HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, KEANE AND GORDON JJ

ALEX ALLEN APPELLANT

AND

DANIELLE LOUISE CHADWICK RESPONDENT

Allen v Chadwick
[2015] HCA 47
9 December 2015
A14/2015

ORDER

1. *Appeal allowed in part.*

2. *Set aside orders 1-4 of the Full Court of the Supreme Court of South Australia made on 10 December 2014 and, in their place, order that:*

   (a) the appeal be allowed in part;

   (b) the cross-appeal be dismissed; and

   (c) paragraph 1 of the order made by Judge Tilmouth on 19 November 2012 be varied by replacing the sum of $1,387,888.87 with the sum of $1,223,287.74.

3. *Appellant to pay the respondent's costs of and incidental to the appeal to this Court.*

On appeal from the Supreme Court of South Australia

Representation

M C Livesey QC with B J Doyle for the appellant (instructed by Hunt & Hunt Solicitors)

R J Whitington QC with J M Atkins and B J Krupka for the respondent (instructed by Meller Olsson Lawyers)

CATCHWORDS

Allen v Chadwick

Torts – Negligence – Contributory negligence – Section 47 of *Civil Liability Act* 1936 (SA) ("Act") presumes contributory negligence of injured person who relied on care and skill of intoxicated person and who was aware or ought to have been aware that other person was intoxicated – Section 47(2)(b) of Act establishes exception where injured person could not reasonably be expected to have avoided risk – Where respondent travelled in car with intoxicated driver and suffered serious injuries – Whether respondent could reasonably be expected to have avoided risk – Proper construction of s 47(2)(b) of Act – Relevance of respondent's capacity to make reasonable assessment of relative risks – Relevance of subjective characteristics.

Torts – Negligence – Contributory negligence – Section 49 of Act presumes contributory negligence where person injured in motor vehicle accident not wearing seatbelt – Where respondent was not wearing seatbelt and suffered serious injuries in motor vehicle accident – Whether appellant's erratic driving prevented respondent from fastening seatbelt – Whether factual findings overturned on appeal – Relevance of "act of a stranger" defence.

Words and phrases – "act of a stranger", "could not reasonably be expected to have avoided the risk", "reasonable assessment of risk".

Civil Liability Act 1936 (SA), ss 3, 44(1), 47, 49.

1 FRENCH CJ, KIEFEL, BELL, KEANE AND GORDON JJ. On 12 March 2007, the respondent, Danielle Chadwick, was thrown from the back seat of a car being driven by the appellant, Alex Allen. Ms Chadwick sustained serious spinal injuries which rendered her paraplegic. At the time of the accident, Mr Allen's blood alcohol level was around 0.229 per cent. It is not in dispute that his negligent driving caused Ms Chadwick's injuries.

2 The issues for determination by this Court are whether Ms Chadwick was contributorily negligent, first, for choosing to travel in the car driven by Mr Allen when she ought to have known that he was intoxicated, and, secondly, for failing to engage her seatbelt. The resolution of each of these issues depends respectively upon the operation of ss 47(2)(b) and 49 of the *Civil Liability Act* 1936 (SA) ("the Act").

3 The trial of Ms Chadwick's action in the District Court of South Australia occupied 62 sitting days. It is a matter of some concern that the trial of an action for damages for personal injury arising out of a motor vehicle accident should have involved so much time and associated expense. After this litigious marathon, the trial judge (Tilmouth DCJ) declined to make the reduction of 50 per cent in Ms Chadwick's damages which Mr Allen's insurers had sought pursuant to s 47 of the Act. His Honour held that, in the circumstances in which Ms Chadwick found herself, she could not reasonably be expected to have avoided the risk of riding with Mr Allen. On that basis, s 47(2)(b) of the Act operated to except Ms Chadwick from the presumption of contributory negligence on her part which arose from riding with Mr Allen.

4 The trial judge did, however, reduce Ms Chadwick's damages by 25 per cent pursuant to s 49 of the Act because she was not wearing a seatbelt at the time of the accident.

5 On Mr Allen's appeal to the Full Court of the Supreme Court of South Australia, the Court by majority (Gray and Nicholson JJ, Kourakis CJ dissenting) upheld the trial judge's decision in relation to the s 47 issue; and, on Ms Chadwick's cross-appeal, unanimously reversed the trial judge's conclusion in relation to the s 49 issue.

6 Mr Allen appeals to this Court pursuant to special leave granted on 19 June 2015 by French CJ and Keane J.

7 For the reasons which follow, Mr Allen's appeal should be allowed, but only to the extent of restoring the trial judge's decision on the s 49 issue[1].

The circumstances of the accident

8 At the time of the accident in 2007, Ms Chadwick and Mr Allen were in a relationship that had been on and off again for several years. Ms Chadwick was 21 years old and Mr Allen was 28 years old. Ms Chadwick's daughter, Hope, was five years old. Ms Chadwick was pregnant at the time. She had known that she was pregnant for nine or 10 weeks.

9 On 10 March 2007, Ms Chadwick, Mr Allen and Hope set off from their home in the Adelaide Hills for a weekend on the Yorke Peninsula. They slept overnight near Port Pirie, and the following morning met up with a friend of Mr Allen, Mr Martlew. Ms Chadwick, Mr Allen and Hope joined Mr Martlew and his two children, then aged three and six, and the whole group travelled onward in Mr Martlew's Holden Commodore station wagon.

