) 154 CLR 672 at 687-688.

BMA was under "a special responsibility or duty to see that care was taken." Mason J's judgment in *Kondis* (with whom Deane J agreed, at least generally) is often cited as accurately setting out the law on the subject of the imposition of such a duty. Mason J identified the requisite necessary circumstances for the imposition of such a duty in the following passages in his judgment:

> "In these situations the special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised.
>
> …
>
> The foreseeability of injury is not in itself enough to generate the special duty. Before the special duty arises there must exist in the relationship between the parties an element of the kind already discussed.
>
> That such an element exists in the relationship of employment is beyond serious challenge. The employer has the exclusive responsibility for the safety of the appliances, the premises and the system of work to which he subjects his employee and the employee has no choice but to accept and rely on the employer's provision and judgment in relation to these matters. The consequence is that in these relevant respects the employee's safety is in the hands of the employer; it is his responsibility. The employee can reasonably expect therefore that reasonable care and skill will be taken. In the case of the employer there is no unfairness in imposing on him a non-delegable duty; it is reasonable that he should bear liability for the negligence of his independent contractors in devising a safe system of work. **If he requires his employee to work according to an unsafe system he should bear the consequences.** Indeed, there is a stronger case for concluding that the employer's duty is non-delegable than there is for reaching the same conclusion in the case of the invitor...."[124]

[161] The most cogent argument for the imposition of a non-delegable duty is that if BMA required workers on its mine site to work according to an unsafe system BMA should bear the consequences. It is BMA who required the employee to work in accordance with a particular system of work that created the risk. It is BMA who had control over the premises. It is BMA who controlled HMP through its contract.

[162] Against those considerations, BMA did not have the "exclusive responsibility" in relation to relevant matters as might an employer and which led Mason J to assert that "in these relevant respects the employee's safety is in the hands of the employer."[125] But while it was not exclusive it was dominant. A significant feature here is that the employer, Axial, did not have "exclusive responsibility" in the sense of an ability to exercise autonomous action. Nor did it have the resources to supply housing or transport. Axial was under the control of HMP and HMP under the control of BMA. Axial argues that lack of autonomy in its defence.

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[124] Ibid – my emphasis and footnotes omitted.
[125] Ibid at 688.

[163] When I compare BMA's position to that of HMP there are two relevant differences. The first is that BMA was the one in control of HMP. That suggests that if a non-delegable duty is to be imposed on HMP so it should be on BMA.

[164] The second difference is that HMP had day-to-day contact and control over Mr Kerle and BMA did not. Because of that it cannot be said that BMA had "undertaken the care, supervision or control" of Mr Kerle being the first of Mason J's postulates. Was BMA so placed in relation to Mr Kerle "as to assume a particular responsibility for his … safety, in circumstances where [Mr Kerle] might reasonably expect that due care will be exercised"? I think not. The interposition of contactors between BMA and Axial's employees means that BMA had deliberately distanced itself from those employees. The extension of the non-delegable duty to host employers comes about because those employers are in as close a connection with the employee as the actual employer, or if anything closer in the circumstances actually pertaining. BMA is not in that position *vis à vis* Mr Kerle. As senior counsel for BMA submitted:

> "… [Mr Kerle] was not selected by BMA; it had no say in the fact he lived and intended to commute a long distance from site; he was trained by HMP by its own trainers; he was supervised and answered to HMP's staff; his specific shift arrangements were matters between him and HMP; his immediate safety was in HMP's hands; hiring and firing was a matter for HMP not BMA. Moreover, [Mr Kerle] knew or ought to have known all this."[126]

[165] I am conscious of the statutory duties imposed on BMA discussed earlier. No doubt employees on the mine had an expectation that BMA would be responsible for matters falling within their purview. But beyond that employees in Mr Kerle's position had no reason to expect the mine owner to take due care for their safety.

[166] I conclude that the duty was not personal and non-delegable.

Autonomy

[167] Before leaving the subject I should respond to BMA's submission that the duty contended for amounts to an unwarranted imputation of a duty to control Mr Kerle's autonomous actions. Reliance was placed on *Stuart v Kirkland-Veenstra*[127] and what was said there concerning the duty which the plaintiff alleged the police officers owed her late husband being a duty to control his actions to prevent him harming himself. The comparison is inapposite. BMA is in a very different position to the officers in *Stuart* relative to the injured person. The police officers there did not create the risk that caused the husband's death. Indeed they did not appreciate that there was a risk of imminent suicide. The plurality[128] pointed out:

> "In the present matter, as in a number of cases about the exercise of statutory power, it is the factor of control that is of critical significance. It was not the officers who controlled the source of the risk of harm to [the deceased]; it was [the deceased] alone who was the source of that risk. For the reasons that have been

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[126] Ex 40 para 53.
[127] (2009) 237 CLR 215.
[128] Gummow, Hayne and Heydon JJ.

expressed in connection with consideration of the value of personal autonomy, this factor is of predominant importance."[129]

[168] The submission depends on the view that the crucial act that created the risk of harm was Mr Kerle's decision to drive home at the end of his shift. While obviously true in one sense the submission ignores all that went before and the context in which that decision was made. The postulated duty required BMA to use reasonable care to avoid unnecessary risks of injury and to minimize other risks of injury.[130] What "reasonable care" might involve will be influenced by those considerations that differentiate BMA from Axial, the actual employer, and indeed by all the circumstances of the case.

[169] I am satisfied that each of the defendants owed a duty of care. I turn them to consider the issue of breach.

BREACH OF DUTY

[170] In considering the position of an employer it has been said[131] that a case based upon an allegation of unsafe system of work will be unfit for submission to the jury unless the evidence establishes four separate issues of fact:

(a) that the defendant's operations involved a risk of injury which was reasonably foreseeable;
(b) that there were reasonably practicable means of obviating such risk;
(c) that the plaintiff's injury was caused by the risk in question;
(d) that the failure of the defendant to eliminate the risk showed a want of reasonable care for the plaintiff's safety.

[171] The same four issues are relevant to each of the defendants. I have decided the third issue in favour of the plaintiff.

Foreseeability

[172] I have already said that the risk was both foreseeable and foreseen. I did not understand that to be in issue. However it is useful to briefly note the extent of the knowledge available to employers, contractors and mine owners and well before the subject accident.

[173] On 9 October 2000 the House of Representatives Transport Committee of the Commonwealth Parliament released its report on managing fatigue in the Australian transport industry entitled "Beyond the Midnight Oil: Managing Fatigue in Transport". While not directly concerned with the mining industry there are several obvious parallels. The report at least identified that driving whilst fatigued was a matter of concern.

[174] In 2001 the Queensland Parliament introduced s 42 of the Regulations that I have discussed above. The need for fatigue management plans to manage risks of injury on mine sites was legislatively acknowledged. It is a small step from that to risks of fatigue related accidents immediately after work.

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[129] *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 at 254 [114].
[130] *Stevens v Brodribb Sawmilling Co* 160 CLR 16 at 47-48 per Brennan J - see [89] above.
[131] *The Liability of Employers* (1979, 2nd edn) by Glass, McHugh and Douglas at 25-26.

[175] In November 2007 the New South Wales Mine Safety Advisory Council published the findings of the "Digging Deeper" Project. The experts assembled were asked to investigate three areas of interest to the mining council, one of which was "hours of work and fatigue management". The Project was interested in mining in New South Wales. The mining industries examined included, but were not restricted to, extractive industries. Their executive summary notes that "night shift was reported to cause significantly worse effects on work performance and fatigue levels than either afternoon or day shift" and that "current shift arrangements are not adequately managing the risks associated with shift work."[132]

[176] Among the possible control measures suggested in the "Digging Deeper" report were reducing working hours, controlling the length of shifts, and, noting that "excessive commuting times" were a factor, proposed starting work the day after arrival and commencing the drive home the day after the shift cycle finished, and providing transport.[133] The defendants argued[134] that the report was not germane to Queensland and they ought not to be expected to have had cognizance of it. No material difference was shown to exist between fatigue management in Queensland mines and those of New South Wales. If anything long distance commuting, and so the prospect of serious accidents, is much more of a feature of mining work in this State. No evidence was led that the report was not published and freely available to anyone interested in mine safety. And each of the defendants ought to have been interested in mine safety.

[177] Some of HMP's submissions appeared to be based on the premise that an employer discharged its duty of care by responding to government initiatives. For example it was argued that the Digging Deeper report was irrelevant as it was directed to the NSW government for formulation of policy and "to refer to the report at this stage absent the completion of such government processes is premature and apt to mislead".[135] It was further submitted that "Mining communities in Qld would look to the regulators in Qld and not NSW for the regulatory process to be applied to Qld mines".[136] This submission completely misapprehends the obligation on HMP. Employers and those in like positions such as HMP are obliged to be proactive to the risks that they create not reactive to government intervention. Where employers expose their workers to a risk of injury then it is the employer who must take steps to adequately meet that risk.

[178] BMA says that it was proactive. Among the admitted documents is BMA's booklet entitled "Managing Shiftwork and Fatigue – A shared responsibility" published on 1 January 2006.[137] The booklet contains much of the information on the impact on shift workers of working consecutive night shifts and consequent fatigue set out in Professor Rogers' comprehensive report that was tendered. Included in that material is a discussion of work related fatigue:

> "If we are chronically sleep deprived, our ability to be alert will be compromised because we will carry a sleep "debt" which we must pay back if we are to be restored to peak levels of alertness. Research has found that most shift workers are sleep deprived (only getting an average of 5.82 hours sleep on night shift and 6.76

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[132] Ex 16 p xi.
[133] Ex 17 p 13, 15.
[134] Eg see the second defendant's submission at Ex 38 para 53.
[135] Ex 38 para 53(c).
[136] Ex 38 para 53(d).
[137] Ex 2 tab 44.

> on day shift), compared to around the 7-9 hours per day we require. We know from discussions with many employees from mines in this area, that many of you obtain less than four hours sleep while on nightshift.[138]
>
> ...
>
> This sleep debt accumulates over the shift cycle…[139]
>
> …
>
> Many shift workers get used to being in this state thinking it is a "normal" part of the way they work and do not realise it is a problem."[140]

And this conclusion:

> "One or a combination of these things can lead to a situation where some employees fall asleep at work in an uncontrolled way. Indeed the main reason why sleep related fatigue is such a potential hazard at work is that while we may realise we are tired**, we cannot predict the time of the actual onset of sleep**."[141]

[179] The booklet includes a table dealing with "Signs of Fatigue" and "High risk times of day". In the latter column appear "New to shiftwork", "Driving home" and "Commuting."[142] Each of those applied to Mr Kerle.

[180] Under the heading "Assessing and controlling risks associated with fatigue at work" is a "Hazard Alert" after which the following appears:

> "… we know that when some shift workers are tired, they are driving home and this is of particular concern for those of you who are travelling long distances. For those of you who commute by bus, this is not a direct issue for you.
>
> Research shows that shift workers are 7 times more likely than other commuters to be involved in a road fatality. Commuting when you are tired is therefore something that presents a serious risk to your safety and the safety of others.
>
> If you do drive to and from work, and are tired coming off night shift, either do not drive home or get someone else to take you home. Do not drive when you are sleepy, if you do, you are an accident waiting to happen. This is because whilst we can know that we are tired, we cannot predict when we might involuntarily might [sic] fall asleep."[143]

[181] There is no evident reason why, if this information was available to BMA, it was not also available to HMP and Axial. Each chose to work in the mining sector and was involved in the decision to place men on night shift work. The relevant controlling minds should have familiarized themselves with relevant safety issues. It was long ago established that employers were required to keep abreast of developing knowledge

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138 Ex 2 tab 44 p 3.
139 Ibid p 4.
140 Ibid.
141 Ibid p 5 – emphasis in the original.
142 Ibid.
143 Ibid p 7.

regarding risks and means available to combat them: *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd*;[144] *Thompson v Smiths Shiprepairers (North Shields) Ltd*;[145]and more recently in the Supreme Court in England in *Baker v Quantum Clothing Group Ltd*[146] a case concerning hearing loss due to exposure to noise . These authorities were applied by Gray J in *BHP Billiton Ltd v Parker*[147], a case concerned with asbestos exposure. Where, as here, BMA and, by its contract, HMP were evidently well aware of both the risks and the responses that those having expertise in the area recommended more can be expected. In *Baker* Lord Mance JSC approved the observations of Swanwick J in *Stokes* which included the following*:*

> "…where there is developing knowledge, [the employer] must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions."[148]

[182] Mustill J concluded in in *Thompson v Smiths Shiprepairers (North Shields) Ltd*[149]: "The employer must keep up to date, but the court must be slow to blame him for not ploughing a lone furrow." As the evidence of Professor Rogers shows this was no lone furrow that the plaintiff argues the defendants ought to have ploughed.

[183] In any case, under the terms of its contract with BMA HMP was obliged to make itself familiar with these guidelines and to ensure Axial was. I will detail some of the provisions.

[184] On 17 April 2007 BMA entered into a "Special Services Agreement" with HMP in relation to the Norwich Park Mine. Clause 5.1 of the agreement obliged HMP to:

> "be aware of, comply with, and ensure that its employees, agents contractors, and subcontractors are aware of and comply with … (ii) all safety, health and environment guidelines, rules and procedures provided to the contractor by the Principal or specified in …Annexure J (Fatigue Management Policy)….".[150]

[185] Clause 5.3 required HMP to comply either with that standard or if "applicable health, safety, environment and community laws and regulations are of a different standard or quality" then "the most stringent requirement."[151]

[186] BMA reserved to itself the right to audit compliance with these provisions: cl 19 of Annexure A to the agreement.

[187] Annexure J to the contract included express reference to the booklet I referred to earlier, "Managing Shiftwork and Fatigue – A shared responsibility".[152] There is no evidence one way or the other as to whether the booklet itself was made available to HMP. It was not given to Mr Kerle. It was not given to Axial

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[144] [1968] 1 WLR 1776 at 1783.
[145] [1984] QB 405 at 415-416.
[146] [2011] 4 All ER 223.
[147] [2012] SASCFC 73.
[148] [2011] 4 All ER 223 at [9].
[149] [1984] QB 405 at 415–416.
[150] Ex 2 tab 8 p 7.
[151] Ibid p 8.
[152] Ibid p 186.

[188] Annexure J is titled "BMA Minimum Standard for Fatigue Management Plans" and was issued on 1 January 2006. Clause 6.3 of Annexure J provided that a "training and education program on Managing Shiftwork and Fatigue" was to be developed and implemented on BMA controlled sites. Topics to be covered included "Travel and commuting issues".[153] The "depth of training" to be given to people depended on the "level of fatigue risk that they are exposed to" and examples were given of persons considered to be high, medium or low risk.[154] Mr Kerle was in the high risk category being a shift worker who accessed operating areas.[155] Personnel in that category were "as a minimum" required to attend "fatigue management training as provided by the BSS Corporate Psychology Services and shall complete *The Complete Fatigue Management Workbook."*[156]

[189] Clause 6.10 of Annexure J titled "Commute Travel" provided:

> "In recognition that a large percentage of BMA employees and contractors commute long distances from their principal places of residence to the Central Queensland mining towns, training and education should cover commute travel strategies. Training and education should focus on people taking personal responsibility for their and others' health and safety when commuting. The following commute strategies should be encouraged:
>
> - Travelling to work on the day prior to commencing a Day Shift rather than waking early and travelling on the same day;
> - Allowing for adequate rest immediately prior to commencing a Night Shift;
> - Car pooling with others;
> - Planning appropriate rest breaks through the trip;
> - Having a sleep after working a Night Shift and prior to travelling home;
> - Arranging appropriate accommodation that provides for quality sleep whilst on shift."

[190] Thus the comprehensive treatment of the subject in the BMA documents makes plain that the long distance commuting at the end of a roster was a risk that was acknowledged by those involved in the mining industry long before the subject accident.

[191] I note that Axial too had a fatigue management policy.[157] It is quite basic. It incorporates some half a dozen paragraphs. It reads in part:

> "Policy statement
>
> Research has confirmed that fatigue impairs a person's judgment and response times in similar way to the consumption of alcohol.
>
> In extreme cases this can significantly increase the risk of accident or injury to an employee at work or on the journey to or from work."

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153 Ibid p 189 cl 6.3.
154 Ibid p 189 cl 6.3.1.
155 Ibid p 191 table 2.
156 Ibid p 191.
157 Ex 2 tab 16 p 24-25.

[192] Thus Axial too by its own documents and prior to the subject accident acknowledged the existence of the risk of injury on the journey to and from work resulting from fatigue. Nonetheless the document was quite misleading in downplaying the risks involved.

[193] The expert evidence led makes plain that driving long distances more than 15 hours after last rest, as Mr Kerle was doing, involved a significantly increased risk of accident or injury. The use by Axial of the word "extreme" in defining the relevant class of case under consideration implies that the risk of a fatigue related accident was quite unlikely to occur. That is not in accord with the evidence. The statistics I set out below suggest that long distance commuting after 12 hour night shifts was commonplace. The expert evidence was that a significant increase in the risk occurred if such commuting was undertaken beyond a 15 hour period from rest to rest. Given the frequency with which such commuting was undertaken the significantly increased risk was an every day one. The policy document is quite misleading but at least acknowledges the risk is present.

[194] Total consecutive hours worked under Axial's policy was limited to 16 hours.

Practicability

[195] Mason J's now familiar formulation in *Wyong Shire Council v Shirt*[158] explains the response expected of a reasonable man, there being a foreseeable risk of injury and a duty of care owed:

> "In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position."

[196] The magnitude of the risk was high – serious injury or even death was possible on a long journey home when fatigued.

[197] The degree of probability of the risk eventuating also seems relatively high. The statistics referred to earlier[159] are relevant – one study showed that 16.6% of fatal road accidents and 19.6% of road fatalities were fatigue related. The risk of dying on rural roads from a fatigue related crash is 13.5 times higher than in urban areas. There were statistics proffered of the percentage of mine workers who drove long distances after finishing their roster. A 2008 study showed that 81% drove alone in their cars. Of those 67% drove from 1 to 3 hours, 19% 3 to 5 hours and 12% more than five hours.[160]

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158 (1980) 146 CLR 40 at 47–48.
159 See [82].
160 Ex 54 p 20.

[198] In my view this was not a risk that could be simply ignored. The defendants did not argue that it could be. Rather they each argued that what was done was sufficient. That depends first on what was in fact done, and secondly on an assessment of the "expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have" in respect of the measures in question that were not undertaken.

[199] Counsel for Mr Kerle submitted that there were four ways, each reasonably practicable, by which the risk of injury to him could have been obviated or minimised:

(a) have in place proper limits on the length of shifts so that for workers such as Mr Kerle the total time from place of last rest to the worker's next place of rest did not exceed 15 hours;
(b) provide a bus service to transport workers at the end of a roster to major centres such as Rockhampton and Mackay with stops along the way;
(c) provide a place for Mr Kerle to rest after the shift;
(d) provide a program of education for workers about fatigue and its risks such that they could adequately identify when it was safe to drive and when it was necessary to undertake rest before doing so, and more particularly what the nature of the risk was that they were exposed to and what were the necessary means to manage the risk, given its potentially insidious nature.

[200] I note that the plaintiff's argument was that no one proposition should be looked at in isolation. Thus appropriate education would equip the worker with the knowledge necessary to exercise sound decisions when determining whether to avail themselves of a bus service, or deciding to rest, or to otherwise limit their driving.

[201] In assessing practicability I observe that the first proposition is controversial, as to the second a bus service was introduced subsequently at the mine by HMP, and as to the third and fourth, each defendant says it was in fact done.

The Length of Shift

[202] The 15 hour limit on activity between rest times is well supported by the experts.

[203] The length of shift argument involves alternative propositions – either limit the time actually worked so that the shift finishes in sufficient time to allow the worker to drive for some specified time (to his or her home perhaps) within the 15 hours; or end the work early and pay the workers to rest for the balance of the shift. Each involves the proposition that workers be paid to not work. That is the controversial element. That it is controversial I take from the submissions and Professor Dawson's evidence. I am puzzled as to why. First, requiring workers to rest before driving home is a practice followed at some mine sites according to Professor Rogers.[161] And more significantly perhaps, the proposition to end the shift early to allow workers to drive to their home base appears to be precisely what HMP agreed to do in its contract with BMA.

