SUPREME COURT OF QUEENSLAND

CITATION:	*Dearden v Ryan & Anor* [2022] QSC 111
PARTIES:	**CHARLES OSWALD DEARDEN** (plaintiff) **v** **TERENCE BERNARD RYAN and NICOLE THERESE RYAN** (defendants) **AND** **ROBERT ANDREW TAYLOR** (third party)
FILE NO/S:	S 366/21
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	2 June 2022
DELIVERED AT:	Rockhampton
HEARING DATE:	7, 8 & 9 March 2022
JUDGE:	Crow J
ORDER:	**1. Judgment for the Plaintiff against the Defendant for the sum of $600,797.55.** **2. Judgment for the Defendant against the Third Party in the sum of $420,558.29.**
CATCHWORDS:	TORTS – NEGLIGENCE – STANDARD OF CARE, SCOPE OF DUTY AND SUBSEQUENT BREACH – GENERALLY – where the plaintiff attended a party held on the property of the defendants – where the plaintiff was set alight by the third party using a fuel source whilst on the property – where the plaintiff suffered serious injuries as a result of being set alight – where the plaintiff alleges the defendants owed a duty of care to the plaintiff to protect him from being set alight whilst on their property – where the defendants deny the duty of care owed to the plaintiff extended to preventing such an action – whether the scope of the defendants duty of care extended to protecting the plaintiff from being set alight – whether the defendants breached that duty of care by not adequately storing the fuel source. DAMAGES – ASSESSMENT OF DAMAGES IN TORT – PERSONAL INJURY – GENERALLY – where the plaintiff

suffered serious injuries caused by being set alight – where damages are assessed pursuant to the *Civil Liability Act 2003 (Qld)* – where assessment of general damages, damages for diminution of earning capacity, damages for care and service, special damages and future medical expenses are in issue.

Civil Liability Act 2003 (Qld), ss 9, 10, 11, 57 and 59.

Civil Liability Regulations 2014.

Civil Proceedings Act 2011 (Qld), s 61.

Adeels Palace Pty Ltd v Moubarak (2009) 239 CLR 420, considered.
Allwood v Wilson & Anor [2011] QSC 180, adopted.
Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479, cited.
Hodge v Barham [2011] WADC 71, considered.
Medlin v State Government Insurance Commission (1995) 182 CLR 1 at 16, cited.
Menz v Wagga-Wagga Show Society Inc (2020) 103 NSWLR 103, applied.
Modbury Triangle Shopping Centre Pty Ltd v Anzil (2000) 205 CLR 254, distinguished.
Roads and Traffic Authority of NSW v Dederer (2007) 234 CLR 330, applied.
S v S, unreported, NSWCA 17 July 1998, applied.
Smith v Littlewoods Organisation Ltd [1987] AC 241, cited.
Smith v Leurs (1945) 70 CLR 256, considered
Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited [2022] HCA 11, applied.
Tocker v Moran [2012] NSWDC 248, considered.
Russell v Edwards & Anor [2006] NSWCA 19, considered.
Walker v Greenmountain Food Processing Pty Ltd [2020] QSC 329*,* applied.
WD & HO Wills (Aust) Ltd v State Rail Authority (1998) 43 NSWLR 338, cited.
Wynn v New South Wales Insurance Ministerial Corp (1995) 184 CLR 485, cited.

COUNSEL: R Green & M Willey for the plaintiff
A Collins for the defendants
M Rothery for the third party

SOLICITORS: Grant & Simpson for the plaintiff
McCabes Lawyers for the defendants
Hall Payne for the third party

Factual Background

[1] The plaintiff, Charles Dearden, is currently 24 years of age, having been born on 5 August 1997. Mr Dearden was invited to the 21st birthday party of his friend, Daniel Ryan, to be conducted on Saturday 9 February 2019 at the defendant's property, "The Three Mile". The Three Mile is at 400 Jondaryan-Saint Ruth Road, Jondaryan. The Three Mile is a property that is used to grow sorghum.[1] The homestead on The Three Mile is located on a house block with adjacent sheds and water tanks. The sheds adjacent to the homestead are used to store gardening and associated equipment and provide shelter for motor vehicles. There is a work shed a short distance from the homestead, drone footage of the property,[2] shows that the work shed may be used to store a harvester and other rural equipment.

[2] The majority of the agricultural plant and equipment and the entire fuel store, however, was kept at work sheds on an adjacent property, located approximately 5 minutes' drive from the homestead.[3] As explained by the defendant, Mr Terence Ryan, most of the agricultural equipment is run by diesel fuel which is stored at the remote location, [4] however, unleaded petrol is also stored at that location at a "petrol hub".[5] The unleaded petroleum fuel is used mostly for motorbikes and mowers,[6] and the motorbikes and mowers are fuelled at the petrol hub at the other property. The unleaded petrol is stored in three or four jerry cans.[7] Mr Ryan explained that the fuel stays at the work location on the other property as that is where the refuelling occurs. Mr Ryan explained that the shed adjacent to the homestead did not store petrol. Mrs Nicole Ryan said that if fuel for the mower was requested "it would be brought down then taken back, as a rule",[8] so that fuel was "always kept 5 km away at the hub".[9]

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1 T3-93, line 45.
2 Exhibit 5.
3 T3-94-95.
4 T3-95, line 22.
5 T3-95, line 4.
6 T3-95, line 10.
7 T3-95, lines 30-35.
8 T3-58, line 40.
9 T3-59, line 4.

[3] The defendant, Mrs Nicole Ryan, explained how she organised the 21st birthday for her youngest son, Daniel Ryan. Attending the party were 40-50 mature-aged guests and "a hundred and something … of the young ones".[10] The young ones were the friends of Daniel, most aged around 20 to 21 years of age. I accept the evidence of Mrs Ryan that she carefully planned for the party, in particular, due to the remote location of the party Mrs Ryan was careful to take steps to ensure no one that attended the party would drive home after the party while affected by alcohol. Mrs Ryan did this by inviting guests to stay overnight, arranging for a separate and safe area for party-goers to camp out.

[4] As Mrs Ryan explained, she and her husband provided beer (from full strength through to low alcohol beer), as well as wine. Mrs Ryan did not, however, provide any spirits. Mr and Mrs Ryan both anticipated there would be a number of guests among "the young ones" who were likely to become intoxicated. Mrs Ryan considered that it would be "naïve" to expect her guests to all remain sober.[11] Mrs Ryan explained that she thought it was important to provide a sufficient amount of beer and wine such that no person would need to leave the party in order to go and acquire any further alcohol, and thus expose themselves to the risk of driving whilst intoxicated. Mrs Ryan also bought a breathalyser principally to allow those who wished to leave the following day to test their alcohol levels prior to attempting to drive off in a motor vehicle.

[5] On the evening of the party, one young guest, informed Mrs Ryan that he was going to drive away from the party. Mrs Ryan ensured that guest had not been drinking alcohol and offered him the breathalyser.[12] Mrs Ryan organised for a great deal of food, not only for the party but for the following recovery breakfast and, it would appear, lunch the next day. Two cold rooms were hired, a DJ was hired and placed upon a flatbed trailer, extra lighting was installed, and additional medical provisions were acquired. A caravan, to be inhabited by relations of Mr and Mrs Ryan, was placed near the creek "just in case some 'goose'[13] decided to go down near the creek".[14] Mrs Ryan planned for safety measures to help intoxicated guests.[15]

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10 T3-27, lines 6-10.
11 T3-56, line 1.
12 T3-29, lines 10-18.
13 "Goose" I infer in this context to mean an intoxicated guest.
14 T3-29, lines 43-45.
15 T3-30, line 2.

[6] In short, I accept Mrs Ryan's evidence that it was a well-planned party and that she, principally, but also her husband, Mr Ryan, had put a lot of thought into the party and how to ensure the safety of all guests, particularly the intoxicated guests. This included making sure there were ample first aid supplies in the house.[16] Mrs Ryan also had a fire blanket and fire extinguisher in the house and knowledge that there was no petrol or other fuel anywhere near the party.[17]

[7] Mr and Mrs Ryan knew that some of the guests would be consuming such an amount of alcohol that the judgment of those persons would be impaired and that therefore extra precautions would need to be taken to prevent persons from injuring themselves or each other.[18] Mr Ryan considered that the distance between the equipment and fuel stored at the adjacent property would be sufficient protection from intoxicated guests accessing the fuel store.[19]

[8] At dusk the electricity supply failed. That caused many problems, there was no water supply to the house and so the toilets would not work, the cold rooms and the ovens stopped and many of the lights went out.[20] This caused what is aptly described by Mr Ryan as a "mad panic".[21] Mr Ryan drove a utility from the homestead over to the petrol hub at the adjacent property. He placed a generator, two full jerry cans of fuel (20L jerry cans) and a smaller jerry can (5L jerry can) into the back of the utility and drove back to the homestead.[22] When he arrived at the homestead, Mr Ryan had one of his guests pour the fuel from a small jerry can into the fuel tank of the generator. According to Mr Ryan:[23]

> "…The small one was put into the generator. It – we didn't quite fill the generator with it, and the comment was made – one of my mates was pouring it in – and comment was made the jerry can was empty and I said, "Well, there's enough fuel in the generator there; it'll be fine", and it was left in the back of the ute. The two full ones were put between – the ute was parked very close to the house wall. They were put beside the ute and the house wall."

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16 T3-30.
17 T3-30 to T3-31 & T3-59.
18 T3-96, line 20 - 25.
19 T3-96, line 36.
20 T3-97, lines 40-45.
21 T3-97, line 46.
22 T3-97, lines 13-27.
23 T3-97.

[9] It is plain that Mr Ryan removed the two full 20L jerry cans from the ute and placed them in a secluded and difficult position to access to prevent guests from accessing the fuel. In doing so, Mr Ryan was alert to the danger that the fuel created, namely it was a powerful accelerate to create a fire and it ought not be accessible to guests, particularly intoxicated guests.

[10] Approximately an hour to an hour and a half later an electrician arrived and restored the power and presumably the generator was disengaged. After Mr Ryan's guest had informed Mr Ryan that the small jerry can was empty, it was left in the rear of the utility. The utility was parked close to the homestead and close to the party. Mr Ryan did not check to ensure the small jerry can was empty. In any event, he had an expectation that there would have been 20 to 50 mls of fuel left in the small container.[24] Mr Ryan agreed therefore that he knew that there was some small amount of fuel left in the small jerry can when it was left in the back of the utility.

[11] After the restoration of power, the party proceeded as per Mrs Ryan's plan with several speeches occurring around "9:00ish".[25] However, a couple of hours after the speeches, that is in the vicinity of 11pm, a grassfire was started.[26] The position of the grassfire can be seen from the police photographs that make up Exhibit 4 and is further marked by a "g" upon Exhibit 17 by Mrs Ryan. The grassfire occurred between the homestead and the adjacent shed, and not far from the dog kennels where Mrs Ryan kept her two golden retrievers. After observing the fire, Mrs Ryan went to the kennel to retrieve her two golden retrievers and ensure their safety. Whilst she was doing this, Mrs Ryan observed "quite a few young men come straight over. They ran straight over to – to put it out straight away and Terry put it out as well. He was there".[27] Mrs Ryan smelt "unleaded fuel" at the scene of the grass fire.[28]

[12] After Mr Ryan observed the flame of the grassfire, he raced over to the flat top trailer, grabbed a fire extinguisher and got to the grassfire. Mr Ryan observed at that point there were half a dozen people stomping on it. He used the powder

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24 T3-98, line 24.
25 T3-33, line 29.
26 T3-34, lines 35-38.
27 T3-37, lines 41-44.
28 T3-63, line 6.

extinguisher to put the rest of the fire out.[29] Adjacent to where the grassfire was lit, Mr Ryan found the small jerry can. It was plain to Mr Ryan that it was fuel from the small jerry can, previously placed in the back of the utility, which was utilised to light the grassfire.[30] Mr Ryan observed his adult son, Matthew Ryan, pick up the small jerry can and Mr Ryan told Matthew to "put it in the shed".[31]

[13] Mr Ryan did not check where specifically his son Matthew put the small jerry can in the shed and did not check whether the small jerry can was empty or not, but did state "As far as I was concerned, it was empty".[32] Mr Ryan did not see Matthew check if the small jerry can was empty but rather "trusted Matt; Matt told me that he'd put it away".[33]

[14] Mr Ryan spoke to Mrs Ryan about the grassfire and petrol can as follows:

> "Nic said to me, you know, "You've put the jerry can away?", and I said, "Yes, it's away now. It's empty. It's fine."[34]

[15] Mr Ryan conceded that his wife, Mrs Ryan, was concerned about another fire. Despite Mr Ryan presuming that the small jerry can was then empty, he considered it was important that it was "put it in the shed out of the road of anyone […] looking for it".[35]

[16] Mr Ryan accepted that petrol in the container presented a risk of fire,[36] but thought that the container at that stage presented no risk as he assumed it was empty.[37] After Matthew put the container in the shed, Mr Ryan did not check to see that the container was empty nor check to see where Matthew placed the container within the shed. The defendants submit that the jerry can was expected to have some fuel in it.[38]

[17] After the grassfire, Mr Ryan removed the two large jerry cans from their position between the utility and the homestead and placed them in the shed as shown in the

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29 T3-99, lines 14-17.
30 T3-99, lines 26-27.
31 T3-99, line 30.
32 T3-99, line 36.
33 T3-100, line 36.
34 T3-99, lines 40-41.
35 T3-100, lines 5-9.
36 T3-100, lines 26-27.
37 T3-100, line 10.
38 Defendant written submissions, paragraph 14(e).

photographs in Exhibit 4.[39] Mr Ryan did so, because he was definitely concerned that the petrol might be used again, to start another fire.[40] Sometime later in the night, Mr and Mrs Ryan had a discussion about the steps taken by Mr Ryan, to remove the two large jerry cans and place them in the shed, the effect of which was Mr Ryan assuring Mrs Ryan that "it had been all put away".[41]

[18] The third party, Robert Taylor, boarded at secondary school with the plaintiff, Charles Dearden. They were friends with each other and with Daniel Ryan. At the time of the party Mr Taylor was aged 21. Mr Taylor carpooled with Charles Dearden and two other young men in order to come to Daniel Ryan's 21st birthday party at The Three Mile. The four young men carpooled from Toowoomba and drank beer on the hour long journey between Toowoomba and The Three Mile. The young men brought several swags. Mr Taylor consumed a great deal of alcohol at the party. Mr Taylor gave evidence that after viewing the grassfire out of the corner of his eye, he "went over there and helped put it out with a shovel, I think".[42] Mr Taylor's recollection was that there were several other people stomping on the fire to put it out. Mr Taylor could not recall the number of drinks that he had consumed but state that he was definitely intoxicated by the end of the night.[43]

[19] Mr Matthew Ryan gave evidence that he located the small jerry can nearby where the grassfire occurred.[44] Matthew Ryan described the small jerry can as a 5L jerry can with a cap on it. Matthew Ryan's evidence was "when I picked it up, it didn't feel like it had anything in it. It felt quite empty."[45]

[20] Matthew Ryan therefore picked up the jerry can and took it to the shed adjacent to the house. Matthew Ryan placed what he presumed to be an empty small jerry can inside a big terracotta pot which was situated on the left side of the shed, approximately 1 metre from the front of the shed. Matthew Ryan confirmed that you couldn't see that small jerry can inside the terracotta pot unless you walked into the shed.[46] The shed did not have internal lights.[47] Matthew Ryan did not check to see

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39 Exhibit 4, photographs numbered 3716 & 3718.
40 T3-101, lines 8-10.
41 T3-101, lines 12-15.
42 T2-66, lines 41-43.
43 T2-68, line 29.
44 T3-84, line 8.
45 T3-84, lines 19-20.
46 T3-84.

whether the small jerry can was empty, but rather relied upon the feel of the weight of the jerry can as being quite light.

