COURT: SUPREME COURT OF TASMANIA (FULL COURT)

CITATION: *Port Sorell Bowls Club Inc v Dann* [2022] TASFC 2

PARTIES: PORT SORELL BOWLS CLUB INC
v
DANN, Kraig Anthony

FILE NO: FCA 2541/2020

JUDGMENT APPEALED FROM: *Dann v Port Sorell Bowls Club Inc* [2020] TASSC 47

DELIVERED ON: 2 February 2022

DELIVERED AT: Hobart

HEARING DATE: 19 April 2021

JUDGMENT OF: Blow CJ, Pearce J, Marshall AJ

CATCHWORDS:

Damages – Generally – Incidence of taxation as affecting damages – Other cases and matters – Impairment of earning capacity – Medicare levy.
Income Tax Assessment Act 1936 (Cth), s 251S(1)(a).
Medicare Levy Act 1986 (Cth), s 6(1).
Cullen v Trappell (1980) 146 CLR 1, followed.
Aust Dig Damages [1033]

Damages – Assessment of damages in tort – Personal injury – Income and loss of earning capacity – Particular cases – Loss of benefit of vehicle to be provided by employer – Plaintiff not required to prove contractual right of private use – Damages assessed by reference to cost to employer of renting vehicle.
Penn v Spiers & Pond Ltd [1908] 1 KB 766; *Mills v Baitis* [1968] VR 583; *NSW Insurance Ministerial Corporation v Wynn* (1994) Aust Torts Reports ¶81-304; *Tsekouras v Government Insurance Office of New South Wales* (unreported, New South Wales Court of Appeal, 14 July 1994, Butterworths CaseBase BC 9402820); *Parker v Hill* [2000] WASCA 272, referred to.
Aust Dig Damages [1128]

Torts – Negligence – Contributory negligence – Particular cases – Other cases – Volunteer cooking sausages at bowling club barbeque – Fat caught fire due to negligence of club – Volunteer burned hand removing cup of burning fat from below barbeque plate – Findings of contributory negligence and 15% reduction of damages not disturbed.
Aust Dig Torts [1339]

REPRESENTATION:

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Appellant: K E Read SC and T D Cox
Respondent: B R McTaggart SC and P Griffits
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Appellant: Barry Nilsson Lawyers
Respondent: Griffits and Griffits

Judgment Number: [2022] TASFC 2
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Serial No 2/2022
File No FCA 2541/2020

PORT SORELL BOWLS CLUB INC v KRAIG ANTHONY DANN

REASONS FOR JUDGMENT

FULL COURT
BLOW CJ
PEARCE J
MARSHALL AJ
2 February 2022

Orders of the Court:

1 Appeal dismissed.

2 Cross-appeal dismissed.

Serial No 2/2022
File No FCA 2541/2020

PORT SORELL BOWLS CLUB INC v KRAIG ANTHONY DANN

REASONS FOR JUDGMENT

FULL COURT
BLOW CJ
PEARCE J
2 February 2022

1 On 17 November 2015 Kraig Dann, the respondent to this appeal, was working as a volunteer at the premises of the appellant, the Port Sorell Bowls Club Inc, cooking sausages, when a fire started and his right hand was badly burned. He successfully sued the club for damages. Wood J found the club liable to pay damages for negligence and breach of statutory duty, assessed damages in the sum of $1,264,566, reduced those damages by 15% for contributory negligence, and awarded $1,074,888 plus interest: *Dann v Port Sorell Bowls Club Inc* [2020] TASSC 47.

2 The club has appealed, and the respondent has cross-appealed. The cross-appeal is limited to one ground – the respondent contends that there was no contributory negligence on his part, and that her Honour erred in finding that there was. The club's grounds of appeal raise contentions that the deduction of 15% for contributory negligence was so low as to involve error (ground 1) and that the learned trial judge made errors in assessing damages by awarding damages for the loss of a right to the private use of a proposed employer's vehicle, and by ignoring the Medicare levy when assessing damages for lost earning capacity (grounds 2(a) and (b)).

The club and its barbeque

3 On 17 November 2015, the club was catering for about 60 people for a "barefoot bowls" or "corporate bowls" evening, and the respondent was asked if he would help cook a large quantity of sausages. The club's gas barbeque was an unsophisticated four burner barbeque. A makeshift method to collect the fat from the barbeque involved a ceramic mug positioned out of sight underneath the barbeque plate. Soon after the respondent began cooking the sausages, the mug overflowed and the fat inside it caught fire. The respondent turned off the gas, but the contents of the mug remained alight. The respondent tried to move the mug which was sitting on a bracket. As the respondent moved the mug, it caught on the upturned corners of the bracket and the fat spilt, severely burning his right hand.

4 The appellant's premises are at Port Sorell, a coastal town in north west Tasmania. It is an incorporated association governed by an executive, variously referred to by the witnesses as a board or committee. There were sub-committees for each of the men's and women's competitions. A secretary and public officer was appointed as manager. The club operated a bowling green with clubrooms which included a commercial kitchen and a licensed bar. Paid staff were employed to run the bar. The club paid a cleaner to clean the clubrooms and ground staff to maintain the bowling greens, although some such work was also done by volunteers. The clubrooms were open every day except Sunday. It was, by all accounts, a popular club and venue in the community. Each Friday night the kitchen prepared and provided counter meals to members of the public. At the most popular times of the year, generally January, up to 250 meals a night could be sold.

5 The regular bowls season extended between about October and April or May each year. Pennant competitions were conducted for both men and women in which club teams engaged in competition with teams from other clubs. In addition, the club also hosted other activities like winter indoor bowls, and darts.

6 For about six years prior to 2015, between about November and the end of February each year, with a break for Christmas, the club conducted a weekly lawn bowls event known as "barefoot bowls"

or "corporate bowls". It took place each Tuesday commencing at 6pm. It can be inferred from the description given by the various witnesses at trial that the corporate bowls night, although it involved some generally light hearted competition, was by nature a social occasion, in which players who may or may not have played much before, were invited to participate. The activities were aimed at providing enjoyment, at attracting participants to the sport and as a fund raiser, and were accompanied by the provision of food and refreshments. The club's Garth Jumbuck four burner gas barbeque, was used each Tuesday to cook sausages and onions for the participants and onlookers.

7 The barbeque, and the assembly and operating manual, were in evidence. The body of the barbeque consisted of a metal casing containing four gas burners fitted and housed below a single solid rectangular hot plate. The trial judge found that the "depth/height of the metal housing [of the burners] is approximately 7 cm below the plate." The gas burners were supplied via a hose attached to an LPG gas cylinder with a valve to be opened or closed by turning. Each of the gas burners was independently controlled by knobs on the front of the barbeque which could be turned on and off and from low to high. There were vents in the casing, above the knobs, to dispel heat. The barbeque itself was mounted on a metal trolley with four legs. Trays extended from both sides. Two of the legs were fitted with wheels so the unit could be lifted at one end and pushed along. At the base of the trolley was an open wire rack or shelf, fixed to each of the legs low to the ground, just above the level of the top of the wheels.

8 The barbeque hot plate was 789 mm wide and 410 mm deep. The plate had a raised lip around the edge and the surface level was oriented to a central hole so cooking fat would drain away. Fitted directly below the central drainage hole, underneath the hot plate and between the two central gas burners, was an L shaped bracket. The purpose of the bracket was to hold a receptacle, referred to in the manual as a drip can, for catching and retaining the grease and fat from the hot plate as it dripped through the drainage hole. The trial judge found that, when originally supplied, the barbeque came with a drip can. The drip can is depicted in the manual and a photograph of an example was also in evidence. It was described by the trial judge as like a saucepan with a metal handle. The handle is flat and extends away horizontally from the rim. The back of the bracket was a flat vertical plate. The base of the bracket was a small horizontal tray to support the drip can. It was accessed by reaching in from the front of the barbeque, under the hot plate. A relevant feature of the bracket was that each of the two front corners of the tray were turned up so as to, in combination with the flat back of the bracket, secure the drip can within the tray. The trial judge found that the distance from the base of the tray to the underside of the hot plate was approximately 13.5 cm, and the distance from the front of the barbeque to the edge of the tray was approximately 18.5 cm.

9 Graham Barker became secretary of the bowls club in 2003 and held that position until 2016. He gave evidence that he thought the barbeque had been at the club for about four or five years prior to 2015. It was used, he said, for cooking at a variety of functions and events throughout the year, both for the bowls club and for other clubs and persons who were permitted to hire or use the club facilities. Luke Marshall had, at the time of giving evidence, been a member of the club for 17 years. For two years he had been vice president of the men's committee. He said that the club had owned the barbeque for as long as he could remember.

How the ceramic mug came to be used

10 There was no dispute that for at least some time before the respondent was injured, a ceramic mug was used as a makeshift means of collecting the fat which drained from the barbeque. It had not always been so. Laird Best had been a member of the club for about 10 years and became secretary in 2016. He remembered the drip can which came with the barbeque, which he described as "a metal cup, probably two, two and a half inches diameter, two inches high with a handle probably two to three inches long." He said that it had rusted out and been discarded a year or two before he ever came to use the barbeque.

11 Craig Lynch had been a member of the club for about 12 years. He was on the board for six years and on the men's committee for four years. He used the barbeque on Thursday evenings between about 3pm and 5pm during the regular bowls season between 2013 and early 2014, to cook for the women as they completed their pennant games and for men training at the club. When he used the barbeque he did not put anything in the bracket under the hot plate. Rather, he caught the fat using a beer can with the top cut off which he put on the lower shelf of the barbeque, adjusted to where he saw the fat to be dripping. He said he put vinyl on the concrete and cardboard on the lower tray of the barbeque to avoid staining by splashing from the fat as it dropped. After each use he discarded the beer can and used a new one on the next occasion. He said that he thought that each time a can was used it was about a third full of fat.

12 Arnold Bean was a member of the bowls club from 2002. He cooked on the barbeque for the Tuesday night corporate bowls for about two years until 2014. When he began using the barbeque the fat was collected in "sort of a tin, mug with no handle", which was placed in the tray underneath. He stopped using it because it was "an awkward thing to get in and out." He replaced it with a ceramic mug he brought from the kitchen, which he said was easier to use because it was a little smaller and had a handle. Mr Bean said he did not have any difficulty with fat fires with either of the receptacles he used.

13 Mr Barker gave evidence that the original drip can was lost and that, for a time, a container similar to a tinned fruit tin was used instead. Then, in turn, it was replaced with the ceramic mug. He was challenged about an earlier statement he had made that no drip can had been supplied with the barbeque but nothing turns on that for the purpose of this appeal. Led Best said that he had only cooked on the barbeque once or twice and, when he did so, the ceramic mug was being used as the container for fat.

14 There was little controversy at the trial about the type of ceramic mug which was used as the receptacle for collecting fat when the respondent was injured. The trial judge found the evidence to establish that it was from the same set as the mugs from the club's kitchen. Mr Lynch measured one of the mugs and his evidence was it was about 100 mm high. When sitting on the tray on the barbeque, it extended about 25 mm above the height of the burners. Her Honour noted that, when sitting in the tray, there was a clearance of approximately 35 mm from the top of the mug to the underside of the hot plate. Her Honour noted that "a mug of this height (or even taller, say 110 mm high) if lifted to the level of the plate and retrieved, can be removed without catching on the winged edges of the tray."