10 Mr Allen and Mr Martlew drank alcohol throughout the day, including mixers of rum or bourbon contained in pre-mixed cans which they retrieved from an esky in the boot of the car. The group attended a field day in Kadina; it is probable that this is where the men began drinking. They continued to drink steadily thereafter, including at the Wallaroo Hotel, where the group stopped for lunch.

11 At some point in the day, probably when the group left Kadina, Ms Chadwick assumed responsibility for driving the car; her evidence was that she was not drinking on account of her pregnancy. The group arrived in Port Victoria in the early evening and booked two rooms in a motel attached to the Port Victoria Hotel.

12 Once in Port Victoria, Ms Chadwick and the three children played in a playground. At one point, Mr Allen joined them and fell off a see-saw, something that he attributed to his state of intoxication.

13 Ms Chadwick readied the children for bed while Mr Allen and Mr Martlew continued drinking at the Port Victoria Hotel. Once the children

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1 For the sake of completeness it may be noted that an issue as to one minor aspect of the appeal concerning the quantum of the component of Ms Chadwick's damages for future care was resolved by agreement between the parties.

were asleep, Ms Chadwick left them at the motel and joined the men in the front bar of the hotel. The two men were seen by the bartender, Ms Kneebone, to be drinking mainly spirits, namely whiskey or rum. The trio left the bar after last drinks were called.

14 Between 1.30 am and 2 am, a decision was made to go for a drive, "ostensibly" (as the trial judge put it) to find some cigarettes[2]. All three left, with Ms Chadwick driving Mr Martlew's car. The children remained at the motel.

15 Ms Chadwick's evidence was that she drove for 10 to 15 minutes around Port Victoria, and at one point left the township itself. Mr Martlew was sitting in the front seat next to Ms Chadwick, and Mr Allen was in the rear passenger area. The drive, as described by Ms Chadwick, was chaotic, with very loud music playing and both men constantly shouting directions at her.

16 At one point, Ms Chadwick stopped the car on the side of the road, got out and went behind some bushes to urinate because she was "busting like anything". It was later ascertained that the car was stopped on Wauraltee Road, on the outskirts of Port Victoria, approximately 500 metres from the Port Victoria Hotel. Ms Chadwick gave evidence that she thought she was "in the middle of nowhere" and that it was "just black. Literally black." She said that she could see a light, but that it was so far away that she did not know what it was. Mr Martlew gave evidence that it was "dark" and that he could not see any lights; however, he later added that there were lights to the left and right, and town lights "straight ahead". Undisputed evidence showed that there was street lighting in the distance, to the north and to the south east, about 200 metres away in each direction.

17 The trial judge accepted Ms Chadwick's evidence that she was "somewhat disoriented and considered herself to be much further away from the town" than she in fact was[3].

18 When Ms Chadwick returned to the car, Mr Allen was in the driver's seat. Ms Chadwick remonstrated with him and told him not to drive. She gave evidence that he replied, "Get the fuck in the car" or words to that effect. Mr Martlew did not recall an argument between the pair, but gave evidence that they "said something to each other".

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2 *Chadwick v Allen* [2012] SADC 105 at [12].

3 *Chadwick v Allen* [2012] SADC 105 at [138].

19 Ms Chadwick entered the car via the rear right-side door and sat on the rear right-hand passenger seat. She said that Mr Allen took off so fast that she did not have a chance to close the door, which closed with the force of his acceleration. Ms Chadwick failed to put on her seatbelt. Mr Allen was driving aggressively and erratically. He drove back into Port Victoria, performed a U-turn on the main street, spun the tires, and accelerated back out of town along Wauraltee Road.

20 When Mr Allen attempted a sweeping left-hand bend, the car started to spin first in an anti-clockwise direction, then in a clockwise direction, and then again in an anti-clockwise direction. While spinning anti-clockwise for the second time, the right-hand side of the car struck a small tree, and then the rear right side heavily struck a mature tree. The force of the second impact towards the right rear door of the car catapulted Ms Chadwick out of the car and she hit the ground, sustaining acute spinal cord injuries.

Relevant legislation

21 Section 3 of the Act relevantly provides:

> "***contributory negligence*** means a failure by a person who suffers harm to exercise reasonable care and skill for his or her own protection or for the protection of his or her own interests".

22 Section 44(1) of the Act is significant. It precludes any suggestion that the reasonable care and skill expected of a plaintiff for the protection of his or her own interests is something different from the reasonable care and skill expected of a defendant for the protection of the interests of others. Section 44(1) provides that:

> "The principles that are applicable in determining whether a person has been negligent also apply in determining whether a person who suffered harm (the ***plaintiff***) has been contributorily negligent."

23 Section 47(1) creates an irrebuttable presumption of contributory negligence on the part of a person injured in the circumstances in which Ms Chadwick was injured. It provides:

"If –

(a) the injured person –

(i) was of or above the age of 16 years at the time of the accident; and

(ii) relied on the care and skill of a person who was intoxicated at the time of the accident; and

(iii) was aware, or ought to have been aware, that the other person was intoxicated; and

(b) the accident was caused through the negligence of the other person; and

(c) the defendant alleges contributory negligence on the part of the injured person,

contributory negligence will, subject to this section, be presumed."