[21] Sometime after midnight, Charles Dearden walked from the party over to the carpark as indicated upon photograph number 3721 contained within Exhibit 4, found a swag, placed it upon the ground and went to sleep. As he had absented himself from the party, Charles Dearden's friends went looking for him.[48] Charles Dearden's friend, Robert Taylor, was one of a group of men that were "standing in the party area and someone said to someone anyway Charlie has been asleep, and so we thought we'd go out there and wake him up and keep him partying".[49]

[22] It is important to record that there is no animosity between Mr Taylor and Mr Dearden. They were good friends, Mr Taylor was called as a witness in Mr Dearden's case. It was in the attempt to wake Mr Dearden up to have him re-join his group of friends for the purpose of partying, that things went terribly wrong.

[23] As Mr Taylor explains it, the group of young men, after deciding that they wished to wake Mr Dearden up, walked to the bar area to get another beer and then travelled around the side of the house, past the area where the grassfire had been, and followed the path detailed on Exhibit 11.[50] This led to the carpark area where Mr Dearden was sleeping on a swag. It was during this journey that Mr Taylor deviated into the shed to obtain some fuel as he, in his drunken state, formed the intention, in respect of Mr Dearden, "to wake him up via lighting his swag on fire".[51]

[24] I accept Mr Taylor's evidence in this regard, that his intention was to wake Mr Dearden up and his method to wake him up was to light Mr Dearden's swag on fire. I accept Mr Taylor's evidence that "the fire earlier in the night gave me the idea of a fire situation to wake Charlie up".[52] I accept Mr Taylor's evidence that he deviated from the group of young men by walking into the shed with the intention of finding

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47 T3-85, lines 4-5.
48 T2-69, line 1.
49 T2-69, lines 4-6.
50 As indicated by the blue line marked on Exhibit 11.
51 T2-71, line 12.
52 T2-73, lines 1-2.

fuel and that he found the small jerry can which had been placed in the shed by Matthew Ryan.[53] Mr Taylor explained that he had an expectation there would be fuel in the shed as "I grew up on a farm, so there's always fuel in a shed like that."[54]

[25] Mr Taylor found the fuel in the small jerry can in the shed but did not know where he found it.[55] Mr Taylor recalls "an image in my head - like a phone light showing the jerry can beside what I thought was a tyre, maybe".[56] Whilst I accept that Mr Taylor found the small jerry can that was previously placed into the shed by Matthew Ryan, I accept Matthew Ryan's evidence that it was placed inside a terracotta pot, approximately one metre inside the shed. I prefer Matthew Ryan's evidence in this regard as it is certain and Matthew Ryan had consumed little alcohol whereas Mr Taylor had consumed a large quantity of alcohol.

[26] Mr Taylor's evidence is that he picked up the container and checked that there was fuel in it by simply tipping it "upside down and dribbles came out. So it was obviously sufficient enough to pull the prank".[57]

[27] Mr Taylor's version of what occurred thereafter was that he arrived at the sleeping Charlie Dearden with a group of young men around him, however, "No one had a lighter. And then after about – I don't know, I obviously asked around. No one had a lighter to do – to pull the prank".[58]

[28] Mr Taylor's recollection is that there might have been 10 young men standing around attempting to wake Mr Dearden.[59] Mr Taylor's version is that someone handed him a lighter and then "I kind of dribbled fuel on his lower shirt, high jeans area and his – say his hip area and then ignited it … with the lighter".[60]

[29] Mr Dearden was then on fire. I accept Mr Taylor's evidence that it was "Not what I intended to happen".[61] The scene was horrific, with Mr Dearden jumping up and running away, his shirt on fire and stuck under his armpit. There was also fire on his

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53 As indicated by the green line marked on Exhibit 11.
54 T2-71, lines 18-19.
55 T2-71, lines 15-25.
56 T2-71, lines 24-25.
57 T2-71 lines 36-39.
58 T2-72, lines 1-4.
59 T2-72, line 9.
60 T2-72, lines 26-30.
61 T2-72, line 37.

body and hands. He was taken to the homestead, placed immediately in a shower, and attended to by Mrs Ryan's sisters, who are nurses. An ambulance was called. Mrs Ryan accompanied Mr Dearden in the ambulance to the Toowoomba Base Hospital before handing over care to Mr Dearden's mother, Elizabeth Dearden.

Duty of Care

[30] It is not in dispute that the defendants, as occupiers of The Three Mile, owed to the plaintiff a duty of care to take reasonable steps to minimise the foreseeable risk of harm.[62] This description of the general occupier's duty of care however is but a starting point in determining the fact specific scope and content of the duty of care. It is also necessary to consider and apply ss 9, 10 and 11 of the *Civil Liability Act* 2003 (Qld).

Civil Liability Act 2003

[31] Sections 9, 10 and 11 of the *Civil Liability Act* 2003 (Qld) provide:

> **9 General principles**
>
> (1) A person does not breach a duty to take precautions against a risk of harm unless—
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
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> (b) the risk was not insignificant; and
>
> (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.
>
> (2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among other relevant things)—
>
> (a) the probability that the harm would occur if care were not taken;
>
> (b) the likely seriousness of the harm;
>
> (c) the burden of taking precautions to avoid the risk of harm;
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> (d) the social utility of the activity that creates the risk of harm.
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> **10 Other principles**

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62 Defendant's written submissions, paragraph 21.

In a proceeding relating to liability for breach of duty happening on or after 2 December 2002—

(a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible; and

(b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and

(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in relation to the risk and does not of itself constitute an admission of liability in connection with the risk.

Division 2 Causation

11 General Principles

(1) A decision that a breach of duty caused particular harm comprises the following elements—

(a) the breach of duty was a necessary condition of the occurrence of the harm (*factual causation*);

(b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused (*scope of liability*).

(2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty—being a breach of duty that is established but which can not be established as satisfying subsection (1)(a)—should be accepted as satisfying subsection (1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party in breach.

(3) If it is relevant to deciding factual causation to decide what the person who suffered harm would have done if the person who was in breach of the duty had not been so in breach—

(a) the matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and

why responsibility for the harm should be imposed on the party who was in breach of the duty.

[32] In respect of s 9, I respectfully adopt the analysis of Applegarth J in *Walker v Greenmountain Food Processing Pty Ltd*[63] in respect of the analogous provisions in the *Workers' Compensation and Rehabilitation Act*. His Honour said:[64]

> [77] In applying the relevant provisions, the risk of injury must be identified so as to encompass the risk which is claimed to have materialised and caused the damage of which the plaintiff complains. The "risk of injury" referred to in the section is not to be confined to the precise set of circumstances in which the plaintiff was injured. It is well-established that, in order that a defendant be held to be negligent, it is not necessary that the defendant should have reasonably foreseen that the particular circumstances in which the plaintiff was injured might occur. Rather, what must be reasonably foreseeable is the nature of the particular harm that ensued, or, more relevantly, the nature of the circumstances in which that harm was incurred. Necessarily, the risk must be defined taking into account the particular harm that materialised and the circumstances in which that harm occurred. As Leeming and Payne JJA stated in *Coles Supermarkets Australia Pty Ltd v Bridge*:
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> "What is to be avoided is an unduly narrow formulation of risk of harm which then distorts the reasoning, because, for example, it obscures the true source of potential injury … or because it too narrowly focuses on the particular hazard which caused the injury …, or because it fails to capture part of the plaintiff's case." (references omitted)
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> [78] The following three propositions are derived from the same judgment. They were recently adopted by the New South Wales Court of Appeal in *Menz v Wagga Wagga Show Society Inc*:
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> "(1) the formulation of risk of harm should identify the 'true source of potential injury' (*Roads and Traffic Authority of NSW v Dederer* at [60]) and the 'general causal mechanism of the injury sustained' (*Perisher Blue Pty Ltd v Nair-Smith* (2015) 90 NSWLR 1; [2015] NSWCA 90 at [98];
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> (2) 'the risk must be defined taking into account the particular harm that materialised, and the circumstances in which that harm occurred'; *Erickson v Bagley* [2015] VSCA 220 at [33]; *Southern Colour (Vic) Pty Ltd v Parr* [2017] VSCA 310 at [55];

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63 *Walker v Greenmountain Food Processing Pty Ltd* [2020] QSC 329, [77] – [79].

64 Ibid [77] – [79].

> (3) 'What is to be avoided is an unduly narrow formulation of risk of harm which then distorts the reasoning, because, for example, it obscures the true source of potential injury (as noted in *Dederer* at [60]) or because it too narrowly focusses on the particular hazard which caused the injury (as noted in *Port Macquarie Hastings Council v Mooney* at [67]), or because it fails to capture part of the plaintiff's case (as in *Garzo*).'"
>
> [79] These authorities explain that it is possible to formulate the "risk of injury" in different ways. The state of affairs to which the legal rule applies may be described more or less generally or specifically without undue artificiality. Both unduly narrow and unduly broad formulations should be avoided."
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> [footnotes omitted] [emphasis added]

[33] In *RTA v Dederer,*[65] Gummow J at [59] emphasised the importance of the first step of accurately identifying the risk of harm. As Gummow J put it "It is only through the correct identification of the risk that one can assess what a reasonable response to that risk would be." Gummow J then identified the risk as follows:[66]

> [60] In the Court of Appeal, the risk faced by Mr Dederer was characterised by the majority as being "serious spinal injury flowing from the act of diving off the bridge". That risk, it was said, was one created by the RTA through the erection of the bridge by its predecessor. However, such a characterisation of the risk obscured the true source of potential injury. This arose not from the state of the bridge itself, but rather from the risk of impact upon jumping into the potentially shallow water and shifting sands of the estuary. This mischaracterisation of the risk led to two consequent errors. First, the majority were distracted from a proper evaluation of the probability of that risk occurring. Secondly, they erroneously attributed to the RTA a greater control over the risk than it possessed.
>
> [footnotes omitted]

[34] Heydon J at [295] agreed with the reasons of Gummow J. Callinan J, the other member of the majority, identified the risks as follows:

> [272] The evidence shows that there was a basis for holding that both the appellant and the second respondent should reasonably have foreseen that the bridge and the railing on it, in its current state, might present these risks; that the latter might provide a platform for divers and jumpers; and that they might thereby injure themselves, severely, either by jumping

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65 *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330.

66 Ibid at [60].

or diving on to a passing boat or a submerged bank, or indeed in the water itself.

[35] In *Menz v Wagga-Wagga Show Society Inc,*[67] Leeming JA with whom Payne JA and White JA agreed, addressed the issue of the degree of specificity (or intensity) which attends to the proper definition of the identification of the risk of harm as follows:[68]

> [61] I shall return to that meaning momentarily. But it is convenient immediately to note how the causality embedded in s 5L informs the specificity of the characterisation of an obvious risk. When Ms Hutton-Potts suffered harm from slipping on a recently polished floor which had not been buffed, Bryson JA (with whom McColl JA agreed) explained in CG Maloney Pty Ltd v Hutton-Potts [2006] NSWCA 136 at [173]–[174] why the appropriate formulation of the risk was quite narrow:
>
> "[173] … Rejecting more highly generalised statements, such as that bad things sometimes happen in hotels or that people sometimes fall over when walking on floors, the risks which confronted Ms Hutton-Potts can be stated at several different degrees of intensity. In a room in a hotel where a cleaner is polishing the floor with a buffing machine there is a risk that a recently polished floor will be slippery, because it is polished. I do not think that it would be correct in fact to see this as the risk which matured. If it were to be said that that risk was obvious it would, in the application of the meaning of 'obvious risk' to the facts, have to be said that a reasonable person in the position of Ms Hutton-Potts who entered the room would have seen that Mr Elder was in the room, and would have gone further and considered what he was doing, and would have gone further and noticed that he was buffing the floor with a buffing machine; and that it would have been obvious to the reasonable person who did those things that there was a risk of slipping on the floor because it was recently polished.
>
> [174] However that would not be enough to show that Ms Hutton-Potts suffered harm from an obvious risk, because it was not the recent polishing of the floor which caused her injury. A higher degree of intensity is required in stating the risk. Her injury was caused by there being polishing material on the floor which was not visible, and had not been removed in the buffing process. The finding that the risk which caused her injury was an obvious risk involves attributing to the

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67 *Menz v Wagga-Wagga Show Society Inc* (2020) 103 NSWLR 103.

68 Ibid at [61]-[64].

> reasonable person in her position discernment, as an obvious matter, that there may (even with a low degree of probability) be polishing material on the floor which was not visible. This is the risk which matured and caused her injury. Involved in this is not only advertence to what Mr Elder was doing, but advertence to the risk that he was not doing it properly."

[62] Bryson JA's point was that a relatively high degree of specificity was required in order fairly to capture the risk which materialised causing harm to the plaintiff in that case. When that was done, the risk was not an obvious risk.