[204] Annexure J to the service agreement between the two companies that I have referred to includes a document entitled "BMA Hours of Work Standard".[162] The standard included the concept of "gross shift length" which included "shift length" with "travel time" as defined. That latter definition was:

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[161] Ex 2 tab 54, p 39, section 6.5.
[162] Ex 2 tab 8, p 182.

> "The time taken to travel from the person's place of residence whilst working a block of rostered shifts. ***Travel Time*** does not include the commute time if the person's principle *(sic)* place of residence is remote from the worksite. (For example ***Travel Time*** does not include the time taken to drive from Mackay to Moranbah if the person's principle *(sic)* place of residence is in Mackay)."[163]

[205] The maximum gross shift length was 15 hours (cl 6.2.1) with provision for an extension to 16 hours (cl 6.3.1). These provisions, which by their terms were not concerned to enable workers to travel to their principal place of residence within the 15 hour period identified, were subject to cl 6.4 which dealt with "Commute Time":

> "6.4 Commute Time
>
> It is recognised that BMA employees and its contractors commute some considerable distance from their principle *(sic)* places of residence to work. The following controls will apply.
>
> 6.4.1 BMA Employees
>
> BMA employees whose principle *(sic)* place of residence is remote from the Central Queensland mining towns are encouraged to plan appropriate rest periods prior to and after their rostered shifts. Sleeping following the working of night shifts and prior to travelling extended distances is encouraged.
>
> Commuting is a personal choice. Shift lengths will not be reduced to cater for the time taken to commute. Employees have a responsibility to ensure they present to work in a fit and healthy state.
>
> 6.4.2 Contractors
>
> **Contract management deploying their employees to BMA operating sites shall ensure that the total time from place of rest to the employees' next place of rest shall not exceed 15 hours.**
>
> **Example: A contractor, whose base is in Mackay, staying in motel accommodation at Blackwater and leaves the motel at 05:30 to start work at BWM[164] at 06:00, must leave BWM at 16:00 in order to arrive back in Mackay by 20:30 and not exceed to 15 hour limit.**[165]
>
> Notwithstanding this limitation, rest breaks prior to travelling long distances, particularly after working night shifts may be prudent risk management."

[206] Hence while BMA exempted itself from complying with the more stringent standard it expected no less from HMP.

[207] Where sophisticated commercial enterprises such as BMA and HMP, well accustomed to mines and mine workers, agree on such a provision it seems remarkable that the practicability of it would be so strongly disputed by those same companies. I note in

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[163] Ex 2 tab 8 p 201 cl 4.9.
[164] I assume a reference to "Blackwater mine". The drive from Mackay takes a little over four hours.
[165] Ex 2 tab 8 p 206 - my emphasis.

passing that subsequent to the accident (less than two months) the 15 hour limit was reduced to 14.5 hours.[166]

[208] Senior Counsel for HMP submits that the clause was not designed to enable workers to return to their home base within the 15 hours. He pointed out that the clause refers to "next place of rest". He argued that where there is a camp site adjacent to the mine then that is the place to which the worker must return within the 15 hours intended by the clause.

[209] While that may be relevant to whether or not HMP complied with their own contract – a subject to which I will return - that construction is no answer to the argument that the contract itself contemplated, as a practical response to the risk of fatigue related accidents when commuting long distances, that shifts be shortened.

[210] It is uncontroversial that there was no limiting of the shifts worked.

[211] As a general comment it has often been said in cases involving safety at the workplace that in the hierarchy of controls the best are those that are not dependent on worker behaviour – the engineered solution is the more reliable way of meeting the risk in question. Here there can be no engineered solution that completely meets the risk. Of the four options advanced by Mr Kerle the closest to an engineered solution is the suggested shortening of shift. The simplest approach from a management perspective was to require that workers remain at camp so that they could rest.

[212] BMA's defence to the plaintiff's pleading that the length of shifts should have been controlled comprehends, I think, all arguments advanced by the defendants. The arguments appear in paragraph 14 of its amended defence:

> 14. As to paragraph 14 of the statement of claim, BMA:
>
> 14.11B further or in the alternative, says shortening the length of the last shift in a roster was not a reasonable response to the risk in that:
>
> 14.11B.1 it would encourage or allow workers to commence a journey home during the low point in the circadian rhythm, namely between 12 midnight and 6am;
>
> 14.11B.2 it would truncate and/or disrupt the shift between the conclusion of the shortened night shift and the commencement of the next day shift;
>
> 14.11B.3 the workforce was constituted by persons who:
>
> 14.11B.3.1 had journeys to their homes, or other destinations, of varying lengths;
>
> 14.11B.3.2 may or may not have wished to leave the MAC camp between rostered sets of shifts;
>
> 14.11B.3.3 had, or may have had, different rest or sleep periods prior to the commencement of their last night shift;
>
> 14.11B.3.4 may, or may not, be suffering from the same level of fatigue as other works on the same shift;
>
> 14.11B.3.5 may, or may not, want to depart from the camp immediately at the conclusion of the last night shift.
>
> 14.11C further or in the alternative, says there was no, or no sufficient, research basis available as at October 2008 so as to allow any proper decision as to the

[166] Ex 21 p 33, 35 (note this document is dated 13 November 2008, only one a half months after accident.)

length of time by which any shift ought be shortened for or in respect of any individual, or group of workers;

14.11D further or in the alterative, says the duration of any shortening of a shift provided reasonable protection against the risk of a worker suffering from fatigue so as to render the journey undertaken after the completion of a shift unsafe.

…

14.11F further or in the alternative, says an instruction to rest was neither enforceable nor sufficient to overcome any accumulated sleep deficit;

14.11G further or in the alternative, says the workforce was constituted by persons who:

14.11G.1 had commute journeys to their homes of varying lengths;
14.11G.2 may or may not have wished to go to their homes or other locations between rostered sets of shifts;
14.11G.3 had, or may have had, different rest or sleep periods prior to the commencement of their last night shift;
14.11G.4 may or may not be suffering from the same level of fatigue as other workers on the same shift;
14.11G.5 may, or may not, want to depart from the camp immediately at the conclusion of the last night shift;
14.11G.6 was no, or no research basis available as at October 2008 so as to allow any proper decision as to the length of time by which any shift ought be shortened for or in respect of any individual, or group, of workers;
14.11G.7 the duration of any shortening of a shift would not, in any one case, provide adequate protection against the risk of a worker sufficiently suffering from fatigue as to render any journey undertaken after the completion of a shift unsafe;

14.11H further or in the alternative, says that BMA had no power or ability to enforce the plaintiff to sleep prior to the commencement of his journey to Monto on or about 6.30am on 28 October 2008 as sleep was the only means by which any sleep debt could be repaid.

[213] I am not sure what is intended by the pleading at para 14.11D. Perhaps there are words missing. Para 14.11G.7 is almost identical but it has the words "would not, in any one case" as qualifying the protection offered by the shortening of the shift.

Para 14.11B.1

[214] Para 14.11B.1 is a plea that the introduction of such a regime would not meet the risk.

[215] Professor Dawson pointed out that in Mr Kerle's particular circumstances limiting the shift time to enable him to leave on the drive home at say 2am (up at 3.30pm the day before and so the 15 hours ended at 7.30 am with a five hour commute) exposed Mr Kerle to driving at the circadian low point. That in itself has risks.

[216] It is accepted that the actual circadian low point for any given individual can vary and vary markedly, and that the working of night shifts itself tends to shift that low point. So how acute the risk for any given individual cannot be known. But generally speaking, for most individuals, midnight to 6am will represent their circadian low

point. However there is a fundamental fallacy in this response that was exposed in cross examination of Professor Dawson.

[217] Mr Diehm pointed out that Mr Kerle was expected to work through his circadian low point driving trucks on a mine site which one assumes has significant hazards. What distinction then was to be drawn between the risks on the road and the risks on the mine site? Mr Diehm explored the issue:

> "Well, Professor Dawson, how can it be an answer to managing the risk that the worker might be put at by driving through the circadian low point to have him instead driving a truck around a mine site? -- Because it's a community-acceptable risk. We accept the risks to the community of people having accidents while working night shift, because we believe as a community that the benefits of that, whether it be mining or healthcare or emergency services operators, is a reasonable thing for the community to expect. I agree with you: it is not ideal. But the community expects and tolerates that level of risk."[167]

[218] That answer, save for the concession that "it is not ideal", is with respect unsatisfactory in several ways. While useful in revealing the professor's mindset it was otherwise completely irrelevant. As it reflects the approach that Professor Dawson took to many of the questions with which he was confronted I think it necessary to observe that Professor Dawson's views as to what might be acceptable to the community generally, or to the mining companies, can have no probative force.

[219] The first point is that Professor Dawson is there expressing an opinion and an opinion on which he has no demonstrated expertise. He was not invited by the cross-examiner to do so. The second point is that he is in effect swearing the issue. The point of this trial is to determine what level of risk to mine workers is acceptable to the community (as represented by the Courts) in accordance with legal principle. The third point is that even had Professor Dawson any expertise to inform the Court of what "community-acceptable risk" might entail, and were his views relevant, he has not disclosed how he has reached that view – what assumptions he has made and what research he has performed.[168] I suspect none.

[220] For my own part I do not know under what conditions "healthcare or emergency services operators" work. Professor Dawson's views equate the extent of the fatigue experienced by healthcare or emergency services operators performing shift work with that of machinery operators working 12 hour shifts on mine sites. It may be that the fatigue induced thereby is the same but that was not shown. But the proposition tends to put at naught the distinction between such operators and a mine worker. In the former case the risk is an unavoidable one if our community is to function. In the latter case the risk is incurred to increase the profits of the mine operators. It is entirely avoidable. Those who bring the risk into being for their own profit are required to manage it.

[221] Effectively I take Professor Dawson's answer, so far as his expertise goes, to be that there is no significant distinction in the risks that he can identify. While I would anticipate that speeds would be higher on the highways there are many hazards on

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[167] T6/15-28/35.

[168] As to the need for that disclosure see *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 731-732 [64] per Heydon JA (as his Honour then was).

mine sites that one doesn't encounter on public roads. It was not argued that the risk of injury when driving on the highways was appreciably different to that of driving on a mine site.

[222] The effect of the expert evidence seems to be that while driving at the circadian low point is not ideal, the risks are sufficiently manageable to permit the driving of heavy machinery on a mine site and therefore on the roads. However the risks increase if one attempts to drive more than 15 hours after the last rest period. As Mr Diehm demonstrated in his cross examination of Professor Dawson he would have considered the risks involved in having a worker drive machinery after being on duty for 15 hours, as a "significant risk".[169]

[223] A measure that minimises but does not remove a risk of injury is not dismissed as impracticable. I have previously referred to Brennan J's formulation of the duty owed by an independent contractor in *Stevens v Brodribb:*[170]

> "The duty to use reasonable care in organizing an activity does not import a duty to avoid any risk of injury; it imports a duty to use reasonable care to avoid unnecessary risks of injury **and to minimize other risks of injury**."

[224] This observation applies to all the suggested measures. Professor Dawson pointed out that it was not possible to eliminate fatigue by the implementation of fatigue management policies or procedures. All that can be done is to "implement sufficient additional controls in order to mitigate the risk."[171]

[225] In my view it is no answer to assert that the risks were present whatever approach was adopted. They were appreciably less with the restriction proposed.

Para 14.11.B2 - it would truncate and/or disrupt the shift between the conclusion of the shortened night shift and the commencement of the next day shift

[226] That disruption might be caused to the shifts is not per se a relevant response to amelioration of a foreseeable risk of injury. Perhaps the intended point is that adjustment of the shifts would have involved administrative effort and an increase in costs. If so then the defendants needed to lead evidence of the inconvenience and cost involved. None was led.

[227] One submission made which does not expressly fit within the pleaded case but may be encompassed by the pleading here was this:

> "…the blanket early shift departure to rest or sleep preparatory to commute has potential to foster workplace tension and worker abuse. One could readily predict workforce disharmony if on the last shift some workers finished 4 or 6 hours early on account of necessary commute, not just home but to wherever he or she wished to drive to join family members or friends on free time post shift, while others worked through."[172]

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169 T6-15/20.

170 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 47-48 (my emphasis.)

171 Ex 2 tab 55 para 4.4(c).

172 Ex 40 p 25 [94].

[228] I do not understand the plaintiff's submission to be that there should be one rule for one worker and one for another. Nor did I understand the proposition to be that the worker could pick and choose the destination and thereby alter his terms and conditions of employment. The argument seems to pre-suppose that the employers' approach should not be governed by practical considerations. That was not suggested nor is it essential to the proposed measure.

[229] Here again the absence of any evidence about the claimed practical difficulties is notable. No evidence was led of any worker unrest at mine sites that have endeavoured to control shift lengths. Professor Rogers gave evidence that she has worked for mines that have adopted this approach or at least claim to have done so in their fatigue management policies.[173]

[230] No evidence was led of the number of mine workers at Norwich Park Mine potentially affected by long commutes. According to the Confiance survey nearly 50% of workers lived over 3 hours away. Evidence was led of the introduction of a bus service to Mackay and Rockhampton subsequent to the subject accident which might inferentially suggest that significant numbers of workers resided in those locations. That introduction suggests that these matters can be worked out and policies formed. Why a policy could not be introduced of limiting shifts in a way that would lessen the risk for the majority of workers, based on their disclosed residential location was not explained.

[231] Effectively, the plaintiff's arguments require a flexible approach. The end point of the shift would presumably be dictated by practical considerations. The point of any policy would be to provide a situation in which the workers could, at some point, commute to their homes in relative safety. To some the risk might be met by taking a rest period; to others, they may be able to travel home within the 15 hour period the studies suggest is to be preferred; to others a combination might be necessary. To have an effective policy that substantially met the risk did not require that the hours worked be adjusted in a way that suited every individual. As mentioned the plaintiff's argument was that each of the proposed measures worked in with the other – they should not be looked at in isolation. That is how every expert who has looked at the problem has suggested it should be approached.

Para 14.11.B3 and 14.11G (save for 11G.6 and G.7)

[232] The plea in these paragraphs raise several discrete issues.

[233] That some men may not wish to travel home, or may not wish to leave camp immediately after the end of a shift, or have journeys of differing lengths to get to their homes, is no answer to the fact that rest for a period (or commuting within the 15 hours since last rest) reduced the risks of accident or injury. For those who wished to stay in camp the argument really is that the defendants are being required to pay a worker not to work when that is not necessary to keep that worker safe. That is, the true complaint is that the measure involves wasted costs. If that is the point, the defendants chose to lead no evidence on the subject.

[234] The plea in paras 14.11B.3.3 and 3.4 (and 14.11G.3.3 and 3.4) is that each individual may have had a different level of fatigue at the end of the shift, either because they are

[173] Ex 2 tab 54 at p 39 section 6.5; T5-35/18-23.

more resilient than their colleagues, or had more rest before the shift started. While true enough, that provides no reason to not implement a measure that would minimise the risks to the average worker. No employer has ever argued that risk minimisation should not be undertaken say on the factory floor because some workers are more vigilant than others, that some are less likely to be distracted by monotony or tedium, or that some are more able.

[235] As well the efficacy, or likely efficacy, of these measures needs to be judged in the context of proper education of the workers as to why the measure would be introduced and what their shared responsibility was.

Para 14.11C, 14.11F, 14.11G.6 and 14.11G.7

[236] By how much should a shift be shortened? The defendants' response effectively is that whatever the shortening permitted, the added rest period (or commuting time) thereby achieved could not be long enough to enable a worker to fully repay the sleep debt that had accumulated. Hence a risk remained and the measure was impracticable.

[237] The argument was premised on a shortening of the shift by something in the order of four hours – say from 6am to 2am. The expert evidence was consistent in that the only way to reverse the effects of sleep loss on neuro-cognitive functioning and performance is to get sleep. The evidence was also consistent that a nap for a period of 2 to 4 hours before driving may not be sufficient to pay off sleep debt and reverse entirely the effects of sleep loss if the extent of the sleep loss was sufficiently great. However these points have significant validity only if the workers are likely to be completely sleep deprived with an overwhelming sleep debt. If the workers were likely to be in that condition of complete sleep deprivation with an overwhelming sleep debt then they should not be working at that stage of the shift as the prospect of fatigue related accidents would appear inevitable. The fundamental premise underlying the defendants' approach to their own workplace is that those in their position should not assume that workers are likely to be completely sleep deprived with an overwhelming sleep debt. That is a reasonable assumption on which to predicate action for the commute home at the times envisaged.

[238] While it seems to have been common ground that sleep debt might well accumulate with consecutive night shifts it was not said that it would approach anything like complete sleep deprivation.

[239] On that premise the evidence seems consistent that such a rest period would be beneficial in reducing the effects of any sleep loss. The studies show that such a rest period would increase alertness and improve neurocognitive performance.[174] The authors of one paper tendered assert that their study showed that naps as short as 10 to 20 minutes "provided significant reduction in physiological sleepiness and eventually reduced subjective sleepiness levels".[175] While that paper was published in 2014 and well after the subject accident it reflected the findings of studies performed decades before. While some earlier studies had produced different or non-conclusive results it seems that those studies were dealing with complete sleep deprivation – "when

[174] Ex 2 tab 54, p 40, section 6.6 at p 40.
[175] Ex 19 p 1137.

pressure from homeostatic and circadian factors were approaching their maximal intensity."[176]

Para 14.11F and 14.11G - Enforceability

[240] Another objection made was that the management of these risks was a shared responsibility between the workers and the management – so much can be accepted – but each side lacked the necessary maturity to bring about a satisfactory resolution of the problems. The defendants rely on the following passage in the cross-examination of Professor Dawson and his reference to "fairyland". Mr Diehm was asking about the implementation of clause 6.4.2 in HMP's contract that I have referred to above:

> "So one might think that if – if it was decided to do so under this clause, it could be, well, instead of knocking off early and driving home early, you down tools and go and have a sleep before driving home? Yes, that's an entirely plausible strategy. For example, knock off at 2 o'clock, sleep for four hours, and then go home.
>
> A good and effective means of managing the risk from fatigue? Yeah. In fairyland. Because the difficulty that you keep overlooking here is that we're talking about management and unions in a highly contested industry, and it would be incredibly challenging to try and implement something where employees were paid to sleep, and conversely, it's incredibly difficult to require employees to stay in and rest after work. In the culture of the industry at the time, there wasn't the level of maturity – on either side of that discussion – to enforce those kind of issues."[177]

[241] I assume that Professor Dawson does not speak here as an expert in matters relating to fatigue but rather on the basis of giving evidence of factual matters that took place at some time in the past. He said that his personal experience in the industry was a result of his theoretical and academic research work "as well as considerable field-based consulting experience with the industry in the period 1998-2008".[178] What that experience was he does not detail.

[242] If I am wrong in that then Professor Dawson does not restrict himself to his field of expertise – while holding qualifications in psychology he claimed no expertise in the area of industrial relations or the management of human resources, and indeed revealed no experience in, or personal knowledge of, actual dealings between unions and management in the mining sector. To the extent that his *curriculum vitae*[179] revealed any connection with industry I noted the following:

(a) On page 2 paragraph 3 under Current leadership activities Professor Dawson talks of "identifying potential research partners from industry and the community with whom we can develop collaborative research projects";

(b) On page 3 under Academic achievements in point 2 he says "I have been instrumental in championing and establishing significant research collaborations between industry, regulatory and university sectors for

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[176] Ibid p 1132.
[177] T6-16/30-40.
[178] Ex 2 tab 55A p 3.
[179] Ex 23.

projects relating to Safety Management and workload in rail and aviation sectors";

(c) On page 3 under Academic achievements in point 4 he says he has extensive commercialisation experience - successfully developed and commercialised the FAID Software Package (which forms the basis of fatigue risk management analysis within the Australian Rail Industry");

(d) On page 3 under Academic achievements in point 9 he says he is a "recognised authority on Occupational Health and Safety issues concerning liability for shiftwork and fatigue-related accidents having provided legal reports and expert witness testimony in Australia, New Zealand and North America";

(e) On pages 4-5 under Career Highlights he was Project Leader of Qantas Fatigue Risk Management Project (2001-2006); Appointed Program Leader in CRC for Rail Innovation (2008); Appointed to the Fatigue Expert Panel, National Transport Commission (2009) and Appointed to the Rail Fatigue Expert Panel (2010);

(f) On pages 5-6 he lists various grants he has received.