24 An exception to the operation of s 47(1) arises where the injured person establishes that he or she could not "reasonably be expected to have avoided the risk" of injury which arose as a result of relying on the care and skill of a person who was, and should have been known to be, intoxicated. Section 47(2) provides relevantly:

"Subject to the following exception, the presumption is irrebutable. ... The injured person may rebut the presumption by establishing, on the balance of probabilities, that –

…

(b) the injured person could not reasonably be expected to have avoided the risk."

25 In the present case, by reason of Mr Allen's blood alcohol concentration, sub-ss (3) and (5) of s 47 operated, unless the exception in s 47(2)(b) applied, to produce a fixed reduction in the assessment of Ms Chadwick's damages of 50 per cent. In this regard, sub-ss (3) and (5) provide relevantly:

"(3) In a case in which contributory negligence is to be presumed under this section, the court must apply a fixed statutory reduction of 25 per cent in the assessment of damages.

…

(5) If, in the case of a motor accident, the evidence establishes –

(a) that the concentration of alcohol in the driver's blood was .15 grams or more in 100 millilitres of blood ...

the fixed statutory reduction prescribed by subsection (3) is increased to 50 per cent."

26 Section 49 erects a presumption of contributory negligence on the part of a person injured in a motor vehicle accident where that person was not wearing a seatbelt at the time of the accident as required under the *Road Traffic Act* 1961 (SA) ("the RTA"). In such circumstances, s 49 provides for a compulsory reduction in damages of 25 per cent. Section 49 provides relevantly:

"(1) If the injured person was injured in a motor accident, was of or above the age of 16 years at the time of the accident and –

(a) the injured person was not, at the time of the accident, wearing a seatbelt as required under the *Road Traffic Act 1961* ...

...

contributory negligence will, subject to this section, be presumed.

…

(3) In a case in which contributory negligence is to be presumed under this section, the court must apply a fixed statutory reduction of 25 per cent in the assessment of damages."

27 In relation to s 49(1)(a), at the time of the accident in the present case, the RTA contained no provision specifically requiring the wearing of a seatbelt; but s 80 of the RTA made provision for the making of "rules (*Australian Road Rules*) [('the ARR')] to regulate … any aspect of … passenger … conduct", and the ARR, in force at the date of the accident, provided relevantly by r 265:

"(1) A passenger in … a motor vehicle that is moving … must comply with this rule if the passenger is 16 years old, or older.

…

(3) If the passenger occupies a seating position fitted with a seatbelt, the passenger must wear the seatbelt properly adjusted and fastened unless the passenger is exempt from wearing a seatbelt under rule 267."[4]

28 Section 50 of the Act provides for the assessment of damages in light of the operation of ss 47 and 49 of the Act in a given case. The operation of s 50 in this case is not controversial, and no more need be said of it.

The decision of the trial judge

29 The trial judge held that Ms Chadwick ought to have been aware that Mr Allen was intoxicated when she decided to ride with him driving the car[5]. Accordingly, s 47(1)(a)(iii) of the Act gave rise to the presumption of contributory negligence on her part.

30 Ms Chadwick contended that the exception in s 47(2)(b) of the Act applied in this case because, in the circumstances, she could not reasonably be expected to have avoided the risk of travelling with Mr Allen. The trial judge accepted the contention that the circumstances gave rise to the exception in s 47(2)(b), so that Ms Chadwick avoided the 50 per cent reduction in damages that would otherwise have applied pursuant to s 47(5) of the Act.

31 Ms Chadwick also argued that her failure to wear a seatbelt did not constitute contributory negligence for the purposes of s 49 of the Act. In her pleading in reply she alleged that the seatbelt mechanism was inoperable. This allegation was not made out at trial, but Ms Chadwick gave evidence to the effect that the erratic driving of Mr Allen had made it impossible for her to engage the seatbelt mechanism. The trial judge rejected this evidence and held that Ms Chadwick was contributorily negligent for failing to wear a seatbelt. Accordingly, her damages were reduced by 25 per cent pursuant to s 49(3) of the Act.

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4 Mr Allen submitted that none of the exemptions were relevant to the present case.

5 *Chadwick v Allen* [2012] SADC 105 at [86].

32 The trial judge observed of Ms Chadwick that: "She was demonstrably an unsatisfactory witness in relation to a number of key issues."[6] His Honour found that Ms Chadwick "lied profusely"[7]. Nevertheless, his Honour accepted as a fact that Ms Chadwick did not know where she was in relation to the town when she returned to the car to find that Mr Allen insisted upon driving[8]. As will be seen, that was an important finding of fact which was not disturbed on appeal.

33 As to the application of s 47(2)(b) of the Act, the trial judge held that Ms Chadwick was[9]:

> "a 21 year old pregnant woman … with two older men at 2 am in the morning in a strange place, stranded on the outskirts of a remote country town in a darkened area, without appreciating that she was much nearer than she thought, and when no-one was up or about."

34 His Honour went on to conclude that Ms Chadwick "objectively speaking … had little choice but to enter the vehicle", given the "precarious situation" in which she found herself[10]. The trial judge departed somewhat from the approach required by the text of s 47(2)(b) of the Act in referring to "an impossible situation or predicament in which no reasonable person placed in the precise position of the injured person, can avoid, or has no choice but to accept", the risk of riding with an intoxicated person[11]. To the extent that his Honour's reference to "no choice" departed from the language of s 47(2)(b), which contemplates the possibility of a reasonable choice to accept the risk of relying on the care and skill of a person who was, and should have been known to be, intoxicated, it may be said that it imposes upon a plaintiff an unduly stringent qualification for the exception in s 47(2)(b).