15 The evidence established that the barbeque had a metal cover or lid which sat on top of the plate when the barbeque was not in use and stored in the shed. Someone had written on the lid in capitals in a black marker pen the words "EMPTY FAT CONTAINER". The operating manual contained an entry:

> "NOTE: The drip can should be cleaned on a regular basis. If this is ignored, a build up of fats and greases may cause a fire in the can. More frequent cleaning may be necessary as usage demands."

The respondent

16 The respondent was injured on 17 November 2015. At the time he was aged 44 having been born towards the end of 1970. He was brought up in Burnie. He completed an apprenticeship as a fitter and turner but left Tasmania shortly afterwards to play football professionally in Victoria and Queensland. He returned in about 1993 and was employed as a storeman. He married in 1995 and he and his wife had two children. In about 1997 he took up employment in an administrative role with a labour management company. He remained with that company until 2013 by which time he had advanced to the position of business development manager for Tasmania but with responsibilities across Tasmania, Victoria, New South Wales and South Australia. He worked long hours. One of his duties was induction of employed workers, which included the provision of instruction in matters relevant to workplace health and safety.

17 The respondent separated from his wife in 2010 but remained on good terms. He began to live in Port Sorell. In 2013 he was retrenched from his employment. After a short break he commenced work as a fitter and turner, engaged by the same labour management company, on a fly in, fly out basis in various locations in Queensland, the Northern Territory, Western Australia and Tasmania. He also did some general labouring work.

18 The respondent played football until about 2000, following which he took up tennis and golf. His house in Port Sorell was only a 10 minute walk from the bowls club. He began to socialise there, initially going on Friday night "for a beer and a meal", and then with increasing frequency. He joined the club and took up the sport. When not absent for his employment, he attended the club at least a couple of times a week to play, and on other occasions socially. By 2015, he was regularly there, playing, socialising and volunteering.

The circumstances which led to the respondent's injury

19 The respondent's evidence was that he first used the barbeque about a year before he was injured. He was then relatively new to the club, and was asked, or volunteered, on one occasion to cook the sausages on a corporate bowls night, "with some other guys." On that night he did not get the barbeque from where it was stored, or set it up, light it, clean it or put it away, all of which was done by "the committee guys."

20 In about September 2015, about a month before the regular bowls season started, the subject of the operation of the corporate bowls nights was raised by Mr Barker at a meeting of the men's committee. In the years leading up to 2015 Mr Barker had been the primary organiser. Faced with falling numbers of volunteers, he asked for help with running the competition, to collect money and with general administration. Luke Marshall agreed to be trained by Mr Barker to help out with the general organising. Help was also needed to cook on the barbeque. Mr Marshall's brother, Paul Marshall, was one of those who volunteered. The respondent told the trial judge that he was also one of the number of persons who "put our hands up" to help with the barbeque at the corporate bowls nights depending on their respective work commitments. The first time he did so was, he said, "the week before" he was injured, which would have been 10 November 2015. When he arrived the barbeque was already set up and going. The sausages, onions, bread and barbeque tongs were ready on a large silver tray inside the clubrooms. He cooked the sausages and then played bowls while others cleaned up and put the barbeque away.

21 The next corporate bowls night was conducted on the following Tuesday, 17 November 2015. Luke Marshall was also present at the club on that night. By that time he had been helping Mr Barker with corporate bowls for three or four weeks. Mr Marshall arrived at about 4.15pm to help Mr Barker prepare for the 6pm start. He brought out the trolley of lawn bowls kept in the storage shed and Mr Barker wheeled the barbeque out from the same place. The barbeque was set up in the usual location, on the concrete verandah outside the clubrooms and directly adjacent to the bowling green. He helped Mr Barker prepare the sausages, onions and cooking utensils, put them onto a tray and left them covered with a tea towel. He said that, as usual, between 100 and 120 sausages were cut ready for cooking. There were about 48 participants in the corporate bowls, and with visitors and onlookers the total number of attendees was somewhere between 50 and 60.

22 The respondent went to the club on 17 November, but Paul Marshall, and not him, was rostered to do the cooking. The respondent's intention was to "catch up with the guys and have a drink after work", and he arrived a little later than usual. However as he walked into the club he was approached by Graham Barker. Mr Barker told him that they were running late because Paul Marshall was still playing bowls, and asked whether he could "cook the barbeque." The respondent agreed to help out "till Paul finishes." According to the respondent the barbeque was already set up and going. He retrieved the

tray of sausages, onions, bread, tongs, oil and a roll of paper towel from inside the club room door and began to cook. Butchers paper had been placed on the bottom wire shelf of the barbeque.

23 Paul Marshall was not called to give evidence. The only direct evidence of the incident came from the respondent. He said that he had been cooking for 10 or 15 minutes when he saw "a wall of flames come up" from the barbeque. It caused him to step back. It happened, he said, just as Paul Marshall got there. When asked to describe what he saw he said "the flames were really shooting out, shooting out the back of the barbeque, and then blowing up in front of the barbeque as well". He said that the flames were "up to my chin". The respondent bent down and turned the gas bottle off, but the flames continued. He said that the "flames kept continuing and actual flames dripping down". He was distressed because:

> "… there was a lot of people hanging around. There was a lot of kids hanging around …"

24 The respondent said that he got down on one knee, looked under the barbeque and saw a ceramic mug "sitting on a little round thing". He said:

> "… the cup was sitting in there but it was at a kind of an angle touching the gas burner and there was fat – hot fat – bubbling out of the cup and hitting the burners and being on fire and the hot fat was bubbling out of the cup also dripping down onto the paper and that was causing the fire."

25 He was next asked what he did and answered:

> "I said to Paul, 'I don't know why someone has put a ceramic cup under there because this can – something like this can explode'. We agreed that if this cup falls out full of hot fat or if it explodes, which I know can happen under heat for glass or ceramic, if this explodes there's going to be hot fat and glass shards and these kind of things are going to go all over. Our main concern was – my main concern was there was a lot of kids that was face level with the barbeque at that time so we was trying to say, 'Get away kids' but being a fire and all that kind of thing people come to you . They don't – especially kids. They didn't run away but our main concern then was that if that cup fell over or exploded that there was going to be hot fat splash and there would be hot shards of glass that, you know, could damage kids or damage us or whatever. So, yeah."

26 The respondent decided to attempt to remove the mug. He put his sunglasses on and asked Mr Marshall to grab something to wrap around his hand. He said that Mr Marshall told him that "there's not enough time." The trial judge found that the respondent wrapped his hand in paper towel instead. He went down on one knee, put his hand under the barbeque and reached up to grab the handle of the mug. His aim was to set it down at the base of the barbeque. He found the mug to be jammed in against the burners. He grabbed it, began to wiggle it to remove it from the place it was "wedged", but the mug caught on one of the folds of the bracket. Hot fat spilled across his hand. He kept hold of the mug and put it down on the ground but not before his hand was badly burned.

27 When asked whether he considered his own health before attempting to remove the mug he answered:

> "I didn't really think about my own health, I was more concerned about if this cup explodes or anything like that, and there's a lot of children around and other people that if something does happen, it was – you know, there's a chance of kids being blinded or whatever. That was my main concern, that was – our main concern was that if this cup wasn't pulled out and something stopped that if it explodes or falls out, there was going to be hot fat going everywhere and shards of glass explode everywhere as well. So the main concern was more the kids …".

28 When cross-examined, the respondent repeated that his primary concern was the safety of the children nearby. He agreed that it would have been a sensible response to clear them from the area, but

he said that when he told them to get back they were not, to his mind, sufficiently clear to avoid the risk he perceived. In cross-examination he also referred to his concern that, if the mug fell and broke, the burning fat may pose a risk to the club premises. When asked about the level of the flames, he explained that after the initial flare up, and before his attempt to remove the mug, the flames receded. He said flames were still coming out from the front vents, but not very far, and were coming from the hole in the middle of the barbeque plate to a distance of three or four inches. Everything happened, he said, within about 30 or 40 seconds. His initial examination of the mug was, he said, for about five seconds and he did not see the lips on the bottom of the drip can tray. He did not agree with the proposition that, as he was attempting to remove the mug, he could not properly see it as it was sitting in the tray. He accepted that it was because he attempted to pull the mug straight out, rather than lift it over the lips at the front of the tray, that it caught, tipped and spilled.

29 The trial judge largely accepted the respondent's evidence. Her Honour found that when the respondent looked under the plate for the first time he observed the cup on an angle, with fat bubbling over and on fire. He looked for a few seconds, his attention focused on the fire, the fat bubbling over and flames dripping onto the butchers paper on the shelf below. Her Honour found that he was alarmed by what he saw, was concerned about the fire and the prospect of the mug exploding, and did not notice the upturned corners of the tray.

The cross-appeal

30 It is convenient to first address the cross-appeal, although both the appeal and the cross-appeal require an examination of the conduct of the respondent. The respondent contends that the trial judge erred by finding that he was guilty of any contributory negligence.

31 A finding of contributory negligence against the respondent is a finding that he contributed to his own injury by failing to take reasonable care for his own safety. The *Wrongs Act* 1959, s 4(1), provides that the damages recoverable by a person injured partly as a result of his or her own wrongful act "shall be reduced to such extent up to 100% as the court thinks just and equitable, having regard to the claimant's share in the responsibility for the damage." The test for contributory negligence is an objective one, to be determined having regard to all of the circumstances of the case: *Joslyn v Berryman* [2003] HCA 34, 214 CLR 552. The *Civil Liability Act* 2002, s 23, provides:

> "**23 Standard of contributory negligence**
>
> (1) The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent for the purpose of apportioning liability under section 4 of the *Wrongs Act* 1954.
>
> (2) For the purpose of apportioning liability under section 4 of the *Wrongs Act* 1954 –
>
> (a) the standard of care required of the person who suffered harm is that required of a reasonable person in the position of that person; and
>
> (b) the matter is to be determined on the basis of what that person knew or ought to have known at the time."

32 Subject to application of the foregoing principles, the issue whether the respondent failed to take reasonable care for his own safety is substantially a question of fact. In determining whether the trial judge erred in finding contributory negligence, this Court is to conduct a "real review" of the trial and her Honour's reasons, and is to weigh the conflicting evidence and, with allowance for the advantages enjoyed by the trial judge, draw its own inferences and conclusions: *Warren v Coombes* (1979) 142 CLR 531; *Fox v Percy* [2003] HCA 22, 214 CLR 118. As the majority in *Warren v Coombes* stated at 551:

> "Shortly expressed, the established principles are, we think, that in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it."

33 A court of appeal should not interfere with a judge's findings of fact unless they are "demonstrated to be wrong by 'incontrovertible facts or uncontested testimony', or they are 'glaringly improbable' or contrary to compelling inferences'." *Robinson Helicopter Co Inc v McDermott* [2016] HCA 22, 90 ALJR 679 [43]. That restraint includes findings of secondary facts which are based on a combination of the trial judge's impressions of the credibility and reliability of witnesses, and other inferences from primary facts: *Lee v Lee* [2019] HCA 28, 93 ALJR 993 at [55]. Nevertheless, as the majority in *Warren v Coombes* continued at 552:

> "The duty of the appellate court is to decide the case – the facts as well as the law – for itself. In so doing it must recognize the advantages enjoyed by the judge who conducted the trial. But if the judges of appeal consider that in the circumstances the trial judge was in no better position to decide the particular question than they are themselves, or if, after giving full weight to his decision, they consider that it was wrong, they must discharge their duty and give effect to their own judgment."