[243] It was evident that Professor Dawson had had experience with the mining industry in some form – apart from his statement that I have mentioned his involvement with the Digging Deeper project would show that. However none of these various matters suggests any proper basis for the admission of Professor Dawson's evidence as establishing the facts on which he apparently bases his opinion, nor for the acceptance of his opinion if the facts were otherwise established, which they are not. Absent personal knowledge, all the professor is doing, at best, is relaying hearsay comments from an unidentified source. He is entitled, indeed bound, to reveal facts that he assumes and on which he relies in informing his opinion even if based on hearsay. But that does not establish the fact. It is worth repeating Heydon JA's remarks in *Makita (Australia) Pty Ltd v Sprowles*:[180]

> "The basal principle is that what an expert gives is an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based. If other admissible evidence establishes that the matters assumed are "sufficiently like" the matters established "to render the opinion of the expert of any value", even though they may not correspond "with complete precision", the opinion will be admissible and material: see generally *Paric v John Holland Constructions Pty Ltd*; *Paric v John Holland Constructions Pty Ltd*. One of the reasons why the facts proved must correlate to some degree with those assumed is that the expert's conclusion must have some rational relationship with the facts proved."

[244] However the most significant problem with the professor's evidence in this regard is that even if one accepts that the professor had personal knowledge of the matters of which he speaks he does not provide any basis upon which I can assess the credibility of his opinion. What were the attempts to implement these proposals? To whom were they made? When? With what response? What were the terms offered? Professor Dawson fails to comply with what Heydon JA referred to in *Makita* as "a prime duty of

[180] (2001) 52 NSWLR 705 at 731-732 [64] (citations omitted); and see *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588; [2011] HCA 21 at [37].

experts in giving opinion evidence: to furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusions."[181]

[245] For myself it is not immediately apparent why it would be "incredibly challenging to try and implement something where employees were paid to sleep." As Mr Diehm rather dryly observed in his submissions: "It's hard to imagine that workers would necessarily complain about something that was being done for their safety and that did not disadvantage any one of them."[182] It would indeed be interesting to hear what objections the workers had to the implementation of a system of work that required that they be paid for not working.

[246] If the professor meant that there was no guarantee that the workers would sleep, even though paid to do so, then that can be accepted as a trite observation that one cannot force another to sleep. No expertise is needed to so observe. But if it was intended to argue that the proposal was impractical to implement because of employee resistance then that is a different point. Generally speaking if an employer wishes to argue that they have not breached their duty of care in failing to implement a proposed alternative that would have kept the workers safe because it was impracticable as the workers would not have accepted the change then it is for the employer to prove the point by way of cogent evidence. The point was settled in *McLean v Tedman*[183]:

> "It is said, nevertheless, that the alternative system was not practicable because the employees would have refused to accept it or to have carried it out, notwithstanding that its object and effect was to protect them from injury. We would reject the suggestion that the appellant [ie the injured worker] bore the onus of proving specifically that the alternative system was acceptable to the employees and that they would have carried it into effect. In our view once the appellant was able to point to an alternative and safe system which was practicable in other respects and would have obviated the relevant risk of injury, it was for Brambles [ie the employer] to establish that in the circumstances of the case it would have been unable to enforce compliance with the suggested system because its implementation would have been resisted by employees on the ground that the increase in the time taken to do the work would have damaged the men's prospects of taking a second job."[184]

[247] In understanding the reference to enforcement of compliance regard should be had to an earlier part of the judgment where the plurality pointed out:

> "The employer's obligation is not merely to provide a safe system of work; it is an obligation to establish, maintain and enforce such a system. Accident prevention is unquestionably one of the modern responsibilities of an employer (see Fleming: *The Law of Torts* (6th ed, 1983) pp 480–1). And in deciding whether an employer has discharged his common law obligation to his employees the court must take account of the power of the employer to prescribe, warn, command and enforce obedience to his commands."[185]

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[181] Ibid at 729-730 [59] and the numerous authorities there cited.
[182] T7-83/33-36.
[183] (1984) 155 CLR 306.
[184] Ibid at 314 per Mason, Wilson, Brennan and Dawson JJ.
[185] Ibid at 313.

[248] There may be a distinction to be drawn between BMA on the one hand and HMP and Axial on the other as to the power to command. I am not sure that there is - but I see no difference between the defendants on the issue of where the evidential burden of proof lay.

[249] And the professor may have intended his remark that it is "difficult to require employees to stay in and rest after work" to refer to the concept of staying on without pay after the 12 hour shift has ended. If he meant that the employers' power to order workers to do so is in doubt in those circumstances that is no doubt right but obscures the fact that the real issue is cost. As Professor Rogers observed: "…a lot of the issue is around whose time it is and how that particular time could be and is not compensated."[186] As I have said no evidence was led from the defendants showing that expense – in the sense Mason J intended in *Wyong Shire Council v Shirt*[187] – was relevant or at a level that made the implementation impracticable.

[250] There is no difficulty that I can perceive with imposing a requirement that workers stay – simply have as part of the contract of employment or hire a requirement that their pay includes a worker travelling by bus back to the camp site, and staying at the camp site for four hours before being at liberty to leave. As to a worker in fact resting – all that those in the defendants' position can ever do is educate as to the need for rest, provide facilities, and then leave it up to the worker. If there are difficulties with these propositions I would expect evidence to be led proving the point.

[251] However the proposition be framed – to shorten the shift, either to enable a rest period or to be permitted to go home early - the only real objection to the proposal is, I suspect, cost. It would cost the mine operators, or the contractors, or the employers, money to pay a worker not to work but to drive home or to rest.

[252] It is here that I find the lack of evidence from the defendants inexplicable. If there were reasons why the proposals advanced were not practicable then I would expect evidence from the defendants demonstrating the point. In regard to this proposal there was none. Mr Diehm submitted that I was entitled to draw a *Jones v Dunkel*[188] inference from this dearth of evidence. I agree.

[253] Counsel for BMA submitted that the decision of the Court of Appeal in New South Wales of *Harris v Woolworths Ltd*[189] stood for the proposition that the burden of proof lay on the plaintiff to demonstrate that the alternative measures proposed were practicable, not that the defendants show they were impracticable. If advanced as a general proposition applicable to all cases then I cannot accept that is the law. The decision in *McLean v Tedman*[190] shows that it is not.

[254] *Harris* was concerned with a slip on a supermarket floor. One issue concerned the practicability of a different floor surface. At first instance the judge held:

> "The plaintiff also contended that another precaution to avoid the risk of harm available to the defendant was to provide an alternative floor surface like the types referred to earlier (at [88]). This contention gives rise to a question of whether the

[186] T3-70/25.
[187] (1980) 146 CLR 40.
[188] (1959) 101 CLR 298.
[189] [2010] NSWCA 312.
[190] (1984) 155 CLR 306.

> provision of such alternative floor surfacing material was reasonable and practical. This was not an issue that was explored in the evidence. It would be relevant to know something about the cost of providing alternative floor surfacing material and whether it would be practical having regard to the number of people and shopping trolleys that traverse the supermarket floor space. There was no exploration in the evidence of whether the use of other floor surfaces might give rise to alternative risks to customers, for example, tripping in relation to mats. The plaintiff has the onus and I am not persuaded when considering the burden of taking these types of precautions to avoid the risk of harm (s 5B(2)(c) Civil Liability Act) that such steps would be reasonable and practical."[191]

[255] The NSW Court of Appeal upheld that finding. Hodgson JA[192] said:

> "... it was put that the primary judge erred in not finding the defendant negligent, because it didn't provide a non-slip floor in the area. The significance of this challenge is that if it were successful, it would overcome any causation problem. I accept that there was some material that might have supported a finding that a reasonable response to the risk of slipping by a reasonable person in the defendant's position would have been to install non-slip flooring in the area. However, in my opinion, in the absence of clear evidence directed to questions of cost, practicability, and advantages and disadvantages, it was open to the primary judge not to be satisfied of this, and in my opinion his reasons were apposite...." [193]

[256] So expressed the decision falls well short of a general statement that in a negligence case the plaintiff fails in the absence of evidence as to costs etc. of proposed alternative measures. Indeed there is authority for the proposition that where there was no evidence at all the plaintiff can still succeed. So, in *Neill v NSW Fresh Food & Ice Pty Ltd,*[194] Taylor and Owen JJ said:

> "…in many cases no more than common knowledge, or perhaps common sense, is necessary to enable one to perceive the existence of a real risk of injury and to permit one to say what reasonable and appropriate precautions might appropriately be taken to avoid it."

[257] While the plaintiff failed there through lack of evidence the point remains true. In my view the correct position is this: while the overall burden always remains on the plaintiff the evidential burden can shift, and as the comment in *Neill* shows, sometimes not much is required to shift that burden. The general principle was identified by Lord Mansfield over 240 years ago in *Blatch v Archer*: "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted."[195]

[258] In *Harris* the issues going to cost and practicability were not matters on which Woolworths would be likely to have special knowledge. The cost of a non-slip floor can be proved easily from a third party supplier. The quality of such a floor vis-à-vis the floor in fact in place would be the subject of expert opinion. Woolworths were not

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[191] *Harris v Woolworths Ltd* [2010] NSWCA 312 at [17].
[192] Campbell and Young JJA agreeing.
[193] *Harris v Woolworths Ltd* [2010] NSWCA 312 at [33].
[194] (1963) 108 CLR 362 at 368.
[195] (1774) 1 Cowp 63 at 65.

in some special position of advantage in appreciating that durability might be an issue, or in being able to seek out engineers familiar with different floor surfaces. Evidence of this type, in my experience, is proffered by plaintiffs as a matter of course in slipping cases. For some reason none was there.

[259] In contrast here the defendants were in a far better position than the plaintiff to understand why such a measure as is proposed was impractical, and the defendants had exclusive access to the evidence that might show that.

[260] Take cost. Presumably if the plaintiff was to be permitted to stop work at say 2am either to rest or to allow him to drive home within the 15 hour limit, then all workers must receive that same treatment. What is the cost impact (both relatively to income or profit and absolutely) on the defendants? Only they will know.

[261] I think that the argument is much the same for each defendant but I will look at BMA's position. The cost may not only be relevant at the Norwich Park Mine – it is well known that BMA was involved in several mines in Queensland and perhaps elsewhere.[196] How many such mines are under their control and whether those mines faced the same measure of risk is something only BMA could show. A measure demanded by a duty of care cannot be restricted to just one mine where there are similar problems elsewhere that the defendant must confront. And whether a measure is expensive or inexpensive is a relative concept. BMA is described in the contract documents as an alliance of BHP Billiton and Mitsubishi, two of the largest corporations in the world. In fiscal 2008 BHP Billiton Limited publicly reported a record profit of AUD$15.37 billion. What contribution the BMA Alliance made to that profit is unknown. Is the overall cost of this measure a fraction of one percent of the relevant profit or something more significant? Only BMA can say. It chose to say nothing. Presumably HMP and Axial were able to adjust their contract rates to accommodate such expense. Given the contractual terms already discussed it is difficult to see how cost could be relevant.

[262] In summary the contract between BMA and HMP provided for control of shift lengths. That was not done. No evidence was led from the defendants to suggest any impracticability. I cannot see any reason why it was not practicable to do what BMA anticipated in its own contracts would be done, at least with contractors living remote from the mine site.

The provision of a bus service

[263] Both HMP and Axial plead that a bus service was available to the plaintiff at the time of his accident. Both retracted the claim in addresses.[197]

[264] Mrs Kerle related that the service was not in operation in January 2009 when she commenced work at Norwich Park Mine but was by the end of February 2009. Mrs Kerle availed herself of the service by driving from Monto to Westwood where she would leave her vehicle, using the bus service to travel the rest of the way to the mine and vice versa on her return journey.

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[196] Seven mines are mentioned in Ex 26 – see cl 4.3.

[197] T7-4/1-2; T7-82/11-16.

[265] The fact that a bus service was introduced does not prove that the earlier failure to do so involved a breach of duty. However that fact is probative of the availability of the measure and its practicality: *Nelson v John Lysaght (Australia) Ltd*[198] per Gibbs J, Stephen and Mason JJ agreeing. There are many authorities to the same effect.

[266] HMP's pleads: "It was unreasonable to expect the second defendant to arrange additional buses, and unnecessary for it to do so, given the number of workers it had on site at any one time".[199] Axial pleads: "The Third Defendant could not control the manner in which or the rostering of employees so it was not reasonable for it to provide a bus for the journey home … in circumstances where the Second Defendant had in fact provided a bus."[200]

[267] No evidence was advanced to support these pleaded allegations. There was no evidence that there was any expense, difficulty or inconvenience in providing the service. It is difficult to see what conflicting responsibilities the defendants had which would work against the provision of bus service for workers to get to and from a remote mine site.

[268] The reasonableness of that course is supported by the reports of experts. It was a measure recommended in the "Digging Deeper Guideline for Fatigue Management".[201] Professor Dawson was a contributor to the research underlying that report. Professor Rogers' unchallenged evidence was that in 2008 such bus services were provided at other mines with which she was familiar.[202] That too indicates that there was nothing impractical about the proposal being implemented in 2008 at this mine. Professor Rogers stated in her report that "many of the workers who use the buses find them convenient and a feasible way to manage their fatigue and reduce their risk of a fatigue-related motor vehicle accident."[203]

[269] Professor Dawson did not express any view against the provision of bus services for the transport of workers to and from the mine closer to their homes. While not proffering any detail Professor Dawson's estimate was that "less than 25% of mining companies … provided voluntary transport".[204] Whether this cohort of less than 25% were similarly placed to Norwich Park and its workforce I do not know. He pointed out that the historical take up was not always high but for a variety of reasons that he accepted were variable from site to site. HMP did not call evidence to show that any of the factors identified by Professor Dawson applied at its site.

[270] HMP did not inform the court when the bus service was introduced. HMP led no evidence as to why a bus service was not introduced earlier. What prompted the introduction of the bus service is not known as the defendants led no evidence on the point. I draw the inference that there was no material change in circumstances that prompted the decision. It could have been introduced earlier and before the subject accident but HMP chose not to.

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198 (1975) 132 CLR 201.
199 Third Further Amended Defence of the Second Defendant para 13(d)ii.
200 Amended Defence of the Third Defendant to the Third Further Amended Statement of Claim para 23(b)
201 Ex 17 p 15.
202 Ex 2 tab 54 p 72; T3-70/41 – 71/29.
203 Ex 2 tab 54 p 41.
204 Ex 2 tab 55 para 4.3(a).

[271] That conclusion is reinforced by the evidence of a Mr Cross, a human resources consultant whose firm Confiance was retained by HMP in 2008. Confiance carried out a survey of workers[205] drawn from five workplaces including three mines, among them Norwich Park Mine. At a presentation in April 2008 Confiance produced the results of that survey which included the observation that managing fatigue was seen as a safety issue.[206] A reported comment from workers (presumably meeting the criteria of being a common one[207]) was that "the drive to and from camp is too long – it makes travelling back from night shift difficult".[208] In consultation with management Confiance prepared a series of slides for presentation reflecting the instructions from management as to what was to occur. Under a heading "Attraction & Retention" one issue noted was to address concerns around the terms and conditions of employment including "develop a remuneration policy which includes HMP's position on rosters, accommodation, bus service, commute, relocation and motor vehicles."[209] Another issue was to develop a HR policy manual standard across all sites to include amongst other things "fatigue management".[210]

[272] Confiance then proposed a means of meeting the fatigue safety issue in an email of 26 May 2008.[211] The concerns of management are set out in an email exchange that then followed on 21 and 22 August 2008 between the executive general manager Mike Ryan[212] and one Rod Wilson whose position is unexplained, presumably a manager reporting to Mr Ryan. Mr Wilson included in his list of concerns the need to educate workers in managing "longer journey requirements by workers living further afield."[213] He observed that the issue of fatigue was raised by the workforce as a "priority concern" but also "viewed by all regional communities and clients as a major concern".[214] It is evident from that exchange that nothing had been done to implement the proposals by October 2008 (when Mr Kerle commenced employment). Indeed it is evident that nothing had been done by the next January when Confiance returned for a further presentation when again the bus service issue was raised again in the context of a "remuneration policy".[215] At that later presentation, under the heading "Broad summary of results", it was noted that there were "some issues around work life balance – particularly fatigue" and a "key initiative" from the survey of March 2008 was said to be "Address the issue of fatigue raised at all sites through education."[216]

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[205] 289 in total, 81 from Norwich Park. Mr Perry led Mr Cross to assume that the 28% figure for Norwich Park (in the column headed "% of all respondents" in the table at p 10 of Ex 13) was the percentage of the workforce employed at Norwich Park who responded to the survey: T3-18/45 – 3-19/5. That is plainly wrong. It is the fraction 81/289 ie the column represents the number who responded to the survey from each workplace over the total number of respondents from all five workplaces (289) expressed as a percentage. Not only is that the natural meaning of the table given the heading and the fact that the percentages add up to 100% but if that is not right then there is a truly remarkable coincidence - each of the workplaces has precisely the same number of employees (289) and that happens to match precisely the total number of respondents (289). So far as I can see it is not known what percentage of the workforce responded to the survey.

[206] Ex 13 p 27 - a Norwich Park specific comment: T3-21/1.

[207] T3-8/35-40.

[208] Ex 13 p 27 - again a Norwich Park specific comment: T3-21/1.

[209] Ex 13 p 41.

[210] Ex 13 p 41.

[211] Ex 12 p 2-3.

[212] I was told that Mr Ryan had passed away at some time prior to trial.

[213] Ex 12 p 1.

[214] Ibid p 2.

[215] Ex 13 p 44, 51; and see T3-16/40 – 18/20.

[216] Ex 13 at p 45.

[273] The arguments advanced by the defendants are:

(a) There was no need for a bus service at the end of a roster if a permanent room was available to the plaintiff at the MAC camp for him to rest and there was;

(b) A bus service would not be provided to Monto but rather to major population centres, such as to Mackay and/or Rockhampton and so would not obviate the risk of driving whilst fatigued given the unpredictability of sleeping when on the bus and that Mr Kerle would have had to have driven some distance whatever the service;

(c) It cannot be demonstrated by the plaintiff, on the balance of probabilities, that had a bus been available to Rockhampton or Mackay that he would have used such a facility. The issues that would impact on the probabilities are:

(i) the timing of the departure of the bus and how convenient that might be to Mr Kerle, both departing from home and travelling to home. Mr Kerle led no evidence of when such a bus would arrive or depart;

(ii) the arrangements he would need to make to ensure that he was collected or had other transport available to him from the arrival point of that bus service to his home;

(iii) a study of coal mine workers in Central Queensland showed that only 18.6% of workers surveyed travelled by bus in 2011;

(iv) Professor Rogers' studies showed that employees do not like being "trapped" without a car at work.

[274] The first two arguments are relevant here, the last is largely relevant to causation to which I will come.

Availability of a room

[275] Again the absence of evidence from the defendants is of significance. The fact that the bus service was introduced subsequently rather suggests that the "availability of a room" argument was not seen by HMP itself as a sufficient answer to the risk.

[276] The availability of a room in which to rest does not, in my view, provide any answer for two reasons. The first is that while it seems that a room was provided I am satisfied that Mr Kerle was not told that. He believed that he had to give up his room by the end of the shift. He had in fact done so at the end of his first roster. The second reason is that such an approach puts to one side the reasonable requirements of workers for whom the notion of remaining for four unpaid hours after their shift ends – assuming that is the intent of the argument - would not be of interest because the commute to their homes may have been achievable safely with the assistance of a bus service.

[277] That Mr Kerle did not understand how the system worked with room availability was a contentious point at trial. I accept his evidence on the matter for four reasons. One is that he was patently honest. A second is that he in fact vacated his room at the end of his first rostered shift. A third is because of the support he had from a Mr Hillcoat.[217] Mr Hillcoat was also employed by Axial, and was inducted at around the same time as

[217] Wrongly identified in the transcript as Ryan Hilcoat – in fact Brian Hillcoat according to timesheets tendered (see Ex 9).