[63] That reasoning is, to my mind, impeccable. It is endorsed in an article which closely considers the questions of generality and causation in s 5L, and which I have found helpful: G Perry, "Obvious risks of dangerous recreational activities: How is risk defined for Civil Liability Act purposes?" (2016) 23 Torts Law Journal, 56 especially at 64–70.

[64] Another example is *Alameddine v Glenworth Valley Horse Riding Pty Ltd* (2015) 324 ALR 355; [2015] NSWCA 219, where an 11-year-old girl was injured during a quad bike excursion in a recreational park. The instructor drove at an excessive speed, causing the girl also to drive too fast. The relevant risk was described as "the risk of injury resulting from an instructor riding faster than was safe for inexperienced or young participants and effectively giving such persons no real choice but to also do so in order to keep up with him", in contradistinction with the risk if the rider or another participant lost control of his or her bike: at [46]. The fundamental instability of the bike and the instructor's dictation of an excessive speed were said at [40] to be "other matters altogether" from the risks of injury following a loss of control.

[36] More recently, the plurality in *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd*[69] said:

> [107] The correct approach to characterisation of the risk for the purposes of breach of duty under s 5B of the Civil Liability Act was adopted in Port Macquarie Hastings Council v Mooney. In that case, a pedestrian slipped and fell into a stormwater drain on an unlit, temporary gravel footpath. The characterisation of the risk ignored the manner in which the pedestrian fell, and the particular hazard which precipitated the fall (the stormwater drain). Sackville A-JA said:
>
> > "The relevant risk of harm created by the construction or completion of the footpath was that in complete darkness a pedestrian might fall and sustain injury by

69 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited* [2022] HCA 11.

> reason of an unexpected hazard on the path itself (such as an unsafe surface or variation in height) or by unwittingly deviating from the path and encountering an unseen hazard (such as loose gravel, a sloping surface or a sudden drop in ground level)."

[108] Section 5C(a) of the *Civil Liability Act* reflects, and is consistent with, the common law. The effect of this provision is that a defendant cannot avoid liability by characterising a risk at an artificially low level of generality, that is, with too much specificity. As this Court said in Chapman v Hearse, "one thing is certain" and that is that in identifying a risk to which a defendant was required to respond, "it is not necessary for the plaintiff to show that the precise manner in which [their] injuries were sustained was reasonably foreseeable". The Court continued:

> "it would be quite artificial to make responsibility depend upon, or to deny liability by reference to, the capacity of a reasonable [person] to foresee damage of a precise and particular character or upon [their] capacity to foresee the precise events leading to the damage complained of".

[109] Similarly, in *Rosenberg v Percival*, Gummow J said:

> "A risk is real and foreseeable if it is not far-fetched or fanciful, even if it is extremely unlikely to occur. The precise and particular character of the injury or the precise sequence of events leading to the injury need not be foreseeable. It is sufficient if the kind or type of injury was foreseeable, even if the extent of the injury was greater than expected. Thus, in *Hughes v Lord Advocate* [[1963] AC 837], there was liability because injury by fire was foreseeable, even though the explosion that actually occurred was not."
>
> [footnotes omitted]

[37] The plurality warned at [117], [119], and [124] against a too precise or detailed identification of the risk.

[38] Applying the principles derived from these cases I consider that:

(a) the true source of the potential injury is an uncontrolled fire;

(b) the general causal mechanism of the injury sustained is the use by an intoxicated guest of the defendant's petrol to start a fire;

(c) the particular harm which materialised was the burn injury suffered by the guest Charles Dearden;

(d) the circumstances in which the harm occurred was the lighting of a fire by an intoxicated guest.

[39] I conclude that, the facts, as outlined above, identify the risk as a risk of suffering a burn injury from an uncontrolled fire lit by an intoxicated guest from petrol made available by the defendants.

Section 9(1)(a): Was the Risk Foreseeable?

[40] Upon the facts in the present case, I conclude that the risk was foreseeable as it was a risk of which the defendants knew. The defendants knew of the risk of a guest suffering a burn injury from an uncontrolled fire by the experience but a few hours previously of the grass fire. There were over a hundred young adults at the party, some were highly intoxicated. Following the first fire, which I would infer was a prank, Matthew Ryan and Mr Terrence Ryan moved the remaining jerry cans. In respect of the large jerry cans which held a large amount of fuel, Mr Ryan deposed that he moved them "because of the concern the petrol might be used from those jerry cans".[70] As noted at paragraph [14] above, Mrs Ryan specifically asked her husband whether the jerry can had been put away following the grassfire.

[41] Although the small jerry can had been used to fill the generator and then used by an unidentified person to start the grass fire, it does not follow that it was reasonable to conclude the small jerry can was likely to be empty following the lighting of the grass fire. As Mr Ryan conceded, it ought to be expected that there would have been a small amount of fuel (20 to 50 mls) left in the small jerry can.[71] This was not only Mr Ryan's expectation but it accords with common usage of pouring fuels from jerry cans. Therefore, the reasonable expectation was that there ought to have been a small amount of fuel left in the small jerry can and that expectation ought not to have been displaced by a feeling that the jerry can "felt quite empty".[72] The evidence shows that it was very easy to determine that the jerry can was not, in fact, empty. Mr Taylor, although 'definitely intoxicated',[73] simply tipped it upside down and that simple act made it plain to an intoxicated person that the small jerry can

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70 T3-101, lines 8-10.
71 T3-98, line 24.
72 T3-84, lines 19-20.
73 T2-68, line 29.

was not in fact empty.[74] The event that precipitated the fire, in this case, the use of fuel, was the event that is required to be foreseeable, not the act of throwing the fuel onto Charles Dearden. As Gummow J observed (supra) of *Hughes v Lord Advocate*, injury by fire may be foreseeable even if the specific antecedent action (an explosion) was not.

[42] I conclude therefore that the risk was foreseeable within the meaning of s 9(1)(a) of the Act.

Section 9(1)(b): "not insignificant"

[43] In *Walker v Greenmountain* (supra), Applegarth J said:[75]

> [100] This statutory test effected a slight increase in the necessary degree of probability over the common law formulation of "not far fetched or fanciful". The double negative formulation of "not insignificant" is deliberate, and was not intended to be a synonym for significant. The word "significant" would be apt to indicate a higher degree of probability than was intended.
>
> [Footnotes omitted]

[44] Absent the first grassfire, it was at least arguable that the risk was insignificant. The first grassfire, however, changed things, as it had been recently demonstrated that the level of intoxication of some of the guests (or at least one of the guests) had led that guest to engage in extremely reckless behaviour of lighting a grassfire beside the homestead and beside the kennel. If the fire had not been contained, serious injury may have been occasioned.

[45] Ordinarily, the sheer stupidity of lighting a fire at a party would be sufficient to categorise the probability or risk of occurrence as being low, perhaps even to the level of being insignificant. However, I accept that the first grassfire did place in the mind of Robert Taylor the idea of starting a fire and using that to wake up his friend Charles Dearden.[76] Therefore, in my view, due to the recent grassfire (recent in the sense of being within a few hours of the fire which harmed Charles Dearden) I conclude that the risk was not insignificant.

Social Host Liability

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74 T2-71, line 37-38.
75 *Walker v Greenmountain Food Processing Pty Ltd* [2020] QSC 329 at [100].
76 T2-73, lines 1-2.

[46] Counsel for the defendants and third party argued that the concept of social host liability law, which may have found favour in the United States and Canada, had not been accepted in Australian common law. The leading authority is the New South Wales Court of Appeal decision in *Parissis & Ors v Bourke* [2004] NSWCA 373.[77]

[47] Mr and Mrs Parissis gave permission for their house in Sydney to be utilised for the purpose of an 18th birthday party for their son, Angelo. The occupiers made available their house together with a barbecue to provide dinner, and agreed to host the party on the basis that only light beer would be served. Mrs Parissis explained her concern that she expected at the party there would be a "bunch of young males" and she was concerned about them becoming intoxicated and drink driving. Angelo Parissis followed his father's practice of soaking heat beads in methylated spirits prior to the barbecue. The first barbecue, from about 7:30pm to 8:30pm occurred without incident.

[48] In the early hours of the morning between 1:00am and 2:30am, as the guests became hungry, an attempt was made to re-start the barbecue with leaves, sticks and paper, assisted by cigarette lighters, however, it was not successful. Accordingly, the same methylated spirits bottle was obtained from the garage, brought to the barbecue where three men threw methylated spirits on the fire three or four times before the flame caught and burnt the respondent, Bourke, who was sitting nearby and not participating in the re-ignition.

[49] In allowing the appeal, Bryson JA (with whom Mason P and Tobias JA agreed), quoted from the reasons of Priestly JA in *S v S*, unreported, NSWCA 17 July 1998, where Priestly JA said:[78]

> "Questions of the general principles applicable in situations analogous to that in the present case are discussed in *Smith v Littlewood's Organisation Ltd* [1987] AC 241 and *Husband v Dubose* (1988) 531 North Eastern Reporter 2d Series, 600, which give access to the earlier authorities. They show that in general social hosts do not owe duties to social guests, but that circumstances may arise where the foreseeability of harm and the capacity of the host to prevent it combine to bring a duty of care into existence; see *Jobe v Smith* (1988) 764 P 2d 771 (Court of Appeals of Arizona) also see generally American Law Reports 3d Cases and Annotations Vol 10

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77 Special leave refused, 2005 HCATrans 673, whilst noting in argument that s 54 of the Crimes Act and the "criminal" behaviour relied on by Bryson JA was not raised at trial.

78 *S v S*, unreported, NSWCA 17 July 1998.

(1966) at 619–660 and the August 1996 Supplement at 98-151, esp at 113 and 120, and, in Australia, the general observations of Dixon J in Smith v Leurs (1945) 70 CLR 256 at 262."

[50] Bryson JA then said at [55]:

> [55] The facts of the present case direct attention to the observations of Dixon J in *Smith v Leurs* (1945) 70 CLR 256 at 261–262:
>
> > But, apart from vicarious responsibility, one man may be responsible to another for the harm done to the latter by a third person; he may be responsible on the ground that the act of the third person could not have taken place but for his own fault or breach of duty. There is more than one description of duty the breach of which may produce this consequence. For instance, it may be a duty of care in reference to things involving special danger. It may even be a duty of care with reference to the control of actions or conduct of the third person. It is, however, exceptional to find in the law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature. It appears now to be recognized that it is incumbent upon a parent who maintains control over a young child to take reasonable care so to exercise that control as to avoid conduct on his part exposing the person or property of others to unreasonable danger.
>
> [emphasis added]

[51] In the present case, it was not suggested that it is part of the plaintiff's case that the defendants, as social hosts, owe a duty of supervision to social guests. I respectfully accept the analysis of Priestly JA in *S v S* that, in general, social hosts do not owe duties to social guests. However, in the present case, I do consider that the provision of the source of fuel, being the small jerry can, then placing it in a position that made it available to social guests, who were expected to be highly intoxicated, combined with the fact that there had been an earlier grassfire, does place upon the defendants a duty to take reasonable care to prevent harm from an uncontrolled fire lit by an intoxicated guest from petrol made available by the defendants.

[52] The defendant's duty does not arise from the defendants' position as social hosts, but rather as an occupier under the general duty of care under the law of negligence as established in *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

[53] In *Russell v Edwards & Anor* [2006] NSWCA 19, the Court of Appeal upheld the decision of Sidis DCJ, dismissing the case brought by Mr Russell. Mr Russell was a 16-year-old who attended at a house party held by Mr and Mrs Edwards for their 16-year-old son. Much alcohol was consumed and late in the evening Mr Russell dived into the pool and struck his head, suffering serious injury. Sidis DCJ found that the combined circumstances of young persons who are consuming alcohol called for the party hosts to provide a degree of supervision such that a reasonable person in the defendant hosts' position would have taken the preventative action of closing the swimming pool to the intoxicated children.

[54] Sidis DCJ found that the plaintiff, Mr Russell, had established negligence against the hosts Mr and Mrs Edwards, however, Mr Russell's case was dismissed under s 50(2) of the *Civil Liability Act* 2002 (NSW). That provision limits recovery to an intoxicated plaintiff, where the plaintiff fails to satisfy the court that the injury would likely have occurred if the person had not been intoxicated.

[55] In *Hodge v Barham* [2011] WADC 71, Ms Hodge was the 17-year-old plaintiff who attended at the 21st birthday party of the first defendant, Barham's house. During the party, the son of the first defendant took hold of Ms Hodge in attempt to persuade her to dance with him, however, as he was intoxicated, he fell onto her. Ms Hodge extended her arm to break her fall with her right wrist landing on broken glass causing a laceration and significant nerve and tendon damage. Ms Hodge's action against the first defendant occupier was dismissed. Applying *Parissis v Bourke*, Derrick DCJ said at paragraphs [165]-[166]:

> [165] I do not consider that it can be said that the first defendant was, by supplying alcohol at the party and thus enabling the second defendant to drink to excess, responsible for creating or increasing the risk that the second defendant would cause harm to the plaintiff. The second defendant was not a teenager. He was a 21 year old man. He was responsible for his own conduct when it came to the amount of alcohol that he consumed at his birthday party in his own home: *Parissis v Bourke* [2004] NSWCA 373 [8].

> [166] In the circumstances I do not consider that there were sufficient salient features in the relationship between the plaintiff and the first defendant so as to justify or require the conclusion that the relationship between them was sufficiently close to give rise to a duty on the part of the first defendant to take reasonable care to prevent injury being caused to the plaintiff by violent, quarrelsome or disorderly conduct of the second defendant. I do not consider that the relationship between the plaintiff and the first defendant, such as it was, is sufficient to justify a departure from the ordinary common law position that there is no duty of care to protect another from risk of harm unless a person has created or increased the risk of harm.

[56] *Parissis* was also applied by Mahoney SC DCJ in *Tocker v Moran* [2012] NSWDC 248.[79] The plaintiff, Mr Tocker, was a 19-year-old male who attended the 18th birthday party at the defendant Moran's premises. The evidence showed that much alcohol was consumed. At approximately 11:30pm, the plaintiff, Mr Tocker, was observed in and around the bonfire when, as a result of his intoxication, he stumbled and fell into the bonfire, suffering burn injuries. Mahoney SC DCJ reflected on evidence showing that bonfires were commonplaces at parties, and had occurred on many occasions without resulting in injury, and that therefore the risk of a party attendee falling into the fire was not foreseeable and alternatively if it was it was "not 'not insignificant'" such that no duty of care arose in favour of the plaintiff, Mr Tocker.

