

AUSTRALIA / JUDGMENT

Gause v Alderson [2024] NSWCA 312

COURT

Court of Appeal

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Court of Appeal

Supreme Court

New South Wales

Medium Neutral Citation: Gause v Alderson [2024] NSWCA 312

Hearing dates: 29 November 2024

Date of orders: 20 December 2024

Decision date: 20 December 2024

Before: Mitchelmore JA at [1];

Stern JA at [2];

Price AJA at [114].

Decision: (1) Appeal dismissed.

(2) Cross-appeal allowed.

(3) The appellant to pay the respondents' costs of the appeal and cross-appeal.

(4) The parties are to take reasonable steps to agree short minutes of order as to what further orders should be made to reflect the respondents' success on the cross-appeal which should be filed by 5 February 2025. Failing agreement:

(a) The respondents to file submissions of no more than 3 pages in support of their proposed orders by 4 pm on 7 February 2025; and

(b) The appellant to file submissions of no more than 3 pages in support of their proposed orders by 4 pm on 12 February 2025.

Catchwords: NEGLIGENCE - breach – discrete or hidden risk – where risk of a non-operational smoke alarm was foreseeable and highly significant – where precautions were not onerous
NEGLIGENCE – intoxication – where relevant conduct or activity was being asleep in home – whether there was impairment of capacity to exercise reasonable care and skill due to intoxication
APPEALS - from finding of fact - credibility of witnesses – where primary judge observed the appellant giving evidence - primary judge entitled to make adverse credibility findings

Legislation Cited: Civil Liability Act 2002 (NSW), s 50

Compensation to Relatives Act 1897 (NSW)

Evidence Act 1995 (NSW), s 140(2)

Interpretation Act 1987 (NSW), s 8(b)

Cases Cited: Alderson v Gause [2024] NSWDC 152

Amanda's On The Edge Pty Ltd v Dries [2011] NSWCA 358

Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34
Browne v Dunn (1893) 6 R 57
Commercial Union Assurance Co of Australia Limited v Ferrcom Pty Ltd (1991) 22 NSWLR 389
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22
J and E Vella Pty Ltd v Hobson [2023] NSWCA 234
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8
Kuhl v Zurich Financial Services Australia Ltd (2011) 243 CLR 361; [2011] HCA 11
Lee v Lee (2019) 266 CLR 129; [2019] HCA 28
Luxton v Vines (1952) 85 CLR 352; [1952] HCA 19
Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd [1992] HCA 66; (1992) 67 ALJR 170
New South Wales v Ouhammi (2019) 101 NSWLR 160; [2019] NSWCA 225
Payne trading as Sussex Inlet Pontoons v Liscardy [2023] NSWCA 73
Roads and Traffic Authority v Royal [2008] HCA 19
Russell v Edwards (2006) 65 NSWLR 373; [2006] NSWCA 19
Russo v Aiello (2003) 215 CLR 643; [2003] HCA 53
Scott v Scott [2022] NSWCA 182

Category: Principal judgment

Parties: James Gause (Appellant / Cross-Respondent)

Tamara Alderson (First Respondent / First Cross-Appellant)

Narelle Heafey (Second Respondent / Second Cross-Appellant)

John Heafey (Third Respondent / Third Cross-Appellant)

Elijah Heafey BHT Tamara Alderson (Fourth Respondent / Fourth Cross-Appellant)

Kruz Heafey BHT Tamara Alderson (Fifth Respondent / Fifth Cross-Appellant)

Tamara Alderson (Compensation to Relatives) (Sixth Respondent / Sixth Cross-Appellant)

Representation: Counsel:

J Turnbull SC and M Hamdan (Appellant / Cross-Respondent)

R Sheldon SC and E Anderson (Respondents / Cross-Appellants)

Solicitors: Holman Webb Lawyers (Appellant / Cross-Respondent)
Law Partners Personal Injury Lawyers (Respondents / Cross-Appellants)

File Number(s): 2024/00279252

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Decision under appeal Court or tribunal: District Court