Mr Kerle. He had the same mistaken impression as Mr Kerle and so his evidence tends to show that this was not an idiosyncratic view of the information provided to the workers.[218] A fourth is that I formed the view that the information provider, a Ms Greensill, may not have made the situation plain, and perhaps perceived that her employer had an interest in her not making it plain.

[278] Ms Greensill was an administration officer at HMP. She was called to explain the information Mr Kerle was given so as to show that his interpretation of it was not credible. The probabilities are that Ms Greensill spoke to both Mr Kerle and Mr Hillcoat on these matters. One assumes that they received much the same information. For some reason both received the wrong impression. The effect of Ms Greensill's evidence was that the room provided was permanent accommodation available to the worker specifically. In cross examination she said:

> "Firstly, you would tell them that their room was their room? That's correct. Yes.
>
> That – assuming by that stage they had already collected a key given that they were at the induction that it was HMP's request of them that they return the key when they were checking out? Yes.
>
> Because that would allow HMP to avoid unnecessary charges for accommodation? Yes. If the room was vacant, yes.
>
> Right. And you told that to the employees? Yes."[219]

[279] I would not expect that the precise words used in 2008 are now known to Ms Greensill.

[280] The evidence was that for HMP to avoid the extra charge of about $30 per day the keys needed to be handed in by 12 o'clock.[220]

[281] It seems to me that there was ample room for misunderstandings arising from such a message. The crucial distinction was between having a room that was yours from the day you started at the mine until the day your employment came to an end, as opposed to having a room for the course of one roster of four shifts. The request to hand in the keys combined with the message that it cost HMP money if you didn't could well lead a worker to hold the view that this was my room only for so long. All depends on what precisely was said and where the emphasis was put. I have no confidence that Ms Greensill would have made the distinction clear. It was evidently in her employer's interests to reduce the charges and I am confident that she was not averse to bringing that about. And I have no confidence that her memory now is accurate.

[282] As to the accuracy of her memory - Ms Greenhill was endeavouring to recall what had transpired eight years before. A number of times she pointed out that her memory was, unsurprisingly, affected by that passage of time.

[283] As to her interests - I thought Ms Greenshill was an unsatisfactory witness. It was quite evident that she came to defend her employer and perhaps her own position. Mr Diehm's repeated attempts to have her answer questions where an accurate answer was

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[218] T3-90/10-14.
[219] T4-36/40 – 37/5.
[220] The 12pm deadline time was as reported by Mr Jury: Ex 11 para 8.

against her employer's interests made that plain.[221] And her repeated assertions along the lines that the fatigue management policy was of importance and that various things should not have been done that contravened the policy is in complete contradistinction to what in fact happened on the mine site, and in some respects to her knowledge. Workers handed in their keys plainly without resting at the end of their shifts. Workers quit their rooms and parked their cars near their workplace (instead of using the bus which transported them from the camp to the mine site) evidently ready to leave the mine site and clearly not resting before departing. Ms Greensill admitted that she knew workers were doing this with respect to both the day shift and the night shift. This was self-evidently against the fatigue management policy. She may have reported the matter. So much is not clear but if she did there is no evidence anything was ever done about the practice.

[284] HMP pointed out that Mr Kerle had used the MAC camp facilities after his day shift to shower before driving home.[222] I do not see how that shows that he believed that he could sleep in his room for whatever period he thought appropriate nor that he had the room for his exclusive use so long as his employment lasted.

[285] I am satisfied that whatever was said was misleading.

Convenience of the bus service

[286] The arguments in [273](b) and (c)(i) and (ii) above start from a false premise. The defendants assume that what was eventually provided met the standard of reasonableness and was all that should have been done.

[287] The bus service eventually offered was from Norwich Park Mine to Rockhampton and a separate bus service from Norwich Park Mine to Mackay through Middlemount. No evidence was led as to why a service travelling through or close to Monto was impractical. That major population centres were chosen as the destinations seems appropriate. But from there practicality would presumably depend on the numbers of workers who sought, or might seek, to travel to each centre and where they lived. Only the defendants could lead that evidence and they did not.

[288] If the argument is that the percentage take up was so low as to justify a decision not to implement the service then I reject it for a number of reasons. One is that HMP did not call evidence to show the take up rate of its bus service when introduced was lower than might be expected for the number of potential passengers. Mrs Kerle's evidence was that workers other than herself did use the bus service. That significant numbers lived some distance from the mine site seems likely given the survey carried out by Confiance – 47% of those who responded lived more than three hours from the mine.[223] I have referred to the 2011 study of coal mine workers in Central Queensland that showed that 18.6% of workers surveyed travelled by bus. If applicable to Norwich Park, and the defendants did not attempt to show otherwise, a near 20% of the workforce is a sizable proportion. Even if 20% is thought to be too low a take-up to

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[221] For example see T4-40/40 – 41/25.

[222] See T 2-98/35-46.

[223] Ex 13 at p 12. Mr Perry's cross examination of Mr Cross on the Table (T3-19/25-45) is bedevilled by his error in assuming that a quarter of the workforce at Norwich Park responded to the survey. The conclusion that more workers live more than three hours from the Goonyella Riverside Mine than Norwich Park may be right but that is not shown by this survey unless the near 11% difference in response rate validates the conclusion. There was no evidence led on that point.

justify the expense, about which there was no evidence, it needs to be kept in mind that the usefulness of that statistic depends on a number of matters that were not proved. One is whether decision of the mine workers who had the option available to them, but did not avail themselves of it despite an inevitably long commute, was an informed one.

Fatigue

[289] The defendants' argument pre-supposed that the nearest drop off point for Mr Kerle would be at Westwood. That left him with a two hour or so commute to his home at Monto. The assumption is that Mr Kerle would drive from Westwood. No other suggestion was made.

[290] Again the point made above that what was in fact provided is not the measure of what was possible or appropriate applies. Again the defendants led no evidence to enable me to reach an informed view.

[291] However I assume for the purpose of argument that the premise is a good one – that the only bus service that could practicably be provided would have left Mr Kerle with a two hour commute. The defendants' argument is that the reduction in risks would not be sufficiently marked to require the implementation of the service. A two hour commute after a three hour bus ride, it was said, may simply postpone the manifestation of any risk brought about by driving fatigued.

[292] It should be borne in mind that the issue at this stage is the prospective question of whether someone in the shoes of the defendants should have appreciated the need to provide a bus service to obviate or minimise the risk of accident or injury. Mr Kerle's precise circumstances were not the only factor and perhaps not a major one. Many workers presumably lived at major centres to which the bus would take them. But even for those workers who had to commute some distance after a bus journey there were advantages. While it is true that the provision of the bus service could not be said to remove the risks inherent in driving whilst fatigued entirely it clearly reduced those risks. Three hours resting on a bus, even if no sleep is obtained, is far less tiring than three hours driving at 100kph on country roads. The observations made earlier concerning the impact of rest are here relevant.[224]

[293] In my view there was nothing impracticable in 2008 about the provision of a bus service.

Availability of a room to rest

[294] Professor Rogers asserted: "Resting following completion of a shift or shift cycle prior to driving home is a commonly-used control included in fatigue risk assessment and fatigue policy."[225] She explained that she based her remark on her knowledge of fatigue management policies at a number of different mines where she had worked identifying the mines as Grasstree, at German Creek, Foxleigh and Moura. She noted too that it appeared in the BMA Hours of Work Standard dated January 2006 that I have referred to.

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[224] See [239].

[225] Ex 2 Tab 54 Section 6.5 at p 39.

[295] The provision was clearly practicable. Each defendant says that a room was provided. The issue was whether Mr Kerle knew that. I have dealt with the arguments above.

Education

[296] Senior counsel for Mr Kerle submitted that Mr Kerle "was plainly not adequately educated as to the warning signs of fatigue such as to recognise that he was not in a position to safely drive home on the morning in question or to otherwise seek to manage the high risk of a fatigue related accident to which he was plainly exposed."[226] I accept that submission.

[297] To varying degrees the defendants did something towards alerting workers to the risks involved of working when fatigued. The issue is whether it was adequate.

[298] It was submitted that Mr Kerle was "a person aged 50 years (at the date of the accident), experienced in shift work, including night shifts, in recognising fatigue signs, in being vigilant and cautious in driving so as to cope with fatigue and preparing a travel plan incorporating appropriate stops".[227] These propositions involve considerable overstatements, save for Mr Kerle's age. But if the point be to urge that there was no need for education or training in these matters then I reject it.

[299] In order to meet the risk in question here there were four key points that any training needed to get across to adequately prepare a worker for the risks that they faced:

(a) The degree of risk, both in terms of likelihood and magnitude, personal to the employees particularly those considered to be at high risk which must have included those facing long distance commuting after shift work;
(b) Education about the basic concepts behind fatigue, the need to pay down sleep debt, education that the total time from last place of rest to the person's next place of rest should not be greater that 15 to 16 hours, including commuting[228] and importantly that there existed a risk of falling asleep involuntarily;
(c) The warning signs of the onset of fatigue;
(d) The ways to meet those risks including the control measures available onsite.[229]

[300] I concentrate here on the risk in question. I appreciate that there are many risks on a mine site that need to be addressed. I am conscious of Professor Dawson's caution that there is an opportunity cost potentially involved.[230] For the reasons earlier discussed[231] I consider that it is reasonable to expect that the education and training have the emphasis I have identified necessary to meet this particular risk. Quite apart from the likelihood and magnitude of the risk of injury there is the fact that BMA, in setting out its requirements for consecutive 12 hour night shifts, had itself identified an education and training program that encompassed these features at least to a very considerable extent.[232] As well, training and education was fundamental to any other measure working.[233]

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[226] Ex 41 para 139.
[227] Ex 38 para 40(b).
[228] See Ex 2 Tab 54 page 70 (file note of conference with Professor Rogers of 29 March 2016).
[229] While obvious see Ex 17 p 7.
[230] Ex 2 tab 55A p 5, para 2.51.
[231] See [87-114]; [299].
[232] See Ex 2 Tab 8 at p 189 and clauses 6.3, 6.3.1 and 6.10 of the BMA "Minimum Standard for Fatigue Management Plans" that prescribed what the training and education should include.
[233] See the cross-examination of Professor Dawson at T5-74/5-21.

[301] The training and education that took place came from four sources. Mr Kerle underwent a generic induction for surface coal miners conducted by New Horizons Safety & Training Services in 2006 and a refresher course in September 2008. Axial and HMP provided inductions. At best they occurred on 8, 14, 15 and 16 October 2008.

[302] I note Professor Dawson's views that the training provided to Mr Kerle "would fall short of being 'best practice'" albeit he thought that it met "the minimum standard requirements and was consistent with current custom and practice in the industry".[234] My attention was not drawn to any "standard requirements" that applied to the risk in question[235] – assuming that the reference is to legislative or regulative requirements as the question that he was there addressing seems to suggest. I deal later with the claimed "custom and practice". I note that Professor Dawson says that the training programs that Mr Kerle was exposed to "did not include many of the structural factors that are known to influence fatigue."[236]

[303] In my view taken individually and collectively the training undergone by Mr Kerle fell well short of equipping him with the essentials that I have identified.

[304] Before examining what was done I note what BMA thought ought to be done. BMA's views do not set the standard that reasonable care demands, *per se*, but the fact that an experienced mine owner has given consideration to the issue and provided by its contract that HMP meet those standards is some evidence of what is reasonable. Indeed, given that BMA laid down by its contract what it required to be done to meet the risk that it had created by its insistence on the working of 12 hour night shifts at this location then there would need to be some compelling reason shown to accept that some lesser standard met the test of reasonable care in all the circumstances.

[305] I have detailed this information previously.[237] It appears in Annexure J to the contract with HMP. First, BMA considered that someone such as Mr Kerle fell into the "high" risk category.[238] That required that particular attention be paid to fatigue management issues. Mr Kerle did not receive the training set out in the Minimum Standard. Secondly, the BMA standard required particular attention to commuting. While there was passing mention made of commuting in the documents that Mr Kerle received (eg "You need to be aware too of your responsibility not to drive to and from your place of work while fatigued"[239]) the information fell well short of that BMA suggested was appropriate.[240] The most significant instruction was to "[have] a sleep after working a night shift and prior to travelling home". Thirdly, BMA was conscious of the need to restrict activities that extended beyond 15 consecutive hours of effort – it provided in relation to contractors that the contractor "shall ensure that the total time from place of rest to the employees' next place of rest shall not exceed 15 hours."[241] Mr Kerle was unaware of this recommendation. When asked "Is it good practice for you to be driving on the road 15 to 16 hours after you'd last slept?" his uninstructed view was that

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234 Ex 2 tab 55 para 4.2; and see Ex 2 tab 55A p 6.
235 See Professor Dawson's opinion at Ex 2 tab 55A para 2.7.5 – there was no industry standard.
236 Ex 2 tab 55A para 2.5.1.
237 See [188] – [189].
238 See Ex 2 Tab 8 at p 191 - Table 2.
239 New Horizons Generic Handbook Exhibit 2 tab 52 at p 59.
240 Ex 2 tab 8, p 192, cl 6.10; cl 6.3.
241 Ex 2 tab 8 p 206, cl 6.4.2.

"you'd probably need some breaks along the way; but not necessarily that you shouldn't be doing it, per se, no".[242]

The warning signs of fatigue

[306] There was a significant contest about the lack of Mr Kerle's understanding of the warning signs of the onset of fatigue. I think it evident that he was taught very little about any warning signs. I will detail that in a moment. But largely what he knew he had garnered through his life experience.

[307] In the course of his cross examination by senior counsel for BMA the following exchange occurred:

> "And if I asked you whether you would have agreed that yawning was such a warning sign, would you have said yes? Of being tired?
> Yes. While driving? Yes. That's one thing that – why you would yawn, yes.
> Would you have agreed that feeling the need to stretch while driving was such a warning sign? Of being tired? No.
> Would you have agreed that winding down the car window to let the breeze in was such a warning sign? No.
> Would you have agreed that wanting to turn up the sound volume on the radio was such a warning sign? No.
> Do you agree with me that if you are tired, that to wind down the window and let the breeze come in and stimulate you is a means of dealing with tiredness? I've got no idea on that because I travel with the window down. So I'm sorry, I don't have that as a – as a point of reference, to say that that is why you're tired or not.
> If you've been tired in the past while driving, would you turn up the volume on the radio? No.
> Would you've agreed me in this hypothetical conversation that feeling the need to wriggle the body in your seat frequently was such a warning sign? No.
> Would you've agreed that your head proceeding to nod forward involuntarily was such a warning sign? I would agree with that one. Yes.
> Would you've agreed that your eye-blinking slowing down such that your eyes were opening and closing very slowly was such a warning sign? No.
> Would you've agreed that you being slow to respond to something on the road that you needed to decrease your speed concerning would be such a warning sign? No. But I must add, at this point – I probably would've been pulled over by this point.
> Pulled over by whom? Myself. I would've probably pulled out and hopped out and gone for a walk around the car. So
> …
> I want you to stay with my hypothetical. Would you've agreed that nodding off was such a warning sign, of your tiredness while driving? Yes.
> Would you've agreed that feeling lethargic while driving was such a warning sign? No.
> Would you've agreed that your thoughts wandering off from your driving was such a warning sign? No.
> Perhaps if some of these things are happening in combination you'd agree that there'd be a cause for concern; as you've just said, that you would've pulled off.

[242] T2-49/35.

> Is that so? Especially the ones that were related to – as far as the head nodding and the eyes closing, yes, I would've – obviously would have pulled over and realised that I need to go for a walk around the car. Yeah.
> Would you have agreed that losing eye focus was such a warning sign? Well, yes.
> And would you've agreed that drifting in and out of the lane that you were travelling in was such a warning sign? Hypothetically, yes.
> Yes? If I saw someone doing that – yes.
> And if – your doing it yourself would be a warning sign to you of your own tiredness, wouldn't it? Yeah. Yeah.[243]

[308] Professor Rogers provided a comprehensive list of the warning signs of the onset of fatigue in her report.[244] Mr Douglas based his questions on those warning signs. Those that Mr Kerle did not identify were: feeling the need to stretch; winding down the car window; turning up the sound volume on the radio; wriggling around in the seat frequently; eye blinking slowing down such that your eyes were opening and closing very slowly;[245] being slow to respond to something on the road that you needed to decrease your speed concerning; feeling lethargic and wandering thoughts.

[309] I would summarise Mr Kerle's position as being that he recognised the gross signs but not the more subtle ones. Some of these signs appear in BMA's fatigue management booklet.[246]

Axial

[310] Whether Mr Kerle underwent Axial's induction is in issue. There are unsatisfactory aspects to the evidence from both sides of the case. The probabilities seem to favour Axial's argument. However if the induction took place Mr Kerle could have learnt nothing of substance from it. Essentially he was required to respond to a multiple choice questionnaire that was irrelevant for present purposes.[247]

[311] Axial's fatigue management policy set out in the Employee Handbook does not deal with the issue of long distance commuting after shift work at all. The policy was very brief. It provided:

> "**Policy Statement**
> Research has confirmed that fatigue impairs a person's judgment and response times in a similar way to the consumption of alcohol.
> In extreme cases this [fatigue] can significantly increase the risk of accident or injury to an employee at work or on the journey to and from work.
> Accordingly, it is the policy of Axial to monitor and control the fatigue levels of employees at work, particularly when working extended hours or attending call outs.
> The following guidelines apply to all employees when performing work on site:
> - Total consecutive hours worked by any employee must not exceed 16 hours.

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[243] T2-48-49/20.
[244] Ex 2 Tab 54 p 37, para 6.3.
[245] Although as can be seen in the above passage Mr Kerle later refers to eyes closing and eyes losing focus as a fatigue symptom.
[246] Ex 2 Tab 44 at p 5.
[247] Ex 2 Tab 25; Ex 34.

- Total hours worked by any employee in a 24 hour period should not exceed 16 hours.
- It is the responsibility of every employee to ensure that both they, and their colleagues, do not place themselves and others at risk by working when excessively fatigued.

[and a further dot point not presently relevant] ...

It is the responsibility of every employee to ensure that both they, and their colleagues do not place themselves and others at risk when working when excessively fatigued.

Note: There are separate guidelines covering long distance driving"[248]

[312] The handbook identified the relevant risk as only present in "extreme cases". As I have already observed that was simply misleading. There was no monitoring of fatigue levels of employees at all so far as the evidence shows.

[313] Professor Rogers was critical of the information provided in the handbook. She pointed out that:

(a) it does not provide information on how an employee is to judge whether he is fatigued or how another person will judge he is too fatigued to work;
(b) there is no information on the signs and symptoms of fatigue, how to reduce the risk of fatigue or how to manage it once it has manifested;
(c) the information was insufficient to allow the plaintiff to be educated about the causes and signs of fatigue and the risks associated with it.

Her criticisms were valid.

[314] Axial's defence was principally that it relied on HMP and BMA to provide the necessary education in their inductions.

New Horizons

[315] New Horizons Safety & Training Services provided general inductions. Mr Kerle underwent the Generic Induction to Coal Mining (Surface) on 31 August 2006.[249] He completed a renewal of the Course in Generic Induction to Coal Mining (Core) on 26 September 2008 (ie about 1 month prior to the subject accident).[250] As part of this course, he completed 11 Topics of the Coal Core General Induction and Assessment. Topic 2 related to "Legal Obligations in the Mining Industry" and was presented by way of a power point presentation. That presentation including information relating to how to identify fatigue and respond to the risk posed by fatigue:[251]

Fitness for Work

Fatigue

Signs include: Lethargy, Tiredness, Vagueness, Poor Concentration, Headache

Work related Fatigue	**Non Work related Fatigue**
Long Hours	Lack of Sleep

[248] Ex 2 tab 16.
[249] Screen print of New Horizons database entry for Harold Kerle – See Exhibit 2 Tab 52 at p 53.
[250] Ex 2 Tab 52.
[251] See Ex 2 Tab 53 (at pages 4 – 13).