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6 *Chadwick v Allen* [2012] SADC 105 at [48].

7 *Chadwick v Allen* [2012] SADC 105 at [63].

8 *Chadwick v Allen* [2012] SADC 105 at [141]-[142].

9 *Chadwick v Allen* [2012] SADC 105 at [141].

10 *Chadwick v Allen* [2012] SADC 105 at [142]-[143].

11 *Chadwick v Allen* [2012] SADC 105 at [94].

35 As to the s 49 issue, the case which Ms Chadwick ultimately advanced was that the gravitational forces generated by Mr Allen's aggressive and erratic driving prevented her from fastening her seatbelt. The trial judge accepted that, as a matter of law, the failure of a passenger to fasten her seatbelt might be excused on the basis that she was prevented from doing so by the erratic driving of the vehicle. This ground of excuse was referred to as the "act of a stranger" defence, the description deriving from decisions of the Supreme Court of South Australia which recognised a defence to charges of offences of strict liability where a person charged is prevented from complying with a statutory requirement by the conduct of another[12]. But his Honour was not prepared to accept that Ms Chadwick had been so prevented.

36 In this regard, there was expert evidence to the effect that Ms Chadwick had opportunities (albeit limited) to fasten her seatbelt during those periods when Mr Allen was driving the vehicle in a straight line. The trial judge accepted that evidence, and went on to hold that[13]:

> "it is impossible to conclude on balance that Ms Chadwick was prevented from fastening her seatbelt in the critical moments leading up to impact, either by the gravitational forces being too high for the better part of the period of time in question, that there was too little time to do so, or that it was defective in some unspecified way."

37 Accordingly, the trial judge rejected Ms Chadwick's reliance on the "act of a stranger" defence[14]:

> "because the failure to place the seatbelt in the engaged position was not due to driving conditions or malfunction, rather it was due to impatience and impetuosity on Ms Chadwick's part, causing her to pull it too quickly and then to give up just as she described in her evidence."

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12 cf *Norcock v Bowey* [1966] SASR 250 at 266, 268; *Mayer v Marchant* (1973) 5 SASR 567 at 573.

13 *Chadwick v Allen* [2012] SADC 105 at [167].

14 *Chadwick v Allen* [2012] SADC 105 at [170].

The decision of the Full Court

38 The Full Court of the Supreme Court of South Australia dismissed Mr Allen's appeal with respect to the s 47 issue. Gray and Nicholson JJ held that the trial judge was correct to conclude that Ms Chadwick could not reasonably be expected to have avoided the risk of re-entering the vehicle with Mr Allen driving[15]. Their Honours noted that the approach taken by the trial judge was unduly stringent, holding that it is not necessary for an injured person to demonstrate that no reasonable person placed in the precise position of the injured person could have avoided the relevant risk, or would have had no choice but to accept the risk[16].

39 Their Honours held that, in determining whether s 47(2)(b) applies, a court must assess whether a reasonable person in the position of the injured person would have avoided the particular risk[17]. Their Honours took a broad approach to the question, in that they viewed s 47(2)(b) of the Act as posing[18]:

> "the question whether the conduct of a plaintiff, in choosing to expose themself to a risk of injury, which risk in fact eventuates, can be excused."

40 In this regard, their Honours observed that Ms Chadwick's feelings of "helplessness and panic are readily understandable"[19].

41 To the extent that their Honours' reasons, which are not pellucid in this respect, suggest an approach which looks to whether the decision of the plaintiff is as reasonable as a helpless and panicking person could be expected to make, that approach does not conform to s 47(2)(b) considered in the light of s 44(1). Kourakis CJ dissented on this issue, taking the view that s 47(2)(b) imposes an

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15 *Allen v Chadwick* (2014) 120 SASR 350 at 383 [119].

16 *Allen v Chadwick* (2014) 120 SASR 350 at 383 [116]-[117].

17 *Allen v Chadwick* (2014) 120 SASR 350 at 383 [116].

18 *Allen v Chadwick* (2014) 120 SASR 350 at 381 [103].

19 *Allen v Chadwick* (2014) 120 SASR 350 at 382 [113].

objective standard in which an injured person's emotional or intellectual difficulties in making a reasonable decision are not taken into account[20].

42 Kourakis CJ traced the history of s 47 to the enactment of the antecedent provision, s 35a(1)(j) of the *Wrongs Act* 1936 (SA), in respect of which there was "no doubt but that [it] was intended to effect a more rigorous approach to the reduction of damages for contributory negligence"[21]. His Honour held that to take into account subjective difficulties impairing a plaintiff's decision-making capacity would "transform s 47 of the [Act] into the converse of what was intended by the enactment of its progenitors"[22]. In terms of the divergent approaches to the operation of s 47(2)(b), it will be seen that the approach of Kourakis CJ is to be preferred to that of the majority.