Jurisdiction: Civil

Citation: [2024] NSWDC 152

Date of Decision: 6 May 2024

Before: Montgomery DCJ

File Number(s): 2021/00080424

2021/00080437

2021/00080442

2021/00080450

2021/00174019

2021/00309993

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

These proceedings arise out of the tragic death of Bradley Heafey (the deceased) in a fire at a single-story home (the premises), where he was living at the time, shortly after 11 pm on 8 April 2019. The premises were owned by James Gause (the appellant/cross-respondent) and leased to the deceased and his partner, Tamara Alderson, from 14 February 2019. Ms Alderson, their two young children, and the deceased's parents (together, the respondents/cross-appellants) successfully brought proceedings against Mr Gause for personal injury resulting from the discovery of the death of the deceased and, in respect of Ms Alderson, under the Compensation to Relatives Act 1897 (NSW). Prior to 14 February 2019, the premises were vacant from January 2018 until 14 February 2019. The primary judge found that mains power was not reconnected to the premises until 15 February 2019.

At some time prior to the fire, the smoke alarm in the lounge room of the premises (the Smoke Alarm – another smoke alarm was in the main bedroom) had been tampered with by removing its battery and speaker. This meant that the Smoke Alarm, which was connected to mains power, activated but did not sound any alarm on the evening of 8 April 2019. This resulted in the deceased, who was asleep in the lounge room at the time of the fire, not becoming aware of the fire until the room had filled with smoke and heat, which caused confusion, disorientation and incapacitation. On autopsy, the deceased was found to have a blood alcohol concentration (BAC) of 0.051%, and the presence of cannabis (delta-9-THC acid) and prescribed medications at therapeutic levels were detected.

The appellant had been present, inside the premises, on three occasions during the period from 14 February 2019. On the first of these occasions, on 14 February 2019 when the lease documents were completed, there was no mains power connected. On the second occasion the appellant observed a green light on the Smoke Alarm and that it was not making any audible noise.

The primary judge found that the appellant was negligent because he breached his duty to check that the Smoke Alarm was operational. The primary judge also found that at the time of the fire the deceased was intoxicated to the extent that his capacity to exercise reasonable care and skill was impaired, resulting in the damages awarded to the respondents being reduced by 25% under s 50 of the Civil Liability Act 2002 (NSW).

The appellant appeals against the orders finding him liable and the respondents cross-appeal against the reduction in damages.

The primary issues in this appeal were:

- (1) Did the primary judge err in finding that the appellant did not at any time between 14 February and 8 April 2019 check that the Smoke Alarm was working by pressing the test button on the Smoke Alarm?
- (2) Did the primary judge err in finding on the balance of probabilities that the Smoke Alarm had been tampered with prior to 14 February 2019?
- (3) If the appellant did not press the test button on the Smoke Alarm between 14 February and 8 April 2019, did the primary judge err in finding that the appellant had breached the duty of care, which he undoubtedly owed in the circumstances, because reasonable care did not require that the appellant press the test button on the Smoke Alarm in the circumstances?
- (4) Did the primary judge err in finding that the deceased was intoxicated to the extent that his capacity to exercise reasonable care and skill was impaired on the evening of 8 April 2019?

The Court (Stern JA, Mitchellmore JA and Price AJA agreeing) held, dismissing the appeal and allowing the cross-appeal:

As to issue (1)

(1) The primary judge observed the appellant giving evidence and was entitled to make adverse credibility findings against the appellant. As regards such findings, the primary judge plainly had advantages and appellate caution is apt: [9], [41].

J and E Vella Pty Ltd v Hobson [2023] NSWCA 234; *Lee v Lee* (2019) 266 CLR 129; [2019] HCA 28; *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22, cited.

(2) The primary judge properly placed weight on the fact that the appellant did not at any time during his evidence in chief suggest that he pressed the test button on the Smoke Alarm on or after 14 February 2019: [41]. The primary judge was also entitled to interpret the appellant's evidence that "I can't recall doing it" as evidence that he did not have any recollection of pressing the test button on the Smoke Alarm at the start of the deceased and Ms Alderson's tenancy: [42].