34 The respondent does not challenge the primary facts as found by the trial judge but, rather, asks this Court to draw a different inference on the basis of the facts as found. At trial, the appellant pleaded that the respondent caused or contributed to his own injuries by his own negligence in a number of respects, but only one particular was found by the trial judge to have been established. Her Honour found that the respondent negligently attempted to remove the fat runoff container under the barbeque when the liquid was overflowing; and that his attempt to retrieve the mug without taking stock and observing the surrounds of the mug and the tray amounted to negligence.

35 The respondent contends that the finding of contributory negligence is wrong when her Honour also found that the respondent was confronted by a situation of urgency, that his conduct was to be judged by reference to the exigencies of the moment, that from his perspective the situation of danger was unexpected, and that due allowance was to be made for the unusual situation in which he found himself. The respondent also points to her Honour's finding that the upturned corners of the tray, which made extraction of the cup more difficult, were not evident to the respondent when he attempted to remove the cup, and that it was counterintuitive that a container which was difficult to extract would be used as a means of fat collection. The trial judge concluded that the respondent was, at the time, alarmed and "under pressure", and that it was a natural reaction to "try and remove the receptacle from the tray" to move the fire away from the barbeque.

36 The conduct of a person faced with an unusual situation, or a situation of urgency, should not be minutely scrutinised or criticised, particularly with the benefit of hindsight. Not every error of judgment amounts to contributory negligence: *Ansell v Arnold* [1962] SASR 355. Inadvertence, inattention or misjudgment do not necessarily amount to negligence: *McLean v Tedman* (1984) 155 CLR 306; *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492. The trial judge correctly stated, citing *Caterson v Commissioner for Railways* (1972) 128 CLR 99 per Gibbs J at 111-2 and *Vos v Hawkswell* [2010] QCA 92, that the respondent's conduct was to be judged by the exigencies of the moment. In *Vos v Hawkswell*, Muir JA, with whom Holmes JA (as she then was) and Atkinson J agreed, observed, with respect to the circumstances of that case, at [30]:

> "The appellant, having deliberately or recklessly created a dangerous situation which gave rise to a distinct risk of an accident of the kind that in fact occurred, cannot expect the respondent's conduct to be assessed according to the most exacting of standards. In assessing the appellant's duty of care and any breach of it, due allowance must be made for the unusual situation in which the respondent found himself. Faced with such a

> situation, a person may well react in a way which, with the advantage of hindsight, may appear less than optimal. That would not, of itself, establish negligence. Negligence would be found only if such person failed to act reasonably in the emergency created by the other's wrongdoing. In those circumstances misjudgement does not equate with negligence. In this case the evidence does not even show misjudgement. The primary judge's finding, in effect, that no degree of care by the respondent could have avoided the collision, was perfectly justified if, as his Honour doubtless intended, the degree of care referred to was reasonable rather than fanciful." [Citations omitted.]

37 The respondent's conduct is to be weighed against how a reasonable person would have responded to the risk. As to that question the trial judge made a number of findings and observations. She observed that "[c]learing the area of people would undoubtedly have been a sensible response to avoid the risk of harm to others", but that even if that had been done a person in the respondent's situation would have remained concerned about the fire and the possibility of it spreading. The trial judge accepted that the respondent was genuinely concerned about the prospect of the ceramic mug exploding or falling out and smashing. Her Honour made no finding about the extent of any such risk beyond a statement that it was "realistic." Although the trial judge accepted the genuineness of the respondent's concern that the clubroom building may catch on fire, she regarded the concern as not at all realistic.

38 With due allowance for such considerations, and leaving aside for this purpose the appellant's criticism that the trial judge's consideration of the respondent's contributory negligence was too narrowly confined, the trial judge was correct to find that the respondent unreasonably and imprudently exposed himself to a high risk of foreseeable injury, and that there was contributory negligence. Her Honour found:

- even about a minute after the respondent had turned the gas off the flames continued;
- before reaching in, the respondent saw the cup on the tray but at an angle, full and overflowing with fat which was bubbling and on fire;
- when he attempted to remove the mug the flames were still coming out of the vents at the front of the barbeque, and the hole in the centre of the plate and were "dripping down" below the barbeque;
- the respondent was not aware, and had not observed the upturned corners of the tray on which the mug was sitting and which, as events occurred, caught on the mug and caused it to spill fat onto the respondent's hand;
- as he attempted to remove the mug his vision was impaired by the paper towel he had wrapped around his hand.

39 The respondent decided to reach under the barbeque, when flames were still extending from the front vents and through the hole in the hot plate, with an effectively unprotected hand to grab a cup which he knew to be not sitting squarely, which he knew to be full and overflowing with boiling and burning fat, and when he did not know whether he could remove the cup without resistance or obstruction. There was a significant probability of serious harm. Although there were reasons for his decision to attempt to remove the mug, a reasonable person in the same circumstances would not have regarded the exigencies of the situation as so overwhelming or urgent as to sufficiently explain the respondent's decision to expose himself to such risk of injury. The trial judge was correct to find that he should have taken greater stock than he did before exposing himself to such risk. His actions in attempting to remove the mug went beyond misjudgment and amounted to a failure to take reasonable care for his own safety, and contributed to his injury. The cross-appeal must fail.

The appeal – ground 1

40 Ground 1 of the appeal is concerned with issues regarding apportionment. It involves a different standard of appellate review. The appellant accepts that a challenge to a finding of apportionment, because of the discretionary nature of the question, is governed by the *Supreme Court Civil Procedure*

Act 1932, s 45. In appeals challenging the exercise of a discretion which a judge was entitled by law to exercise, this Court is not to vary the determination unless, relevantly to this case, the judge has proceeded on a wrong principle or otherwise contrary to law, or on irrelevant or insufficient materials, or has misapprehended the facts or has failed to consider any material fact: s 45(1)(b) and (c).

41 The appellant does not challenge the trial judge's determination that the respondent's injuries were caused by the negligence of the appellant. However, mindful of the principles to be applied to determination of the appeal, the appellant asserts that her Honour erred in determining that a "just and equitable" apportionment for the respondent's negligence was 15% because it was manifestly inadequate. The appellant also alleges four specific errors.

42 The task to be undertaken when considering apportionment is stated in *Podrebersek v Australian Iron & Steel Pty Ltd* (above) at 494:

> "The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man (*Pennington v Norris*) and of the relative importance of the acts of the parties in causing the damage: *Stapley v Gypsum Mines Ltd*; *Smith v McIntyre* and *Broadhurst v Millman* and cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance." [Citations omitted.]

43 The claimed specific errors referred to in ground 1(a), (b), (c) and (d) should be addressed first. The appellant alleges that this Court should infer that the specific errors it alleges in those grounds, if established, were matters which erroneously affected the exercise of her Honour's discretion.

Appeal ground 1(a)

44 By this ground the appellant asserts that the defendant breached its duty by failing to provide an instruction not to attempt to move the fat container "when there was no particular of negligence to that effect", and thus took into account an irrelevant matter. It is appropriate to set out the relevant paragraph of her Honour's reasons in full:

> "121 The Club breached its duty by failing to ensure that a suitable container, placed in a safe position was used, and that the receptacle was empty before it was used. It failed to provide adequate instructions in this regard to the volunteers working on the barbeque and people responsible for setting it up. The Club ought to have made provision for a fat fire by providing an oven mitt or heat proof gloves as part of the cooking equipment. Further, the Club failed to provide adequate instructions in the case of a fat fire, such as the need to clear people away, information about the location of the fire extinguishers and fire blanket, and the use of those to extinguish any fire continuing after the gas had been turned off, and an instruction not to attempt to move the fat container."

45 According to the literal terms of the ground of appeal, it cannot succeed. At trial the respondent's allegation of breach included a particular of negligence and breach of duty that the appellant failed to provide "adequate instruction in the use of the equipment he was required to use." That particular is broad enough to cover her Honour's finding. However the appellant relies on a comment made by the trial judge later in her reasons. The appellant relied on the obvious risk provision in the *Civil Liability Act* s 17, which provides that a person does not owe a duty to another person to warn of an obvious risk to that other person. Her Honour referred to the particular of negligence just stated, but added:

> "The plaintiff's case regarding the failure to provide adequate instruction does not assert that there should have been a warning given about dangers of moving a runoff container

> full of boiling fat and/or that contact with the skin would result in a burn. The failure to provide adequate instruction related to failing to instruct the plaintiff to ensure the fat container was empty before he commenced the barbeque, and failing to warn him about the difficulty in removing the ceramic mug from the tray arising from the configuration of the tray, and the prospect of the mug catching on the tray, as well as failing to notify the plaintiff of methods of managing and extinguishing a fire."

46 As to this ground of appeal the respondent submits that the comments made by her Honour concerning the defence case about obvious risk do not take the particular of negligence found by her Honour outside of the scope of the pleaded case. The submission should be accepted. The appellant has not pointed to any submission made by the respondent at trial which limited the appellant's pleading of a "failure to provide adequate instruction in the use of the equipment" so as to preclude a finding by the Court of breach of duty by failing to provide adequate instructions in the case of a fat fire, including by an instruction not to attempt to move the fat container. Regardless of the correctness or otherwise of the trial judge's later comment, the assertion that her finding was impermissibly outside the scope of the pleading is not made out.

Appeal ground 1(b)

47 The appellant contends that the trial judge erred by failing to consider if particular (a) of the particulars of contributory negligence had been made out. By that particular, the appellant pleaded that the respondent negligently caused or contributed to his injuries by "failing to empty the fat runoff container before using the barbeque".

48 The particulars of contributory negligence were in these terms:

> "Further or in the alternative, the defendant says that if the plaintiff was injured as alleged in the statement of claim, which is not admitted by the defendant, then any injuries suffered by the plaintiff were caused or contributed to by his own negligence:
>
> **PARTICULARS OF CONTRIBUTORY NEGLIGENCE**
>
> (a) Failing to empty the fat runoff container before using the barbeque.
>
> (b) In failing to adhere to the warning sign on the lid of the barbeque lid which states 'empty fat container' before using the barbeque.
>
> (c) Pouring oil onto the barbeque plate before barbequing instead of using a light oil spray from a pressure pack can, or similar quantity of oil.
>
> (d) Attempting to remove the fat runoff container under the barbeque when the liquid was overflowing.
>
> (e) Failing to turn the barbeque off and allow the fat to cool before attempting to remove the fat runoff container.
>
> (f) In failing to seek assistance when the fat runoff container commenced to overflow.
>
> (g) Having used the barbeque on a number of previous occasions, the plaintiff would have been aware of the sign on the barbeque lid, and the consequences of not adhering to it, in not emptying the fat runoff container before using the barbeque."

49 The appellant's written submissions assert that the trial judge stated that particular (a) was "not pressed" and thus did not find a breach based on it. The appellant contends that the allegation was not withdrawn and remained in issue. The trial judge dealt with some of the particulars of contributory negligence, including the particular the subject of this ground, in her reasons at [136]:

> "I note that particulars (b), (c) and (g) are not pressed. There is no evidence that the plaintiff was aware of the 'sign' on the barbeque lid and there is no evidence that he poured oil on to the barbeque plate. The defendant does not contend to the contrary. Further the contention at (e) that the plaintiff failed to turn the barbeque off is not

> pressed, no doubt in light of the evidence that he did turn the gas off. I do not understand the defendant's position to be that the plaintiff should have emptied the mug beforehand as alleged in (a). Indeed, there is no dispute that the plaintiff was unaware of the existence of the mug before the fire."