43 Kourakis CJ went on to conclude on the facts that a reasonable person in Ms Chadwick's position would appreciate that "the risk in getting into the car driven by Mr Allen was great", "would take the time to survey her geographical location and would appreciate that she was about 200 m away from the outskirts of the township and about … 10 minutes walk from the Hotel", and would then "assess that there was no significant danger to her personal safety in walking the short distance into a quiet country town even at that hour."[23] Kourakis CJ concluded that a reasonable person would have substantially discounted such risk as there might have been in that regard "because there was no reason for [her] to think that Mr Allen would be so callous as to abandon her completely even if he had initially driven off."[24] A different view of the proper conclusion to be drawn from the application of the law to the facts of the case would follow from the acknowledgement that there was, in truth, little reason why Ms Chadwick should have expected common sense or common decency from Mr Allen.

44 As to the s 49 issue, all three members of the Full Court were in agreement that the "act of a stranger" defence excused Ms Chadwick's failure to

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20 *Allen v Chadwick* (2014) 120 SASR 350 at 359 [23]-[24].

21 *Allen v Chadwick* (2014) 120 SASR 350 at 364 [39].

22 *Allen v Chadwick* (2014) 120 SASR 350 at 366 [46].

23 *Allen v Chadwick* (2014) 120 SASR 350 at 367 [50].

24 *Allen v Chadwick* (2014) 120 SASR 350 at 367 [50].

fasten her seatbelt. Kourakis CJ said[25] that "Ms Chadwick's actions were a direct and natural response to Mr Allen's bad driving", and that[26]:

> "To the extent that [the trial judge's] reasons imply a finding that Ms Chadwick acted as she did only out of anger at Mr Allen for taking over the driving and not by reason of the urgency created by Mr Allen's driving, the evidence does not support that finding."

45 It should be noted here that even if Ms Chadwick's actions in failing to fasten her seatbelt were a "direct and natural response" to Mr Allen's bad driving, that would not mean that he had actually prevented her from fastening her seatbelt; whether or not her response was motivated by anger was not decisive of the question.

46 Gray and Nicholson JJ held that[27]:

> "It can be readily understood that, in these circumstances, a passenger would yank or pull at a seatbelt in an effort to free it, even more so an anxious and distressed 21 year old pregnant woman who was desperate to fasten her seatbelt. To conclude to the effect that, in these circumstances, a passenger should be sufficiently calm and collected to wait for an opportunity to fasten the seatbelt if it were to arise and to seize upon that opportunity immediately before it was lost again, is wholly unrealistic.
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> …
>
> We consider that the judge's conclusions in this respect cannot be sustained. We are satisfied that Ms Chadwick adduced evidence which would be capable of giving rise to an act of a stranger defence."

47 The issue was not whether Ms Chadwick had "adduced evidence which would be capable of giving rise to an act of a stranger defence", but whether the evidence which she gave should have been accepted. The trial judge did not accept her evidence; and, as will be seen, the Full Court did not overturn factual findings which supported that rejection.

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25 *Allen v Chadwick* (2014) 120 SASR 350 at 358 [19]-[20].

26 *Allen v Chadwick* (2014) 120 SASR 350 at 358 [20].

27 *Allen v Chadwick* (2014) 120 SASR 350 at 393-394 [156]-[158].

The s 47 issue

48 On behalf of Mr Allen, it was submitted that there was a fundamental difference between Kourakis CJ and the majority. It was said that the majority erred in fixing upon Ms Chadwick's personal characteristics and asking whether her position was "understandable" in the light of those characteristics, and whether her choice to expose herself to the risk of injury "can be excused"[28] by reference to some other unidentified standard of behaviour. It was argued that the proper approach, once s 47(1) is engaged, is for the "idiosyncrasies of the particular person whose conduct is in question" to be disregarded in the evaluation required by s 47(2)(b)[29].

49 On behalf of Ms Chadwick, it was argued that the expression "the injured person" in s 47(2) permits the decision-making characteristics of the individual person to be taken into account. It was said that the majority committed no error of principle when their Honours concluded that Ms Chadwick's "feelings of helplessness and panic are readily understandable"[30], nor when their Honours observed that Ms Chadwick was not to be judged by reference to the standard of a perfectly rational decision-maker[31]. It was said that the majority's allowance for reactions of confusion, helplessness and panic was a proper acknowledgement that the standard set by s 47(2)(b) allows for a range of human emotions apart from strict and dispassionate rationality. These submissions as to the operation of s 47(2)(b) should not be accepted.

50 Section 47(2)(b) is concerned with the reasonable evaluation of the relative risks of riding with an intoxicated driver or taking an alternative course of action. As Kourakis CJ rightly held, it contemplates an objectively reasonable evaluation of the relative risks. Section 47(2)(b) contemplates the possibility that it may be reasonable for a plaintiff to decide *not* to avoid the risk of riding with an intoxicated person because it may reasonably be assessed as the less risky of two unattractive alternatives. It does not contemplate that a plaintiff be confronted with "no choice" but to ride with the intoxicated driver; nor does it

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28 *Allen v Chadwick* (2014) 120 SASR 350 at 381 [103].

29 *Joslyn v Berryman* (2003) 214 CLR 552 at 564 [32]; [2003] HCA 34 citing *Glasgow Corporation v Muir* [1943] AC 448 at 457.

30 *Allen v Chadwick* (2014) 120 SASR 350 at 382 [113].

31 *Allen v Chadwick* (2014) 120 SASR 350 at 383 [113].

contemplate the most reasonable evaluation of which a person whose capacity for reasonable evaluation is diminished is capable.