[57] An analysis of the party cases does not assist in the determination of liability in Mr Dearden's case as it is a case with significantly different facts to those party cases.

Duty of Care for Criminal Conduct

[58] The defendants submit that the conduct engaged in by Robert Taylor was criminal in nature and that "he pleaded guilty to doing grievous harm".[80] Footnote 1 of the defendant's written submission records that Mr Taylor pleading guilty to doing grievous harm was an admitted fact, however, there is no reference to any admitted fact upon the pleadings or any other admitted fact. The plaintiff's written submissions do not address the issue at all. I will assume that Mr Taylor's conduct was criminal in nature.

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79 *Chadley Winston Tocker v Denise Kathleen Moran* [2012] NSWDC 248.

80 Defendant's written submission, paragraph 2.

[59] In *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 267 [29] – [30], Gleeson CJ said

> "[29] … The unpredictability of criminal behaviour is one of the reasons why, as a general rule, and in the absence of some special relationship, the law does not impose a duty to prevent harm to another from the criminal conduct of a third party, even if the risk of such harm is foreseeable.
>
> [30] There may be circumstances in which, not only is there a foreseeable risk of harm from criminal conduct by a third party, but, in addition, the criminal conduct is attended by such a high degree of foreseeability, and predictability, that it is possible to argue that the case would be taken out of the operation of the general principle and the law may impose a duty to take reasonable steps to prevent it. The possibility that knowledge of previous, preventable, criminal conduct, or of threats of such conduct, could arguably give rise to an exceptional duty, appears to have been suggested in *Smith v Littlewoods Ltd*…"
>
> [Footnotes omitted]

[60] Gleeson CJ further said at [34]:

> "[34] It is unnecessary to express a concluded opinion as to whether foreseeability and predictability of criminal behaviour could ever exist in such a degree that, even in the absence of some special relationship, Australian law would impose a duty to take reasonable care to prevent harm to another from such behaviour. It suffices to say two things: first, as a matter of principle, such a result would be difficult to reconcile with the general rule that one person has no legal duty to rescue another; and secondly, as a matter of fact, the present case is nowhere near the situation postulated."
>
> [Footnotes omitted]

[61] Hayne J said at [112] – [114]:

> "[112] The occupier of land has power to control who enters and remains on the land and has power to control the state or condition of the land. It is these powers of control which establish the relationship between occupier and entrant "which of itself suffices to give rise to a duty … to take reasonable care to avoid a foreseeable risk of injury" to the entrant. It is the existence of these powers which lies behind both the particular conclusion in Hargrave v Goldman that occupiers of land owe a duty to take reasonable care in respect of fire or other hazards originating on the land and general statements, of the kind made by Lord Nicholls of Birkenhead in his dissenting speech in Stovin v Wise, that "[t]he right to occupy

can reasonably be regarded as carrying obligations as well as rights".

[113] The appellant, in this case, did not control what happened to the first respondent. It is not enough to say that the appellant had power to act in a way that may have made the occurrence less likely (by leaving the lights on). That is doing no more than restating, in other words, a conclusion about foresight or, perhaps, causation. The conduct which caused the first respondent's injuries was deliberate criminal wrongdoing. By its very nature that conduct is unpredictable and irrational. It occurs despite society devoting its resources to deterring and preventing it through the work of police forces and the punishment of those offenders who are caught. That is, such conduct occurs despite the efforts of society as a whole to prevent it. Yet the respondents' contention is that a particular member of that society should be held liable for not preventing it.

[114] I have emphasised the inability of the appellant to control the conduct of the assailants who injured the first respondent because a duty to take steps to control that conduct should not be found if the person said to owe the duty has not the capacity to fulfil it. It may be said, however, that analysing the matter in this way pays too much attention to the position of the occupier and too little to the position of the injured party. In particular, it may be said that the question should be whether the occupier could reasonably have hindered the offending behaviour, if only by doing something which would have better allowed the injured party to protect himself from attack."

[footnotes omitted] [emphasis added]

[62] Mr Anzil was an employee of a video shop business at a suburban shopping centre occupied by Modbury Triangle Shopping Centre Pty Ltd. Mr Anzil concluded work after 10pm and whilst walking to his car in the carpark he was assaulted by three criminals. The argument in respect of liability, which succeeded at trial and at intermediate appellant level, was that the occupier should have ensured that the lighting in the carpark remained illuminated until Mr Anzil had left his employment. In this regard it is important to acknowledge that the nature of the claim brought was against an occupier failing to act to prevent a criminal offense.

[63] As the High Court said in *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at 436 [23] – [25]:

"[23] ...It is important to recognise, however, that the duty alleged in Modbury was said to be founded only on the defendant's

> position as occupier of the land controlling the physical state of the land (there the level of its illumination). What is said in Modbury must be understood as responding to those arguments. No complaint was made that the defendant should have controlled, but did not control, access by the assailants to the land it occupied.
>
> [24] It is, of course, important to recognise that the decision in Modbury forms part of a line of cases in which consideration has been given to whether and when one person owes another a duty to take reasonable care to control the conduct of a third person. And the fact that the conduct in question is criminal conduct is of great importance in deciding not only what, if any, duty is owed to prevent its commission, but also questions of breach and causation.
>
> [25] Several considerations set the present case apart from Modbury and point to the conclusion that Adeels Palace owed each plaintiff a relevant duty of care. First, the complaint that was made in these cases was that the occupier of premises failed to control access to, or continued presence on, its premises. Secondly, the premises concerned were licensed premises where liquor was sold. They were, therefore, premises where it is and was well recognised that care must be taken lest, through misuse and abuse of liquor, "harm [arise] from violence and other anti-social behaviour". And thirdly, the particular duty said to have rested on the occupier of the premises (who was the operator of the business that was conducted on the premises) is a duty to take reasonable care to prevent or hinder the occurrence of events which, under the Liquor Act, the licensee was bound to prevent occurring — violent, quarrelsome or disorderly conduct. (And although variously expressed in the legislation of other Australian jurisdictions, the evident scheme of all liquor licensing laws in Australia is to minimise anti-social conduct both on and off licensed premises associated with consumption of alcohol.)"
>
> [Footnotes omitted]

[64] In my view, there are several considerations that set the present case apart from *Modbury* and similarly point to the conclusion that the defendants owed Charles Dearden a duty of care.

[65] Firstly, duty of care in the present case is not founded solely upon the defendants' position as occupier of the property The Three Mile.

[66] Secondly, as set out in the further amended statement of claim, complaint is made that the defendants, in this case, failed to control the continued presence upon the

property of the expected irrational and intoxicated guests by supervising those guests that were acting in an unacceptable or unruly manner.

[67] Thirdly, the harm to which the various Liquor Acts in Australia are directed, to minimise anti-social conduct both on and off licenced premises associated with the consumption of alcohol, is enlivened upon the facts in the present case. The guests, many of whom were young men, were supplied with essentially an unlimited amount of alcohol and it was expected that many would become intoxicated and therefore may act in an irrational manner.

[68] The fourth consideration is the introduction of the fuel source, albeit in an innocent manner in order to allow the generator to be operational. Nonetheless, the defendants, with a large number of intoxicated persons, introduced fuel from a remote location to the party area where there was always a prospect that an intoxicated irrational person may start a fire.

[69] Finally, the first grass fire having been lit, and with the continued consumption of alcohol, more likely than not resulting in the young guests becoming even more intoxicated and irrational, called for prudent steps to deal with that high level of risk by removal of the fuel source. Those risks were actually foreseen by Mr and Mrs Ryan.

[70] In *Modbury Triangle (supra)*, Callinan J at 301 [145] said:

> "[145] … In *Smith v Littlewoods Organisation Ltd* a case which involved a lockfast, derelict cinema, Lord Goff of Chieveley applied the principles expressed in *Dorset Yacht Co Ltd v Home Office*, but in doing so his Lordship did not define the "negligence" to which he referred in the context of the prevention or deterrence of criminal activity generally:
>
> > That there are special circumstances in which a defender may be held responsible in law for injuries suffered by the pursuer through a third party's deliberate wrongdoing is not in doubt … But there is a more general circumstance in which a defender may be held liable in negligence to the pursuer, although the immediate cause of the damage suffered by the pursuer is the deliberate wrongdoing of another. <u>This may occur where the defender negligently causes or permits to be created a source of danger, and it is reasonably foreseeable that third parties may interfere with it and,</u>

> sparking off the danger, thereby cause damage to persons in the position of the pursuer.
>
> In the event however the House of Lords held that no relevant duty of care existed in that case."
>
> [emphasis added]

[71] The present case is more than that referred to by Lord Goff of Chieveley in *Smith v Littlewoods Organisation Ltd*.[81] In the present case, the defendants have caused the source of danger by introducing the fuel source. Given the high level of intoxication and irrationality of the young persons at the party, it was foreseeable that one of those intoxicated persons may interfere with it and "spark off danger". That in fact occurred with the first grass fire and then occurred again with the burning of Charles Dearden.

[72] The common law has long opposed the imposition of liability on defendants for what are called pure omissions. As Dixon J said in *Smith v Leurs* (1945) 70 CLR 256 at 262:

> "…It is, however, exceptional to find in the law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third."

[73] The principle however is quite different where a defendant has created a source of danger. Fundamentally the case is no longer a case of an imposition of liability for a pure omission (see Mason P in *WD & HO Wills (Aust) Ltd v State Rail Authority* (1998) 43 NSWLR 338 at 359).

[74] In the present case, in my view, the duty of care arises to protect Mr Dearden from risk of harm in being burnt by fire because of the actions of Mr and Mrs Ryan as occupiers in firstly making the accelerant petrol available and making a large amount of alcohol available to a large (over 100) group of young persons, some of whom were likely to become intoxicated. After the experience of the first grassfire, Mr and Mrs Ryan considered it important to remove the fuel source so as to prevent another guest using the fuel to light a fire. Regrettably, they did not.

Section 9(1)(c) and 9(2): The Precautions Taken by a Reasonable Person

[75] Paragraph 7 of the Further Amended Statement of Claim (FASOC):

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81 *Smith v Littlewoods Organisation Ltd* [1987] AC 241.

"7. The personal injuries and consequential loss and damage suffered by the Plaintiff were caused by the negligence of the Defendants:

Particulars

(a) Failing to take reasonable care to provide for the safety of the entrants upon the Property including the Plaintiff;

(b) Failing to take any or any reasonable care to ensure the safety of persons who were invitees or guests and were camping or sleeping upon the Property;

(c) Failing to undertake any or any adequate steps to ensure proper storage measures were implemented to remove or keep removed, dangerous substances such as petrol or fuel from possible ignition sources of guests or invitees upon the Property;

(d) Failing to take any or any reasonable steps to manage or supervise the area where invitees or guests were sleeping or camping whilst there were other guests or invitees still revelling upon the Property;

(e) Failing to take any or any reasonable care to ensure that the Plaintiff was not at risk of personal injury by other guests or invitees who were intoxicated;

(f) Failing to take any or any reasonable care to ensure that fuel stored on the Property was not available to guests or other invitees upon the Property;

(g) Permitting Robert Taylor and other attendees or guests to access petrol or fuel whilst upon the Property as guests or invitees;

(h) Failing to take any or any reasonable care to ensure that the plaintiff was not exposed to a risk of injury, whether from other attendees at the property or otherwise;

(i) Failing to act as a reasonably prudent landowner;

(j) Failing to act as a reasonable prudent landowner in relation to preventing risks from fire upon the property;

(k) Failing to ensure that the area in which attendees such as the plaintiff were required to sleep was safe in the circumstances;

(l) Failing to take care to ensure that there were no reasonably foreseeable risks of injury to the plaintiff whilst upon the property attending the celebration;

(m) Failing to safely store fuel where there was a risk of injury from fire due to the surrounding environment."

[76] Paragraph 7 of the FASOC particularises thirteen allegations of negligence which, it seems, sets out the plaintiff's case as to the precautions it alleges a reasonable person in the position of the defendants would have taken against the risk of the identified harm. These thirteen allegations may broadly be categorised into three types of allegations: general allegations, supervisory allegations and storage allegations.

[77] It may be observed in terms of s 9(1)(c) and 9(2)(a) and (c) of the Act that general allegations of negligence which do not descend to sufficient particularity to identify reasonable precautions a plaintiff alleges ought to have been taken against the risk of injury or harm cannot in any meaningful way be considered because of the generality of the allegation. For example, in respect of paragraph 7(a) of the FASOC it cannot be said that the precaution that ought to have been taken was to take reasonable care to provide for the safety of entrants upon the property. Such a characterisation begs the question: what ought the defendant have done? General allegations do not allow an assessment of the probability that the harm would occur if care were not taken as required by s 9(2)(a), nor the burden of taking the precaution so as to avoid the risk of injury as required by s 9(2)(c).

[78] As general allegations do not descend to particularity of the precaution said to constitute the breach of duty of care they cannot be regarded as a breach of duty of care.

[79] In my view, paragraphs 7(a), (b), (e), (h), (i), (j),(k), and (l) of the FASOC all fall into the category of general allegations of negligence which are not sufficiently precise to amount to an allegation of a precaution against risk of harm which could constitute a breach of duty.

[80] Paragraph 7(d) of the FASOC alleges that a reasonable person in the position of the defendants would have taken reasonable steps to "manage or supervise the area where invitees or guests were sleeping or camping whilst there were other guests or invitees still revelling upon the property". This allegation of precaution, similar to the general allegations, is devoid of particularity. In particular, what steps to manage and supervise the area did the plaintiff allege ought to have been taken by the defendants?

[81] In terms of the organisation of the party, I accept Mrs Ryan's evidence that she delineated the areas of parking for the party into parking area for guests that were anticipated to leave the party after the party, the area where most probably "the oldies" (as Mrs Ryan referred to them) would park, and a quite separate and distinct area being the camping area where overnight guests would stay. In respect of the camping area, Mrs Ryan provided a low level of lighting as well as the caravan near the creek, inhabited by the brother and sister-in-law to ensure that intoxicated persons did not attempt to swim in the creek.