50 There is no challenge to her Honour's statement that particulars (b), (c) and (g) were not pressed. However, she did not say that particular (a) was not pressed. As to that particular she said:

> "I do not understand the defendant's position to be that the plaintiff should have emptied the mug beforehand as alleged in (a). Indeed, there is no dispute that the plaintiff was unaware of the existence of the mug before the fire."

51 It is first necessary to refer to her Honour's relevant findings of fact. She found, by inference from the evidence, that the fat in the mug caught fire and was bubbling over the edge after 10 or 15 minutes of cooking, and that the mug had not been emptied before the barbeque was lit and used. She found, in accordance with Luke Marshall's evidence, that Mr Barker brought the barbeque from the shed and put it in position. She accepted the respondent's evidence that he did not light the barbeque, and that it was already lit when he began cooking on it. Her Honour observed that "[g]iven Mr Barker's conduct in bringing the barbeque out and setting it up, and that he asked the [respondent] to start cooking the sausages 'now', it makes sense that he would have lit the barbeque". She found that Mr Barker lit the barbeque, contrary to his denial, or at least lack of memory that he had done so. There is no challenge to any of those findings of fact.

52 In the course of the evidence at trial, counsel for the appellant objected to a question asked in cross-examination of Mr Barker about whether the fat container was empty, on the basis that the respondent had not alleged against the appellant in any particular of negligence that the fat container was not empty. The appellant contended that it did not perceive the respondent's case at trial to include the allegation that it should have emptied the mug. Her Honour did not agree. Her Honour allowed the question on the basis that the particular of negligence, particular 8(d), that the "fat runoff collection system was inadequate and unsafe" and "permitted the fat runoff to overflow and catch fire" was sufficiently wide. Her Honour returned to the subject in her reasons for judgment at [88] in the context of her finding that the mug had not been emptied or replaced before cooking on that day:

> "The defendant objected to this finding of fact being made for the reason that it was not a pleaded fact that the mug had not been emptied before the plaintiff started to cook. It was submitted that instead, the particulars of negligence provide that the overflow was caused by a large amount of fatty meat. I conclude to the contrary, the particulars are wide enough to capture the conduct of failing to empty the mug. Particular 8(d) provides that 'the fat runoff collection system was inadequate and unsafe' and that the defendant 'permitted the fat runoff to overflow and catch fire'. Given the uncontested observations of the plaintiff that after 10-15 minutes of cooking, the mug overflowed and caught fire, and the evidence from Mr Barker that he set the barbeque up and he did not suggest he replaced the mug, my conclusion is that the mug had not been emptied or replaced before it was used on this occasion."

53 During the course of the closing submissions to the trial judge, there were a series of exchanges between her Honour and counsel for the appellant which referred, albeit somewhat obliquely, to the issue. Counsel submitted, contrary to the trial judge's subsequent finding, that there was "no evidence that [the mug] wasn't emptied". However he accepted that the proposition that it would have been "a sensible thing to do before commencing barbequing … to empty the fat container", was not put to the respondent. Her Honour made clear that she did not accept that there was any reason that the appellant had been deprived of the opportunity to put that proposition to the respondent. In the respondent's closing submissions to the trial judge, both written and oral, no assertion was made that the respondent contributed to his own injury by negligently failing to empty the fat receptacle prior to cooking. The written submission about contribution referred only to the events which followed the fire.

54 The contention that the trial judge failed to consider this particular of contributory negligence is not made out. Her Honour correctly perceived that the respondent did not advance such a proposition, notwithstanding no formal abandonment of that allegation in the pleading. In any event, given the state of the evidence and the facts found by the trial judge, the particular could not fairly have been sustained. It would have been necessary for the appellant to establish, as counsel for the respondent correctly submitted to this Court, that it was negligent for the respondent not to have turned the barbeque off, looked under it, seen that there was a mug there, emptied it after it had cooled down, and turned it back on to start cooking, all when he had been asked by the secretary to start cooking "now" because they were running late.

Appeal grounds 1(c) and (d)

55 These grounds raise essentially the same issue and may be dealt with together. They contend that her Honour acted on a wrong principle. By ground 1(c) the appellant asserts that her Honour erred in finding that "the relevant risk was '*the difficulty of extracting the mug from its tray due to the turned up corners of the tray*' [which was to characterise] the risk in too narrow a form". Ground 1(d) asserts that her Honour erroneously "limited her findings on particular (d) to *'his attempt to retrieve the mug without taking stock and observing the surrounds of the mug and the tray amounted to negligence*' which was too narrow".

56 The particular (d) referred to in ground 1(d) is the particular of contributory negligence which her Honour found proved. It has already been referred to in a different context. It alleged that the respondent caused or contributed to his own injuries by "attempting to remove the fat runoff container under the barbeque when the liquid was overflowing". The comments the appellant criticises were expressed at [141] of her Honour's reasons in these terms:

> "The defendant was responsible for creating a situation that was fraught with risk and danger. Then having placed the plaintiff in that position, the defendant failed in its duty in multiple respects so that the plaintiff was extremely poorly equipped to handle the situation. He was not informed at all about the risk and how best to respond. From the plaintiff's perspective, the situation was entirely unexpected and what would seem to be the sensible response instinctively, ie, to remove the flaming receptacle from the barbeque, was in fact fraught with risk. Some of that risk was apparent to the plaintiff. A reasonable person could see that there was a risk of spillage from the mug. However that was not the risk that eventuated, resulting in harm. *The risk that eventuated was the difficulty of extracting the mug from its tray due to the turned up corners of the tray.* That was not evident to the plaintiff, but it could have been if he had taken steps to look more closely. However, he did not make those observations because, as I find, due to the urgency of the situation and his focus on the dramatic aspects of the scene. I note too, the upturned corners of the tray were less obvious because the mug was tipped on an angle and not squarely sitting in the corners of the tray." [Emphasis added.]

57 The appellant submits that, by reference to the *Civil Liability Act*, s 11(1), "the risk at law is the risk of harm", with the result that in this case the risk was personal injury by burning. The appellant claims that by characterising the risk as one related to how the harm was caused, her Honour unduly confined the enquiry in s 23(2). No other submission expanding on those contentions was advanced.

58 Neither ground has been made out. It is correct that s 23(1) of the *Civil Liability Act* requires the principles which apply to the determination of negligence to also be applied to determination of contributory negligence and apportionment. Section 11 provides that a person does not breach a duty to take reasonable care unless there was a foreseeable risk of harm (that is, a risk of harm of which the person knew or ought reasonably to have known), that the risk was not insignificant, and that, in the circumstances, a reasonable person in the position of the person would have taken precautions to avoid the risk. By reference to that provision, the risk of harm to the respondent by attempting to remove the cup may properly be described as the risk that he may suffer injury by burning. However we do not understand her Honour as suggesting to the contrary. At [114] of her reasons, when considering matters

of principle concerning breach of duty of care, s 11 of the *Civil Liability Act* and the authorities which related to it, she characterised the risk of harm in somewhat broader terms:

> "With these principles in mind, the risk of harm may properly be characterised as follows: the risk of a person suffering a burn injury caused by them removing or trying to remove the ceramic mug from the tray under the barbeque when it was full of fat and on fire. This is not the only appropriate characterisation of the risk of harm, and it can be characterised at a greater or lesser degree of abstraction."

59 Read in proper context, the later comment which the appellant now criticises was not a characterisation of the risk for the purpose of determining the respondent's breach of duty. Rather, it was made when undertaking the fact-finding process necessary for the comparison she was required to undertake, of the culpability and the relative importance of the acts of the parties in causing the damage. The respondent submits, correctly in our view, that her Honour did not there characterise the legal risk, but merely observed that the "risk that eventuated was the difficulty of extracting the mug from its tray due to the upturned corners of the tray".

Principal appeal ground (ground 1)

60 By this ground the appellant contends that the 15% reduction for contributory negligence made by the trial judge was manifestly inadequate. The appellant submits that a far higher share should have been attributed to him. Consideration of that question involves application of the deferential standard applicable to appellate review of an exercise of judicial discretion, as explained in *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30, 264 CLR 541 by Gageler J at [35] and following. An appellate court is not to interfere even if it would have exercised the discretion in a different way. The appellant must demonstrate that the trial judge's apportionment is unjust and unreasonable, such that it falls beyond the proper exercise of the discretion. Accordingly, findings about apportionment of responsibility are not lightly to be disturbed: *Podrebersek v Australian Iron & Steel Pty Ltd* (above); *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301; *Wynbergen v Hoyts Corporation Pty Ltd* (1997) 72 ALJR 65; *Liftronic Pty Ltd v Unver* [2001] HCA 24, 75 ALJR 867.

61 In *Pennington v Norris* (1956) 96 CLR 10, the Court stated at 15:

> "It is clear that the Act intends to give a very wide discretion to the judge or jury entrusted with the original task of making the apportionment. Much latitude must be allowed to the original tribunal in arriving at a judgment as to what is just and equitable. It is to be expected, therefore, that cases will be rare in which the apportionment made can be successfully challenged."

62 Similarly, in *Podrebersek v Australian Iron & Steel Pty Ltd* (above) at 493-4:

> "A finding on a question of apportionment is a finding upon a 'question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds': *British Fame (Owners) v Macgregor (Owners)* [1943] AC 197 at 201. Such a finding, if made by a judge, is not lightly reviewed."

63 To return to the passage earlier quoted from *Podrebersek*, what was required of her Honour was a comparative examination of the degree of the departure of each party from the standard of care of the reasonable man and the relative importance of the acts of each in causing the respondent's injury. The appeal involves a limited challenge to the trial judge's factual findings about the respondent's claimed belief about the level of urgency of the situation in which he found himself. The appellant submits that:

> "… the plaintiff's belief is based on hindsight and reconstruction and, when compared against the contemporary materials, the objectively established facts and the apparent logic of events ought not be accepted."

64 There is no challenge to the trial judge's findings about the basis of the appellant's negligence. The trial judge found that the appellant was "responsible for creating a situation that was fraught with risk and danger." She variously found that:

- Mr Barker brought the barbeque from the shed, put it in position and lit it;
- there was general awareness by those who regularly used the barbeque that there was to be a "fresh empty vessel for fat collection before every use", but on this occasion the ceramic mug was not emptied of fat or replaced before the barbeque was lit and used;
- use of the ceramic mug to collect fat was a "completely flawed" method in that it was in very close proximity to the burners and the top of the mug was above the level of the burners;
- if the mug overflowed with fat, a fat fire was highly likely;
- the height of the mug made it difficult to remove over the turned-up edges of the tray, and the absence of a long handle added to its unsuitability;
- the club gave no instruction to the respondent about what to do in the event of a fire, such as the need to clear people away, the location of the fire extinguishers and fire blanket; and
- the respondent was not provided with an oven mitt or heat proof gloves as part of the cooking equipment.

65 The trial judge found that the matters just referred to were in breach of the appellant's duty to the respondent. She found the club breached its duty and ought to have used a safe system for fat collection, and by "failing to ensure that a suitable container, placed in a safe position was used, and that the receptacle was empty before it was used". She found that the burden of taking precautions was minimal and any financial burden negligible. Her Honour determined that the breaches were causative of the respondent's injury. In substance, she found that if not for the appellant's breach of duty an empty container would have been used before the respondent started cooking and there would not have been a fat fire. If a container of suitable height had been used it was less likely that the fat would have caught alight, and if the receptacle had a suitable handle it was less likely that fat would have spilt on his hand. If he had been provided with a suitable mitt or glove it is likely he would have used them and not been burned. Her Honour found that if the respondent had been instructed not to remove the mug and to evacuate the area he would have followed those instructions. If he had been told about the location of the fire extinguishers and fire blanket he would have used them, and "may then have thought the situation required less immediate attention".