As to issue (2)

(3) The appellant did not mention in his evidence seeing a red light on the Smoke Alarm when he observed it during the period of vacancy and on 14 February 2019, and his counsel did not ask him to continue his answer after interrupting it. This gives rise to an inference that he did not observe any flashing red light on the Smoke Alarm when he inspected it during the period when the premises were vacant: [70]. *Commercial Union Assurance Co of Australia Limited v Ferrcom Pty Ltd* (1991) 22 NSWLR 389; *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8; *Russo v Aiello* (2003) 215 CLR 643; [2003] HCA 53, cited.

(4) The expert evidence, together with the evidence of the appellant and Ms Alderson, strongly suggests that there was either no battery in the Smoke Alarm, or the battery was completely depleted, when the appellant made his observations during the period that the premises were vacant and in the period prior to power being reconnected to the premises: [71].

(5) Having regard to the expert evidence and to the evidence of the appellant and Ms Alderson that they never heard the Smoke Alarm make any noise, the speaker on the Smoke Alarm must have been removed prior to 15 February 2019 when the mains power was connected to the premises: [73].

As to issue (3)

(6) The nature of the risk of a faulty smoke alarm meant that it was discrete or hidden, which made the appellant's duty to perform the inspection more onerous, compared to the level of care required for an obvious and less dangerous risk: [87]. *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361; [2011] HCA 11, cited.

(7) The primary judge did not err in concluding that the appellant was in breach of the duty of care he owed to the occupants of the premises. The risk that the Smoke Alarm may not operate properly in the event of a fire was foreseeable and highly significant. If it occurred, serious harm would likely be caused. The precaution was not onerous: [88].

As to issue (4)

(8) Application of s 50(1) of the Civil Liability Act requires, as a preliminary step, characterisation of the conduct or activity in which a plaintiff is engaged in the relevant circumstances. Whether the plaintiff had any reason to suspect the danger, or the danger was readily apparent, may be relevant to that characterisation: [96]-[98], [100]-[101].

Amanda's On The Edge Pty Ltd v Dries [2011] NSWCA 358; *Payne trading as Sussex Inlet Pontoons v Liccardy* [2023] NSWCA 73; *New South Wales v Ouhammi* (2019) 101 NSWLR 160; [2019] NSWCA 225, considered.

(9) The deceased had no reason to suspect that on the evening of 8 April 2019 there

would be a fire in his house, still less that the Smoke Alarm would not sound. The deceased's conduct or activity should not be characterised by reference to the need to navigate his house to escape the fire. As there was no evidence that the deceased's capacity to exercise reasonable care and skill whilst sleeping on the sofa at his home on the evening of 8 April 2019 was impaired, s 50 of the Civil Liability Act was not engaged: [110].

JUDGMENT

1. MITCHELMORE JA: I agree with Stern JA.
2. STERN JA: These proceedings arise out of the tragic death of Bradley Heafey (the deceased) in a fire at a single-story home at 12 Macquarie Street, Barnsley, New South Wales (the premises), where he was living at the time, shortly after 11 pm on 8 April 2019. The premises were owned by James Gause (the appellant/cross-respondent) and leased to the deceased and his partner, Tamara Alderson, from 14 February 2019. Proceedings were brought against Mr Gause by Ms Alderson, their two young children Elijah and Kruz, and the deceased's parents, John and Narelle Heafey (together, the respondents/cross-appellants) for personal injury resulting from the discovery of the death of the deceased. Ms Alderson also sought provision under the Compensation to Relatives Act 1897 (NSW).
3. The primary judge found that the appellant was negligent because he breached his duty to check that the smoke alarm in the lounge room of the premises (the Smoke Alarm – another smoke alarm was in the main bedroom) was operational: *Alderson v Gause* [2024] NSWDC 152. The fact that the Smoke Alarm did not operate as it ought to have caused the death of the deceased. The primary judge also found that at the time of the fire the deceased was intoxicated to the extent that his capacity to exercise reasonable care and skill was impaired within the meaning of s 50(1) of the Civil Liability Act 2002 (NSW) and that the respondents had not satisfied the court that the deceased's "low level of intoxication and consequent impairment did not contribute to his death": J[182]. Thus, under s 50(4) of the Civil Liability Act, the damages awarded to the respondents were reduced by 25%.
4. An unusual feature of the case is that, at some time prior to the fire, the Smoke Alarm had been tampered with by removing the battery and the speaker of the Smoke Alarm, and forcibly tucking the battery cables back into the body of the Smoke Alarm. This meant that the Smoke Alarm, which was connected to mains power, activated but did not sound any alarm on the evening of 8 April 2019. This, in turn, meant that the deceased, who was alone in the house and asleep on the sofa in the lounge room at the time, did not become aware of the fire until the room had become filled with smoke and heat. When he responded and sought to escape, this caused confusion, disorientation and incapacitation and the fire, smoke and fumes caused him to collapse.