51 The evaluation which s 47(2)(b) contemplates is an evaluation of relative risk in a given situation by the exercise of reasonable powers of observation and appreciation of one's environment, as well as the exercise of a reasonable choice between alternative courses of action. Inputs into the evaluation contemplated by s 47(2)(b) are those facts, as they may reasonably be perceived, which bear upon the reasonable assessment of the relative risks of alternative courses of action. Those facts may include matters of objective fact personal to the plaintiff as well as aspects of the external environment. But subjective characteristics of the plaintiff which might diminish his or her capacity to make a reasonable evaluation of relative risk in the light of those facts are immaterial to the evaluation which s 47(2)(b) contemplates. Those subjective characteristics might include impetuosity, drunkenness, hysteria, mental illness, personality disorders or, as Kourakis CJ said[32], "witlessness". For example, if a person suffering from a medical condition, and subject to episodic disabling symptoms, were to be confronted with the choice of an arduous trek out of a wilderness as the only alternative to accepting a lift with a drunk driver, that person might reasonably choose to accept the lift rather than be left at the risk of the occurrence of the episode in the wilderness where he or she would have no recourse to assistance; whereas a risk-laden decision by the same person to accept a lift with a drunk driver in a busy urban area would not be "reasonable" simply because it was made while the person was, because of stress associated with a particular episode, prevented from making a reasonable evaluation of the relative risks. That is to say, the circumstance that a person is incapable of making a reasonable decision at the relevant time has no bearing on the reasonableness or otherwise of the decision actually made.

52 Had the issue arisen under the common law unaffected by statute, a plaintiff's subjective mental or emotional state would have been irrelevant to the reasonable choice expected of him or her. In *Joslyn v Berryman*[33], McHugh J, speaking of the position at common law, said:

> "a plaintiff cannot escape a finding of contributory negligence by pleading ignorance of facts that a reasonable person would have known or

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32 *Allen v Chadwick* (2014) 120 SASR 350 at 366 [46].

33 (2003) 214 CLR 552 at 567 [39].

> ascertained. A pedestrian or driver who enters a railway crossing in the face of an oncoming train cannot escape a finding of contributory negligence because he or she was not, but should have been, aware of the train. Nor does it make any difference that the pedestrian or driver had defective hearing or sight. Contributory negligence is independent of 'the idiosyncrasies of the particular person whose conduct is in question'[34]."

53 Nothing in s 47(2)(b) (or the Act more generally) suggests a statutory purpose to alter the law in favour of making an allowance for a plaintiff's subjective difficulties of cognition and decision-making.

54 It is important here to bear in mind that a defendant who inflicts harm on another by unreasonable conduct is not excused from liability in negligence because of a reduced personal capacity for reasonable decision-making[35]. Section 44 of the Act operates to apply the same rule to determining whether a plaintiff has been contributorily negligent. In either case, confusion or panic on the part of the actor does not reduce what reasonableness requires. To take into account a mental or emotional state which subjectively reduces the capacity for reasonable decision-making would be inconsistent with the objectively reasonable assessment of risk which s 47(2)(b) postulates.

55 The terms of s 47(2)(b) reflect the legislative adoption of a policy that, of those who suffer injuries in accidents, including motor vehicle accidents, only those injured as a result of a risk which they "could not reasonably be expected to have avoided" should be entitled to recover full damages from a defendant whose liability is to be met by the compulsory insurance scheme. The legislative determination that the full benefits of a claim in negligence covered by the scheme should not be available to those who have not acted as would reasonably be expected reflects a balancing of policy considerations including those which bear upon the viability of the scheme[36]. Sections 44 and 47 of the Act give effect to that balance.

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34 *Glasgow Corporation v Muir* [1943] AC 448 at 457.

35 *Vaughan v Menlove* (1837) 3 Bing (NC) 468 at 475 [132 ER 490 at 493]; *McHale v Watson* (1966) 115 CLR 199 at 213; [1966] HCA 13; *Cook v Cook* (1986) 162 CLR 376 at 391; [1986] HCA 73; *Fleming's The Law of Torts*, 10th ed (2011) at 130-132.

36 *King v Philcox* (2015) 89 ALJR 582 at 595-596 [49]; 320 ALR 398 at 414; [2015] HCA 19.

56 The circumstance that Ms Chadwick felt helpless, anxious and confused has nothing to do with a reasonable evaluation of relative risk. Ms Chadwick could reasonably be expected to have walked back into the township in order to avoid the risk of riding with Mr Allen if walking back to town and the hotel could reasonably have been assessed as a less unsafe course of conduct. In this regard, Mr Allen submitted that Kourakis CJ was right to hold that a reasonable person would have appreciated that the risk of getting into a car driven by Mr Allen was great[37]; would have surveyed her location and appreciated her proximity to the township[38]; and would not have been disoriented[39]. While the first of these propositions may be accepted, the second and third must be rejected.

57 Mr Allen submitted that a reasonable person in Ms Chadwick's position would not have been disoriented or confused, given her "objective proximity to residential areas" as found by the trial judge[40]. It was said that Ms Chadwick's evidence that the car travelled away from the township for upwards of 10 to 15 minutes should not be accepted, given the trial judge's adverse view of Ms Chadwick's credibility and the conflicting evidence in Mr Martlew's account. It was also said that there was street lighting visible in the distance from the location at which Ms Chadwick got into the car driven by Mr Allen; and that, in these circumstances, a reasonable person would have known and appreciated that she was not far from the township and hotel. These submissions do not proceed upon a sound factual foundation. Once it is accepted that, as the trial judge found, Ms Chadwick did not know where she was, then the availability of a relatively low-risk alternative to travelling back to the hotel in the vehicle with Mr Allen was not reasonably apparent. That finding was not disturbed by the Full Court, and no sufficient reason has been shown for this Court to set it aside[41].