66 Contributory negligence is to be measured against the same objective standard of reasonable conduct as is applicable to negligence: *Civil Liability Act*, s 23, following from the recommendations of the Final Report of the Review of the Law of Negligence, 2002, commonly referred to as the Ipp Report. The Report, at 8.12 provides that application of the same standard:

> "… would not, for instance, involve ignoring the fact that of the two parties, the defendant was in the better position to avoid the harm. But the mere fact that a person has suffered harm, rather than inflicted it, says nothing about that person's ability, relative to that of the inflicter of the harm, to take precautions to avoid it."

67 The *Wrongs Act*, s 4, permits reduction in damages for up to 100% for contributory negligence, consistently with the Ipp Report.

68 The matters which the trial judge thought relevant to the contribution the respondent made to his injury by his own negligence are canvassed earlier in these reasons in relation to the cross-appeal.

The essential aspect of the appellant's submission is that it was the actions of the respondent which were the immediate cause of the harm he suffered, and that those actions were entirely under his control. The appellant argues that the respondent had time to assess the situation, but then proceeded to do something which was "just plain stupid". The appellant argues that the task of cooking the sausages was delegated to the respondent, and that it thereafter became, at least, a joint responsibility. That was so, the appellant contends, because the respondent, like the other club representatives, was a mere volunteer.

69 The appellant's call for a finding that it was the respondent who should have emptied the mug of fat before using the barbeque may be rejected for the reasons already stated in the context of the cross-appeal. The contention that he was on an equal footing to the club in terms of decision-making may also be rejected. Although the club was a community organisation run largely by volunteers, it was a substantial organisation. It had some paid employees and a commercial kitchen. The appellant admitted that it owed the respondent a statutory duty pursuant to the *Work Health and Safety Act* 2021, s 19 to ensure, so far as was reasonably practicable, the respondent's health and safety. Although the respondent was a volunteer, when Mr Barker requested the respondent to cook the sausages he did so from a position of putative authority as the principal organiser and secretary of the club. The contention that the respondent was "able to check the fat runoff system well before he was placed in any situation of urgency" ignores the evidence, and her Honour's finding, that by the time the respondent was asked to cook, the barbeque was already alight and Mr Barker had informed him that the cooking arrangements were running late. There was nothing in the evidence which tended to suggest that the respondent had any need to check the system before doing what he had been asked to do, and the evidence did not justify a finding that the absence of a check on his part amounted to a failure to take reasonable care for his own safety.

70 The submission made by the appellant which, in our view, requires greatest attention involves assessment of the likelihood of serious harm to the respondent against the potential net benefit to be achieved by exposing himself to that risk. The appellant's contention that the respondent had "ample time to assess the situation and see for himself the way the mug was placed under the barbeque" is to be considered in light of her Honour's findings about the urgency of the situation in which the respondent found himself. The appellant contends that there was "no reason or logic for the [respondent] to do what he did when he did it" and contends that this Court should make different findings based on the "objectively established facts and the apparent logic of events". Her Honour's findings depended strongly on her assessment of the credibility of the respondent. After a detailed review of the evidence, her Honour rejected many of the criticisms of the respondent's evidence made at trial, in particular that the respondent had overstated his belief about the risk to the safety of others posed by the fire. The genuineness of his belief was accepted by the trial judge. It is a case in which her Honour, in the assessment of the respondent's state of mind, had an advantage over this Court. Her conclusions cannot, in our respectful view, be regarded as contrary to incontrovertible facts, glaringly improbable or contrary to compelling inferences*: Queensland v Masson* [2020] HCA 28, 381 ALR 560.

71 It may be accepted that it was open to the trial judge, in our respectful view, to allow a greater apportionment of liability against the respondent. However, in all the circumstances, we are not persuaded that, in light of the situation of danger created by the appellant and the respondent's belief of the potential harm to others, his failure to take reasonable care for his own safety by attempting to retrieve the mug when he did, required a greater apportionment of liability than that made by the trial judge. The reduction of 15% was not unreasonable. The trial judge did not make any error within the scope of s 45 of the *Supreme Court Civil Procedure Act*. This ground is not made out.

Loss of use of employer's vehicle

72 At the time of his injury the respondent was about to take up employment with a company named Baytech Trades Pty Ltd. He had received an employment contract that provided for a starting date of 23 November 2015, only six days after his injury occurred. Because of his injury he was unable

to commence employment with that company. In assessing damages for his past and future economic loss, the learned trial judge took into account the salary that he would have received, the superannuation contributions that Baytech would have paid for his benefit, and the value of the right to use a work vehicle provided by Baytech for private purposes. There was evidence that Baytech had arranged to lease a work vehicle for use by the respondent at a rental of $251 per week. Her Honour assessed damages on the basis that that figure represented the approximate monetary value of the benefit of the vehicle to the respondent.

73 Ground 2(a) of the notice of appeal reads as follows:

> "2 The Learned Trial Judge erred in assessing the final award of damages in a sum that is manifestly excessive in that:
>
> a at [304] and [322] the plaintiff's lost earning capacity (past and future) included $251pw for the benefit of a vehicle leased by the plaintiff's employer when the evidence was contrary to the award of any sum at all for a vehicle; in the alternative only the value excluding the cost of use of the vehicle for work purposes ought to have been allowed."

74 The respondent's employment contract provided for him to hold a position entitled "Account Manager". He was to work from home, organising the supply of workers to a poppy farm in Latrobe. A workforce of 130 workers was required for a poppy season of four to five months.

75 An annexure to the employment contract contained particulars of the respondent's remuneration package as follows:

"**ANNUAL SALARY**

TOTAL EMPLOYMENT PACKAGE (including Superannuation): $105,000.00

Calculated as follows**:**

Gross Annual Salary	$94,725.88
Superannuation @ 9.5%	$8,998.96
Annual Leave Loading @ 17.5% (calculated on the gross annual salary, paid pro-rata when leave is taken)	$1,275.16
Motor Vehicle (assessed value)	N/A
Car Parking (assessed value):	N/A

Gross Weekly Salary:	$1,821.65
Gross Rate Per Hour:	$45.54 "

76 On the hearing of the appeal, the appellant contended that the letters "N/A" against the words "Motor Vehicle (assessed value)" indicated that it was not a term of the employment contract that the respondent was to be permitted to use Baytech's vehicle for private purposes. However the respondent gave unchallenged and uncontradicted evidence at the trial of the action that there had been a discussion with a representative of Baytech about what kind of vehicle he would get as part of his "package".

77 In assessing damages for "past loss of earnings", the learned trial judge allowed $62,248 for the loss of the benefit of the private use of Baytech's vehicle. The relevant paragraphs of her reasons, omitting irrelevant passages, read as follows:

> "[303] Baytech was to provide and arrange a lease of a vehicle as part of his employment benefits, as well as a telephone and computer. The lease of a Ford Ranger had been arranged. ... The defendant has highlighted that there is no evidence that he was entitled to use the vehicle for other than work purposes. ... Assuming the vehicle was for private use, it was also pointed out that there was no evidence of the value of the use of the vehicle, such as the cost of maintaining a vehicle.
>
> [304] Clearly, the lease of the vehicle was part of his salary package. I infer this was not to be a vehicle for work purposes only. In the absence of evidence I assume that

> the cost of the lease (annual cost $13,062.48) represents approximately the monetary value of this benefit to the plaintiff. I allow the amount of $251 per week. ... The benefit of the leased vehicle since 23 November 2015 to today is allowed in the sum of $62,248."

78 At [322] her Honour assessed the respondent's damages for "total loss of future earnings" in the sum of $678,721.32. That figure was based on a figure of $1,828 per week for loss of earnings as at the date of judgment, and that weekly figure included a component of $251 for the loss of the use of an employer's vehicle.

79 Her Honour appears to have overlooked the unchallenged and uncontradicted evidence to the effect that the vehicle was to be part of the respondent's package. That evidence may have been insufficient to establish on the balance of probabilities that the respondent was going to have a contractual right to use the vehicle privately. However it was sufficient to establish on the balance of probabilities that Baytech was content for him to use the vehicle privately.

80 There is a body of case law that supports the proposition that fringe benefits and perks are to be taken into account in assessing damages for the impairment of a plaintiff's earning capacity even in the absence of contractual rights. In *Tsekouras v Government Insurance Office of New South Wales* (unreported, New South Wales Court of Appeal, 14 July 1994, Butterworths CaseBase BC 9402820), the tips that a waiter would have received were taken into account in assessing damages for the impairment of his earning capacity. In *Penn v Spiers & Pond Ltd* [1908] 1 KB 766, the English Court of Appeal took into account the tips that a waiter received as "remuneration" in assessing his average weekly earnings for the purposes of a workers compensation statute. In *Mills v Baitis* [1968] VR 583, Gowans J said, at 587:

> "A waiter's receipts in the form of tips are gratuitous, but they cannot be excluded in measuring loss of earning capacity. Nor could the fees of an English barrister, who is unable to sue for them."

81 In *Parker v Hill* [2000] WASCA 272, which concerned an injured plaintiff who had been working in Karratha where he received subsidised rental and three return air tickets to Perth each year, the Western Australian Court of Appeal held that those benefits should have been taken into account in assessing damages for the impairment of earning capacity.

82 The fundamental principle is that "where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation": *Livingstone v Rawyards Coal Company* (1980) 5 App Cas 25 at 39 per Lord Blackburn. As Gibbs CJ and Wilson J put it in *Todorovic v Waller* (1981) 150 CLR 402 at 412, "a plaintiff who has been injured by the negligence of the defendant should be awarded such a sum of money as will, as nearly as possible, put him in the same position as if he had not sustained the injuries".

83 The decision of the New South Wales Court of Appeal in *NSW Insurance Ministerial Corporation v Wynn* (1994) Aust Torts Reports ¶81-304 concerned the assessment of damages for the impairment of the earning capacity of a woman who had been employed in a managerial position by American Express and provided with a company car for her private use. At first instance, the loss of the car was taken into account in assessing her damages. That was challenged on appeal. At 61,739, Handley JA, with whom Clarke and Sheller JJA agreed, said:

> "The Judge accepted the evidence given by a Miss Thompson from American Express relating to the components of the salary package she would have received at the date of trial had she remained with that company. It comprised a net cash salary of $646 a week and non-taxable fringe benefits worth $807 a week. In making this finding the Judge rejected a submission for the defendant that the value at the date of trial of

> her company car should not be included. She used the company car for her own benefit and not for business purposes. Accordingly the loss of this car had to be allowed for in any award of damages.
>
> The appellant's challenge to the inclusion of the motor vehicle allowance in the plaintiff's damages was based on the fact that she no longer needed to travel to work on a regular basis and she had therefore lost nothing. The appellant also submitted that the real benefit from such a vehicle was its availability for private use during weekends and holidays and accordingly that on a time basis the allowance for the loss of the vehicle should be discounted by 60-70%."

Those submissions were rejected out of hand.

84 In the light of these authorities, it is clear that it was appropriate to take into account the availability of a Baytech vehicle for private purposes in assessing the respondent's damages if, as a matter of fact, there was an arrangement for Baytech to permit the private use of its vehicle. The respondent was not required to prove on the balance of probabilities that he was going to have a contractual right to use it. His unchallenged evidence about the vehicle being part of his package warranted a finding that there was an arrangement for private use of the vehicle. We are not persuaded that the learned trial judge erred in taking into account the loss of the benefit of the private use of the vehicle.