[82] I accept Mrs Ryan's evidence that she was alive to the risks to guests, namely guests driving away from the party whilst intoxicated or guests driving out of a carpark and running down another sleeping guest. Those risks were addressed by Mrs Ryan as discussed above. I accept that those steps were reasonable in terms of management and supervision of the sleeping or camping area. As the plaintiff has not pled, particularised or led evidence as to what other steps may have been taken as a precaution to manage or supervise the sleeping or camping area, I conclude that the defendants have not breached their duty of care as alleged in paragraph 7(d) of the FASOC.

[83] At the heart of the plaintiff's case are the precautions referred to in paragraphs 7(c), (f), (g) and (m) of the FASOC; that is the safe storage of petrol. Paragraphs 7(c), (f), (g) and (m) raise the same precaution, that is, failing to store the fuel in a secure location such that it was not available to guests upon the property. As to potential sites for proper storage, Exhibit 4 contains numerous photographs of the house shed. As explained by Mr Ryan, the eastern end of the house shed, closest to the kennels and the initial grassfire, has a set of doors which were closed.[82] The shed then had two open bays as depicted in the photographs of Exhibit 4 with the western bay containing a boat.[83] The middle bay is a space where Matthew Ryan explained his father's utility was ordinarily parked.[84] As shown in Exhibit 4, it is an open bay with a wall to the right-hand side and with a storage area to the left-hand side. Exhibit 4 photographs numbered 3711, 3712, 3713, 3714 and 3716 show the interior of the shed. The doors to the eastern end of the shed were closed for the

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82 T3-94, lines 25 - 35.
83 Photographs numbered 3710 and 3711.
84 T3-84, lines 25-26.

entire night.[85] It is therefore more likely than not that location was a safe area of storage for fuel.

[84] Matthew Ryan's evidence is that after the initial grassfire, he placed what he presumed to be the empty jerry can inside a big terracotta pot on the left-hand side as one walks into the shed, approximately one metre from the front of the shed. Matthew Ryan said that he placed the small jerry can inside the terracotta pot which had no lid or anything upon it and that was "just inside the shed" on the left-hand side of the vehicle.[86]

[85] Exhibit 4 photographs numbered 3711, 3712, 3713 and 3716 show a terracotta pot in the house shed, however the terracotta pot is shown not just inside about a metre from the front of the shed, but rather approximately four to five metres away, at the back of the shed. Photographs 3711, 3712, 3713 and 3716, showing the terracotta pot at the back of the shed, were not shown to Matthew Ryan for his comment. There are no other terracotta pots shown in the photographs. It would appear from photographs 3711 and 3712 there is no terracotta pot in the position as described by Matthew Ryan.

[86] The photographs in Exhibit 4 are Queensland Police Service photographs taken on 13 February 2019. That is, approximately three days after the incident. As Matthew Ryan was not affected by alcohol and has a clear recollection of events on the evening and as I accept Matthew Ryan's evidence, I conclude that a terracotta pot was in the position as described by Matthew Ryan about a metre from the front of the shed. I further record my view that the alternative factual scenario that the terracotta pot had remained in situ at all times as shown in the photographs, that is 4.5 metres away at the back of the shed, and that Matthew Ryan had placed the small jerry can in the terracotta pot at that position, I would form no differing view as to liability.

[87] Regardless of the whether terracotta pot in which the small jerry can was placed was at the front or 4.5 metres away, it was easily accessible in the open bay shed.

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85 T3-94, line 35.
86 T3-91, lines 39 – 46.

[88] Another curious feature of Matthew Ryan's evidence is his evidence that the second time he attempted to dispose of the small jerry can, that is after Charles Dearden had been burnt, he threw it into the corner of the shed such that "it would have been much further back".[87] Matthew Ryan's evidence was that he certainly did not put it in the cardboard box the second time he attempted to dispose of the small jerry can.[88] I accept Matthew Ryan's evidence in this regard.

[89] The photographs numbered 3712, 3713 and 3714 in Exhibit 4 show the small red jerry can being placed in a cardboard box in close proximity to the terracotta pot at the back of the house shed. Again, it is curious that the small red jerry can was photographed by police in the small cardboard box as it does not accord with Matthew Ryan's evidence of throwing it into the corner of the shed. Matthew Ryan was not challenged on this inconsistency. On this aspect of Matthew Ryan's evidence, I conclude that it is more probable than not that a person moved the small jerry can and placed it in the cardboard box as shown in the police photographs numbered 3712, 3713 and 3714.

[90] The photographs, particularly photographs 3711, 3712, 3713 and 3716, show that if the red jerry can had been thrown into the corner of the shed it would be very difficult to access and retrieve. Given the very serious nature of the incident which had unfolded, and the likely and eventual police investigation, I consider it likely that a person retrieved the small red jerry can from the corner of the shed and placed it in the cardboard box so as to make it more accessible to police than if positioned at the back of the shed.

[91] Exhibit 4 photographs 3711, 3712, 3713 and 3716 show there is no passageway from the area where Mr Ryan parked his vehicle and the left wall of the shed as the area is strewn with numerous items. I conclude that had the small jerry can been placed in the eastern end of the shed behind the doors, or, as Matthew Ryan deposed (with respect to his second removal of the small red jerry can), thrown into the corner of the shed beside the open bay, then it is more likely than not that the small red jerry can would not have been accessible to Mr Taylor.

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87 T3-89, lines 28 – 33.
88 T3-89, lines 28 – 29.

[92] In the present case, therefore, I conclude that a safe storage area for the small red jerry can, containing as it did a small amount of fuel, was either the fuel store location 5 minutes' drive away at the general machinery hub, or in the eastern area of the shed behind closed doors, or in the far and inaccessible corners of the open shed area, which would have required the fuel container to be thrown or flung in as suggested by Matthew Ryan.

[93] In terms of s 9(2)(a) of the Act I would conclude that there was low probability that the harm would occur if the precautions identified were not taken. I conclude the probability as low because even though there had been an earlier act of lighting the grassfire and there were, I would infer, many highly intoxicated young persons in the area, the likelihood of a guest, even a drunken guest, lighting a fire was, in my view, a matter that was less probable than not. The act, after all, of setting the fire was as described by Mr Taylor "an act of complete stupidity".[89]

[94] In respect of the hundred or more young people that attended, Mr Wardel, Mr Taylor and Charles Dearden gave evidence that they were highly intoxicated, and it was only Matthew Ryan that was not, having significant duties to assist in the running of the party and taking photographs. Therefore, I accept his evidence that he consumed little alcohol.

[95] As to s 9(2)(c), I would conclude that the likely seriousness of the harm was extremely high. The first grassfire which was lit in close proximity to the dog kennels so alarmed Mrs Ryan that she rushed to rescue her dogs. Although the areas in close proximity to the homestead block were extremely well-presented and watered as can be seen from the numerous photographs in Exhibit 4, the surrounding areas contained a good deal of dry grass. A fire, therefore, was a most serious matter and likely to cause great harm.

[96] As to s 9(2)(c), the burden of taking precautions to avoid the risk of harm were low. A vehicle could have been driven by a person who was not intoxicated, such as Matthew Ryan, the five minutes back to the proper fuel store which was sufficiently remote to remove all risk. The return of the fuel was not a matter which placed much burden at all upon the defendants. Alternatively, the fuel could have been

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89 T2-80, line 33.

stored in a safe place, such as the closed area on the eastern side of the house shed, or, as Matthew Ryan put it, simply flung into the edge of the shed. The positioning of various pieces of equipment and other items in the shed would have made any fuel can that was simply flung into the corner of the shed extremely difficult to access.

[97] As to s 9(2)(d), if it were accepted that the activity that created the risk of harm was the 21st birthday party of Daniel Ryan, then I accept there is a high social utility in such an event. In my view, it is a proper analysis to accept the 21st birthday party as being the activity which creates the risk of harm because, as the risk is defined, it is not merely the presence and availability of the fuel, it is the presence of the intoxicated guests which is also relevant.

[98] The conclusion I have reached, taking into account the s 9(2) factors as discussed above, is that the very low level of burden in taking precautions combined with the likely seriousness of the harm to be suffered from a fire and notwithstanding the low probability that harm would occur and the high social utility of conducting the 21st birthday party, that a reasonable person in the position of the defendants would have taken the precautions of safely securing the fuel. I therefore conclude that Mr Dearden has proved that the defendants were in breach of their duty of care to him.

Causation

[99] As to factual causation, Mr Taylor was asked the hypothetical question, what would have occurred if he had not found the petrol in the shed,[90] to which Mr Taylor answered that Charles Dearden would not have been set on fire by fuel, before adding "But I don't know what could have otherwise occurred".[91]

[100] In cross-examination, Mr Taylor agreed with the proposition put to him that if he had not found the fuel in the shed he may have got a lighter off someone and gone and lit Charles Dearden and in that regard "anything could have happened".[92]

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90 T2-82, lines 20 – 24.
91 T2-82, line 24.
92 T2-82, lines 35 -38.

[101] In this regard, Mr Wardle's evidence is somewhat relevant. Mr Wardle was one of the party of several young men that went over to Charles Dearden with the intention of waking him up so that they may continue "partying with him".[93]

[102] Mr Wardle went over with a party of eight or ten boys including Robert Taylor. Mr Wardle's evidence was that after the group had decided to go and wake Charles Dearden, to get him to continue partying, the group were walking down beside the house when Robert Taylor said "I'm going to get this jerry can". Mr Wardle replied "No, don't worry about that… There's already been a fire started tonight. We don't need to, you know, start any more fires. Just don't worry about that".[94]

[103] Mr Wardle continued walking with the group and did not see Mr Taylor go into the house shed. Mr Wardle recalls that when the group of men arrived at the sleeping Charles Dearden, Robert Taylor was not with the group.[95] Mr Wardle's evidence is that the group woke Charlie Dearden up and asked him to come back to the party, to which Charles Dearden responded he was not going to get up as he did not wish to return to the party.[96]

[104] Mr Wardle's evidence was that Robert Taylor then arrived "sort of out of nowhere".[97] Mr Wardle described what then occurred was Robert Taylor "within a space of maybe 5 seconds, splashed the fuel onto Charlie … with one hand … from a jerry can".[98] Mr Wardle then observed Robert Taylor have a lighter in the other hand and light the fuel that had fallen onto Charles Dearden, causing him to be lit up. Importantly, Mr Wardle's evidence is the process between splashing and lighting occurred within the space of seconds and the fire was immediate and intense. The effect of the fuel in the promotion of the fire is plain on Mr Wardle's evidence and I accept that evidence.

[105] Whilst it may be that something else may have occurred if the fuel had not been located, I consider it proper to conclude that the presence of the fuel as a powerful accelerant has caused the injury to Charles Dearden. But for the presence of the fuel, Mr Dearden would not have suffered the injuries he suffered. I also accept the

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93 T3-67, line 44.
94 T3-68, lines 39 – 42.
95 T3-69, lines 25 - 27.
96 T3-69, lines 34 – 38.
97 T3-70, line 9.
98 T3-70, lines 19 – 33.

evidence of Mrs Elizabeth Dearden that her son Charles' habit was to sleep with his arm raised, which coincides with the area of intense burning to Charles Dearden's right axilla. This is consistent with the splashing of fuel onto the upper torso and right axilla of Charles Dearden.

[106] In view of the fact that there were eight to ten young men in and around Charles Dearden as he slept (and although it would appear likely most, if not all, of the young men were highly intoxicated), I would conclude that absent the petrol, at least one, if not more than one man, would have attempted to intervene to prevent Robert Taylor using a lighter to ignite Charles Dearden or his swag. They would have had ample opportunity to do so. I would conclude that it is the presence of the fuel as an accelerant causing the immediate burning of Charles Dearden which is highly likely to have caused the injury. Absent the fuel, it is likely that Mr Dearden would not have been lit up at all or if Robert Taylor attempted to use a lighter, it would have taken such a time that one of the group of men would have intervened or Charles Dearden could have awakened and extinguished the fire.

[107] It was plainly the intention of the group of men, as evidenced by Mr Wardle, to simply wake up Charles Dearden for the purpose of having him join them in partying on. It was not the intention of any of the men to cause Charles Dearden harm. The comments of Mr Wardle to Mr Taylor that he should not obtain fuel is an indicator of the good intent of the majority of the group, which in my view would likely have intervened had Robert Taylor attempted to use a lighter or other means to ignite Charles Dearden, without fuel.

[108] A contentious aspect of the cause of action against the defendants arises from a consideration of the scope of liability, or normative causation under s 11(1)(b) of the Act. As part of the general direction in s 11(4) of the Act, I must consider whether or not and why responsibility for the harm should be imposed upon the defendants. The defendants and third party have not pointed to other relevant things to consider.

[109] The defendants' argument on scope of liability and causation may be seen in paragraph 9(b), (c) and (d) of the further amended defence. In particular, the defendants allege that "the scope of liability [does not] extend to the harm so caused

because the harm was occasioned by the intentional, criminal or entirely reckless act of Robert Taylor, who is a third party that the defendants had no control over."

[110] In my view, in the present case it is proper to characterise Robert Taylor's actions as entirely reckless and criminal. However, I also accept Robert Taylor's evidence that whilst he intended to light up the swag that Charlie Dearden was lying upon due to his highly intoxicated state, he had no intention to harm Charles Dearden. Such an act is inconsistent with their friendship and the evidence which I accept that there was no animosity at all between Charles Dearden and Robert Taylor.

[111] In this regard, there is no doubt that Robert Taylor is a cause of the incident by which Charles Dearden suffered such serious injuries, however, as expressed above, absent the fuel, it is likely that there would have been no injury sustained by Charles Dearden. In the present case, three out of the four young men who gave evidence, gave evidence that they were highly intoxicated. The intentions of the group of approximately ten young men in going to wake Charles Dearden after midnight also attest to the likely state of sobriety, that is, they were all highly intoxicated.

[112] Mr and Mrs Ryan, in organising the party, generously supplied a large amount of beer and wine (as well as ample food) with the intention that a large group of highly intoxicated young people would stay the evening. That there may be boisterous activity, pranks or dangerous activity is not something unexpected when large groups of young people become highly intoxicated. The lighting of the first fire, the grassfire, was enabled by the provision of the small jerry can of fuel being left in a place that was easily accessible, the back of the utility where the generator was situated, which was beside the homestead.