5. The appellant now appeals against this decision and the respondents cross-appeal against the primary judge's decision that damages should be reduced under s 50 of the Civil Liability Act.
6. For the reasons set out below the appeal should be dismissed and the cross-appeal allowed.

Issues on appeal

1. The substantive issues on the appeal and cross-appeal are:
 1. Did the primary judge err in finding that the appellant did not at any time between 14 February and 8 April 2019 check that the Smoke Alarm was working by pressing the test button on the Smoke Alarm (ground 3 of the notice of appeal as advanced in submissions)? The evidence before the primary judge, which was not challenged on appeal, established that if the test button had been pressed then this would have revealed whether or not the Smoke Alarm had a functioning speaker. If the speaker was operating, it would emit a siren.
 2. Did the primary judge err in finding on the balance of probabilities that the Smoke Alarm had been tampered with prior to 14 February 2019 (ground 1 of the notice of appeal)? An additional ground of appeal (ground 4) sought to challenge the primary judge's approach to what needed to be pleaded by the appellant on this issue, but Senior Counsel for the appellant accepted during the hearing of the appeal that this complaint probably did not add much of substance to the complaint about the primary judge's ultimate finding on this issue. In my judgment, given that the primary judge's substantive finding is challenged on appeal, it is unnecessary to deal separately with the challenge to the primary judge's approach to the pleadings.
 3. If the appellant did not press the test button on the Smoke Alarm between 14 February and 8 April 2019, did the primary judge err in finding that the appellant had breached the duty of care, which he undoubtedly owed in the circumstances, because reasonable care did not require that the appellant press the test button on the Smoke Alarm in the circumstances (ground 2 of the notice of appeal)?
 4. Did the primary judge err in finding that the deceased was intoxicated to the extent that his capacity to exercise reasonable care and skill was impaired on the evening of 8 April 2019 (raised by the notice of cross-appeal)?
1. Whilst the order of issues set out above does not reflect the numbering of the grounds of appeal, as the outcome of issue one may affect the remaining issues, it is convenient to address it first.
2. Issues one and two involve challenges to the primary judge's findings of fact. Those findings were to some extent likely impacted by the primary judge's impressions of the witnesses giving evidence and conclusions as to the credibility and reliability of witnesses, and being immersed in the milieu of the trial: *J and E Vella Pty Ltd v Hobson* [2023] NSWCA 234 at [214]. When such findings are challenged, this Court must exercise the usual restraint

reflecting the natural limitations of the appellate process: *Lee v Lee* (2019) 266 CLR 129; [2019] HCA 28 at [55]. A compelling basis such as the finding being contrary to "incontrovertible facts or uncontested testimony", "glaringly improbable" or "contrary to compelling inferences" is needed to overturn a finding likely to have been affected by such impressions: *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 at [28]-[29].

The appellant

1. The appellant has an associate diploma in electrical engineering. Under the tenancy agreement for the premises, the deceased and Ms Alderson were to contact the appellant for any electrical repairs.

The premises

1. The prior tenant at the premises was Ms Proctor, who had rented the premises from the appellant from July or August 2016 until January 2018. For most of that time her daughter also lived at the premises. Ms Proctor gave evidence before the primary judge.
2. The premises were vacant from January 2018 until 14 February 2019 when the deceased and Ms Alderson rented the premises. Mains power to the premises was disconnected from 16 April 2018. An inspection of the premises was conducted by the appellant on 14 February 2019, and a condition report was completed on that day. The following day (although Ms Alderson had remembered it as being the same day as the inspection) mains power was reconnected to the premises.