85 The appellant contends that the figure of $251 per week represented an overestimate of the value of the right to the use the vehicle privately. It was intended to be used predominantly as a work vehicle. Baytech was to get more benefit from the outlay of $251 per week than the respondent was. If the use of the vehicle would have been something like 70% for business purposes and 30% for private purposes, it does not follow that the respondent's damages should have been assessed by reference to a percentage attributable to private use. That sort of methodology is used in calculating fringe benefits tax, but it is simply not appropriate as a basis for estimating the sum of money that "will, as nearly as possible, put him in the same position as if he had not sustained the injuries". If the respondent were given 30% of $251 each week, he would not be able to acquire 30% of a vehicle and drive it for private purposes. Even though Baytech would have had most of the benefit of the vehicle that it was going to provide, the full cost of providing a substitute vehicle was the only appropriate yardstick for the calculation of this component of the respondent's damages. It follows that the learned trial judge did not err in using the rental figure of $251 per week in undertaking her assessment, and that ground 2(a) must fail.

86 In deciding what allowances to make for adverse contingencies, it would probably have been appropriate for her Honour to have differentiated between the benefit of the provision of a vehicle and the payments of salary and superannuation contributions. However there is no ground of appeal relating to adverse contingencies. Counsel for the appellant submitted that greater allowance should be made for adverse contingencies if this Court were to re-assess the respondent's damages. We need not address the submissions as to contingencies since we have concluded that the appeal should be dismissed.

Medicare levy

87 Ground 2(b) of the grounds of appeal asserts that the learned trial judge erred in assessing damages by ignoring the Medicare levy when assessing the respondent's net weekly lost income. We accept that her Honour erred in that respect, but have come to the conclusion that her Honour's error was not sufficiently significant to warrant the re-assessment of the respondent's damages.

88 Section 251S(1)(a) of the *Income Tax Assessment Act* 1936 (Cth) provides as follows:

> "(1) Subject to this Part, a levy by the name of Medicare levy is levied, and shall be paid, at the rate applicable under the relevant Act imposing the levy for a financial year upon:

(a) the taxable income of the year of income of a person, not being a company or a person in the capacity of a trustee, who, at any time during the year of income, was a resident of Australia".

89 Section 6(1) of the *Medicare Levy Act* 1986 (Cth) provides as follows:

"(1) The rate of levy payable by a person upon a taxable income is 2%."

90 In assessing damages for personal injuries, a court must take into account the income tax which the plaintiff would have had to pay on the earnings of which his injuries had deprived him: *Cullen v Trappell* (1980) 146 CLR 1. The Medicare levy did not exist when that case was decided. It came into existence on 1 February 1984. There is no reason why the same principle should not apply to the Medicare levy.

91 The High Court's decision in *Cullen v Trappell* put an end to a controversy as to whether damages for the impairment of a plaintiff's earning capacity should be calculated by reference to his or her gross income or net income. In *Atlas Tiles Limited v Briers* (1978) 144 CLR 202, the High Court held, by a three-two majority, that such damages should be calculated by reference to a plaintiff's gross earnings. That decision was reversed in *Cullen v Trappell*, which was a four-three majority decision. Each of the four judges in the majority simply adopted the reasoning in the minority judgments in *Atlas Tiles v Briers*. In simple terms, their Honours held that damages assessed by reference to net earnings or after tax earnings were sufficient to place an injured plaintiff in the position that he or she would have been in if uninjured. Damages calculated by reference to gross earnings would have resulted in a windfall.

92 Like income tax, the Medicare levy is a tax that individuals have to pay in relation to their earnings, calculated by reference to their taxable incomes. It is routinely taken into account by judges assessing damages for personal injuries. It should have been taken account by the learned trial judge in this case in calculating the respondent's hypothetical net earnings.

93 At the conclusion of the trial, counsel for each side provided her Honour with written calculations as to the net income that the respondent would have received from Baytech for each relevant financial year from the day he would have started work for Baytech up to the time of the trial. They also provided figures as to the net income that he would have been receiving at the time of the trial. Their figures were different. For example, for the year ending 30 June 2017, the respondent's counsel's figure was $72,852 but the appellant's counsel's figure was $70,928.65. In the closing speeches at the trial, nothing was said about the fact that the two sets of figures were different. Her Honour adopted the respondent's figures when assessing damages, without mentioning that the appellant's figures were different.

94 The reason that the two sets of figures were different was that the appellant, in accordance with the law, had taken the Medicare levy into account whereas the respondent had not. Documents setting out the relevant income tax rates and details of the Medicare levy were attached to the written submissions of the appellant, but the Medicare levy was mentioned in those submissions only in one place – in footnote 72, not a conspicuous place.

95 The respondent's gross salary from Baytech, excluding superannuation contributions, would have been $96,001 per annum or $1,846 per week. The period from the date he would have started work for Baytech to the date of her Honour's judgment was 248 weeks. The amount that should have been deducted in respect of the Medicare levy in respect of that period was therefore as follows:

$1,846 x 2% x 248 = $9,156.

96 Every component of the learned trial judge's calculation of damages for future loss of earnings was based on a net figure of $1,828 per week. That figure should have been reduced by 2% of $1,846

per week, which is $36.92. Rounding that figure to $37 per week, the appropriate reduction to the final figure for damages for future loss of earnings ($678,721) can be calculated as follows:

$678,721 ÷ 1,828 x 37 = $13,738.

Reduced income tax

97 The learned trial judge gave judgment on 28 August 2020. She assessed damages, taking into account the income tax rates that were then in force pursuant to the *Income Tax Rates Act* 1986. Those rates were amended by the *Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Act* 2020. That Act received the Royal Assent on 14 October 2020, and amended the relevant tax rates with effect from 15 October 2020. With effect from that date, the respondent's weekly income after tax (but not the Medicare levy) would have been $1,429 per week, calculated as follows:

Gross salary	$96,001
Tax thereon	$21,667
Income after tax	$74,334

$74,334 ÷ 52 = $1,429 per week.

98 The learned trial judge calculated damages for future loss of earnings on the basis of an after tax income of $1,404 per week. If this Court were to reassess damages, it would be necessary to apply the new tax rates, and that would result in an adjustment in the respondent's favour as from 15 October 2020 based on a net increase of $25 per week. The appropriate adjustment would be as follows:

$678,721 ÷ 1,828 x 25 = $9,282.

To re-assess or not to re-assess?

99 The relevant principles to be applied when considering grounds of appeal relating to the assessment of damages in a personal injury case are as stated by Porter J in *Marlow v Walsh* [2008] TASSC 58, 51 MVR 169 at [137], as follows:

> "The following summary of the principles to be applied is taken from *MAIB v Richards* (1991) 14 Tas R 221 per Underwood J at 224 – 229, 235; per Zeeman J at 244 – 245, and *Southern Regional Health Board v Grimsey* (1998) 8 Tas R 166 at 188:
>
> - Before an appellate court interferes with an award of damages it should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered.
> - In the absence of a wrong principle of law or misapprehension of fact, appellate intervention is warranted only if the final award is shown to be wholly erroneous in the sense of being manifestly excessive or inadequate.
> - In determining whether the final award is wholly erroneous, it is permissible to examine amounts attributed to individual heads of damage, but the disproportion of those amounts must appear in the total sum awarded; that is, all other matters in the case being equal, the conclusion that the total award is disproportionate cannot be reached unless that same conclusion is reached in relation to the ingredients of the total award sought to be challenged."

100 In assessing damages for the impairment of the respondent's earning capacity, the learned trial judge did not misapprehend the facts, nor did she act on a wrong principle. She assessed damages on the basis of the respondent's net income, but erred by adopting the figures provided by his counsel. The question that this Court must address is therefore whether her award of $1,264,566 before apportionment was a wholly erroneous estimate of the damage suffered by the respondent.

101 On the basis of the figures calculated above, allowing ground 2(b) would result in the following adjustments to that figure:

Medicare levy – past	$9,156
Medicare levy – future	$13,738
	$22,894
Less tax adjustment	$9,282
Total	$13,612

102 This represents approximately 1.08% of the damages as assessed, before apportionment. The learned trial judge did not make a wholly erroneous estimate of the damage suffered by the respondent. Ground 2(b) must therefore fail.

Conclusion

103 For these reasons both the appeal and the cross-appeal should be dismissed.

File No 2541/2020

PORT SORELL BOWLS CLUB INC v KRAIG ANTHONY DANN

REASONS FOR JUDGMENT

FULL COURT
MARSHALL AJ
2 February 2022

104 The appellant, Port Sorell Bowls Club Inc, appeals from the orders of the primary judge made on 2 October 2020 in which she ordered, in an action for negligence by the respondent, Mr Dann, that the appellant pay him the sum of $1,074,880 and interest in the sum of $13,044: *Dann v Port Sorell Bowls Club Inc* [2020] TASSC 47.

105 The appellant does not challenge the finding of her Honour that it was in breach of its duty to the respondent. Its grounds of appeal allege that the award of damages was too high for two reasons. First, it contends that the primary judge's apportionment of the respondent's contributory negligence, assessed at 15%, was too low. Second, it submits that the final award of damages was too high, having regard to the inclusion in the respondent's lost earning capacity the benefit of a vehicle lease by his employer, and by reason of the 2% Medicare levy not being taken into account in the respondent's net lost weekly income.

106 The respondent has cross-appealed. He contends that the primary judge erred in considering that he was guilty of contributory negligence.

The facts

107 The appellant takes no issue with the opening paragraph of the judgment of the primary judge which its counsel contends records correctly what happened once the respondent commenced to cook sausages on a barbeque owned by the appellant:

108 At [1], her Honour said:

> "On 17 November 2015, Kraig Dann, the plaintiff, was working as a volunteer at the Port Sorell Bowls Club Inc, for a 'barefoot bowlers' evening. The Club was catering for about 60 people and the plaintiff had been asked if he would help cook a large quantity of sausages. The Club's gas barbeque was an unsophisticated four burner barbeque. A makeshift method to collect the fat from the barbeque involved a ceramic mug positioned out of sight underneath the barbeque plate. Soon after the plaintiff began cooking the sausages, the mug overflowed and caught fire. The plaintiff turned off the gas, but the contents of the mug remained alight. Mr Dann tried to move the mug which was sitting on a bracket. As the plaintiff moved it, it caught on the upturned corners of the bracket and the fat spilt, severely burning his right hand. The burn injury required extensive medical treatment and he is left with scarring and restriction of movement, and his working capacity is impaired."

109 At [5] her Honour noted that the respondent first cooked on the barbeque about 12 months before the incident and that he would "just do the cooking". The storage and retrieval of the barbeque was a matter for committee members of the appellant. The primary judge noted that the respondent had cooked on the barbeque a week before his injury for about 60 people and that afterwards the barbeque was cleaned up and put away by committee members. He next used the barbeque on the occasion of the injury.

110 The primary judge described the barbeque and the mug at [9]-[16] of her judgment. She stated at [10] that "It has a large single solid plate and a hole in the middle of the plate to drain fat and grease." At [11] her Honour noted the presence of a metal bracket under the hole in the plate. She then said:

> "From the base of the bracket, referred to as the tray, to the barbeque plate is approximately 13.5 cm. A receptacle placed on the tray may be used to collect the fat that drains off the plate. Originally, the barbeque came with a metal receptacle, a 'drip can', like a saucepan with a metal handle. It was designed so that it sat on the bracket. The bracket has upturned corners to hold the receptacle in place. Over time that drip can became damaged and was discarded or lost. The barbeque does not have some feature providing for collection of excess fat runoff if the receptacle is full. If the bracket were removed, the fat and grease would drip freely onto the wire rack ...".