[113] Accordingly, on the evening, a certain form of reckless behaviour, that is, lighting a fire by using fuel, had been experienced and with the continued provision of large amounts of alcohol by the defendants, there was no reason to conclude that such a similar dangerous prank would not be further attempted by an intoxicated person. The proper response, that which was alluded to by Mrs Nicole Ryan in conversation with her husband Mr Terrence Ryan, was the removal and safe storage of the fuel.

[114] The lighting of any fire using a fuel substance at a party where persons are highly intoxicated is, as described by Robert Taylor, an act of gross stupidity. It had been

shown, at the party, that such acts of gross stupidity were not outside the realm of what could occur with such highly intoxicated young persons.

[115] The defendants had a safe fuel store where all fuels were kept, some five minutes' drive away from the party and therefore inaccessible to partygoers. Due to the loss of electricity and the provision of a generator, fuel was brought and placed where the party was held with numerous highly intoxicated young persons. The fuel source could have been removed easily, and in my view, ought to have been removed after the first grassfire, at the very least. I do consider then that it is appropriate that the harm suffered by Charles Dearden ought to be imposed upon the defendants, notwithstanding the criminal, and entirely reckless actions of Robert Taylor.

[116] The intention of Robert Taylor, I accept, was to engage in a prank to wake Charles Dearden up. It was not an intention to severely harm him, however, the highly intoxicated state of Mr Taylor, a state the defendants expected of the guests at the party, has rendered Mr Taylor's prank a most serious incident causing grave personal injury to Charles Dearden.

[117] I conclude that the defendants are liable in negligence to Charles Dearden.

Quantum

[118] That Charles Dearden suffered from serious burn injuries is not in issue. Photographic evidence contained in Exhibit 1 shows the positioning and severity of the injuries and the extensive skin grafts taken from Mr Dearden's right thigh.[99] The photographs annexed to the report of Mr Scalia show the current state of Mr Dearden's scarring.[100] The skin grafts from the right thigh appear to have healed remarkably well and much of the scarring upon the hands has disappeared. There is still scarring on Mr Dearden's right wrist and extensive scarring shown in the photographs of Charles Dearden's right upper torso and axilla.

[119] Plastic and reconstructive surgeons Dr Lewandowski and Dr Mackay both assessed Mr Dearden as suffering from a class 2 scarring impairment under the AMA Table 8.2. Both assessed a 15% whole person impairment (WPI). The occupational physician, Dr O'Toole, assesses a 12% WPI. While acknowledging there is little

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99 Exhibit 1, Document 4.
100 Exhibit 1, Document 10.

difference in the level of permanent impairment, I consider that the assessments of the reconstructive surgeons ought to be preferred. In my view, the type of injury suffered, the nature of the treatment that Mr Dearden has undertaken and that he will require in the future, and the effect of the scarring injury is a matter upon which the reconstructive surgeons, Dr Lewandowski and Dr Mackay are able to give better guidance as those matters are central to their areas of expertise.

[120] As reflected in the file note of the conference with Dr Lewandowski of 2 March 2022, there is a difference of expert opinion relating to Mr Dearden's capacity to undertake usual duties of work.[101] In the report of Dr O'Toole, he concluded "Mr Dearden does not have any limitation on working in his chosen career path".[102] Although he is an occupational physician who has grown up as a child on a dairy farm in Victoria, I do not accept Dr O'Toole's opinion as expressed. The file note of the conference with Dr Lewandowski of 2 March 2022, records:[103]

> "Dr Lewandowski considered that in his view it was not likely that Mr Dearden would be able to do his work without restriction. Skin grafts just do not work the way natural skin does."

[121] I accept Dr Lewandowski's opinion in that regard.

[122] I further accept Dr Lewandowski and Dr Mackay's opinion that it is likely Mr Dearden would require a number of repeat plastic surgical procedures throughout his life as it was anticipated that Mr Dearden would have an active life working in rural enterprises as opposed to a person engaged in a sedentary occupation. The file note further records as follows:[104]

> "Dr Lewandowski considered that sedentary work would be more suited to Mr Dearden given his injuries, and his ability to continue with this work will be significantly dependent upon the occurrence of degradation of the grafts, or the extent to which he is fatigued by the consequences of having to deal with the issues related to the burns and their treatment."

I accept Dr Lewandowski's opinion.

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101 Exhibit 1, Document 9.
102 Exhibit 14, page 10.
103 Exhibit 1, Document 9, paragraph [3].
104 Exhibit 1, Document 9, paragraph [6].

[123] Dr Mackay holds a similar opinion. Dr Mackay has recorded the following in his report of 29 July 2021:[105]

> "2.1.1 … The most problematic of the thickened hypertrophic areas lies across the axilla itself where there are longitudinal cords of hypertrophic scar causing tethering and restriction in range of motion. To palpation these cords are exquisitely tender and problematic. Mr Dearden tells me that this is an area scenario which has ruptured since the time of the surgery and reconstruction. There is some tethering and contour irregularity. There is a loss of the appendageal structures in this area.
>
> …
>
> 2.5.1 Mr Dearden does have significant ongoing problems, particularly in the right axilla.
>
> …
>
> 2.6.2 … The scars limit some of his daily activities, particularly any work overhead. Lifting his hand over his head is difficult due to the tight contractures and he is easily fatigued working against the scar.
>
> …
>
> 2.7.2.1 Charlie Dearden experiences daily symptoms from the scars and performs daily maintenance. The severity of the symptoms varies depending on his activity.
>
> …
>
> 2.7.4.1 Mr Dearden is a reasonably fit and well young man. He does experience difficulty performing work over his head and has to work hard against the thick scar in the axilla. Consequently, he cannot perform these tasks for very long and is easily fatigued. Given the appearance of the scar, particularly around the axilla, this seems consistent and reasonable with the clinical findings. He feels the scar on the volar wrist is tight, but this does not restrict any of his range of motion."

[124] The effect of the injury upon Charles Dearden ought to be considered in light of his pre-accident status and the work he undertakes in his rural career. I accept Mr Dearden's evidence as to the effect of his injuries upon his ability to work. In my view, Mr Dearden was prone to understate his problems in respect to his scarring. His evidence as to his difficulties in carrying out his employment, as a result of his injury, is confirmed by observations from his father (and Chief Executive Officer of his employer), Peter Dearden, his elder brother, Jack Dearden, and his partner,

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105 Exhibit 15.

Jemma Hawker. I accept the evidence of Mr Dearden Snr, Jack Dearden and Ms Hawker.

[125] Peter Dearden described his son, Charles Dearden, as commencing work on the rural property aged 12 years.[106] This work included mustering duties, cattle yard duties and fencing. In his teenage years, he worked during his holidays, driving tractors or other plant. He was paid an hourly rate by his parents. Peter Dearden described Charles as having a passion for working on the land and "he was just focussed on working on the land and with cattle in particular".[107]

[126] As discussed below, after leaving school, Charles Dearden went to the Northern Territory to work for Consolidated Pastoral Company. Charles commenced work at Manbulloo Station in February 2016 and within 3 years, and aged only 21 years old, was promoted to head stockman, a feat which was modestly described by Peter Dearden as "a fairly good effort",[108] and Ms Jemma Hawker as "a big deal".[109]

[127] Although Ms Hawker undertook her schooling in Roma, she had not met Charles Dearden until she was undertaking contract mustering work in Katherine, Northern Territory.[110] Ms Hawker performed contract mustering on Manbulloo Station for a week.[111] During examination, she described her observations of Charles Dearden prior to and following the accident. Prior to the accident, Ms Hawker's description was:[112]

> "…he would give everything his 100 per cent. He wasn't afraid to do anything. He didn't walk into a pen of cattle with any hesitation or hop on a young horse with any hesitation or – yeah, and he would work massive days and he'd be out all night working at Manbulloo, and they had terrible bushfires there and he was out working, yeah, 14, 16 hour days and he would never fatigue."

[128] As to Ms Hawker's observations post-accident, she said:[113]

> "So he's a lot more hesitant, a lot more cautious, especially around cattle as they are unpredictable, and anything to do with reaching up over his head, climbing ladders, silos, climbing crates, using the head

106 T2-8, line 35-36.
107 T2-7, lines 45-46.
108 T2-7, lines 15 - 16.
109 T2-92, line 41.
110 T2-88, lines 32 – 34.
111 T2-88, line 45.
112 T2-90, lines 36 to 40.
113 T2-90 line 45 to T2-91 line 4.

> bail, it's all – you know, he fatigues within a couple of hours or at the end of the day, depending on what – how much strain is on his arm and ribs and stuff, and yeah, and horses as well. You know, I haven't seen him ride nearly as much as what he would have done up north."

[129] I accept Ms Hawker's evidence in this regard. It is particularly relevant to the issue of fatigue in performing work activities. This issue of fatigue caused by Charles Dearden having to work against his scar is an important matter in assessing damages. I accept the evidence of Mr Dearden as contained in his quantum statement.[114] This was largely not challenged. An example of the vulnerability that Charles Dearden suffers from is shown in the aftermath of the ATV accident of 28 March 2019. Upon his rescue from the site of the accident to the Toowoomba Hospital on 10 February 2019, Mr Dearden was admitted to the Royal Brisbane Hospital, where he underwent the burns operation of 12 February 2019, records of which are contained in Exhibit 1.[115]

[130] Charles Dearden underwent a second operative procedure on 15 February 2019, being a change of dressing and removal of staples.[116] He was then discharged from the Royal Brisbane Hospital on 22 February 2019 with his discharge summary indicating the need for continuing burns outpatient follow up with the Royal Brisbane and Women's Hospital.[117] After being discharged on 22 February 2019, Charles Dearden returned to his home where he lived with his brother, Jack, and received considerable care. Charles Dearden was discharged in a pressure garment which he needed to wear for approximately 15 months.

[131] Charles Dearden has been medically certified as fit to obtain a private pilot's licence and is currently obtaining such a licence. The intention in gaining the pilot's licence is to allow Charles Dearden quick access to the remotest of the Dearden family's properties, which is over 600km away from the Dearden backgrounding properties in the Roma area.

[132] In his quantum statement, Charles Dearden stated:[118]

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114 Exhibit 1, Document 1.
115 Exhibit 1, Document 5.
116 Exhibit 1, Document 6.
117 Exhibit 1, Document 7.
118 Exhibit 1, Document 1, paragraph [37].

> "I am concerned that in the future I will be forced to avoid any work in the rural sector that might involve a risk of my scarring breaking down or splitting. In such circumstances, I might be forced to seek employment outside of the rural sector and in sedentary employment, which will require training. I presently don't have any interest in obtaining a commercial endorsement to earn money from flying though I might contemplate this if I am left with no other option."

[133] Dr O'Toole, a designated aviation medical examiner (DAME), has explained how the configuration of commercial aircraft differs from private aircraft. Being that some important equipment, including some fire restraint systems, are situated upon the ceiling of an aircraft such that a restriction in range of movement of an upper limb may possibly be an impediment in the obtaining of a commercial pilot's licence.[119] I accept that the highest the evidence from Dr O'Toole comes is that such a consideration is a concern, rather than an impediment. Of course, much depends upon the future, in terms of Mr Dearden's ability to continue working in the rural industries and the progression of his injuries, in particular, any further restriction in range of motion which may occur. Although raised by the parties as an issue, I consider that the matter of the inability to obtain a commercial pilot's licence at some point in the future is speculative and I place no weight upon it in the assessment of any head of damage.

[134] I accept that Charles Dearden has suffered serious injuries and their nature and extent are properly described in the reports of Dr Lewandowski and Dr Mackay. I accept that Charles Dearden suffers from increased pain in the area of his scarring, greater difficulty in working in the hot climates that he is required to work in because his right axilla does not sweat, and pain and difficulty in the cooler months where his scarring also causes him pain and restriction of movement. I accept that Charles Dearden has restrictions in his ability to undertake rural work, particularly forceful work with his right arm or work requiring his right arm to be raised. I accept that as a consequence of the scarring that Charles Dearden suffers from, he does fatigue quickly in the undertaking of this work.

General Damages

[135] Part 8 of Schedule 4 of the *Civil Liability Regulation* 2014 provides:

> **Part 8 Burn Injuries**

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119 Exhibit 14.

General Comment

- The ISV for a burn injury must be assessed having regard to the item of this schedule that –
  (a) relates to the part of the body affected by the burn injury; and
  (b) is for an injury that has a similar level of adverse impact to the burn injury
- Burns to the face must be assessed under part 3, division 2.
- In burns cases, the ISV for an injury to a part of the body causing functional impairment will generally be at or near the top of the range for an injury to that part of the body.
- In serious burns cases, the effects of scarring are more comprehensive and less able to be remedied than the effects of scarring from other causes.

[136] I respectfully adopt the approach of McMeekin J in *Allwood v Wilson*[120] as the correct approach in assessing injuries under the *Civil Liability Regulations 2014 (Qld)*. The horrific nature of the injuries sustained by Mr Dearden are best explained by the eight photographs taken at the Royal Brisbane Hospital,[121] and the several photographs annexed to the report of the occupational therapist, Mark Scalia, dated 12 July 2021.[122] I accept Mr Dearden's evidence as to the severe pain that he suffered when he woke up after being set alight, and the pains he suffered thereafter including as a result of his skin grafting treatment.

[137] As set out in Part 8, it is necessary to identify all parts of the body affected by the burn injury. The photographic evidence, and Dr Lewandowski's report, shows that Mr Dearden suffered injuries to his right upper arm, right axilla, right upper back area, right chest, right wrist, right thumb and the dorsal aspect of Mr Dearden's right hand. In addition to the areas that were burnt, a large portion of the skin from Mr Dearden's right leg was removed for grafting to the affected area.

[138] In my view, the skin graft areas are a matter that I ought to have regard to under s 9 of Schedule 3 in addition to Mr Dearden's age, pain, suffering and loss of amenities of life. I accept Dr Lewandowski's opinions and in particular his opinion of a 15%

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120 *Allwood v Wilson & Anor* [2011] QSC 180.
121 Exhibit 1, Document 4.
122 Exhibit 1, Document 10.

WPI being sustained as a result of the burn injury.[123] I accept Dr Lewandowski's opinion that, with wound breakdown in the future, it is commonly the case that further skin grafting will be required.