Rotating Shifts	Sickness in the Family
Night Shifts	New Babies
Demanding physical or mental work	Demanding physical or mental activities
Extreme conditions (hot/cold)	Parties

If you feel fatigued at work REPORT IT TO YOUR SUPERVISOR IMMEDIATELY!"[252]

And:

"Fitness For Work

Shiftwork – Enables continuous mining around the clock but can disrupt Your bodies normal Digestive and Sleep patterns
Management must set rosters to Minimize fatigue.
But to help overcome this you should:

- Keep a regular sleep routine
- Eat Regular meals with a balanced diet
- Exercise regularly
- Avoid excessive alcohol
- Avoid taking sleeping tablets

If you feel fatigued at work REPORT IT TO YOUR SUPERVISOR IMMEDIATELY![253]

[316] The topic of fatigue is covered in one page of the training manual.[254] As part of this course Mr Kerle was provided with that manual.[255] The information largely reflects the power point presentation. It states:

"Fatigue

To enable continuous mining operations, coal mine workers work in shifts that normally commence early in the morning for the day shift and early evening for night shift. Shiftwork disrupts the normal body digestive and sleeping functions of some coal mine workers when they initially commence shiftwork.

When working shifts, all coal mine workers should be aware of the problems associated with fatigue that may occur where there are periods of consecutive night shifts or during a series of long shifts.

It is important that you understand how to recognise the signs of fatigue. These include:

- Lethargy
- Tiredness
- Vagueness
- Poor concentration (easily distracted)
- Headaches

Some of the common causes of fatigue are:

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[252] See the slide at p 6 of Ex 2 Tab 53.
[253] See the slide at p 6 of Ex 2 Tab 53.
[254] Ex 2 tab 52 p 59.
[255] Or a book containing similar information: see T2-64/9

Work related Fatigue	Non Work related Fatigue
○ Long Hours	○ Lack of Sleep
○ Rotating Shifts	○ Sickness in the Family
○ Night Shifts	○ New Babies
○ Demanding physical or mental work	○ Demanding physical or mental activities
○ Extreme conditions (hot/cold)	○ Parties

If you feel fatigued for any of these reasons at the start of or during your shift, you must talk to your supervisor about it immediately so that you can work out a way to manage the risk.

You need to be aware too of your responsibility not to drive to and from your place of work while fatigued.

It is recommended that to overcome the problems associated with shiftwork you should:

- keep a regular sleep routine
- eat regular meals with a balanced diet
- exercise regularly
- avoid excessive alcohol
- avoid taking sleeping tablets.

Workers should have adequate rest so that they are not fatigued at the start of a shift.

The important point to remember when working shifts is to try to establish a life style and routine that is as normal as possible."

[my emphasis]

[317] That appears to be the entire information provided. As Professor Rogers points out the information provided was both incomplete and in some respects positively misleading.[256]

[318] Mr Kerle was required to undergo an assessment with respect to Topic 2, ie his legal obligations. The assessment of that issue was confined to simplistic questions of this kind: if a friend tells you he is really tired you and your friend have an obligation to tell the supervisor at the start of the shift; and both the worker and management are responsible for fitness for work which includes fatigue, drugs and alcohol. His answers do not display any sophisticated understanding of the issues. As an example he was asked the following question and provided the following handwritten answers:[257]

> You are to start a new job at a mine that works four (4) twelve (12)

[256] Ex 2 tab 54, p 22-24.
[257] See Ex 2 tab 52 at p 8.

> hour shifts in a cycle (4 on / 4 off). You haven't worked in this situation before.
>
> To ensure that you meet your personal obligations prior to commencing work, provide **one (1)** example of an action you would take next to each of the following:

Fitness For Work	*Exercise*
Fatigue	*Sleep or adequate rest*
Shiftwork	*Eat regular meals with a balanced diet*

[319] By the time of trial Mr Kerle recalled undergoing an open book exam and then copying the answers out of a book.[258] Eight years after the event, after suffering a significant brain injury, and despite having a demonstrably fallible memory about significant events that took place in 2008, Mr Kerle was asked about his absorption of these materials. For what it is worth he said that he had absorbed the lessons they contained.[259] I think that it can safely be accepted that he knew that if he felt fatigued he should notify his supervisor immediately,[260] and steps would be taken to manage any issue of fatigue including by rest breaks. He wasn't told much more than that.

[320] Professor Rogers was critical of the information provided and again I agree with her remarks. Her general comments on the Handbook are:

> "New Horizons Generic Induction handbook provides minimal education regarding fatigue and fatigue management.
>
> In my opinion there is inadequate information and detail regarding fatigue, fatigue associated with shift work, identifying fatigue and managing fatigue to provide much useful information for coal mine workers to understand shiftwork associated fatigue and how to identify and manage it.
>
> The brevity of the information provided regarding fatigue in this handbook may also underemphasise the importance of fatigue and the risks associated with it."[261]

The Norwich Park Mine Mining Area Induction

[321] On 15 October 2008 Mr Kerle completed the Norwich Park Mine Mining Area Induction. He was assessed by one Brooke Dowsett who is identified variously as a "Supervisor/BMA contact" and as a "Trainer Assessor". The induction included an assessment. My attention was drawn to the following questions and answers as relevant to this issue (with the answers completed in the plaintiff's handwriting):[262]

> Q2 What action must you take if you are feeling fatigued?
> *Notify your supervisor*
> Q3 Who is responsible for ensuring you are fit to commence work each shift?

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[258] T2-64/5; T2-67/20.
[259] See T2-63/18-45 and following, T2-68/10-40, T2-70/32, and T2-71/36.
[260] See T2-62/44; T2-63/21, T2-67/5-41, T2-70/4-46, T2-71/1-3; T2-72/42 and T4-13/16-40.
[261] Ex 2 Tab 54 p 22.
[262] Ex 2 Tab 48 p 8.

Me

Q8 Name four (4) hazards of vehicle operation on a mine site.
Collision
Fatigue
Visibility
Excessive Speed

[322] I note Professor Dawson's statement that the requirement to have workers "complete a questionnaire which was a competency based test" "exceeded the standard of many organisations". If the professor was referring to this questionnaire then I cannot accept that it achieved the purpose he describes, that is "to demonstrate that the material covered in the induction had been digested and the worker was capable of using the material to demonstrate competency".[263]

[323] The level of questions asked and the responses given suggest that there was no attempt made to provide any detailed knowledge of the true level of risk involved either in respect of fatigue or in respect of long distance commuting after working consecutive night shifts, nor how to meet those risks. Certainly no attempt was made to see if Mr Kerle had learnt anything of substance.

[324] Of interest is what BMA had instructed ought to be done. As part of the process Mr Kerle was required to state his level of experience. He indicated that he had less than one year's experience in coal mining, less than one year's experience at BMA sites and less than one year's experience in working at Norwich Park. With any one of those answers BMA instructed that "Supervision Action" was required including: "If the place of residence for the job and the home address indicate that the gross shift length may be exceeded, then supervision must give guidance on fatigue management to the individual in accordance with the BMA hours of work policy."[264] As discussed earlier the "gross shift length" was 15 hours.[265] No supervision action was undertaken at all and no guidance given to Mr Kerle on fatigue management.

HMP's policies & procedures

[325] HMP had in place a "Statutory Procedure for Fatigue Management (SP (OHS) 002)"[266] which provided for minimising the effect of fatigue through:

- General restriction on hours of work
- Extension of hours of work
- Fitness for extension of hours of work
- Rest breaks provided within each shift
- The number of consecutive shifts and hours per roster.

[326] The procedure did not address any one of the four key areas that I have identified above.

[327] HMP also had in place a "Standard Operating Procedure "SP (OHS) 002 (RA) SOP on Fitness for duty – Fatigue" dated 1 July 2005"[267]. It provided a risk assessment of a

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[263] Ex 2 tab 55 para 4.2(a).
[264] Ex 2 Tab 48 p 15.
[265] See [205] above.
[266] Ex 2 tab 37, p 4.
[267] Ex 2 tab 39 p 2.

hazard identified as "a fatigued person potentially being unable to exercise required level of control, coordination, and reasoning required to operate equipment at the mine". No reference was made to long distance commuting after completion of shift work. The "Risk Reduction Measures" identified were:

- Employee Assistance Program
- Education Program for all personnel, including induction briefings
- Prescription of maximum hours of work
- Supervisory training on detecting fatigue

[328] So far as the evidence shows there was no assistance program and no education program, apart from the induction previously mentioned which was largely irrelevant so far as the present subject is concerned. What training was given to supervisors to detect fatigue was not explained. As the Confiance presentation mentioned earlier[268] showed there was a need identified for further education of the workers in the March prior to Mr Kerle's employment, which need remained unaddressed as at the January after his accident.

CAUSATION

[329] The arguments involving causation centre on:

(a) the likelihood of Mr Kerle adopting the measure; or
(b) the likelihood of the measure avoiding the fatigue caused accident.

[330] The test is whether on the balance of probabilities the proposed measure would have obviated or minimized the risk of injury sufficiently to avoid the accident: *Queensland Corrective Services Commission v Gallagher*[269] per de Jersey CJ citing *Vozza v Tooth & Co Ltd*[270]; *Turner v South Australia*[271] per Gibbs CJ. In that latter case Gibbs CJ said:

> "When the employer does unreasonably fail to take a precaution against danger, the plaintiff cannot succeed unless he satisfies the court that if that precaution had been taken the injury would probably have been averted, or, in other words, that the safety measures would have been effective and that he would have made use of them if available: *Duyvelshaff v Cathcart & Ritchie Ltd*."[272]

[331] I gained no great assistance from seeing Mr Kerle give evidence save that he seemed to be typical of many country people – quite sensible and stolid in his approach to life and not one to take unnecessary risks. He was obviously honest but on these issues whatever evidence he could give as to what he might have done can have little weight. His own personal experiences was that he could drive safely for long periods.

[332] Fundamental to my assessment of the probabilities is the underlying finding that the real nature and extent of the risk of accident was not brought home to Mr Kerle. The defendants pointed to what Mr Kerle actually did in terms of deciding the day before that he would drive home and bringing his vehicle to place where he could make a quick get-away after the end of the shift, as others did. The weight to be given to these

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[268] See [271]-[272].
[269] [1998] QCA 426 at [26]–[27].
[270] (1964) 112 CLR 316 at 319.
[271] (1982) 56 ALJR 839 at 840.
[272] Ibid (citation omitted).

actions is greatly lessened because they were made in a context of there being no viable alternative from Mr Kerle's viewpoint and made without a thorough understanding of the risks involved in his conduct. The education and training undertaken was woeful.

[333] I very much doubt that Mr Kerle's desire to reach home would overwhelm his common sense.

[334] I turn to consider each issue.

Shift Lengths

[335] Mr Kerle's demonstrated ability to drive from 6.30am to nearly 10am, so far as is known without incident, on the day of his accident suggests that some minimising of the risks was all that was required to keep him safe on this journey.

[336] The shift length argument involved either staying at the mine after the end of the shift or being allowed to leave early at say 2am to rest at the camp site or immediately return home.

[337] There is no reason to think that if his contract of service required Mr Kerle to remain at the mine site albeit resting and not working that he would not have complied with that requirement.

[338] And there is no reason to think that if Mr Kerle had been permitted to leave the mine site at say 2am to drive home there would not have been a reduction in the risks sufficient to keep him safe. As it was he continued to operate machinery for another four hours safely, then drove for a further three hours.

Bus Service

[339] Whether Mr Kerle would have availed himself of the bus service is problematic. Workers did when it was introduced. What percentage I was not told. None, save Mrs Kerle, were called to identify where they lived and how convenient the service happened to be for them – that is, did they still need to drive for some distance after the journey as Mr Kerle would have done?

[340] An inference is that it would not have suited the defendants, or at least those with access to records, to tell me how popular the service was from Norwich Park Mine. Presumably BMA would not have such records, but HMP and Axial must have records of where their employees lived, or claimed to live, and presumably HMP would have records of the take up of the option.

[341] There were two advantages for Mr Kerle in using the bus service. He would have saved on fuel costs which in 2008 was not an insignificant saving. And he would have kept himself safer. I refer again to my earlier observations on the minimising of risks from three hours resting on a bus, even if no sleep is obtained, as it is far less tiring than three hours driving at 100kph on country roads.

[342] One argument put (see [273](c)(i) above) was that Mr Kerle failed to adduce evidence of when the bus would depart from the camp and so I could not be satisfied that it would leave at a time that he was likely to find suitable and convenient. That assumes

that Mr Kerle was under some time pressure. To the extent that the issue was explored it was not evident that was so. In cross-examination Mr Douglas posed the following question and received this answer:

> "Is it the case, or is correct to say, that at that point in time, you were not under any particular deadline to get home by a particular time? --- No particular deadline other than to see my wife and family."[273]

[343] In any case the defendants' argument inverts the onus. It was not for Mr Kerle to lead evidence that the departure times of the bus would meet his convenience. How could he in the absence of evidence of what those times might be? Presumably HMP, or any person providing a bus service, acting reasonably, would ensure that the bus departed at a time that suited workers coming off shift. Mr Kerle falls into that class of worker. If for some reason that was not a viable option (or that the wishes of the majority of workers could not be met for some reason) then the only person capable of showing that is the service provider. The defendants chose not to lead evidence on the subject. Nor did the defendants cross-examine Mr Kerle along the lines that a bus departing at a particular time would have been inconvenient for some reason – whether coming to or going from the mine. The passage quoted immediately above is against that proposition. I decline to draw the inference now advanced.

[344] The practical issue of where Mr Kerle might leave his car during his shifts was met by the evidence of Mrs Kerle. She left her vehicle at Westwood. There is no reason to think that Mr Kerle could not have followed the same course.

[345] Finally to the point in [273](c)(iv) above - the finding of resistance based on workers not wanting to be trapped at work. In the absence of evidence of departure times and travel times it is difficult to draw any conclusions personal to Mr Kerle. I suspect that the further the commute the less the significance of the unavailability of a car as the bus service would seem more attractive in terms of savings both of effort and fuel costs.[274]

[346] I am satisfied that it is more likely than not that Mr Kerle would have availed himself of a bus service in the same way his wife did subsequently in 2009 and as a consequence would not have been involved in an accident as a result of fatigue. Incidentally I do not mean by this finding to reason that because Mrs Kerle took up the option so would have Mr Kerle – she had the advantage of knowing of his fate.

Provision of a place to rest

[347] Each of the defendants asserted that a place of rest was provided and each argued that it was a satisfactory response in all the circumstances. It is not controversial to find that had Mr Kerle slept for a few hours after the end of the shift the accident in all probability would have been avoided.

Education

[348] The provision of education alone is rarely enough to meet in a practical way the risks involved in any workplace or system. Nonetheless it was essential. The provision of

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[273] T2-28/35-37

[274] T2-26/1-15.

sound training and education had to be carried out in accord with other measures to make those measures effective. That is self-evident and in any case was the view of both experts.[275]

[349] There is no way of proving conclusively one way or the other if the provision of greater information would have altered Mr Kerle's decision making. What can be said is that had the education and training that BMA had provided be in place then Mr Kerle would have been far better equipped to make sound decisions concerning his own safety.

[350] What I find particularly striking is that it would not have been difficult to bring home the importance of a simple rule along the lines that 15 hours was a maximum that one should attempt to continue to function, and that long distance commuting after 15 hours from the last rest carried with it a significant risk of accident and was strongly against the interests of the worker concerned. The sort of education and training that BMA envisaged in their standards would have resulted in particular training for Mr Kerle, he being in a high risk category.

[351] The probabilities seem to me to strongly favour that Mr Kerle was likely to have taken a different course if he had understood the high risks involved in attempting a five hour drive after four consecutive night shifts.

REASONABLE CARE

[352] Each of the defendants was in a different position in terms of its ability to control and ability to adopt measures and indeed in its response. So whether the failure to adopt a particular measure involved a breach of the relevant duty varies from one to the other.

Industry practise

[353] Before addressing the position of each defendant I should address one point that has overall relevance. That is that what the defendants did or did not do reflected industry standards. Reliance was placed on the observation of McHugh J in *Dovuro Pty Ltd v Wilkins*:[276]

> "[C]ompliance with common practice is powerful, but not decisive, evidence that the defendant did not act negligently."

[354] For a defendant to avail itself of the comfort of such compliance it is first necessary to proffer persuasive proof that there is such a common practise. Professor Dawson's first report largely consists of him responding to questions along the lines of whether what was done was in accord with industry standards. One cannot be critical of a witness responding to what they are asked but nowhere does the witness advise on how it is that he has determined what those standards are. In fact in his supplementary report Professor Dawson says that there was "no clear industry standard".[277] Hence I am left with his unexplained and untestable opinion of whether the measure in question meets the standard he has determined. Nor does the professor, generally at least, advise why it is that the standard he identifies – and which at times he says is not ideal – is at that level. Whether it is because the risks went unrecognised, the costs were unacceptable,

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[275] Professor Dawson at T5-74; Professor Rogers at Ex 2 tab 54 p 34.
[276] (2003) 215 CLR 317 at 329 [34].
[277] Ex 2 tab 55A para 2.2.

that there was some practical problem, or that employers were unconcerned to protect their staff are all possibilities.

[355] A further problem in accepting Professor Dawson's views is that Professor Rogers clearly had a different view of what practises were followed at some mines. Thus just how prevalent the practise was that Professor Dawson relies on is very much a moot point.

[356] Even if such common practise were shown, as McHugh J pointed out, that does not determine the matter. There have been a number of cases where the Courts have held employers liable despite following common practise – *General Cleaning Contractors v Christmas*;[278] *Morris v West Hartlepool Steam Navigation Co Ltd*;[279] *Cavanagh v Ulster Weaving Co Ltd.*[280] If the magnitude of the risk is serious and the probability of its occurrence high (as I perceive the risk here to be) then there would need to be some good reason shown why the taking of reasonable care should not extend to the adoption of measures otherwise practicable that meet the risk, whatever might be the practise of employers.

[357] I conclude that this case is not concerned with a long established, well recognised practise in the industry. What guidance materials there were could hardly be considered by a reasonably proactive employer as reliable. As Professor Dawson pointed out to the extent that "guidance materials" were available they were uninformed by "any formal risk assessment and rarely contained any systematic risk mitigation process."[281]

[358] I referred earlier to *Thompson v Smiths Shiprepairers (North Shields) Ltd.*[282] Mustill J's conclusion there expressed (at 416) is apposite here - an employer is not exonerated simply by proving that other employers are just as negligent.

[359] I will deal with each defendant in turn.

BMA

[360] BMA comprehensively dealt with the issues relating to fatigue in its contract documentation and policies. There can be no criticism of it in that regard. In those documents BMA identified the relevant risk, correctly identified workers such as Mr Kerle as falling into a high risk category deserving of special guidance and training, indicated the sort of guidance and training that ought be undertaken commensurate with the risk to each class of employee, and provided for accommodation to be available to enable workers to rest at the end of their shifts. It did not provide a bus service nor did it shorten shift lengths. BMA left it to HMP to carry out the education and training and to ensure that the workers understood that the accommodation was available. Effectively its argument is that that was sufficient.

[361] I have previously mentioned clauses 5.1 and 5.3 of the services agreement between HMP and BMA and BMA's reservation of the right to audit compliance.[283] The

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[278] [1953] AC 180.
[279] [1956] AC 552.
[280] [1960] AC 145.
[281] Ex 2 tab 55A para 2.2 at p 3.
[282] [1984] QB 405.
[283] See [184] – [185].

contract was entered into on 17 April 2007. By those clauses HMP agreed to comply with BMA's Fatigue Management Policy set out in Annexure J or "the most stringent requirement" if existing laws and regulations provided for a different standard than that.[284] By the time Mr Kerle was employed 18 months later little had been done to meet those standards.

[362] HMP did not comply with those requirements in several respects. It effectively ignored the education and training that BMA had insisted be in place in respect of fatigue management. There was no highlighting of the fact that Mr Kerle was at a high risk of injury given both his employment as a machinery operator on shifts and because of his long distance commuting. Travel and commuting issue were not addressed. The "minimum" requirements that he attend "fatigue management training as provided by the BSS Corporate Psychology Services and … complete *The Complete Fatigue Management Workbook*"[285] were ignored. Nothing comparable were put in place. The commute strategies set out in cl 6.10 of Annexure J that I have previously detailed[286] were neither communicated nor encouraged. As well workers were patently not resting after ending their consecutive night shifts. The evidence of Mr Kerle and Ms Greensill shows that. No other steps were taken to meet the risk – eg it had no bus service; shifts were not adjusted.