The Smoke Alarm

1. The primary judge found that the relationship between the appellant, on the one hand, and the deceased and Ms Alderson, on the other, was that the appellant was responsible for the inspection and maintenance of the Smoke Alarm.
2. Whilst both Ms Alderson and the deceased's parents recalled only one smoke alarm, in the hallway of the premises, the primary judge found, consistent with the appellant's evidence and the fact that the appellant located two smoke alarms after the fire (in the rubble of the bedroom and in a rubbish tip where rubble from the lounge room of the premises had been placed), that there were two smoke alarms at the premises at the time of the fire, one in the lounge room (the Smoke Alarm) and one in the main bedroom. These smoke alarms were installed in 2002. The appellant attended to their maintenance. At the time of the fire, the Smoke Alarm was almost 17 years old and had not been replaced, notwithstanding that the manufacturer recommended their replacement every ten years.
3. As I have already set out, based upon the expert evidence, the primary judge found that, as at the time of the fire, the Smoke Alarm did not have a battery in it and the speaker had been removed. The Smoke Alarm and the smoke alarm in the bedroom of the premises were examined by Mr Munday and Mr Kelly, the expert fire investigators instructed by,

respectively, the respondents and the appellant. They also examined what was described as an "exemplar" smoke alarm, which was a smoke alarm that was installed at the appellant's parents' house at the same time as the Smoke Alarm was installed at the premises, and which was of the same make and model (Clipsal Lifesaver 755) as the Smoke Alarm. The primary judge found that the exemplar smoke alarm was identical to the Smoke Alarm and the smoke alarm in the bedroom of the premises.

4. Mr Munday and Mr Kelly agreed in their joint report that the sensitivity of the Smoke Alarm would have been such to detect smoke from the kitchen at a relatively early stage compared to the overall fire development.

The fire

1. The primary judge made no findings as to the cause of the fire.
2. As to its progress, the primary judge accepted the evidence of Mr Munday. Mr Munday explained that, once ignition occurred in the kitchen and flames were produced, smoke would spread through the open plan lounge area at, or close to, ceiling level. The primary judge found that, had the Smoke Alarm been operational, it would have sounded its siren at this very early stage of smoke reaching the ceiling of the loungeroom. As the fire spread to other combustibles in the kitchen, it would have grown rapidly, producing large quantities of thick smoke and the depth and temperature of the hot gas layer under the ceiling would increase. At around this point the kitchen window would have failed, which would speed up the growth of the fire, causing the layer depth under the ceiling to increase. When the deceased stood up in the loungeroom it is likely that he encountered a smoke and hot gas layer which was already deep enough to affect his eyes and airways and to cause him to become disorientated, walking towards rather than away from the fire. Mr Munday considered this the most likely explanation for the deceased being unable to leave the premises.

Issue one: pressing the test button on the Smoke Alarm (ground 3 of the notice of appeal)

1. The primary judge accepted the evidence of Mr Munday, based upon his examination of the exemplar alarm, that pushing the test button on an operational smoke alarm of the same make and model as the Smoke Alarm, with mains power, battery power, or both, would have caused flashing of the red light on the alarm and the siren to activate. There is no challenge to this finding. The primary judge found, however, that the appellant did not press the test button on 14 February 2019 when the deceased and Ms Alderson became tenants of the premises.
2. At [63] of his judgment, the primary judge said:

"As was his evidence, closing arguments for the Defendant conceded that the Defendant chose not to "bother" to push the test button: T561.45 – T562.15".

1. The appellant contends that this is both a mischaracterisation of the appellant's evidence and of what was said in his counsel's closing submissions at trial. As the appellant contends, the issue of whether the appellant pushed the test button on the Smoke Alarm at the commencement of, or during, the deceased and Ms Alderson's tenancy is a critical issue in the appeal. If at either of those times he did so, and found that the Smoke Alarm was fully operational, then the contentions of breach of duty would fall away and it would in any event be apparent that the Smoke Alarm must have been tampered with after the time when the test button was pushed. It is for this reason that, logically, this issue must be considered first.
2. The appellant's evidence in chief was that he had observed the smoke alarms at the premises during the time when it was vacant (between Ms Proctor leaving and the deceased and Ms Alderson becoming tenants). His evidence as to this was:

"Q. What did you see when you observed the fire alarm?