[139] Mr Dearden was born on 5 August 1997 and is currently 24 years of age. He was only 21 years of age when he suffered these severe injuries. The scarring suffered by Mr Dearden is distressing and he is naturally concerned as to its appearance. The injury to Mr Dearden's right upper arm is best classified as an Item 123 moderate upper arm injury, with an injury scale value (ISV) range of 6 to 20. The injury to Mr Dearden's upper chest is properly classified as an Item 38 moderate chest injury with an ISV range of 11 to 20. The burns operation record of the Royal Brisbane and Women's Hospital shows all areas of burning including the area of burning that Mr Dearden suffered to his side of his back and mostly in the upper thoracic area.[124] It is reasonable to quantify that as an Item 93 moderate thoracic injury – soft tissue injury with an ISV range of 5 to 10.

[140] The above-mentioned burns operation record shows burning to the entirety of Mr Dearden's right shoulder girdle. I consider that to be properly classified as an Item 96 serious shoulder injury with an ISV range of 16 to 30.

[141] The burning to Mr Dearden's right wrist ought to be quantified as an Item 107 moderate wrist injury with an ISV range of 6 to 15. The burning to Mr Dearden's right thumb is properly quantified as an Item 116.2 serious thumb injury with an ISV range of 11 to 15. The burning suffered by Mr Dearden to his left hand is best shown in the photograph numbered 286 of 308 taken at the Royal Brisbane and Women's Hospital.[125] As the burning is in the left hand and thumb area, it seems to be appropriate to quantify the injury as an Item 119 moderate hand injury with an ISV range of 6 to 15.

[142] This is plainly a case of multiple injuries where the dominant injury is the right shoulder injury with a maximum ISV of 30. In accordance with ss 3 and 4 of Schedule 3 to the *Civil Liability Regulations*, it is necessary to consider if the level of adverse impact of the multiple injuries in an injured person is so severe that the

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123 Exhibit 1, Document 8.
124 Exhibit 1, Document 5.
125 Exhibit 1, Document 4.

maximum dominant level of ISV is inadequate to reflect the level of impact. Taking into account the extreme suffering of Mr Dearden in the injury, his initial surgery, his further surgery when his wound broke down after the ATV incident as described below, and the likelihood of future surgery, I do conclude that the level of adverse impact on Mr Dearden is so severe that the maximum dominant ISV of 30 is inadequate.

[143] Importantly, Mr Dearden is only currently 24 years of age, with a life expectancy of a further 61 years. Mr Dearden was born into a rural lifestyle, which he clearly enjoys, and which places him at great risk of further skin breakdown and requires him to work in hot areas, to which he is ill-suited due to his injuries. In those circumstances I conclude it is necessary to increase the ISV by 25% to an ISV of 38, quantifying general damages at $95,670.

Economic Loss

[144] Mr Dearden's family is from the land and have five rural properties. Prior to completing Year 12 in 2015, Mr Dearden desired a life on the land, stating in his quantum statement "I am from a rural background and my career ambition on completing Grade 12 was to obtain employment in the rural sector and to gain experience in the short term so as to widen my career options in the rural sector in the longer term".[126]

[145] Upon completing school in November 2015, Mr Dearden commenced formal employment for his parents as a farm hand on one of their properties. In February 2016, Mr Dearden sought and obtained employment with Consolidated Pastoral Company on Manbulloo Station, near Katherine in the Northern Territory. Within two years, Mr Dearden was promoted to head stockman and had gained valuable experience. Due to an inability to work in the wet season, Mr Dearden returned from Manbulloo Station to one of his parents' properties to work in the December and January of each year.

[146] In December 2018/January 2019 wet season, Mr Dearden worked upon one of his family's grazing properties, Beverley, near Roma. The farmhand role was full-time, and Mr Dearden stated it "did not provide for the scope to go back to the Northern

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126 Exhibit 1, Document 1, paragraph [4].

Territory".[127] After the incident in the early hours of the morning on 10 February 2019, Mr Dearden was unable to perform any significant work for a period of about 8 weeks. During this period, he was employed by his parents, who continued to pay him his normal weekly salary of $600 net per week (npw).

[147] On 28 March 2019, Mr Dearden was driving an ATV exercising his working dogs when the ATV fell into a hole, causing it to flip, roll, and he suffered from further injury in the nature of a splitting of the skin graft under the right armpit which required further surgery. I accept Mr Dearden's evidence in his quantum statement that "this accident set me back a lot in terms of my rehabilitation and recovery. This incident reminded me that the scar tissue was not as tough as I thought it was".[128]

[148] After recuperating from the incident of 28 March 2019, again on full pay courtesy of his parents, Mr Dearden returned to work at Beverley until 31 March 2020. From 1 July 2020, Mr Dearden changed employment from his parents' partnership of PJ & EM Dearden to the company "2DE", which is owned by Mr Dearden's parents and Mr Durak.[129] There is no past loss of economic capacity in the usual sense, as a loss of earnings from Mr Dearden's main employer, namely his parents.

[149] Mr Dearden does, however, claim past economic loss resulting from his inability to undertake casual contracting work. Mr Dearden explained when he returned to Roma in 2018 he was able to obtain casual work as a contract musterer working for "Dearden Contracting". Arrangements which could best be described as "loose" involved requests from a grazier or graziers in the Augathella or Roma area for Mr Dearden and others to attend and perform contract mustering. No rates were agreed at the commencement of the work. However, at the end of the work, the grazier would ask Mr Dearden what his rate was and Mr Dearden would inform the grazier it was $200 net per day, and that would then be paid.[130] There is no record of these earnings in the past, however, I accept Mr Dearden's evidence that contract mustering work was available and that he would obtain that type of employment approximately 5 days a month, that is earnings of approximately $1,000 a month.

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127 Exhibit 1, Document 1, paragraph [8].
128 Exhibit 1, Document 1, paragraph [10].
129 Exhibit 1, Document 1, paragraph [29]
130 T1-16, lines 29 – 15 and T1-16, lines 36-38.

[150] Mr Dearden did concede in cross-examination that his parents would deduct his normal pay if he was absent,[131] however, given that Mr Dearden was working 6 days a week earning $600 npw, it was plain that Mr Dearden would earn double his normal remuneration working as a contract musterer. The loss Mr Dearden suffered therefrom for the loss of contract mustering work is $500 per month, namely the $1,000 net earnings he would receive less the possible deduction from his parents of $500 for the days absent (5 x $100 per day). I am conscious that from 1 July 2020 Mr Dearden was employed by 2DE Pty Ltd on a gross hourly rate of $27 per hour,[132] but as is shown in the payslip of 11 February 2022, the net earnings for a short 39.5 week were $881.50, which is less than the contract mustering work.[133] There is a loss suffered and I consider it to be a loss fairly assessed at $500 a month. I accordingly quantify past economic loss as a loss of $500 per month for the 37 months since the date of accident, a sum of $18,500.

Loss of Superannuation Benefits

[151] The FASOC claims loss of superannuation benefits at 9.5% of the assessed past economic loss and 11.55% of the assessed future economic loss.[134] There is no dispute of that rate contained in the amended defence and accordingly I allow loss of superannuation benefits at the rates claimed.

[152] I quantify past loss of superannuation as 9.5% of $18,500, a sum of $1,757.50.

Loss of Future Economic Capacity

[153] In *Medlin v State Government Insurance Commission* McHugh J said: [135]

> "In Australia, a plaintiff is compensated for loss of earning capacity, not loss of earnings. In practice, there is usually little difference in result irrespective of whether the damages are assessed by reference to loss of earning capacity or by reference to loss of earnings. That is because 'an injured plaintiff recovers not merely because his earning capacity has been diminished but because the diminution of his earning capacity is or may be productive of financial loss'. Nevertheless, there is a difference between the two approaches, and the loss of earning capacity principle more accurately compensates a plaintiff for the effect of an accident on the plaintiff's ability to earn

131 T1-111, lines 22 – 28.
132 Exhibit 1, Document 11.
133 Exhibit 1, Document 14.
134 Further Amended Statement of Claim, paragraph [12].
135 (1995) 182 CLR 1, 16.

> income. Earning capacity is an intangible asset. Its value depends on what it is capable of producing. Earnings are evidence of the value of earning capacity, but they are not synonymous with its value. When loss of earnings rather than loss of capacity to earn is the criterion, the natural tendency is to compare the plaintiff's pre-accident and post-accident earnings. This sometimes means that no attention is paid to that part of the plaintiff's capacity to earn that was not exploited before the accident. Further, there is a tendency to assume that if pre-accident and post-accident incomes are comparable, no loss has occurred."

[154] As explained by Dr Lewandowski, Mr Dearden is vulnerable to further injury, that is, by damaging or splitting his skin grafts which would require further surgery. This is explained by Dr Lewandowski as a "likelihood".[136] Mr Dearden has ceased several activities which he previously enjoyed such as breaking horses and cattle drafting due to concern of suffering further injury. Mr Dearden has difficulty operating a cattle crush and difficulty climbing or performing work above head. This is particularly relevant to climbing ladders in silos, which is required as a part of his normal employment. Mr Dearden is at increased risk from riding or falling off horses, and as has been shown by the incident of 28 March 2019, the driving of ATVs does not necessarily remove the risk of travelling over rural areas.

[155] Mr Dearden has lost the ability to sweat in the affected areas, which increases his heat and discomfort.[137] Unfortunately for Mr Dearden, most of his work is required in hot rural areas. A grazier's work is not light work, nor is it easy, and Mr Dearden's injuries, whilst disabling from only a few of the tasks required, do place him, in my view, at significant risk of further injury to his scars. The effect of further injury to his scars may be quite dramatic and whilst Mr Dearden has extensive rural skills, it would seem he currently has limited employment prospects elsewhere. Mr Dearden did not receive a high OP score, no doubt focusing his time at school upon his intended career as a grazier, a career which is now significantly at risk. For these reasons the current loss suffered by Mr Dearden of $500 a month (or $115 per week) does not reflect his loss of economic capacity.

[156] Contained within Exhibit 1 are the payslips for the weeks ending 4, 11 and 18 February 2022.[138] They show gross earnings at $27 per hour, with the hours

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136 Exhibit 1, Document 9, paragraph [5].
137 T1-36, lines 1 – 15.
138 Exhibit 1, Documents 13, 14 and 15.

differing between 39.5 and 52 hours per week and the earnings varying between $881.50 and $1,102 npw with the average being a little over $1,000 npw.

[157] In assessing Mr Dearden's economic capacity, I bear in mind that Mr Dearden is currently only 24 years of age and his earning capacity at age 24 at $1,000 npw in my view is not a fair reflection of his longer-term prospects. There is little doubt that Mr Dearden has lost significant economic capacity. Mr Dearden suffers from fatigue as a result of his injury, has a limited range of movement in his right shoulder, is unable to tolerate hot work and is at increased risk of further injury to his scarring due to the nature of his work.

[158] As can be seen from the last three payslips and as explained by Mr Dearden, he is now actually paid for the number of hours he works. I accept Mr Dearden's evidence that his productivity has decreased as a result of the injury in that he is unable to perform some tasks and he requires assistance from others to perform certain tasks such as cattle crush work.

[159] Mr Scalia, Occupational Therapist, assessed Mr Dearden as having reduced functional capacity.[139] I accept his evidence as it relates to economic capacity as it is similar to Dr Lewandowski's and Dr Mackay's evidence. It also accords with the observations of Mr Peter Dearden,[140] Mrs Julie Deardon,[141] and Jemma Hawker.[142]

[160] In my experience, it is unusual for graziers to retire at the ages that city dwellers commonly retire, such as ages 65 to 70. Nonetheless, I consider it reasonable to allow a loss of economic capacity to the normal retirement age of 67 which is 43 years hence. The 43-year 5% discount factor is 938.[143] In my view, a reasonable assessment of Mr Dearden's loss of economic capacity is a loss of 40% of his proven current economic capacity of $1,000 npw. It is reasonable to allow that loss of $400 npw for the next 43 years (938) which is a sum of $375,200.

[161] As reflected by the High Court in *Wynn v New South Wales Insurance Ministerial Corp*[144] there are both positive and negative vicissitudes in assessing loss of

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139 Exhibit 1, Document 10
140 T2-9.
141 T2-39.
142 T2-90 – T2-91.
143 Pursuant to s 57 Civil Liability Act 2003 (Qld) and s 61 Civil Proceedings Act 2011 (Qld).
144 *Wynn v New South Wales Insurance Ministerial Corp* (1995) 184 CLR 485.

economic capacity. In the present case, due to Mr Dearden's age and having proven a rapid increase in earnings since age 21 to 24, I consider a quantification of economic capacity of $1,000 npw to be extremely conservative. The positive vicissitudes for Mr Dearden, had he not been injured, far outweigh the negative vicissitudes such that there ought not to be any discount for loss of future economic capacity.

Domestic Assistance

[162] Section 59 of the *Civil Liability Act 2003* (Qld) provides:

> **59 Damages for gratuitous services provided to an injured person**
>
> (1) Damages for gratuitous services provided to an injured person are not to be awarded unless—
>
> (a) the services are necessary; and
>
> (b) the need for the services arises solely out of the injury in relation to which damages are awarded; and
>
> (c) the services are provided, or are to be provided—
>
> (i) for at least 6 hours per week; and
>
> (ii) for at least 6 months.
>
> (2) Damages are not to be awarded for gratuitous services if gratuitous services of the same kind were being provided for the injured person before the breach of duty happened.
>
> (3) In assessing damages for gratuitous services, a court must take into account—
>
> (a) any offsetting benefit the service provider obtains through providing the services; and
>
> (b) periods for which the injured person has not required or is not likely to require the services because the injured person has been or is likely to be cared for in a hospital or other institution.

[163] On his return from the Manbulloo Station in the Northern Territory, Charlie Dearden moved into the homestead on the property, Olivia, with his brother Jack. Olivia is the Dearden family property adjacent to (about 10 minutes' drive) the main family property, Beverley. Charles Dearden was living in that house prior to and subsequent to the accident. Whilst an inpatient at the Royal Brisbane and Women's Hospital from 10 February to 22 February 2019, Charlie Dearden received a great

deal of care from his mother, Elizabeth Dearden. However, such care is not recoverable under s 59(3)(b) of the Act.