111 Her Honour observed at [12] that "any overflow from the receptacle on the bracket would be in close proximity to the gas flames". At [13] the primary judge noted that on the metal lid cover that sits on the single solid plate, there was written in capitals with a black marker pen "EMPTY FAT CONTAINER". It is apparent that the fat container receptacle or mug was not emptied when the respondent was asked to start cooking.

112 The manual for the barbeque referred to the need to clean the "drip can" on a regular basis, warning that "if this is ignored, a build up of fats and grease may cause a fire in the can".

113 The primary judge referred to evidence from the respondent that he was, in effect, a late replacement for someone else who was rostered to do the cooking on the barbeque. He was told that everything had been set up. In other words, the barbeque was ready for use and that all he had to do was start cooking. When he approached the barbeque it was turned on, had been wheeled out of the shed where it was stored when not in use, and it was going.

114 After cooking for 10 or 15 minutes, the respondent heard a "woof" sound. He said a "wall of flames" came up in front of him and he jumped back. The flames were chin height and shooting out the back of the barbeque and blowing up in front of it.

115 The respondent bent down and turned the gas bottle off. The flames continued. He was concerned to prevent the gas bottle or gas bottle line from catching fire which might have led to an explosion. There were people around the barbeque and it was close to the bowling green.

116 As the flames continued and dropped down below the barbeque, butchers' paper on a rack at the back of the barbeque caught fire as a result of fat dripping onto the paper. Fire was also coming up through the hole in the centre of the barbeque.

117 The respondent then looked under the barbeque. He saw a ceramic cup with hot fat flowing out of it and hitting the burner, causing a fire. The fat was on fire as well. He was concerned about the cup exploding. He yelled at children nearby to get away.

118 The respondent put his sunglasses on, looked under the barbeque, and asked a person with him, Mr Paul Marshall, to get him something to wrap around his hand. Mr Marshall said there was not enough time, so the respondent wrapped his hand in a paper towel to grab the handle of the mug and remove it from where it was sitting.

119 The mug was jammed against the burners. As he pulled the mug out it caught on one of the folds of the bracket and hot fat scalded his hands as the mug fell over. He had to wiggle the cup because it was wedged in place.

120 He was not concerned for his own health as much as preventing fat going everywhere and shards of glass exploding. There were no fire extinguishers close to the barbeque. There were no cloths or mitts nearby. He had received no instructions about what to do in case of a fire when cooking on the barbeque.

121 As fat spilt over his hand he felt intense heat but kept hold of the mug until he placed it on the ground. He then placed his hand under cold running water for about 20 minutes. He said the burning

sensation was "incredible". He was later given an ice pack. He was subsequently taken to hospital by ambulance.

122 He rejected the suggestion that it would have been better to leave the mug alone. He said it was a split second decision because of perceived danger to other people.

123 Mr Luke Marshall gave evidence that the club now uses a barbeque with "a bucket underneath on the rack" with sand in it and there have been no fat fires since.

124 The appellant contended before the primary judge that after the gas was turned off, the respondent could have cleared the area of people, obtained a fire extinguisher, or called the Fire Service. It contended that there were two fire extinguishers in plain sight.

125 Mr Graeme Barker, a member of the appellant, said there was a fire extinguisher 30 metres from the barbeque.

126 Her Honour found that the respondent's evidence as to what occurred after the gas had been turned off was reliable. The primary judge also accepted the respondent's evidence that he was not aware of the presence of fire extinguishers on the premises.

127 The primary judge said at [82] that she "largely accepted the [respondent's] evidence of the incident". Her Honour found "his concerns about people nearby and that the mug might explode, to be genuine and giving rise to a real sense of urgency and lack of options and that this was the driving impetus for his conduct".

128 At [87], the primary judge inferred "the mug had not been replaced or emptied before the barbeque was lit and used", and that the mug was not empty (prior to use of the barbeque on 17 November), and "contained a substantial amount of fat". Her Honour, at [92], confirmed her acceptance of the respondent's evidence of "his observations of the fire, the extent of it, and his reasons for acting as he did".

129 At [93] the primary judge set out her findings of fact as to what happened in the critical moments before the injury, saying:

> "I find that when the plaintiff looked under the plate for the first time, he observed the cup on an angle, with fat bubbling over and on fire. He looked for just a few seconds. His attention was focused on the dramatic aspects of the situation: the fire, the fat bubbling over and flames dripping down onto the butchers' paper. He was alarmed by what he saw and was concerned about the fire and the prospect of the mug exploding. He did not notice the turned-up corners of the tray. I note that if a mug is angled and leaning against the burners, it is not sitting in the corners of the tray and the turned-up corners are not as obvious as if the mug is sitting flat. He asked for a cloth and Paul Marshall said there was not time. Mr Marshall unravelled the paper towel for the plaintiff. The plaintiff wrapped his hand in paper towel and leant down a second time, this time to retrieve the mug. He touched the handle quickly to see how hot it was. The tray was relatively close to the edge of the barbeque so that he did not have to lean in under the barbeque. As he reached in, his hand wrapped in paper towel likely obscured some of his view. He did not realise that the turned up corners of the tray were there and would hinder retrieving the mug. He did not lift the mug but moved it out directly, it caught on the corner or corners and spilled. At one point of his evidence he described wiggling it out. However, whether he simply anticipated that because it was on an angle it may be jammed against the burners, and he anticipated needing to free it in this way, or whether he did in fact need to, before the mug caught on the corner or corners of the tray, I do not make a finding on that point."

130 The primary judge observed that the principal challenges to the respondent's case included his reasons for trying to remove the mug. At [95], her Honour rejected that criticism of the respondent,

saying it was a "natural reaction" to remove the mug to get the fire away from the barbeque and the gas bottle and hose.

131 At [98], her Honour accepted the respondent's concern about the mug exploding and accepted at [99] that he was not aware of the presence of fire extinguishers at the club.

Contributory negligence

132 Before the primary judge the appellant claimed that the injuries sustained by the respondent were contributed to by his own negligence. Three particulars of contributory negligence were pressed in the proceedings below. They were as follows:

- failing to empty the fat runoff container;
- attempting to remove the fat runoff container when the liquid was overflowing;
- failing to seek assistance when the fat runoff container commenced to overflow.

133 As to the first dot point in [29] above, the primary judge observed at [136] that there was no evidence that the respondent knew of the sign on the barbeque lid to empty the container or mug, and that there was no dispute that the respondent was "unaware of the existence of the mug before the fire".

134 As to the third dot point, her Honour held that the respondent was not negligent in failing to seek assistance. The primary judge observed at [144] that the respondent acted decisively to try to resolve the situation before the fat cooled.

135 As to the second dot point, her Honour appears to have accepted its validity. At [143] she said:

> "The plaintiff misjudged the situation, he failed to make observations which could have been made. He did not note the turned up corners of the tray. His evidence was 'I knew I could get it out safely and put it on the ground without burning'. He failed to observe the configuration of the tray as a potential obstacle in removing the mug. Was his failure to observe, or the assumptions he made that there would be no hindrance in removing the mug negligent in the circumstances, or was it mere inadvertence? Did he fail to act reasonably in the dangerous situation created by the defendant's wrong-doing? As I have said, his behaviour must be judged by reference to the exigencies of the moment. In judging his failure to observe the turned-up corners of the tray as he acted to remove the mug, I find that his observations were limited to a degree by the paper towel wrapped around his hand. He was aware that he had not looked closely at the mug and its surrounds. He gave evidence that before he tried to retrieve it he looked at it for just a few seconds. I note too the mug was high under the barbeque plate and there could have been obstructions, other than the corners of the tray. He thought the mug was jammed and either wriggled it or was anticipating that he would need to free it from being jammed. Either way, he was expecting some resistance and hindrance. This could have resulted in a spillage or splash. I find his state of mind that 'I knew I could get it out safely' was merely a reference to the temperature of the handle or was an assumption, impulsively reached. Any protection offered by the paper towel was only against the temperature of the handle, not a spillage. I accept in his favour that it is counterintuitive that a container that is difficult to extract would be chosen as the means of fat collection. The defendant has satisfied me on the balance of probabilities, that in the circumstances, the plaintiff's conduct, in particular, his attempt to retrieve the mug without taking stock and observing the surrounds of the mug and the tray amounted to negligence. The plaintiff failed to take reasonable care for his own safety. In this regard, there was negligence by the plaintiff in his attempt to remove the fat runoff container as alleged in 11(d)."

136 The reference to 11(d) is a reference to what I have described above as the second dot point.

137 At [145], her Honour concluded her discussion on contributory negligence by assessing the respondent's negligence as being 15%. Her Honour referred to the respondent's haste in seeking to

resolve the danger, but also of his failure "to pause and make observations in his attempt to remove the mug ...". Significantly, her Honour said that compared with the appellant's negligence, the respondent's negligence was not significant.

Appellant's submissions on contributory negligence

138 The appellant submits that the actions of the respondent warrant a far higher share in the responsibility for damage than 15%. It contends that the respondent was able to check the fat run off system before he was placed in a situation of urgency. It also contends that the respondent's belief that there was a situation of urgency should not have been accepted. It asserts that the immediate proximate act to the harm caused was the respondent grappling with a mug of hot fat from which flames were dripping down, and reaching through the fire with a hand only protected by a paper towel.

139 In support of this ground of appeal the appellant claims that the primary judge erred by finding that it breached its duty of care by failing to provide an instruction not to remove the fat container when there was no claim of negligence to that effect. The appellant also claims that the primary judge failed to consider whether "particular (a)" of the particulars of contributory negligence had been made out. That is, it is contended that the respondent should have been found to have been negligent by failing to empty the fat run off container before using the barbeque. See [30] above.

140 The appellant also submits that the primary judge's description of the relevant risk being "the difficulty of extracting the mug from its tray due to the turned up corners of the tray" was a too narrow characterisation of the risk. It also contends that her Honour's finding at [141] in relation to what I have described as the second dot point, were too narrow. The appeal notice in this regard refers to [141] of the judgment below. The intended reference appears to be to [143], which is the lengthy paragraph in which her Honour describes what she considered to be contributory negligence. The words referred to are in context:

> "The defendant has satisfied me on the balance of probabilities, that in the circumstances, the plaintiff's conduct, in particular, his attempt to retrieve the mug without taking stock and observing the surrounds of the mug and the tray amounted to negligence."

The respondent's submissions on contributory negligence

141 In response to the appellant, the respondent observed that the appellant's failure to provide an instruction not to attempt to remove the fat container is found at par 8(e) of the statement of claim. That subparagraph is set out at [130] of the judgment below, and states:

> "(e) Failing to provide adequate instruction in the use of the equipment he was required to use for as well as adequate instruction in fire prevention and extinguishing."

142 The respondent, in response to the allegation by the appellant that her Honour had failed to consider the alleged particular of contributory negligence concerning a failure to empty the run off container or mug, referred to the evidence before the court below that he was not aware of the existence of the container (or mug) when he was asked to commence cooking.