A. There was no green light, because the AC power was removed and turned off to the house. There was no--

Q. Did you hear anything?

A. There was no audible beeping.

Q. What did that tell you?

A. That the battery was still fine."

1. He was not asked and did not volunteer anything about seeing a red light on the Smoke Alarm during the period when the premises were vacant.
2. On 14 February 2019, the appellant attended the premises to complete what he described as "the lease paperwork". He was asked questions about what he observed of the Smoke Alarm on this occasion:

"Q. Just before I get there, Mr Gause, on 14 February when you went there, was the power connected?

A. No.

Q. Did you look at the fire alarms?

A. I looked at them and they were physically there.

Q. Did you see any green light?

A. I didn't look for a green light because I didn't expect to see one, because there was no power on to the house.

Q. Did you hear anything coming from the alarms?

A. No."

1. Again, he was not asked and did not volunteer anything about seeing a red light on the Smoke Alarm.
2. On that occasion he completed a condition report. Against the entry "smoke alarms" he did not place a tick in the columns for "clean", "undamaged", "working" or "tenant agrees". In the column for "comments" he wrote "LANDLORD TO ARRANGE". He explained in his evidence in chief:

"That meant that as the power was not on, I would arrange to come back at a later date, once the power was applied to the property, to check the smoke alarms to confirm what the condition of the batteries were, and when the power's -".

1. When asked why he could not check the smoke alarms when the power was off he said "because there would be no green light on the smoke alarm to indicate that it was on." He said that he told the deceased and Ms Alderson that he could not check the smoke alarms when the power was not on and that he would check them when the power was on. He was asked what he did after this conversation. He responded that they completed the lease paperwork and he then gave the deceased and Ms Alderson the keys to the premises.
2. Ms Alderson's evidence in cross-examination was that on 14 February 2019 when she signed the lease, the appellant said that if there were any problems with the smoke alarm that they were to contact him. Narelle Heafey was also at the premises on 14 February 2019 during the conversation between Ms Alderson, the deceased and the appellant. She said that she was inside but overheard the appellant say that he had to come back to put batteries in the smoke alarm. John Heafey was also present on that occasion. His evidence was that the appellant said to the deceased that no-one had been in the house for two years and he had to come back to check the smoke alarm. The primary judge found that John Heafey's account of what occurred on 14 February 2019 was "the most reliable and complete oral evidence".
3. On 16 February 2019, the appellant sent text messages to the deceased telling him that he had a couple of smoke detector batteries, but it was common ground that he never took the new batteries to the premises.
4. The appellant's evidence was that he went to the property again about a week after the lease paperwork was completed to sign Centrelink papers for Ms Alderson. He was in the lounge room for about five minutes. He gave evidence that he made an observation of the Smoke Alarm on this occasion and when asked what his observation was, he said:

"That was on the ceiling. It was – I walked over to it. It was powered up, had the green LED light on, and it was making no audible sounds".

1. He said that the green light told him that the mains were connected and that the absence of any audible sound told him that "the battery within the unit was okay. Fine". Whilst nothing turns on this, I would accept the appellant's contention that the primary judge erred in interpreting this as evidence that the appellant inspected the Smoke Alarm for about five minutes. The appellant's evidence was that he was in the loungeroom for five minutes, not that he was inspecting the Smoke Alarm for the whole of this time.
2. He said that he went inside the house on one further occasion, in March, and again observed the Smoke Alarm. He said he did not hear anything on that occasion and that he did not look for a light on the Smoke Alarm because "I'd previously done that". He said that during the deceased and Ms Alderson's tenancy he did not receive any complaints about the smoke alarms at the premises.
3. In his evidence in chief, the appellant said nothing about seeing a red light on the Smoke Alarm either during the period when the premises were vacant, or before or during the deceased and Ms Alderson's tenancy. He also said nothing about pressing the test button at any time during these periods.