[164] Upon discharge from the Royal Brisbane and Women's Hospital on 22 February 2019, Charles Dearden returned to the homestead at Olivia. Charles Dearden returned to performing some work duties on 9 April 2019.[145] As described, after Charlie returned home from work at the end of the day, he was "just busted" with fatigue,[146] and so relied on his brother Jack to do all domestic chores as well as assisting Charles Dearden with dressing, changing and putting his pressure garments on.[147] This activity was said to take 10 minutes a day.[148] Although Charles Dearden gave evidence, which I accept, that his brother Jack did most of the chores in the early stage,[149] there was no descension as to particularity as to the number of hours of care provided. In that early period, however, Charles Dearden was washing his own pressure garments and clothes.[150]

[165] In this initial period from 22 February 2019 to October 2019, Jack Dearden's evidence was that he and his partner did "most of the jobs that he would normally assist with".[151] Jack Dearden explained that prior to the accident there was an equal sharing of household chores.[152] In respect of the activities, Jack Dearden nominated them as meal preparation, maintaining the house and yard, cleaning, mowing, laundry and assisting Charlie Dearden to put his pressure garments on.

[166] The evidence of Jack Dearden was that he or his partner, Sophia, a registered nurse, did assist Charlie Dearden with placing his pressure garments on, and that did take 5-10 minutes per day.[153] I accept that this domestic assistance was given in total for about an hour a week and that occurred for the first 15 months post-accident, with the exception of a period of about two weeks from 28 March 2019 when Charles Dearden was recovering, in Brisbane, from the effects of his ATV accident. I accept in this initial period that Jack Dearden provided approximately an hour a day in

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145 Exhibit 1, Document 1 Quantum Statement, paragraph 28.
146 T1-36 line 34.
147 T1-36 lines 45-46.
148 T1-37 line 22.
149 T1-36 & T1-37.
150 T1-38, lines 1-7.
151 T2-39, line 19.
152 T2-39, lines 6-13.
153 T2-40, lines 30-31.

meal preparation,[154] approximately 12 hours per week in house cleaning,[155] an additional 14 hours per week in yard maintenance,[156] and an additional hour per week for garments, that is a total of 34 hours' assistance per week.

[167] Under cross-examination, Jack Dearden was able to provide verification of the initial amount of care for yard duties at an average of at least 14 hours per week, providing evidence of the need for mowing twice per week in summer (a total of 16 hours per week) and one per week in winter (a total of 8 hours per week) for a very rough average of 12 hours per week per annum for mowing alone. This together with the additional work of whipper snipping, which occurred with every mow, and slashing, which only occurred once per month.[157]

[168] Under cross-examination, Jack Dearden's evidence was that, within a few months of the accident, Charles Dearden was performing more work by way of cleaning and cooking for himself as he progressively improved. [158] Whilst I accept the evidence of the witness Jack Dearden that there was a great deal of care, that is approximately 34 hours a week in care in the first few months from 22 February 2019, I also accept the evidence of Jack Dearden that as Charlie Dearden progressively improved, a few months after the accident, the care levels correspondingly decreased. There is no evidence, however, as to what level the care reduced to and it was not addressed under cross-examination nor re-examination.

[169] Other important facts which are relevant to the determination of this issue is that Charles Dearden returned to rural work, which is hard work, on 9 April 2019.[159] Furthermore, the evidence is that from October 2019 until March 2020, Charles Dearden moved to the property Bilbaringa, also owned by the Dearden family, and moved in with Mr Patrick Burr. The only evidence of the amount of care provided in that period, is the evidence of Charles Dearden that Mr Burr provided him with a few, approximately 3 hours', assistance per week.[160]

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154 T2-39, line 44.
155 T2-40, line 2.
156 T2-40, line 6.
157 T2-52.
158 T2-58.
159 Exhibit 1, Document 1 paragraph [9].
160 T1-38, line 40; T1-87-89.

[170] The evidence that I am left with shows there was a great deal of care in the initial few months, that is up to 34 hours per week, however, by October 2019, that had reduced to as little as 3 hours per week. I do find in terms of s 59(1)(c) that Charles Dearden did receive domestic assistance and services from his brother Jack Dearden and Jack's partner, Sophia, at the rate of approximately 34 hours per week for a period not exceeding 3 months from 22 February 2019 to 21 May 2019. In the period from 22 May 2019 to October 2019 there is a dearth of evidence as to how, why and when the care decreased from 34 hours a week to 3 hours a week. I infer that by 9 April 2019, when Charles Dearden returned to rural work, the care was less than 6 hours a week.

[171] In respect of the third period between October 2019 and March 2020 when Charlie Dearden lived at Bilbaringa with Patrick Burr, the care was provided at approximately 3 hours per week.

[172] In March 2020, Jemma Hawker came to reside at Bilbaringa with Charles Dearden. Ms Hawker was an impressive witness and I accept her evidence that she has provided a great deal of care and assistance to Charles Dearden. I accept this care included 2 to 3 hours per week cleaning duties including de-cobwebbing, mopping, sweeping, vacuuming and washing, half an hour to an hour per day (an average of 45 minutes or a little over 3 hours per week) in massage, further 1 to 2 hours per week on cleaning duties on the workers' cottage at Bilbaringa, and a further 8 hours per week performing external work at Bilbaringa.[161]

[173] By March 2020, Charles Dearden had returned to fulltime work in an arduous occupation performing rural duties for 11 months. In cross examination of Ms Hawker, it was established that she was an employee of the company "2DE", and a part of her employment included provision of housing on the basis of upkeeping that housing (the homestead and the workers' cottage).[162] It seems to me in this regard that the external duties performed and the cleaning of the workers' cottage are properly viewed as obligations that arise out of Ms Hawker's employment rather than services that arise out of a proven need by Charles Dearden for services. I do accept Ms Hawker's evidence that she spent 2-3 hours per week performing additional internal duties in the homestead at Bilbaringa, as that accords

161 T2-93 to T2-94.
162 T2-111.

with Charlie Dearden's evidence on the amount of additional services required from Patrick Burr.

[174] An addition of 2 or even 2.5 hours per week to the accepted 45 minute per day average for the massage does not meet the statutory threshold of 6 hours per week required by s 59(1)(c). Furthermore, I consider that the evidence, in particular the evidence from Charles Dearden as to the care received from Patrick Burr, coupled with the evidence of Charles Dearden's return to employment from 9 April 2019 leads to the inference that the vast majority of the services provided by Jemma Hawker to Charlie Dearden were through her natural affection for him as her partner rather than an injury inflicted need.

[175] The evidence that I have accepted therefore in respect of the issue of domestic services is of a great deal of assistance provided in the first three months at approximately 34 hours per week, reducing at an unknown progressive rate down to as little as 2 hours per week by October 2019. I conclude that the onus is cast upon Charles Dearden, as a plaintiff, to satisfy s 59(1)(c). That the services are provided or are to be provided for at least 6 hours per week for at least 6 months has not been satisfied by Mr Dearden.

[176] In coming to this view, I am conscious that s 59(1)(c) not only refers to the historical amount of service provided, but also to the future, that is to the services that may be provided. It is likely there will be some services provided in the future when Charles Dearden obtains further surgery. Charles Dearden is, in my assessment, an extremely stoic young man and I would expect that whilst he will need some domestic assistance in the future, it will be of limited amount and limited duration.

[177] There is a lack of evidence suggesting any greatly increased car being provided subsequent to the serious aggravation that occurred on 28 March 2019 with the tearing of the scarring (exposing his chest bone) requiring further treatment. In light of that, I consider it likely that the amount of care provided after any future operative treatment will be of a limited number of hours, that is less than 6 hours a week, and for a limited duration such that it is speculative to conclude that the threshold set in s 59(1)(c) has been satisfied. As the s 59(1)(c) threshold has not been satisfied, I make no award for gratuitous services.

Special Damages

[178] As a result of the accident, Mr Dearden received assistance from the ambulance services and at Toowoomba Base Hospital. Furthermore, he received significant assistance, including two surgical procedures, at the Royal Brisbane and Women's Hospital as well as ongoing outpatient services at that hospital and Roma Hospital. Expenses relating to this treatment has not been claimed. There is no evidence to support the cost of these services which has not been claimed as an item of damage.

[179] In respect of doctors' expenses, the parties agree that $1,383.05 ought to be allowed as special damages. That does not bear any interest as it represents the Health Insurance Commission charge.

[180] In his quantum statement, Charles Dearden claimed over $21,000 in travel expenses and $2,355 in pharmaceutical expenses. This portion, at paragraph 40, of the quantum statement was struck out as they were average claims made without reference to evidence, and in respect of the travel, by adopting 75c per kilometre, being an Australian Taxation Office authorised rate for deductions for a motor vehicle.[163]

[181] The plaintiff was invited to prove his travel and pharmaceutical expenses in the usual way, that is, in respect of the travel, by evidence of the amount expended on travel or proof of a proper travelling rate together with the number of kilometres travelled. This did not occur in the plaintiff's case other than the relatively vague evidence from Charles Dearden that, after filling his vehicle up at the farm (with farm fuel) and driving to Brisbane for treatment, he would run out of fuel at some point and re-fill his vehicle for the return journey.

[182] The discharge summary of the Royal Brisbane and Women's Hospital shows that Charles Dearden was expected to return as an outpatient for treatment.[164] The report of Mr Scalia records bi-weekly attendances to physiotherapy appointments for a period of 12 months which subsequently reduced to weekly attendance for a further 12 months.[165] There is no precise evidence as to the number of journeys that Charles Dearden took to attend at the Royal Brisbane and Women's Hospital or at the Roma

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163 T1-9
164 Exhibit 1, Document 7.
165 Exhibit 1, Document 10, page 3.

Hospital however, it is plain that it is dozens. In my view it is appropriate that a sum be allowed for travel expenses. I will allow a small sum of $2,500 as a global sum for past travel expenses.

[183] In respect of antihistamines, I accept Charlie Dearden's evidence that he takes Zyrtec which he purchases from his chemist in bulk, paying $35 for a 70-tablet pack. Charles Dearden consumes 4 per day, spending $2 per day on Zyrtec. I therefore allow $2,198 in respect of past Zyrtec expenses.

[184] Although Charles Dearden has consumed other pharmaceuticals, no evidence has been brought as to their cost nor amount of use. As to moisturisers and creams, I accept Mr Charlie Dearden's evidence that he uses DermaVeen, which he purchases in litre amounts and which lasts him 3 to 4 weeks.[166] The only evidence as to the cost of DermaVeen is from Charlie Dearden at $13.60 for 500ml.[167] I accept that Charlie Dearden has expended approximately $27.20 per month which I allow for 3 years, a total of $979 ($27.20 x 12 months x 3 years).

[185] The total for special damages is therefore $7,060.05, of which $5,617 bears interest at the statutory rate.

Future Medical Expenses

[186] In respect of ongoing pharmaceutical expenses, I consider it reasonable to allow the Zyrtec at a cost of $14 per week and DermaVeen or another cream at the cost of $6.30 per week, a total of $20.30, which ought to be allowed for the life expectancy of 61 years (discount factor 1015), a sum of $20,605.

[187] I consider it reasonable to allow further pharmaceutical expenses consequent upon the surgeries that Mr Dearden will require in the future. I allow a further $5,000 for other future pharmaceuticals.

[188] I accept Dr Lewandowski's opinion that Charlie Dearden is best suited to sedentary work because the work required of him in the cattle business conducted by his parents and others is likely to place him at considerable further risk of injury.[168] This is because Charles Dearden suffers from restrictions of movement in his right

166 T1-97, line 11.
167 T1-96, lines 42 – 46.
168 Exhibit 1 Document 9 Paragraph 6.

shoulder, and because he suffers from pain and fatigue as a consequence of the use of the shoulder for arduous activities. Furthermore, that these activities are outdoors and usually hot further aggravates his condition. I do, however, consider the likelihood is that Charles Dearden will continue to pursue his rural career for the foreseeable future. It has always been his aim and Charles Dearden appears to be a determined person. Both Drs Lewandowski and Mackay consider that in the future Charles Dearden will require excision and re-grafting of the scars. Given the likelihood of Charles Dearden's continued work in the rural industry, I accept Dr Mackay's opinion it is likely there will be multiple procedures, each costing $15,000.[169] The timing of these procedures cannot be determined. As explained by Dr Lewandowski, it depends upon the use to which Charles Dearden puts his arm to, and the success of the surgery proposed.

[189] In addition, I consider it reasonable that 10 sessions of laser therapy be provided, costing $6,000 as well as steroid injections.[170] I further accept Dr Mackay's guidance it would be reasonable to allow four sessions of steroid injections under general anaesthetic as a day patient in hospital, costing approximately $3,000 per injection.[171]

[190] In respect of surgery, therefore, I consider it reasonable to allow $12,000 for steroid injections and $6,000 for laser treatment. I will add a further $15,000 in respect of scar excision and re-grafting as it is impossible to accurately predict the number of procedures, nor when they will be undertaken. Assuming there will only be two procedures 10 years apart, both costing $15,000, on the lump sum 5% deferred tables, the allowance would be $14,865 ($15,000 x 0.614 + $15,000 x 0.377).

[191] I therefore allow $33,000 in future surgical expenses, and $25,605 in future pharmaceutical expenses, a total of $58,605.

[192] In summary I assess Mr Dearden's quantum as follows:

General damages	$95,670.00
Past economic loss	$18,500.00
Interest on past economic loss (1.73% ÷ 2 x 3.2 yrs)	$512.00

169 Exhibit 15, paragraph [2.7.7.1]
170 Exhibit 15, paragraph [2.7.7.2]
171 Exhibit 15, paragraph [2.7.7.3]

Loss of superannuation benefits (past) @ 9.5%	$1,757.50
Future loss of economic capacity	$375,200.00
Loss of superannuation benefits (future) @ 11.55%	$43,336.00
Past medical expenses HIC $1383.05, global travel $2500, DermaVeen $979, Zyrtec $2198	$7,060.05
Interest on past medical expenses $5,667 x 1.73% ÷ 2 for 3.2 years	$157.00
Future medical expenses	$58,605.00
TOTAL	**$600,797.55**

[193] I give judgment for the plaintiff against the defendant in the amount of $600,797.55.

Third Party Proceedings

[194] No issue is raised in the defendant's case against the third party, other than apportionment. As the defendant introduced the fuel, provided a lot of alcohol, and then failed to remove the fuel, they ought to have significant responsibility. The third party, however, must bear the bulk of the apportionment as he has engaged in a reckless and criminal act fuelled by his high state of intoxication. The matters considered at [83] to [116] lead me to conclude that a 70/30% apportionment is appropriate balancing those features. I give judgment for the defendants against the third party in the sum of $420,558.29.