[363] One of the striking features of the evidence in the case was how little evidence was called from BMA and HMP. While it is evident from its contract with HMP and its policies that BMA had given detailed consideration to the risk of fatigue and how it might be managed, there is no evidence that HMP was competent and prepared at the time of entry into the contract to meet those risks. As will be seen they were not in fact prepared. Presumably BMA, when prospectively considering the vulnerability of whatever employees in whatever capacity came onto the site, had no particular knowledge either of HMP's competence or preparedness.

[364] Even if the duty was no more than BMA was obliged to engage contractors competent to manage the risk, and that I think is the extent of it, then such proof was essential. None was proffered. It may be that HMP was skilled in extracting overburden – the task with which it was charged under the contract with BMA – but it was not shown to have any special skill or knowledge vis-à-vis the risk relevant here.

[365] No evidence was led that HMP had demonstrated expertise in managing these risks. No evidence was led that BMA had any reason to think that HMP had such expertise. Indeed the only inference available from the evidence is that it had no such expertise and had no systems in place to meet the requirements of the contract. That appears to have been the case as at April 2007 when HMP entered into the contract and in October 2008 when Mr Kerle came to be employed at the mine.

[366] Presumably BMA could easily have found all this out. While it reserved to itself the right to audit there is no evidence that any audit was undertaken.

[367] Once it be accepted that a duty of care was owed it cannot be a satisfactory response to assert that one has entered into a contract with another who lacks the necessary

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[284] Ex 2 tab 8, pp 7-8.
[285] Ex 2 tab 8, pp 189-191.
[286] See [189].

expertise or systems of work necessary to meet the risks inherent in the work and who, over a long period, was patently not meeting those risks.

[368] I accept BMA's submission that it would be placing too onerous a duty on BMA to expect that it would provide a bus service for HMP's staff. Only HMP could judge the likely demand or need for such a service. That would depend on factors that HMP was far better placed to judge - the numbers of employees, their home locations, and the likely take-up rate.

[369] Nonetheless in my view BMA breached the duty that I have found it owed to Mr Kerle in failing to take any adequate measure to manage the risk of injury to workers at the mine from fatigue following the completion of a roster.[287] Had BMA employed a competent contractor demonstrably able and suited to meeting those risks then that would have been a complete discharge of its duty. It did not.

HMP

[370] The pleading of breach of duty against the second defendant is at paragraph 14 of the plaintiff's pleading:

> 14. The accident was caused by the negligence of the First and/or Second Defendants:-
>
> (a) failing to have in place adequate measures to manage the risk of injury to workers at the said Mine from fatigue including in particular fatigue following the completion of a roster;
>
> (b) failing to provide a bus to transport workers following the end of a roster to major centres such as Rockhampton and Mackay so as to:-
>
> (i) reduce the amount of time that such workers would be driving their own vehicle following the completion of a roster and until such time as they had an opportunity to rest at their intended place of residence whilst off duty;
>
> (ii) provide an opportunity for them to rest whilst on such transport prior to driving their own vehicle;
>
> (c) failing to facilitate and require workers to rest in camp before the completion of a roster before driving their own vehicle on the road;
>
> (d) failing to have in place a programme of education for workers about fatigue and its risks; and
>
> (e) failing to have in place proper limits on the length of shifts and/or adequate breaks in particular for the final shift in a roster;
>
> (f) failing to instruct workers to rest in camp before the completion of a roster before driving their own vehicle on the road;
>
> (g) failing to implement and then enforce a system whereby workers were required to rest in camp before the completion of a roster before driving their own vehicle on the road.

[371] I have dealt with most of the arguments already. There are three further submissions made by HMP that merit a response.

[372] I have earlier mentioned cl 6.4.2 of the BMA "Hours of Work Standard". It provided:

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[287] See para 14(a) of the Third Further Amended Statement of Claim.

> "Contract management deploying their employees to BMA operating sites shall ensure that the total time from place of rest to the employees' next place of rest shall not exceed 15 hours.
>
> Example: A contractor, whose base is in Mackay, staying in motel accommodation at Blackwater and leaves the motel at 05:30 to start work at BWM[288] at 06:00, must leave BWM at 16:00 in order to arrive back in Mackay by 20:30 and not exceed to (sic) 15 hour limit.[289]
>
> Notwithstanding this limitation, rest breaks prior to travelling long distances, particularly after working night shifts may be prudent risk management."

[373] HMP argued that the clause did not apply to Mr Kerle. I consider that it does. That view depends on the width of the phrase "their employees". It is apt to cover both employees properly so called and labour hire employees. Both classes of employees, one would expect, would be under the control of HMP at least to the extent of controlling their attendance on site. That is the premise underlying the clause. As HMP argues the clause would be satisfied by the provision of accommodation at the MAC camp as the time from place of rest to place of rest would comfortably fall within the 15 hour limit. However that meant that it was incumbent on HMP to "ensure" that occurred. They did not do that.

[374] The relevance of that finding is that it makes it impossible for HMP to argue that it was unreasonable for it to "ensure" that its employees knew of the availability of the camp and of the 15 hour time limit. I do not see that it has any greater relevance. It was not submitted that a breach of this term gave to Mr Kerle a right of action in damages against HMP.

[375] I turn to the second point. HMP submitted[290] that it:

> "… was aware of the need to have control measures to manage the risk of fatigue for workers that did not depend upon subjective appreciation by the individual worker concerned. These measures included:
>
> - a roster sequence which was worked by the plaintiff, of four days off and a four day set on, set of shifts, rotating between sets of night and day shifts, each shift being of 12 hours' duration;
> - shifts which did not require the commencement of any commute home during the period from midnight to 6.00am;
> - adequate breaks, being two 30 minute breaks during each shift;
> - an obligation understood by the plaintiff that workers ought report any signs of fatigue exhibited by another worker, whose continued performance of his duties is unsafe or potentially so; and
> - accommodation available to workers, including the plaintiff, for sleep and/or rest at the MAC camp prior to, during and after the conclusion of each shift or set of shifts."[291]

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[288] I assume a reference to "Blackwater mine". The drive from Mackay takes a little over four hours.

[289] Ex 2 tab 8 p 206.

[290] Ex 38 para 50.

[291] I observe that the citation given for this submission (T2-71/5-8) is a reference to Mr Kerle accepting the notional possibility of a worker being taken back to the MAC camp because of fatigue. He had apparently never seen that happen during shift let alone after a shift had ended (T2-71/23-26).

[376] The first mentioned matter – four consecutive 12 hour night shifts - does not address the risks inherent in fatigue but creates the need for those risks to be addressed.[292] Longer shifts or different combinations of shifts create different problems. The second matter moves the risks of the commute home from one time period to a later and significantly more dangerous time period, assuming no rest was taken. The third and fourth matters have nothing to do with the risks of commuting home and the latter depends on workers appreciating the necessary and sometimes subtle signs of fatigue which it appears they were not taught. As to the last matter – see the findings above. Accommodation was there but its availability not appreciated.

[377] Finally the third point. HMP further submitted[293]:

> "Additional to such measures [that I have mentioned above], the plaintiff was aware of and worked under a fatigue management approach where he was aware that:
>
> (i) fatigue management was a shared responsibility between workers and management;
> (ii) the plaintiff was aware that he ought communicate with his supervisor if he felt that he was not fit for duty at the commencement of or during his shift and if he felt any way concerned about matters that would detract from his work;
> (iii) the plaintiff was aware, having so notified his supervisor, that arrangements would be made by the second defendant to manage fatigue;
> (iv) the plaintiff was aware he ought to have adequate rest so as not to be fatigued at the start of the shift;
> (v) the plaintiff was aware of common causes of and signs of fatigue;
> (vi) the plaintiff was aware that, if he considered that he was suffering from fatigue such that his ability to drive home might be impacted upon, he should inform his, or a, supervisor;
> (vii) once the supervisor was informed, the plaintiff was aware that the supervisor would take, or suggest, appropriate measures to address that fatigue;
> (viii) the plaintiff was aware that he ought and did have a travel plan for his journey back to Monto after he completed his shift and had formulated such a plan;
> (ix) further, the defendant provided an opportunity to sleep prior to and after the conclusion of any rostered shift by way of permanent accommodation at the MAC camp;
> (x) the plaintiff was aware of the availability of that accommodation;
> (xi) the plaintiff used that accommodation on 26 October 2008 for approximately nine hours prior to the commencement of his night shift in order to rest and/or sleep;
> (xii) the plaintiff was aware of the need to report any instances of fatigue or fatigue related incidents to his supervisor;
> (xiii) the plaintiff understood the effects of fatigue on safety and driving performance, including driving on his commute to Monto."

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[292] See Ex 2 tab 54 p 72 - Professor Rogers' file note.
[293] Ex 38 para 51.

[378] To a very large extent these submissions depend on Mr Kerle's subjective appreciation of his own fatigue, something that the experts considered that numerous studies had shown was a most unreliable guide and which the defendants had disavowed as an adequate control measure. In any case there is no evidence that Mr Kerle was exhibiting or experiencing any of the symptoms of fatigue when at the mine site. Paragraphs (i), (ii), (iii), (iv), (vi), (vii), and (xii) are therefore not responsive to the issues in the case. Mr Kerle's knowledge of the common causes of and signs of fatigue (para (v)) was well short of complete. As to (viii), as senior counsel for Mr Kerle submitted, the submission really amounts to no more than Mr Kerle knew that he could have a rest in his car on the side of the road if he became tired. I have dealt with (ix) and (xi) above and rejected the submission in paragraph (x). The submission made in paragraph (xiii) is simply wrong if intended to assert that Mr Kerle had any sophisticated understanding of those effects.

[379] As I have said HMP comprehensively failed to provide the education and training in relation to these risks that should have been provided – paragraphs 14(a), (d) and (f) above are made out. So is paragraph 14(c).

[380] The provision of the bus service (14(b)) and the shortening of the shifts (14(e)) would undoubtedly involve more expense and inconvenience. It could be said that had there been in place the training and guidance that BMA had envisaged and had Mr Kerle understood that accommodation was available the subject accident would in all probability have been avoided. However the advantage of the four measures in combination is twofold. First, it served to show that the risk was a serious one and seen as such by management. A consistent approach would serve to bring home the message. As Professor Rogers observed the information in fact provided tended to downplay or minimise the true nature and extent of the risk. Secondly, it had the advantage of catering to the various differences between the workers. Some lived within a three hour drive or at, or on the way to, a major centre and some lived, as did Mr Kerle, five hours and perhaps more away. To some the bus would work well. To others a few hours rest.

[381] As discussed earlier there was no justification for ignoring the four measures advanced because of cost, practicability, or conflicting responsibilities.

[382] I conclude that HMP breached its duty of care in each of the ways particularised in paragraph 14 (a) to (f).

Axial

[383] Axial's breach of duty was alleged at paragraph 14A of the plaintiff's pleading:

> 14A. Furthermore, the accident was also caused by the negligence and/or breach of contract of the Third Defendant in:
>
> (a) failing to have in place adequate measures to manage the risk of injury to employees at the said Mine from fatigue including in particular fatigue following the completion of a roster;
>
> (b) failing to provide or to ensure there was provided a bus to transport employees following the end of a roster to major centres such as Rockhampton and Mackay so as to :-
>
> (i) reduce the amount of time that such employees would be driving their own vehicle following the completion of a roster

and until such time as they had an opportunity to rest at their intended place of residence whilst off duty;

(ii) provide an opportunity for them to rest whilst on such transport prior to driving their own vehicle;

(c) failing to facilitate and require employees to rest in camp before the completion of a roster before driving their own vehicle on the road;

(d) failing to instruct employees to rest in camp before the completion of a roster before driving their own vehicle on the road;

(e) failing to implement and then enforce a system whereby employees were required to rest in camp before the completion of a roster before driving their own vehicle on the road;

(f) failing to have in place any or any adequate programme of education for employees about fatigue and its risks; and

(g) failing to have in place proper limits on the lengths of shifts and/or adequate breaks in particular for the final shift in a roster.

[384] Axial is quite entitled to argue that while it may not have discharged its duty personally it can rely on the fact that others did so on its behalf, either by arrangement or as it happened. Axial of course has a non-delegable duty. It cannot argue that its delegation to HMP was a discharge of its duty, however competent it thought HMP would be, if HMP in fact failed to take reasonable care of Mr Kerle as I have found.

[385] Axial submitted that it managed the risk of fatigue in four ways:

(a) through its fatigue management policy in the Employee Handbook;[294]

(b) requiring Mr Kerle to undergo inductions - the Axial Induction; the SGS Coal Induction/BMA Induction, scheduled for 14 October 2008; the HMP Site Induction on 15 October 2008;

(c) by carrying out a safety audit of the Norwich Park Mine;

(d) by monitoring and controlling working hours by checking the timesheets of its employees when they came into the office and, if it detected that they were working in excess of the identified hours, the matter would be referred to Donna Rogers, who would then telephone the client (HMP) directly.

[386] None of these, save to a very limited extent the inductions performed by others, were responsive to the risk at all. Axial's policy was both inadequate and misleading in downplaying the risks. While the New Horizons Generic Induction Handbook was a considerable improvement on Axial's own induction it too was limited in the information it provided and there is the problem created of conflicting messages. The safety audit was conducted by Mrs Rogers who seemed particularly unfit for the task. I am not sure what if anything she was looking for. The safety check list[295] is irrelevant to the present problem but in any case seems to be of little consequence. Mrs Rogers presumably would have noticed that no bus service had been provided. Perusal of the time sheets was irrelevant. The issue was not whether Mr Kerle was working excessive hours *per se*.

[387] Extensive submissions were made to the effect that there were significant limitations on what Axial could do practically. To the extent that reliance was placed on those authorities where the remoteness from the workplace was a factor favouring some limitation on what might be expected of an employer I do not accept that they apply

[294] Ex 2 tab 16, pp 24-25.

[295] Ex 2 tab 26; Ex 36.

here. The remoteness of the site from Axial's Gladstone office – a six hour drive away – did not impact on its capacity to offer adequate training and guidance on this issue. The cases cited are *Esso Australia Pty Ltd v Victorian WorkCover Authority*[296] and *Pollard v Baulderstone Hornibrook Engineering Pty Ltd*.[297] In *Esso Australia* the workplace was a drilling rig in the Bass Strait. The impracticality of the employer inspecting and being aware of the hazards at the workplace are manifest. In *Pollard* the worker drove a concrete truck to numerous and different building sites. It was held[298] that that very fact "underlined the necessity to give him adequate instructions and guidance about what to do if he encountered conditions that exposed him to a risk of injury."

[388] Axial submitted:

- That its role was to provide labour only to HMP as the contractor at the mine but was not itself a contractor at the mine;
- Axial had no contractual relationship with BMA in contradistinction to HMP's contractual relationship with BMA which was a highly regulated one;
- Axial had no supervisors on the mine site, and was not contracted to provide them. It followed that Axial's ability to manage the risk of fatigue could only be pre-emptively before sending the plaintiff to the mine site, or by means of some remote monitoring whilst he was at the site;
- That there was no allegation of negligence relevant to a failure by Axial to monitor the plaintiff's fatigue at the site. In that way, it is Axial's pre-emptive steps before sending the plaintiff to work at Norwich Park which must be the primary focus of the allegations;
- That it did not control the length of the shifts or the rest breaks, and it could not have done so. It points out that the request for Axial to quote for staff made by Mr Forbes in September 2008 was to provide staff for 12 hour shifts. Contractually, the hours of work between BMA and HMP were covered by Exhibit 2 tab 8 at clause 16. That was the requirement of HMP. Equally, Axial could not have controlled the rest breaks, it having no actual presence on the site;
- Axial had no ability to "require" the plaintiff to rest in camp at any time, let alone before the completion of his roster,[299] because Axial did not have the ability to supervise, instruct or direct its workers whilst they were on assignment to HMP. That responsibility for supervision, instruction and direction was solely HMP's;[300]
- Axial had a very small number of workers at that site on the same shift roster[301] as the plaintiff. Accordingly it is submitted that it was not reasonable for Axial, as a labour hire company, to have to provide a bus at the conclusion of that shift for an extremely small number of workers who undoubtedly were not all travelling to Monto. There was no evidence that any other Axial employees would have used the bus, making the cost of provision of it more prohibitive to Axial.

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[296] [2000] 1 VR 246.
[297] [2008] NSWCA 99 at [46].
[298] Ibid at [58] per McColl JA.
[299] Third Further Amended Statement of Claim, paragraph 14A(c), 14A(d) and 14A(e).
[300] Terms and Conditions, Ex 30, clause 9.6.
[301] Ex 2 tab 59 – 19 in fact.

[389] These submissions, even if factually accurate (and in some respects Axial called no evidence when it could have), do not provide an answer to the plaintiff's case. The observations of Mason P in *TNT Australia Pty Ltd v Christie* are relevant here (my emphasis):[302]

> "In my view, it would be contrary to principle to enable or even to encourage an employer that operates a labour hire business to treat the normal incidents of the employment relationship as modified simply because its employees are sent off to work for a client. **Indeed, the very fact that employees are dispatched to external venues and placed under the de facto management of outsiders will, in some cases, have the practical effect of requiring the employer to adopt additional measures by way of warning or training in order to discharge its continuing common law duty of care to its employees.**"

[390] Sight should not be lost of the fact that the risk in question here did not arise unexpectedly out of the work performed or by reason of some quirk of circumstance. The contract required Axial's staff to work consecutive 12 hour night shifts and, in Mr Kerle's case, to travel vast distances to and from home to do so. These features were well known to Axial and carried with it risks that had to be met. Far from taking reasonable care to ensure that Mr Kerle was prepared with adequate knowledge and training to be cognisant of the risks involved in what he was undertaking and to be aware of what was in place to assist him meet these risks Axial effectively ignored them.

[391] As Mason P pointed out in *Christie*:

> "… in the realm of negligence, (a) a non-delegable duty of care will (like a duty based on vicarious liability) be imposed on categories of persons regardless of personal fault on their part in the circumstances giving rise to the plaintiff's injury; but (b) the plaintiff must prove that damage was caused by lack of reasonable care on the part of someone (not necessarily the defendant) within the scope of the relevant duty of care."[303]

[392] Whether it be Axial or HMP's responsibility, Axial bears the liability for the default and causation is shown. The particulars in para 14A(a), (d) and (f) are made out. Axial breached its duty to take reasonable care through its personal fault in that regard. It also bears responsibility to Mr Kerle for HMP's failure as I have found above.

BREAK IN CHAIN OF CAUSATION

No-Doz

[393] Senior Counsel for the first defendant submitted that there should be a finding that Mr Kerle purchased No Doz while at the Dingo Roadhouse. He submitted that it followed that there was a break in the chain of causation or alternatively that the fact of the purchase assisted in showing that Mr Kerle was contributorily negligent.

[394] There is no direct evidence that there was any such purchase.

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[302] [2003] NSWCA 47 at [67].
[303] Ibid at [47].

[395] The evidence arises from two reports of Mrs Coles, an occupational therapist whom Mr Kerle saw in October 2012 and November 2015. It was common ground that Mr Kerle reported to Mrs Coles what he believed his wife had told him while he was in the Brain Rehabilitative Injury Unit ("BIRU") at the Princess Alexandra Hospital some time after the accident. He reported that his wife told him that during a telephone conversation they had while he was at the Dingo Roadhouse he told her he had purchased "No-Doz."

[396] In the report dated 25 October 2012 Mrs Coles reported that "At Dingo, he got something to eat, told his wife he had coffee and bought No-Doz."[304] In the report dated 3 November 2015 it is stated that "He previously said he told his wife he had coffee and had bought No-Doz. He clarified on this occasion that he does not actually remember buying No-Doz." He said "in a faint way I remember looking at the No-Doz packet, but I don't remember buying it – I'd usually have a coffee."[305]

[397] No objection was taken to the admissibility of the evidence. The statements to Mrs Coles were tendered as previous inconsistent statements under s 18 of the *Evidence Act* 1977 (Qld) ("the Evidence Act") and as establishing the proof of the truth of their contents under s 101 of that Act.