143 As to the submissions from the appellant about her Honour's focus on contributory negligence being too narrow, the respondent referred to the fact that at [138], the primary judge referred to the "plaintiff's conduct" (in a general sense) as requiring examination to see if it "posed a significant risk of harm such that a responsible person in the plaintiff's position would have taken precautions against the risk".

144 At par 30 of the written submissions of the respondent, his counsel contends that:

> "The learned trial judge considered all of the particulars of contributory negligence at (135-144] and concluded that 15% was a 'just and equitable' apportionment for the plaintiff's negligence at (145]. She contrasted the defendants gross departure from the standard of a reasonable person with the plaintiff's breach being not significant when he was seeking, in difficult and pressing circumstances, to resolve a hazard situation created by the defendant. No specific error is revealed."

Consideration of ground 1 of the appeal

145 The primary judge did not err in determining that the just and equitable apportionment for the respondent's negligence was 15%. That figure was not manifestly inadequate or attended with any error.

146 Her Honour carefully considered each particular of contributory negligence that was alleged. The first particular pressed was the failure to empty the fat run off container before using the barbeque. On this particular, the appellant contends that there was no claim by the respondent that the appellant failed to provide instructions about not attempting to move the fat container. The discussion at [35] above shows that to be not correct. The failure to provide adequate instructions about the use of the barbeque was a live issue in the proceeding. The claim that the primary judge also failed to consider the first particular of contributory negligence was also wrong. At [136] the primary judge said the respondent was not aware of a sign on the barbeque lid to empty the fat run off container before using the barbeque. Her Honour said at [136] that there was "no dispute" that the respondent was unaware of the mug before use.

147 I do not consider that the primary judge had a too narrow focus on what was the relevant risk which faced the respondent or that the description of his contributory negligence was too confined. At [141] and [143], her Honour went into some depth concerning the nature of the respondent's contributory negligence and did not minimise it as effectively contended by counsel for the appellant. At [141] her Honour referred to the respondent being in a situation created by the appellant which was "fraught with risk and danger", and to the unexpected situation in which the respondent was placed. Her Honour observed that the risk which continued was the difficulty of extracting the mug or container from its tray because the corners of the tray were "turned up", and had the respondent taken a more careful, closer look, it would have been evident to him. But he did not because he was under much pressure. At [143], her Honour developed her analysis of the contributory negligence, noting that the respondent "misjudged the situation", by not observing the turned-up corners of the tray as a very likely obstacle in removing the mug, but that that behaviour should be considered in accordance with the "exigencies of the situation".

148 In my opinion, her Honour's analysis of the contributory negligence of the respondent was thorough and accurate. Ground 1 has not been made out. No error has been disclosed in the primary judge's assessment of contributory negligence. There was no error of the sort that would engage s 45 of the *Supreme Court Civil Procedure Act* 1932.

The cross-appeal

149 The respondent has cross-appealed, contending that no finding of contributory negligence should have been made.

150 The respondent observed that the finding of contributory negligence was made in respect of what was described in the appellant's particulars of contributory negligence as particular 11(d), or as I have described it above at [29]ff, as the second dot point. It is there described as "attempting to remove the fat run off container under the barbeque when the liquid was overflowing".

151 It is apparent that her Honour has interpreted that particular as an attack by the appellant on the way the respondent approached his task of minimising the danger once he realised that a dangerous situation occurred. That her Honour examined the actions of the respondent from the viewpoint of the

manner in which he assessed and conducted the task of removing the mug, was not an impermissible approach, having regard to all the evidence before her.

152 The primary judge, on the evidence, was entitled to take the view that the respondent's failure to observe the difficulty he would have in extracting the mug from the tray due to the turned-up corners of the tray, was negligence on his part. Her Honour, however, considered that because of the exigencies of the situation the respondent found himself in, that negligence was insignificant compared to the negligence of the appellant.

153 Even if a person has a decision forced upon him or her in the "agony of the moment", it does not mean that the person may not have contributed in some way to the injury caused. Each case will turn on its own facts. Having considered the facts in this matter, I have come to the same view as the primary judge.

154 For the foregoing reasons I would dismiss the cross-appeal.

Ground 2 of the appeal

155 Ground 2 of the appeal alleges that the final award of damages was manifestly excessive. Two aspects are relied on. First, it is said that the respondent's lost earning capacity included a $251 per week benefit for a vehicle leased by his employer which the appellant contends should not have been included on the evidence, or alternatively only the cost of use of the vehicle for work purposes should have been allowed. The second aspect is that the Medicare levy was ignored when assessing the weekly lost income.

(i) The vehicle

156 At [304], her Honour said that the lease of the employer provided vehicle was part of the respondent's salary package. She assessed the annual cost of the lease at $13,062.48 or representing the monetary value of the benefit to the respondent in the sum of $251 per week.

157 Counsel for the appellant submits that there was no evidence that the respondent was entitled to use the vehicle for private purposes.

158 Counsel for the respondent referred to the finding of the primary judge at [190] that the respondent was entitled to "be provided with a leased vehicle as part of his package". At [304] her Honour said, "I infer this was not to be a vehicle for work purposes only".

159 The terms of employment of the respondent were in evidence. There was nothing in those terms of employment which confined the use of the motor vehicle to work purposes only. So much would have been unrealistic in circumstances where the employer's expectation was that the respondent would operate from an office at his home which the employer helped him to establish.

160 I agree with the submission of counsel for the respondent that in the absence of any evidence led by the appellant at trial regarding the value of the private use of the vehicle, her Honour was required to do her best to work out the private value of the motor vehicle. In the circumstances, the finding that the cost of the lease represented the approximate monetary value of the benefit to the respondent was a proper finding.

161 The appellant's claim that the evidence was contrary to the award of any sum for a vehicle is plainly wrong. The vehicle was part of the salary package of the respondent. He gave unchallenged evidence to that effect. The written contract refers to a vehicle as being not applicable. There is no evidence that the parties considered whether that reflected their intentions. I prefer the unchallenged evidence of the respondent on the issue. The reference in Annexure B of the employment contract to a

motor vehicle as part of the total employment package, and "N/A" against that item, is inconsistent with the reality that the respondent was going to be provided with a car as part of his salary package and had already ordered a car for that purpose. The alternative claim that the private use of the vehicle should be excluded is rejected. The better view of the working circumstances of the respondent and his contract was that the salary package contemplated private use of the vehicle as is common in many industries where vehicles are provided by employers to employees. To treat the written contract, where it referred to "N/A" (regarding an employer provided vehicle) as conclusive is to turn a blind eye to the reality of the situation where the respondent was to be provided with a work vehicle. It is tantamount to saying that someone who is a full-time employee, but incorrectly is referred to in a written contract as casual, is in fact a casual. The reference to "N/A" in the written contract is, on the totality of the uncontradicted evidence, a mistake common to both parties and is severable from the rest of the contract.

(ii) Medicare levy

162 Counsel for the appellant submits that the primary judge should have made a deduction in respect of the Medicare levy which would have been payable by the respondent. Counsel referred to that in closing submissions in writing before the primary judge which referred to the Medicare levy, in making submissions as to loss.

163 Taking the Medicare levy into account in the assessment of future damages may depend on the nature of any partial return to work at a reduced capacity and possibly in circumstances where the income of the respondent was below the yearly threshold of $22,801 at which the levy becomes payable. Counsel for the respondent submits, and I agree, that in a situation where a trial judge awards an in globo sum and takes into account factors such as partial recovery of earning capacity, it will be difficult to arrive at a precise mathematical calculation. It can never be known for certain whether a return to work would involve hours which take the respondent beyond the permissible threshold of earnings.

164 Having regard to the foregoing, I am not satisfied that the primary judge erred in failing to take into account the Medicare levy for the purposes of addressing lost income.

(iii) Other matters

165 Although not part of any ground of appeal, the written submissions of the appellant dealt with the issue of contingencies and referred to a 15% discount for usual contingencies having regard to the likelihood that employment with the employer would not have continued indefinitely. Counsel referred to the judgment of Pearce J in *Kent v Payne* [2014] TASSC 11 at [92] where his Honour said:

> "It is necessary to allow for adverse contingencies. It is common in Tasmania to discount damages for future economic loss by 15% to allow for mortality, illness, injury, unemployment, underemployment, early retirement, voluntary absence from the workforce and strikes ...".

166 Counsel for the appellant submitted that a higher discount than 15% was appropriate in this case because of the respondent's propensity to consume alcohol and other health related matters. A figure of 25% deduction for future contingencies was said to be appropriate.

167 Counsel for the respondent referred to her Honour's finding at [308] that "The plaintiff was in general good physical and psychological health at the time of his accident." At [319], the primary judge referred to evidence that before the accident the respondent "was a well adjusted individual who was functioning well".

168 Her Honour set 10% as an appropriate discount for negative contingencies. Given the evidence about the respondent's health, this assessment was reasonable. At [320], the primary judge said:

> "I would regard an appropriate discount for negative contingencies as 10%. This makes suitable allowance for the usual contingencies of mortality, illness and injury and also the contingency of unemployment which I would regard as low in the plaintiff's case. There are the positive contingencies of additional income, and increases in salary to reflect his performance. I would assess those as 5%. Accordingly, I allow a discount for negative contingencies of 5%."

169 The overall discount for contingencies was set at 5%, taking into account positive contingencies.

170 In *Partridge v Hobart City Council* [2012] TASFC 3, the Full Court, at [178], referred to the common, "but not inevitable" practice of assessing adverse contingencies at 15%. In *De Sales v Ingrilli* [2002] HCA 52, 202 CLR 338 at [99], McHugh J referred to "the conventional discount for general contingencies is 15 per cent" and then said:

> "Further reflection on statistics concerning unemployment and the payment of social services and workers' compensation, however, now makes me think that the figure of 15 per cent is too high – at least for low to middle income workers."

The respondent was a middle income earner. Further, the relevance of a factor such as strikes is now questionable. Under current industrial legislation, strikes are no longer as common as they were in the 20th Century. Industrial action is generally confined to limited bans imposed as part of "protected action".

171 In *Raper v Bowden* [2016] TASSC 35, Estcourt J applied a 10% discount for loss of future earning capacity and discussed at [271] the 15% discount as "overly generous to the defendants". See also the judgment of Porter J in *Potts v Frost* [2011] TASSC 55 at [314], where his Honour said:

> "That leaves the question of discount for the 'usual' contingencies. There was no evidence as to the appropriate discount, and the plaintiff made no submissions addressing the issue but simply left the question open. The defendant asserted the figure of 15 per cent without reference to any authority. This is the figure which seems to be very generally assumed to be appropriate in all jurisdictions except Western Australia: see the discussion in *Luntz* ... at par6.4.5. In this State, Evans J in *McLennan v Luttrell* [2006] TASSC 44 and *Dobson v Jackson* [2009] TASSC 118 demonstrated the fallacies within the generally adopted figure of 15 per cent."

172 Here, the primary judge examined the particular circumstances of the respondent's position. Her Honour observed that the respondent would have earned extra income from high voltage work through his own company on a flexible basis.

173 But for the accident, the respondent would have taken up new employment which contained a salary which was subject to review and annual adjustment based on performance and productivity.

174 In setting a 10% discount for negative contingencies in the respondent's circumstances, the primary judge committed no error of principle. There is no basis for the submission that the appropriate figure for negative contingencies was 25%.

Orders

175 In my opinion, for all the foregoing reasons, the orders of the Court should be as follows, with costs following the event in the absence of any application in 21 days, for any other costs order:

1 The appeal is dismissed.

2 The cross-appeal is dismissed.