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37 *Allen v Chadwick* (2014) 120 SASR 350 at 367 [50].

38 *Allen v Chadwick* (2014) 120 SASR 350 at 367 [50].

39 *Allen v Chadwick* (2014) 120 SASR 350 at 367 [51]-[52].

40 *Chadwick v Allen* [2012] SADC 105 at [138].

41 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 434-435; [1988] HCA 7; *Louth v Diprose* (1992) 175 CLR 621 at 633-634; [1992] HCA 61; *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330 at 334-336 [6]-[11], 378-379 [164]-[166], 410-415 [286]-[293]; [2007] HCA 42.

58 The reasonable expectation with which s 47(2)(b) is concerned involves the exercise of reasonable powers of observation and appreciation of one's environment as well as the exercise of a reasonable judgment of the relative risk of alternative responses to the environment as observed and understood. That having been said, it was not unreasonable for Ms Chadwick to have had no clear appreciation of her proximity to the township from the location at which Mr Allen took over the driving of the vehicle. On the evidence accepted by the trial judge, she had driven out of the town under the direction of Mr Allen and Mr Martlew, and had followed a series of confusing directions for 10 to 15 minutes. There was no reason why she should have attended closely to the course she had taken while driving the vehicle under their directions. Reasonableness does not require constant vigilance as to the possibility of an emergency and a photographic memory of one's surroundings.

59 It could reasonably be expected that a reasonable person in Ms Chadwick's position would have taken a moment to apprise herself of her geographical situation to determine whether it was reasonably safe to walk back to town and the hotel. But a reasonable person in the position of Ms Chadwick would not, by "taking a moment", necessarily have appreciated that she was a relatively easy walk from the hotel. The trial judge found as a fact that Ms Chadwick did not know where she was, and did not appreciate how close she was to the township and the hotel; and it cannot be said that her imperfect understanding of her situation was unreasonable. A person with the limited factual information available to Ms Chadwick might reasonably have formed the same appreciation of the situation. A person does not make an unreasonable choice because he or she acts upon imperfect knowledge if perfect knowledge is not reasonably available.

60 As to the view of Kourakis CJ that Ms Chadwick could not reasonably have assumed that she would be abandoned by Mr Allen if she did not get in the car as he had ordered, it must be said that there could be nothing unreasonable in the assumption that Mr Allen's reaction to a rebuff would not involve solicitude for Ms Chadwick's safe return to the hotel. Mr Allen's conduct towards her during the hours prior to the accident, and his peremptory demand that she get in the car, notwithstanding her reasonable objection to doing so, were hardly suggestive of a likelihood that he would behave towards her with reasonable concern for her safety. His insistence that he drive was itself manifestly inconsistent with such a possibility. An expectation that she would not be abandoned would have been an unreasonable expectation of the triumph of hope over experience.

61 In summary, the relevant inputs into the evaluation of relative risk required by s 47(2)(b) included the facts that Ms Chadwick was a young woman, who was pregnant (and therefore vulnerable to more serious consequences of an assault by a stranger than would otherwise have been the case) and on a dark and unfamiliar country road an uncertain distance from the township in the early hours of the morning. Those facts could reasonably lead to an evaluation of a real risk of harm, either from strangers or from the difficulties of a walk in unfamiliar territory over an indeterminate distance in the dark. In addition, the substantial risk of riding with Mr Allen could reasonably be regarded as lessened to a relatively acceptable level by reason of the absence of other vehicular traffic on the roads at the time. On a reasonable evaluation of these facts and the relative risks associated with them, Ms Chadwick could not have been expected to have avoided the risk of driving with Mr Allen.

The s 49 issue

62 It may be accepted that the wearing of a seatbelt was "required under the *Road Traffic Act 1961*"[42].

63 In arguing for the 25 per cent reduction in the assessment of Ms Chadwick's damages, Mr Allen submitted that the "act of a stranger" defence to the failure to fasten a seatbelt is not available as a matter of law. The "act of a stranger" defence seems to have been developed in South Australia as a particular manifestation of a want of mens rea which has been regarded as inconsistent with a finding of criminal responsibility in cases where a defendant might otherwise have been held responsible for the commission of a forbidden act over which he or she had no control. It was explained by Bray CJ in *Mayer v Marchant*[43], where his Honour said:

> "normally speaking it is a defence to a criminal charge ... to show that the forbidden act occurred as the result of an act of a stranger, or as the result of non-human activity, over which the defendant had no control and against which he could not reasonably have been expected to guard."

64 Mr Allen also submitted that on the evidence, the defence of "act of a stranger" was not made out. Mr Allen argued that Gray and Nicholson JJ erred

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42 *Civil Liability Act* 1936 (SA), s 49(1)(a).

43 (1973) 5 SASR 567 at 573.

in overturning[44] the trial judge's finding on the basis that Ms Chadwick's "panic and distress" could be readily understood and that Mr Allen's erratic driving caused the seatbelt mechanism to lock.

