HIGH COURT OF AUSTRALIA

18 June, 2003

**Public Information Officer**

SALLY INCH JOSLYN v ALLAN TROY BERRYMAN AND WENTWORTH SHIRE COUNCIL
WENTWORTH SHIRE COUNCIL v ALLAN TROY BERRYMAN AND SALLY INCH JOSLYN (two appeals)

Mr Berryman ought to have been aware that Ms Joslyn was intoxicated when she took the wheel of his utility. Because that was so he was guilty of contributory negligence which contributed to the serious injuries he suffered when the utility overturned, the High Court of Australia held today.

Both had been at a 21st birthday party on a property near Dareton, in south-western New South Wales, on October 26. 1996. Both had drunk heavily on the previous night in Wentworth and also drank heavily at the party. Mr Berryman went to sleep in his utility about 4am and Ms Joslyn, who was seen staggering about at 4.30am, went to sleep on the ground beside the utility. After a short sleep, they drove into Mildura for breakfast at a McDonald's restaurant. On their return journey to the property, Mr Berryman was nodding off and Ms Joslyn took over driving, despite having lost her licence for drink-driving and not having driven for three years. Ms Joslyn lost control while driving around a sharp corner and the utility overturned. The utility had a propensity to roll and its speedometer was broken. Mr Berryman, 22 at the time, was seriously injured. Blood samples taken later indicated that at 8.45am when the accident occurred Mr Berryman had had a blood-alcohol concentration of about 0.19 per cent and Ms Joslyn about 0.138 per cent.

Mr Berryman sued Ms Joslyn for negligent driving and Wentworth Shire Council for not providing a warning sign before the bend. The NSW District Court found both Ms Joslyn and the shire council guilty of negligence, holding Ms Joslyn 90 per cent responsible and the council 10 per cent responsible for the injuries suffered by Mr Berryman. The Court ordered the council to pay $750,000 and Ms Joslyn $1,995,086.36 but reduced Ms Joslyn's damages by 25 per cent, to $1,496,314.77, owing to Mr Berryman's contributory negligence in allowing her to drive when he ought to have been aware she was unfit to drive.

Mr Berryman appealed to the NSW Court of Appeal against the contributory negligence finding. Ms Joslyn and the shire council cross-appealed, each alleging higher levels of contributory negligence. The Court upheld Mr Berryman's appeal on the ground that Ms Joslyn had not shown signs of intoxication when she took over the driving, restoring the damages to $1,995,086.36. It dismissed the shire council's appeal against Ms Joslyn and rejected the council's separate appeal based on joint illegal activity by the pair.

Ms Joslyn and the shire council appealed to the High Court, which held that the Court of Appeal erred in confining factors relevant to contributory negligence to those observed by Mr Berryman when he became a passenger. The High Court held that, under section 74 of the NSW Motor Accidents Act, which was not considered by the lower courts, he would be contributorily negligent if he was aware or ought to have been aware that Ms Joslyn's driving was impaired. The Court unanimously allowed the appeals and remitted each matter to the Court of Appeal.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

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