[398] Mr Kerle, in cross-examination, stated that he did not recall making the statement about No-Doz to Mrs Coles. The defendants submit that Mr Kerle therefore did not "distinctly admit" the statement.[306] He says he cannot remember the conversation taking place and so the statement of Mrs Coles may be given as proof that he did in fact say it.[307]

[399] It is worth noting that what the defendants seek to do here involves a step in reasoning beyond that supported by the authorities cited (*Simon-Beecroft v Proprietors "Top of the Mark" Building Units Plan No 3410*[308] and *R v Lace*[309]). The evidence of Mrs Coles establishes only the statement which she said Mr Kerle made to her. The fact so established is that when Mr Kerle was in the BIRU Mrs Kerle had told him that before the accident when he was at the Dingo Roadhouse he had told her that he had taken No-Doz or something to that effect.[310]

[400] The fact in issue here is whether Mr Kerle purchased or took No-Doz, not whether Mr Kerle recalls things said to him in the rehabilitation unit. In the principal authority relied on, *Simon-Beecroft v Proprietors "Top of the Mark" Building Units Plan No 3410,*[311] the fact in issue was whether the inadequate height of the balustrade led to the plaintiff's fall and catastrophic injuries. The defendant wished to show that on previous occasions the plaintiff had given a version that his fall was caused by a punch from a bouncer. A witness claimed that the plaintiff's wife had told the witness that the plaintiff had told the wife just that. It was held that the witness could give direct evidence, not hearsay evidence, of what the wife had told her ie that the husband had told the wife of the bouncer's punch causing his fall, and that was proof of the fact that

[304] Ex 2 tab 56 p 2.
[305] Ex 2 tab 57 p 1.
[306] Section 18 Evidence Act.
[307] Section 101 Evidence Act.
[308] [1997] 2 Qd R 635.
[309] [2001] QCA 255.
[310] Ibid at 3 [9].
[311] [1997] 2 Qd R 635; *R v Lace* [2001] QCA 255 at 3 [9] to the same effect.

his fall was caused by the punch. Here Mrs Coles is not called to give direct evidence of what Mrs Kerle says Mr Kerle told her but rather to say what Mr Kerle says that his wife says Mr Kerle told her.

[401] Section 18 of the Evidence Act authorises the reception of "a former statement made by the witness relative to the subject matter of the proceeding and inconsistent with the present testimony of the witness". The proof envisaged is not inadmissible proof but proof by way of admissible evidence. Here s 18 is called in aid not to prove by direct evidence (ie admissible evidence) a hearsay statement concerning a fact in issue, but to prove by hearsay evidence a hearsay statement concerning a fact in issue. The "witness" referred to is Mr Kerle. His "former statement" is that he spoke to his wife when at Dingo Roadhouse over the telephone and said something about purchasing No Doz. No witness gives direct evidence that he said that to his wife or that his wife told them that such a conversation occurred. Given the lack of any objection and so of any argument, and given my views as to the reliability of the evidence, it is not necessary to decide the point but I am sceptical of the notion that s 18 authorises proof by double hearsay. It is a step further than the circumstances in *Simon-Beecroft v Proprietors "Top of the Mark" Building Units Plan No 3410*[312] and *R v Lace*[313] relied on by the first defendant.

[402] For present purposes I observe that the statement to Mrs Coles was effectively a third hand statement and with each step the reliability of this final proposition – that Mr Kerle told Mrs Kerle that he had bought No-Doz when he was at the Dingo Roadhouse diminishes.

[403] In *Simon-Beecroft*[314] Williams J stated "Whilst there seems little doubt that the contents of a prior inconsistent statement made by a witness and properly admitted pursuant to s.18 can be used as evidence of any fact stated therein, the critical issue in most cases will be as to the weight, if any, which should be attached in all the circumstances to that evidence."

[404] Section 102 of the Evidence Act relevantly provides that in estimating the weight to be attached (if any) "regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement" and this is said to include whether the statement was made contemporaneously.

[405] Even disregarding the diminished reliability of a third-hand statement, for a number of reasons, I cannot accept that Mr Kerle's statement of what Mrs Kerle had told him he said was true. First there is the passage of time. Mr Kerle's statement to Mrs Coles was not contemporaneous – he is purporting to report in late 2012 what Mrs Kerle told him in late 2008.

[406] Secondly and most significantly, is that the statement is that of a brain injured man[315] with demonstrated memory problems reporting something that he thinks that he heard when still recovering from that injury. As counsel for the plaintiff submitted the unreliability of such a statement is manifest. That Mr Kerle struggled with what may have been false memories is clear from his own testimony:

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[312] [1997] 2 Qd R 635.
[313] [2001] QCA 255.
[314] [1997] 2 Qd R 635 at 642.
[315] Ex 2.6 – Report of Dr Coyne.

> "No, but we go back to before what I said. I've had glimpses or some sort of reflections in years gone by since – you know, since that period of time of different incidences that may have occurred or may not have occurred which I'm not sure of."[316]

[407] I think these features outweigh the submission that the plaintiff's recollection ought to be accepted because it was "of a person who due to his loss of recall was anxious to secure information of event preceding his accident from a person with whom he was in communication at that point."

[408] Third is the fact that Mrs Kerle repeatedly denied that the conversation allegedly recalled by Mr Kerle ever occurred. Mrs Kerle's honesty was not challenged. Indeed she seems patently honest. That she would forget such a conversation – or that Mr Kerle would have the more reliable memory - is highly improbable. I reject the submission made that Mrs Kerle's evidence about the matter is unreliable because of the time that has elapsed. As she said, a reference to the No-Doz would have been significant. When she was challenged on this in cross-examination Mrs Kerle responded with the following:

> "The coffee is a normal thing. You know, I've pulled up. How you going, dear? I've pulled up, had a coffee. To add No-Doz would stick in my head, I would believe, because it's not a normal thing. Like, I wouldn't – like, if he had of said, well, I've had coffee and pie that would have stuck in my head too. So something like No-Doz, I believe, would have stuck – would have rung alarm bells for me to recall.
>
> …
>
> Again, if the No-Doz was spoken it would have, I believe, stuck in my psyche, because it's not something that he does. It's out of the ordinary."[317]

[409] Finally there is Mr Kerle's evidence that he "can swear on a stack of Bibles that [he's] never taken No-Doz."[318] On its own this statement by Mr Kerle might not carry much weight due to his impaired memory but there are two reasons to believe his statement.

[410] First there is Mrs Kerle's evidence detailed above that "it's not something that he does." Second under cross-examination by senior counsel for BMA, while canvassing the use of No-Doz, Mr Kerle "mentioned something about a bad experience that [his] brother or [his brother's] wife might've had involving No-Doz."[319] The relevant passage is:

> "Well, when did you gain an understanding? Was it subsequent to your accident?---No-Doz? Yes. I have known about No-Doz from a story, basically, that my brother related to me, actually, from back when he was driving trucks in the Northern Territory, so - - -

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[316] T2-42.
[317] T4-74.
[318] T2-43.
[319] T2-42/42.

> So your knowledge of No-Doz extends back many years before the date of your accident; is that so?---I'm aware of it. Yes. Not of what it does, but I'm aware of it and - - -
>
> Well, what was your - - -?--- - - - what it did to him, anyway.
>
> What was your belief prior to the date of your accident as to why one would take No-Doz?---One would take No-Doz to keep you awake, which – I don't understand how that would happen, but – anyway, that's what it was supposed to do.
>
> That was your belief prior to the date of your accident; is that so?---Of what I've read on the side of the packet of a No-Doz, yes, and what had happened to my brother, yes – well, actually, his – his wife at the time."[320]

[411] In these circumstances I cannot give any weight to the statement of Ms Coles as evidence that Mrs Kerle told Mr Kerle he had told her he had bought or taken No-Doz or that Mr Kerle in fact took, or contemplated buying or taking No-Doz.

The continued driving

[412] It was submitted that the decision by Mr Kerle to continue on after his rest in Dingo, allegedly buying or taking No-Doz and not staying longer in Dingo resting or sleeping in his vehicle for a number of hours was "unreasonable conduct on the part of the plaintiff such as to break the chain of causation." His decision not to do so "was a matter for his personal autonomy."

[413] Counsel relies on *Medlin v State Government Insurance Commission*[321] as authority for this proposition. It was submitted by the first defendant that:

> "If, however, despite such forewarning ensuing in the course of his journey before injury, at a time he was in a position to address the risk, he took no sufficient measures to redress same, proof of causal nexus fails by invocation of the abovementioned *Medlin* concept of 'intervention of some act or decision of the plaintiff …which constitutes a more immediate cause of the loss or damage'. The fact that the injury occurs away from work, when the plaintiff is on his own time, and wholly in control of his own affairs underscores that such conclusion is apt to defeat a finding of causation."

[414] With respect I do not see how *Medlin* assists the defendants. There the majority (Deane, Dawson, Toohey and Gaudron JJ) stated that:

> The ultimate question must, however, always be whether, notwithstanding the intervention of the subsequent decision, the defendant's wrongful act or omission is, as between the plaintiff and the defendant and as a matter of common sense and experience, properly to be seen as having caused the relevant loss or damage. Indeed, in some cases, it may be potentially misleading to pose the question of causation in terms of whether an intervening act or decision has interrupted or broken a chain of causation which would otherwise have existed. An example of

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[320] T2-38.

[321] (1995) 182 CLR 1.

> such a case is **where the negligent act or omission was itself a direct or indirect contributing cause of the intervening act or decision**. It will be seen that, on the plaintiff's evidence, the present was such a case.[322] (my emphasis)

[415] There the premature termination of the plaintiff's employment was the product of the plaintiff's loss of earning capacity notwithstanding it was brought about by his own decision to accept voluntary retirement.[323] Here the negligent act of the defendants i.e. the failure to educate Mr Kerle on the nature and extent of the risks of driving while fatigued and informing him of his options was itself a direct contributing cause of the "intervening act" (if it can be classified as such) of Mr Kerle continuing his drive after his 30 minute break in Dingo believing that he was safe to continue driving.

[416] As such I decline to make a finding that Mr Kerle's decision to drive after his 30 minute stop in Dingo was a break in the chain of causation.

CONTRIBUTORY NEGLIGENCE

[417] I here summarise the various contentions advanced. Counsel for the defendants submit that the Plaintiff was contributorily negligent by:-

(a) failing to follow instruction not to operate a vehicle when fatigued;
(b) failing to use the MAC camp accommodation to rest prior to embarking upon his journey home;
(c) embarking on the journey knowing or reasonably knowing that he had enjoyed no rest following the conclusion of his shift;
(d) travelling on such journey alone rather than in company (or failed to make appropriate arrangements to return to his home after completing his roster);
(e) failing to stop and refresh himself more regularly during the course of such journey prior to his accident and injury including failing to rest and/or take a shower at the Dingo Roadhouse;
(f) failing to stop and sleep or rest, in his vehicle, in the course of the journey and or in the alternative knowing, or alternatively reasonably knowing, that he was fatigued, rather than continuing and taking "No-Doz" to treat such symptoms of fatigue so as to permit him to continue to drive.
(g) attempting to drive an excessive distance without adequate rest breaks which he either knew or ought to have known he ought not to;
(h) failing to drive safely/or take care for his own safety in the circumstances;
(i) failing to notify HMP (or anyone on its behalf):-
    i. of his intentions when completing his roster; and
    ii. that he was fatigued and felt he was unable to complete a drive to his home;
(j) failing to adhere to the various fatigue management induction and training to act accordingly;
(k) courting obvious risks in embarking upon and persisting in the journey when he knew that his physical limits for safe driving would be and were exceeded prior to the occurrence of the accident;
(l) having recognised the nature and extent of the risk which is alleged to have materialised in the accident, continuing the journey without adopting one or more of the precautions identified herein.

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[322] Ibid at 6, 7.
[323] Ibid at 11.

[418] In addition to its arguments under the general law Axial points out that s 307 of the WCRA applied. It was submitted that Mr Kerle:

(a) failed to comply with an instruction by his employer for his health and safety: s.307(1)(a);
(b) failed to use something designed to reduce his exposure to the risk of injury, namely the permanent room available to him: s.307(1)(c);
(c) ought to be found guilty of substantial contributory negligence having regard to the broad discretion to make such a finding: s.307(2).

[419] Counsel for the plaintiff submits that the contention that the plaintiff failed to take reasonable care for his own safety should be rejected and no finding of contributory negligence should be made. It was submitted:

(a) The plaintiff did all that could reasonably be expected of him in circumstances where he did not receive adequate training and instruction about the issue of fatigue and how to properly manage the risks associated with it;
(b) The failure to provide the plaintiff with adequate training and instruction on this issue meant he was not in a position to properly assess for himself whether he needed to do anything differently to what he did do on the morning in question;
(c) The plaintiff was not aware, because he had never been told by the defendants, that he was able to utilise a room at the MAC camp before his journey home;
(d) There was no other arrangement the plaintiff could make to return home, but to drive his vehicle. There was no bus of the kind that the plaintiff's wife utilised in 2009;
(e) There is no evidence to suggest the plaintiff could actually have "car pooled" with any other worker at the mine. Who it is that BMA contends the Plaintiff should have shared his journey with rather than travelling alone is not clear;
(f) The plaintiff did in fact stop at the Dingo Roadhouse for a period. It was reasonable of him to do so. He likely would have stopped again at Dululu to "stretch his legs". That would have been reasonable given his lack of education and training about the ineffectiveness of such action;
(g) It should be inferred that the plaintiff did not subjectively appreciate the extent of his fatigue and his impairment. The plaintiff was an experienced driver of country roads over long distances. He had an occasion once before to pull over and sleep when he felt tired. He would have done so here had he appreciated his state;
(h) The evidence shows that persons in this position may not appreciate the extent of their fatigue and impairment and misjudge their ability to drive. The evidence supports a finding that the Plaintiff was in that category.

The relevant principles

[420] The concept of contributory negligence involves the reduction of the damages recoverable "to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage": s 10(1)(b) of the *Law Reform Act* 1995 (Qld). In determining what may be "just and equitable" the principles explained in *Podrebersek v Australia Iron and Steel Pty Ltd*[324] are relevant:

[324] (1985) 59 ALJR 492 at 494.

> "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** (*Pennington v Norris*) and of the **relative importance of the acts of the parties in causing the damage**: *Stapley v Gypsum Mines Ltd*; *Smith v McIntyre* and *Broadhurst v Millman*, and cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance." (my emphasis and citations omitted)"

[421] In *Green v Hanson Construction Tools Pty Ltd*[325] the Court of Appeal observed:

> "Contributory negligence is defined by Professor Fleming as the plaintiff's failure to meet the standard of care to which he or she is required to conform for his or her own protection and which is a legally contributing cause, together with the defendant's default, in bringing about the plaintiff's injury.
>
> In this statement there are three matters which require particular attention. Firstly, a person may be guilty of contributory negligence notwithstanding that he or she owed no duty to the defendant or any third person.
> ….
>
> Secondly, a person may be guilty of contributory negligence if the person contributed to his or her injury. It does not matter whether the plaintiff's failure to protect himself or herself contributed to the accident itself. What is important is if the plaintiff's want of care contributed to the injury.
>
> The third matter of significance is that the burden of proof of contributory negligence lies on the defendant. The plaintiff is not required to prove that she did not contribute to her injury or the damage suffered."

[422] Counsel for the first defendant emphasised the following passage in *Vairy v Wyong Shire Council*,[326] in which Callinan and Heydon JJ wrote:

> "[O]f relevance to any question of contributory negligence …, we would seek to make the point that it is not right to say, without qualification, that the difference between the duties of an injured plaintiff, and those of a tortfeasor, is that the former owes absolutely no duties to others including the defendant, while the latter owes duties to all of his 'neighbours'. The 'duty' to take reasonable care for his own safety that a plaintiff has is not simply a nakedly self-interested one, but one of enlightened self-interest which should not disregard the burden, by way of social security and other obligations that a civilized and democratic society will assume towards him if he is injured. In short, the duty that he owes is not just to look out for himself, but not to act in a way which may put him at risk, in the knowledge that society may come under obligations of various kinds to him if the risk is realized."

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[325] [2007] QCA 260 at [29]-[32].
[326] (2005) 223 CLR 422 at 483 [220].

[423] I do not perceive that any different principle applies to an assessment under s 307 of the *Workers Compensation Rehabilitation Act*: cf. *Kemp Meats Pty Ltd v Tompkins*[327] per Holmes JA, as her Honour then was.

Discussion

[424] I will refer to each of the defendant's arguments in turn.

(a) failing to follow instruction not to operate a vehicle when fatigued;
(j) failing to adhere to the fatigue management induction and training received from BMA and/or HMP and to act accordingly;

[425] It is unclear what instruction the defendants are referring to. No particular instruction was identified in the defendants' submissions. Presumably reliance is placed on the materials Mr Kerle was given during one of his inductions. For example as part of the New Horizons course he was provided with a booklet produced by the Mining Industry Skills Centre Inc which stated "You need to be aware too of your responsibility not to drive to and from your place of work while fatigued."[328]

[426] The induction and training, as I have previously found, was not adequate. In these circumstances I decline to make a finding that Mr Kerle departed from the standard of care of the reasonable person in not following these materials given their brevity and vagueness.

[427] The submission that Mr Kerle drove when fatigued is dealt with below.

(b) failed to use the MAC camp accommodation to rest prior to embarking upon his journey home;

[428] I have previously found that Mr Kerle was not aware that he could use the accommodation at the MAC site to rest after he had completed his last shift.

(c) embarked on the journey knowing or reasonably knowing that he had enjoyed no rest following the conclusion of his shift;
(g) either knew or ought to have known not to attempt to drive an excessive distance without adequate rest breaks;

[429] Both of these propositions are evidently true, the question is whether in doing so Mr Kerle departed from the standard of care of the reasonable person. Plainly enough the relative importance of the decision to drive is of high causative potency.[329]

[430] On the one hand that Mr Kerle decided to drive knowing that he had not rested and had just completed his fourth consecutive night shift illustrates the lack of education he had received such that he could not appreciate the nature and extent of the risk he was taking. But the question remains whether a reasonable person would have made that decision. As counsel for the second defendant submitted the test of contributory negligence is an objective one. However, the circumstances known to the parties will be taken into account.

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[327] [2014] QCA 125 at [6].
[328] New Horizons Generic Handbook Exhibit 2 tab 52 at p 59.
[329] *Podrebersek v Australia Iron and Steel Pty Ltd* (1985) 59 ALJR 492 at 494.

[431] Perhaps many people would be wary of attempting a 5 hour drive after completing a fourth consecutive 12 hour night shift. But the statistics I referred to earlier support that this was commonplace among mine workers. The 2008 study showed that 81% of mine workers drove alone in their cars after finishing their roster. Of those 67% drove from 1 to 3 hours, 19% 3 to 5 hours and 12% more than five hours.[330]

[432] Mr Kerle had a duty "not just to look out for himself, but not to act in a way which may put him at risk." [331] Embarking on the drive may have put him at risk, but evidently his assessment that he could take adequate precautions to meet that risk was shared by many others. In the circumstances it is difficult to hold that it was an unreasonable decision. In Mr Kerle's case his intended precautions included two planned rest breaks after driving two hours or less and the intention to pull over and sleep in the car on the side of the road if feeling tired.[332] I do not think the decision to drive when taken at the mine site was a departure from the standard of care of the reasonable person.

(d) travelling on such journey alone rather than in company (or failed to make appropriate arrangements to return to his home after completing his roster);

[433] I have previously detailed the failure of HMP to provide a bus service and the defendants have failed to prove that any other arrangement was open to Mr Kerle (such as other employees who lived in or near Monto and travelled to and from Monto on the same days as Mr Kerle). Again I refer to the study which showed that 81% of mine workers drove alone in their cars.[333]

(e) failing to stop and refresh himself more regularly during the course of such journey prior to his accident and injury including failing to rest and/or take a shower at the Dingo Roadhouse;
(f) failing to stop and sleep or rest, in his vehicle, in the course of the journey and or in the alternative knowing, or alternatively reasonably knowing, that he was fatigued, rather than continuing and taking "No-Doz" to treat such symptoms of fatigue so as to permit him to continue to drive.
(h) failed to drive safely/or take care for his own safety in the circumstances;
(k) courted obvious risks in embarking upon and persisting in the journey when he knew that his physical limits for safe driving would be and were exceeded prior to the occurrence of the accident;
(l) having recognised the nature and extent of the risk which is alleged to have materialised in the accident, continuing the journey without adopting one or more of the precautions identified herein.