65 It may be accepted, for the sake of argument, that Mr Allen could not take advantage of Ms Chadwick's failure to comply with this requirement if he had, in fact, prevented her from doing so by his own conduct. It may also be accepted, for the sake of argument, that r 265(1) of the ARR must be understood as referring to a person whose non-compliance with the rule is voluntary.

66 All that having been said, the trial judge found that Ms Chadwick was not prevented from fastening her seatbelt by Mr Allen's bad driving. The question is not whether Ms Chadwick's failure to fasten her seatbelt was an understandable, or even a reasonable, response to Mr Allen's driving. The question is whether she was prevented by Mr Allen from fastening her seatbelt; and that question is answered against her by the trial judge's findings of fact. Brief reference to *Norcock v Bowey*[45] supports that conclusion. That case concerned a provision imposing a penalty on the owner of any cattle found straying in a street or public place. Napier CJ concluded that the "act of a stranger" defence was no answer to the charge. While it would have been a defence if the owner had shown that the cattle came upon the street or public place due to some circumstance beyond his control, including the wrongful act of a stranger, it was not enough to show that the owner had taken reasonable care to prevent his cattle straying[46].

67 The trial judge declined to find that Ms Chadwick was prevented from fastening her seatbelt by the manner in which Mr Allen drove the car. The trial judge found[47] that Ms Chadwick had opportunities to fasten her seatbelt. While his Honour found[48] that Ms Chadwick was unable to fasten her seatbelt because she pulled too hard on the straps in her anger at the behaviour of Mr Allen, that particular explanation for her failure to fasten her seatbelt (which was, arguably, not justified on the evidence) was unnecessary, given his Honour's fundamental

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44 *Allen v Chadwick* (2014) 120 SASR 350 at 393-394 [156]-[158].

45 [1966] SASR 250.

46 *Norcock v Bowey* [1966] SASR 250 at 266 per Napier CJ, 268 per Hogarth J.

47 *Chadwick v Allen* [2012] SADC 105 at [159].

48 *Chadwick v Allen* [2012] SADC 105 at [162], [170].

rejection of Ms Chadwick's account of the reason why she was not wearing a seatbelt at the time of the accident.

68 Gray and Nicholson JJ did not accept the reliability of the expert evidence as to the "'reasonable opportunities' for Ms Chadwick to have engaged the seatbelt"[49], and said that it was unrealistic to expect Ms Chadwick to have been sufficiently calm "to wait for an opportunity to fasten the seatbelt if it were to arise and to seize upon that opportunity immediately before it was lost again"[50]. But the Full Court did not explain how it was that the trial judge erred in concluding that the manner of Mr Allen's driving did not actually *prevent* her from fastening her seatbelt at some time from when she entered the car until the occurrence of the accident. The trial judge did not accept Ms Chadwick's account that the accident occurred "a matter of seconds" after she got into the back seat of the car[51]. The account was inconsistent with evidence of the route travelled by the car while it was being driven by Mr Allen[52]. That evidence established that there were at least two opportunities to engage the seatbelt as the car was driven on the straight sections of Main Street[53].

69 The trial judge's finding of fact reflected the advantage he derived from having seen and heard Ms Chadwick give evidence. There was nothing glaringly improbable, or contrary to compelling inferences, about his Honour's evaluation of the probabilities in the light of his advantage in seeing and hearing the witnesses give evidence[54]. Ms Chadwick bore the onus of proof on this issue, and in this regard her account failed to satisfy the trial judge. His Honour was sceptical of Ms Chadwick's evidence generally; and there were good reasons not to accept Ms Chadwick's account in relation to the seatbelt issue. It was inconsistent with her pleaded case; and the contention that she was entirely prevented at all times from fastening the seatbelt because of the physical forces generated by the manner of Mr Allen's driving was inconsistent with the expert

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49 *Allen v Chadwick* (2014) 120 SASR 350 at 392 [154].

50 *Allen v Chadwick* (2014) 120 SASR 350 at 393 [156].

51 *Chadwick v Allen* [2012] SADC 105 at [168].

52 *Chadwick v Allen* [2012] SADC 105 at [159].

53 *Chadwick v Allen* [2012] SADC 105 at [159].

54 *Fox v Percy* (2003) 214 CLR 118 at 126-127 [25], 133-134 [48]; [2003] HCA 22.

evidence that, even allowing for the forces generated by Mr Allen's driving, she would have had opportunities to fasten the seatbelt.

Conclusion and orders

70 The appeal should be allowed in relation to the s 49 issue; but otherwise dismissed.

71 The Full Court assessed Ms Chadwick's damages at $2,210,379.48, which, after the deduction of agreed amounts, resulted in a final judgment sum of $1,803,903.36. The parties are agreed that, after further reducing the assessment of Ms Chadwick's damages by a further agreed amount to produce a figure of $1,776,542.36, then reducing that sum pursuant to s 49(3) of the Act, the sum for which judgment should have been ordered in Ms Chadwick's favour is $1,223,287.74.

72 Orders 1-4 of the Full Court should be set aside and, in their place, the appeal to the Full Court be allowed in part, and the cross-appeal to the Full Court be dismissed. Judgment should be entered for Ms Chadwick in the sum of $1,223,287.74.

73 It was a condition of the grant of special leave that Mr Allen would not seek to disturb the orders as to costs made in Ms Chadwick's favour in the court below and that Mr Allen would pay Ms Chadwick's costs in this Court in any event. Mr Allen must therefore pay Ms Chadwick's costs of and incidental to the appeal to this Court.