[434] Counsel for the first defendant submitted that Mr Kerle:

> "knew that he was feeling tired, such that he took a No-Doz, and still had 285 kilometres, or about 3 hours driving, to tackle, alone, before completing his journey. A sensible person would have taken a longer break, and more specifically would have slept in the car for as long as was required. He could do that at no cost whatsoever, and with complete security given that he could lock himself in the vehicle. Alternatively he could have hired a room at the Dingo Roadhouse."

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330 Ex 54 p 20.
331 *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 483 [220].
332 T2-24; T2-22; T2-48-49.
333 Ex 2 tab 54 p 20.

[435] I have already found that there is no reliable evidence that Mr Kerle purchased or consumed No-Doz. Nevertheless, to make a finding of contributory negligence I must find that Mr Kerle realised he was suffering from fatigue and chose to drive on anyway.

[436] The defendants submit that the report of Professor Dawson is evidence that "it is more probable than not that [Mr Kerle] feeling fatigued, continued to drive with full knowledge of that fact." In his report Professor Dawson stated:

> "The likelihood of a person falling asleep without an awareness of increased sleepiness, reduced alertness, yawning or struggling to stay awake etc is almost zero. If asked to put a percentage on it, it is probably less than 1%."[334]

[437] Against this though is the report of Professor Rogers in which it is stated:

> "One issue with sleep deprivation and fatigue is that the more sleep deprived an individual becomes the less able they are to determine how impaired they are. People tend to over-estimate how well they are performing and underestimate the effects of fatigue on their performance."[335]

[438] After driving for approximately 2 hours Mr Kerle stopped in Dingo for 30 minutes. He planned to stop in Biloela which was another 2 hours on and he would have pulled over to rest in his car, as he had done before, if he felt he was too tired to continue. [336] The accident occurred within 1 hour of his 30 minute break in Dingo – I do not think anyone driving long distances stops more frequently than once an hour, at least as a matter of precaution in the usual course. Professor Dawson referred to studies which suggest an "elevated level of risk post two hours or something approaching that" and that Mr Kerle's accident "wasn't archetypal in the sense that [he'd] been driving for a long time."[337]

[439] Mr Kerle did not accept that feeling the need to stretch, winding down the car window,[338] turning up the volume in the car, feeling the need to wriggle your body in your seat, feeling lethargic or your thoughts wondering off was a warning sign that you were tired in the course of driving.[339] But he agreed that your head proceeding to nod forward involuntarily, being slow to respond to something on the road that you needed to decrease your speed, losing eye focus, eyes closing, and drifting in and out of a lane were such warnings signs. [340] Mr Kerle said that if he experienced some of these things he would have pulled over and gone for a walk around the car.[341]

[440] The defendants of course are hampered in that they cannot prove what symptoms Mr Kerle was experiencing in the lead up to the accident. Mr Kerle was the only witness and he has no recollection. While Professor Dawson's "less than 1%" comment mentioned above does not seem to be supported by any close analysis of observations as opposed to his intuitive estimate, it was not contested and it does not seem inherently unlikely that there will be warning signs of growing fatigue in the vast

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[334] Ex 2 tab 55, p 9 para 4.7.
[335] Ex 2 tab 54, p 37, section 6.3.
[336] T2-24; T2-46.
[337] T6-19/24-36.
[338] Mr Kerle's evidence was that he always drove with the car windows down and so could not give this as a point of reference as to whether a person was tired or not.
[339] T2-48.
[340] T2-48-49.
[341] T2-49.

majority of cases. The professor refers to gross signs of which Mr Kerle was well aware. While conscious that micro sleeps can occur, and involuntarily, the probabilities seem to favour a finding that Mr Kerle must have experienced some gross signs that should have alerted him to increasing tiredness. He should also have been conscious that he had no rest for a very long time (17 to 19 hours), and had been operating machinery – whether at the mine or on the road – for most of that time. Balanced against these considerations is the fact that his own experience had been that he was well capable of driving safely for long periods. He knew that he had had a rest not long before.

[441] Not without some hesitation I have come to the view that there should not be an apportionment. What I think is involved here is some misjudgement by Mr Kerle of his growing weariness. In *Bankstown Foundry Pty Ltd v Braistina*[342] Mason, Wilson and Dawson JJ explained the relevant approach:

> "But [the worker's] conduct must be judged in the context of a finding that the employer had failed to use reasonable care to provide a safe system of work, thereby exposing him to unnecessary risks. The question will be whether, in the circumstances and under the conditions in which he was required to work, the conduct of the worker amounted to mere inadvertence, inattention or misjudgment, or to negligence rendering him responsible in part for the damage."

[442] Mr Kerle did not have the advantage of the education and training that would have better equipped him to appreciate the hazard. Professor Roger's point above is that in making this misjudgement Mr Kerle was not functioning or capable of functioning as he normally would. While the test is objective it must bring into account such subjective features that impact on the issue. Finally a finding as to what symptoms were experienced borders on speculation concerning the symptoms experienced.[343]

[443] I decline to make an apportionment on this ground.

(i) failed to notify HMP (or anyone on its behalf):-

a. of his intentions when completing his roster; and

b. that he was fatigued and felt he was unable to complete a drive to his home;

[444] Firstly, there is no evidence he was required to tell HMP of his intentions when he was completing his roster. Ms Greensill of HMP gave evidence she knew employees parked at the mine site on the last day of their shift so they could drive home immediately.[344] Secondly, Mr Kerle's evidence was that he did not feel he was fatigued and unable to complete a drive to his home when he was still at the mine site.[345] Evidently he was mistaken as to the level of his fatigue.

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[342] (1986) 160 CLR 301 at 310.

[343] Cf. *Muller v Cherrie* [2000] QSC 330 per Atkinson J at [14]-[16]; *Progressive Recycling Pty Ltd v Eversham* [2003] NSWCA 268 at [7] per Young CJ in Eq.

[344] See [283].

[345] See [27] and see [437] above – re less able to determine how impaired they are.

INDEMNITY OR CONRIBUTION BETWEEN TORTFEASORS

[445] In the event of my finding each of the defendants liable for the damage suffered by the plaintiff, each seeks contribution orders.

[446] BMA seeks contribution from HMP. HMP seeks an apportionment of liability between it and BMA and between it and Axial. Axial seeks to apportion responsibility to HMP.

[447] Relevant to each claim are sections 6 and 7 of the *Law Reform Act* 1995 (Qld*)*:

> **6. Proceedings against, and contribution between, joint and several tortfeasors**
>
> Where damage is suffered by any person as a result of a tort (whether a crime or not) the following apply—
>
> ...
>
> (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by the person in respect of the liability in respect of which the contribution is sought.
>
> **7. Amount of contribution and power of the court**
>
> In any proceedings for contribution under this division the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity."

[448] I have found that each of the defendants is a tortfeasor. The premise in s 6 is established.

BMA's claim

[449] BMA does not pursue the claims made in their Statement of Claim for damages or a contractual indemnity against HMP as HMP is in liquidation.

[450] However BMA submits that the proviso in s 6(c) is applicable here to a claim by HMP against BMA for contribution – "that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by the person in respect of the liability in respect of which the contribution is sought." BMA submits that Clause 27 of the services agreement between the parties provides for such an indemnity. It relevantly provides:

> 27. **Liability and indemnities**
> 27.1 The Contractor [ie HMP] will be liable for, and will indemnify the Principal [ie BMA] and keep the Principal indemnified from and against any liability and/or any loss or damage of any kind whatsoever, arising directly or indirectly from:

(a) any breach of any warranty or any of the terms or conditions of this Agreement by the Contractor;
(b) the illness, injury or death of any of the Contractor's employees, agents, contractors, and/or sub-contractors arising out of or in connection with this Agreement;
(c) any personal injury, illness or death to any person or damage to any property or any other loss or damage of any kind whatsoever caused or contributed to by:
    (i) the performance of the Services by the Contractor; and/or
    (j) the entry onto, and the activities undertaken on and in, the Site by the Contractor and/or its employees, agents, contractors and/or sub-contractors
(d) any negligence or wilful act or omission by the contractor and/or any of its employees, agents, contractors and/or sub-contractors in connection with this Agreement.

…

except to the extent that any liability, loss or damage is directly caused by the Principal's wilful misconduct or Gross Negligence or that of its employees, agents, contractors and sub-contractors (other than the Contractor."

[451] There is no submission that BMA's liability is due to "wilful misconduct or Gross Negligence".

[452] HMP argues that the indemnity does not apply. It submits that it is not sufficient for the contract to merely provide the occasion for the incurring of the liability. Rather BMA must show that the injuries claimed to have been suffered by the plaintiff arise "directly or indirectly" as a result of the performance of the services by HMP or Axial. "Services", in this context, are defined as meaning, "services specified in the agreement". HMP says that cannot be shown citing Applegarth J's observation in *Samways v WorkCover Queensland*[346]:

> "The words 'arising out of' are wide. The relevant relationship should not be remote, but one of substance albeit less than required by words such as 'caused by' or 'as a result of'. The phrase connotes a weak causal relationship. However, more is required than the mere existence of connecting links. The words require the existence of a causal or consequential relationship between, in this case, the use of the plant and the injury. "

[453] HMP submits:

(a) That the indemnity must arise out of some aspect of performance by the second defendant of the services. Those services are specified in the agreement but involve the removal of overburden at the Norwich Park Mine site;
(b) It is not within the scope of the clause to indemnify for the plaintiff's motor vehicle accident, some several hundred kilometres distance from the Norwich Park Mine site. It could not be said to arise from the provision of the '*services'* by the second defendant to the first defendant.

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[346] [2010] QSC 127 at [72].

[454] In my view the natural construction of the relevant clause is that the phrase "directly or indirectly" qualifies the connection between the loss or damage that BMA is exposed to and for which it seeks the indemnity and the "the illness, injury or death of any of the Contractor's employees, agents, contractors, and/or sub-contractors" or the "personal injury, illness or death to any person" mentioned in sub paragraphs (b) and (c). It is the the personal injury referred to in each case that must satisfy the condition of "arising out of or in connection with this Agreement" in (b) or be "caused or contributed to by the performance of the Services by the Contractor" in (c).

[455] There is no doubt at all that the loss or damage that BMA is exposed to and for which it seeks the indemnity arises directly from the injury of one of the Contractor's "employees, agents, contractors, and/or sub-contractors". Nor is there any doubt that that personal injury satisfies the condition of "arising out of or in connection with this Agreement" or was "caused or contributed to by the performance of the Services by the Contractor." I have concluded that Mr Kerle experienced a level of fatigue which caused the subject accident and that the fatigue resulted, at least in part, from working for four consecutive night shifts operating machinery removing overburden.

[456] In my opinion the indemnity applies and HMP is precluded by the contract from seeking contribution from BMA.

[457] I turn to consider BMA's contribution argument.

[458] Both BMA and HMP submit that the following observations of McPherson JA in *Kim v Cole*[347] are relevant to the contribution question:

> "In making apportionments under s 7 of the Act, the approach adopted to the significance of the causal element has not been uniform.
>
> …
>
> In my opinion, however, an approach to apportionment that, as a matter of law, ascribes primacy to causal potency does not accord with the provisions of s 7.
>
> …
>
> Among the circumstances to be considered are, in my opinion, the terms of any contract governing the rights and liabilities of the parties at the time the damage was done. Those terms may provide for a complete indemnity by one party in favour of the other as regards the damage for which they both are liable to another; or conversely, they may provide a complete exemption from or partial limit on liability for one against the other with respect to damage to be apportioned. Such an indemnity may be express, or it may result from the application of ordinary legal principles regulating contracts of that kind… or, again, it may be the effect of the nature and terms of the contract between them that one of two tortfeasors should contribute a disproportionately larger share than the other to the loss or damage for which both are liable.
>
> …
>
> There are analogies between the legislation facilitating apportionment between tortfeasors and the legislation providing for reduction of recoverable damages for contributory negligence; but a fundamental difference between the two is, as I have said, that in the case of the

[347] [2002] QCA 176 at [26], [27], [33].

> former, s6(c) of the Act envisages that the apportionment will take place against the matrix of the contractual rights and obligations, if any, of the parties that bear upon that process. In tort, the general duty of the defendant to take reasonable care is, as their Honours say, imposed by the law; but it is open to the parties to enlarge or to circumscribe the extent of that duty by the express or implied terms of the contract between them. Those terms are among the circumstances that are to be considered in arriving at a just and equitable apportionment of, or contribution to the loss or damage as between tortfeasors who are parties to such a contract. Where the contract impacts upon and affects the scope of that general duty of care in some relevant way, it must be the duty of care as so affected that governs the apportionment or contribution that falls to be determined under s7."

[459] HMP argues that the principles applicable to the assessment of contributory negligence apply here: *James Hardy and Coy Pty Ltd v Roberts*.[348] Blameworthiness and causative potency are determinants of responsibility. BMA contends that is not so – that McPherson JA's observation in [33] above is relevant. I am bound by those statements of principle given that McPherson JA was then speaking for a unanimous (at least on this point) Court of Appeal. Here then "the contract impacts upon and affects the scope of that general duty of care in some relevant way, it must be the duty of care as so affected that governs the apportionment or contribution that falls to be determined under s7."

[460] BMA submits that the appropriate apportionment is contribution close to the point of indemnity. It contends:

> "… if it transpires that the plaintiff was not the subject of instruction, and the taking of appropriate steps in relation thereto (eg accommodation), in respect of the fatigue, and more specifically commuting fatigue issue, then that was a consequence of a causative breach of the mining contract by HMP in an area in which, as between BMA and HMP, it contractually assumed responsibility."

[461] HMP argues for an equal apportionment:

> "Taking those matters into account, liability, as between the first and second defendants, ought be equally apportioned. Both had and assumed obligations with respect to fatigue management and the first defendant had investigative powers through its ability to audit the second defendant's performance and its ability to compel compliance under the contract. It took none of these steps, which it, clearly, was empowered to take. Its own defaults, in this regard, cannot be said to be a basis for a greater proportion of liability to be cast upon the second defendant."

[462] I have earlier set out the relevant contractual terms. Clauses 5.1 and 5.3 of the Services Agreement are relevant here. The standard that HMP was to meet was not less than that contained in the BMA Hours of Work Standard and Annexure J. HMP failed to comply with its contractual obligations. Had HMP done so the subject accident and Mr Kerle's injuries would in all probability have been avoided.

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[348] (1999) 47 NSWLR 425.

[463] In my view there is little merit in HMP's submission that BMA could have avoided the consequences of HMP's own default by more assiduous auditing. While true it does not sit well in the mouth of the contract breaker to say to the other party that you should have been more astute in realising our default.

[464] I agree with BMA's submissions. As between the two parties I apportion 90% to HMP.

Contribution between HMP and Axial

[465] HMP contends for an equal apportionment. Axial says that there should be none. I have rejected Axial's claim that HMP was the employer *pro hac vice* of Mr Kerle which seems to inform some of the submissions made here.

[466] HMP emphasises Axial's superior knowledge of Mr Kerle's personal circumstances ie where he lived, Axial's knowledge of the work system and the relevant risk which was not less than HMP's own, and the failure of Axial to take any steps to protect Mr Kerle.

[467] Axial relies on the following features:

(a) the employer took reasonable care in the placement of the plaintiff's labour;[349]
(b) Axial had no direct involvement in the Norwich Park site and no control over it;
(c) Axial did not have any supervisors on the site and was not involved in the day-to-day work;
(d) Axial had only been supplying labour to the second defendant for a very short period of time;
(e) Axial had provided safety and induction training;
(f) Axial knew of the safety induction training which the plaintiff would carry out with the first and second defendants;
(g) Axial knew that, as a mine site, the plaintiff's working environment would be strictly regulated and closely supervised;
(h) Axial had carried out its own site safety audit;
(i) Axial knew that accommodation was available to the plaintiff at the site;
(j) the obligations placed on the first and second defendants under the *Coal Mine and Safety Act*: see s 39, 41, 43 and 62.

[468] Axial's submissions largely ignore the point that I made earlier - the risk in question here did not arise unexpectedly out of the work performed or by reason of some quirk of circumstance. The risk was inherent in the placement of Mr Kerle at this worksite.

[469] The matters set out in paragraphs (a), (b), (g), (h) and (j) are not particularly relevant.

[470] As to (c) above - the one thing that Axial may have discovered if it had an on-site presence was that Mr Kerle, along with others, was leaving the site immediately at the end of roster. It may then have occurred to Axial that the induction and training given about fatigue had not brought home to the works the risk or the means of dealing with it.

[349] Axial cites *Transpacific Industrial Solutions Pty Ltd v Phelps* [2013] NSWCA 31.

[471] As to (d), the duty of care owed to an employee is not delayed until some time when the employer gets around to considering it.

[472] Axial's induction (see (e) above) was uninformative and misleading.

[473] If Axial was aware of the content of the inductions to be performed by HMP and BMA (see (f) above) then it was aware that the relevant risk was barely touched on.

[474] While Axial may have been aware of the availability of accommodation on site (see (i) above) it failed to tell Mr Kerle of his entitlements. It could and should have done so.

[475] Axial was presumably aware that no other steps were taken by HMP to meet the risk such as by the provision of bus service or shortening shift lengths. Given that, it became all the more important to attend to those measures that it could control to meet the risk.

[476] Senior counsel for Axial relied on the analysis and decision in *Hodge v CSR Limited*.[350] There the plaintiff was injured when using a full sized jackhammer to remove concrete which had solidified in the agitator barrel of one of the host employer's concrete agitator trucks. Hislop J declined to find the labour hire employer liable for the injury as between it and the host employer. The decision is in no way analogous to the present case. It involved a casual and unforeseeable (by the employer) act of negligence. There the injury was caused by the use of a full sized jack hammer, work was performed only from time to time, in the usual course when performed a light weight jack hammer was used, the full sized jackhammer was only used on the occasion in question because of a mechanical failure of the usual machine, and no on-site inspection by the labour hire employer was likely to have picked up the defective work system used on the occasion in question. None of these considerations are relevant here.

[477] Here Axial ought to have been well aware of the risk in question, it had available to it the means of meeting that risk by the provision of an appropriate induction which should have included the four matters that I identified earlier and, had Axial done so much, there was a probability that the subject accident could have been avoided. I do not accept that the cases referred to involving a finding of de facto control passing to the host employer to be of much assistance.[351]

[478] HMP knew that Axial expected that it would conduct inductions. It assumed the responsibility of explaining the availability of the facilities on site. HMP had the greater opportunity to provide buses and to adapt shift lengths. As well Axial can rely on the terms of its contact with HMP. Clause 9 of the terms and conditions of hire provided in part:

"Terms and Conditions – On Hire Employees

9 Your [ie HMP's] responsibilities

…

[350] [2010] NSWSC 27

[351] See *Barns v Parlin Pty Ltd* [2010] WADC 92; *Signet Engineering Pty Ltd v Melvan* [2003] WASCA 313*; Fennell v Supervision & Engineering Services Holdings Pty Ltd v Santos Ltd* (1988) 47 SASR 6; *Atkinson v Gameco (NSW) Pty Ltd* [2005] NSWCA 338.

9.6 To supervise, instruct and direct our workers properly at all times whilst they are on assignment to you

…

9.9 To maintain a safe work environment and safe systems of work for our workers by

9.9.1 establishing safe work practices

9.9.2 communicating safe work procedures to each of our workers

9.9.3 complying with safety standards

9.9.4 maintaining plant and equipment

9.9.5 providing induction, training and safety consumables to our workers where appropriate

9.9.6 informing our workers and us promptly of any unusual workplace risk or practice or of any change in site or safety conditions that may present a hazard to our workers

9.9.7 complying with our reasonable requests to ensure the workplace health and safety of our workers;

…."

[479] As between the parties, HMP well understood that Axial relied on it to have in place safe work practices.

[480] I consider HMP should bear a greater proportion of the loss. I assess the apportionment at 60/40 against HMP.

Orders

[481] The orders will be:

1. On or before 5pm on 23 January 2017 the parties should confer in an endeavour to agree on the appropriate orders to give effect to the relevant findings and conclusions in these reasons including orders as to costs;
2. In the event that the parties reach agreement in relation to the orders to give effect to these reasons, short minutes of those orders are to be provided to the Associate to McMeekin J by 9am on 30 January 2017;
3. In the event that the parties are unable to agree in relation to the orders to give effect to these reasons, the proceedings are adjourned to 10am on 30 January 2017.