4. In cross-examination the appellant agreed that he knew that:

"in order to see if a battery is installed and a speaker is working [in smoke alarms such as those at the premises], you press the button, and it emits a sound."

1. He also agreed that pushing the test button was one way of seeing "whether the alarm is working with a battery and an audible speaker".
2. He said that he had "done that" before and when asked if he had done it at the premises he said: "Yes, I recall, yes", and that "[a]t some point, I would have done that". He clarified that this was "[a]t some point in – during my ownership of the property while alarms are installed." The following passage of evidence followed:

"Q. Would it be - did you do that before Ms Alderson and Mr Heafey moved in, in 2019?

A. At what time, immediately?

Q. Immediately before?

A. No, I don't know. I can't recall doing it.

HIS HONOUR: No what? What came after no?

CAMPBELL: I can't recall doing that.

Q. That would have been a way to test the alarms, I want to suggest to you, even if the power was off. Would you accept that?

A. If the power had been off, that could be a way to check it.

Q. All right.

A. But the power was not on, so it made sense to wait till the power come back on."

1. As to this evidence, the primary judge found at J[125]:

"I considered him to deliberately limit and compromise the significance of his omission to press the test button given his evidence (T 196. 1 – 198. 5) because he was aware that pressing the test button was the appropriate test if he wanted 'to make sure that [a smoke alarm was] working', whether or not it was receiving mains power. It occurred to me that his answer was both manufactured and obfuscating so as to avoid answering against interest."

1. As to the appellant's answer "[n]o, I don't know. I can't recall doing it", the primary judge found that this answer "was given when he knew pressing the test button was the regular test procedure and he had omitted to perform that simple test". The primary judge also observed that the appellant had said nothing in his evidence in chief about pressing the test button, and that his evidence did not explain why he did not press the test button on any of the occasions when he was in the premises at the beginning of, or during, the deceased and Ms Alderson's tenancy. The primary judge found that there was no logical reason to wait for the mains power before pressing the test button and noted that the appellant's evidence was "that he did not press the test button when he checked the loungeroom alarm after mains power was connected". As to the former, given the appellant's evidence that the test button tested the speaker and the battery function in a smoke alarm, there is no error in his Honour's observation.

2. The primary judge continued at J[130]-[131]:

"These observations of the Defendant's answers to questions asking why he did not press the test button gave me the impression that he was unwilling to give answers which might be against his interest and that this was in contrast to his methodical, almost mechanical answers during examination-in-chief concerning his inspections of the smoke alarms.

Taking his evidence of his inspections of the smoke alarms at its highest, he in fact only checked whether mains electrical power was being received and only in regard to the loungeroom alarm. He chose not to check that the smoke alarms were operational."

1. The appellant also subsequently gave evidence that at the commencement of the tenancy "[his] intention was to come back and check [the Smoke Alarm] once the power was on".

2. The appellant contends that the primary judge erred in finding that the appellant did not press the test button at the premises at the beginning of, or during, the deceased and Ms Alderson's tenancy. That contention should be rejected. The primary judge observed the appellant giving evidence and made adverse credibility findings against the appellant. The primary judge was entitled to do so. As regards such findings, the primary judge plainly had advantages and appellate caution is apt: see [9] above. In any event, the primary judge properly placed weight on the fact that the appellant did not at any time during his evidence in chief suggest that he pressed the test button on the Smoke Alarm on any of the occasions when he described observing it. Had the appellant pressed the test button on any of those

three occasions, it is difficult to understand why he would not have mentioned that in his evidence in chief or would have had no recollection of doing so. This is particularly so given the detail that the appellant did give of the observations he made and the conclusions that, at that time, he drew from those observations. This suggests that the appellant had a recollection of the instances when he observed the Smoke Alarm both during the period when the premises were vacant and at the beginning of, and during, the deceased and Ms Alderson's tenancy.

3. The primary judge was also entitled to interpret the appellant's evidence extracted at [36] above as evidence that he did not have any recollection of pressing the test button on the Smoke Alarm at the beginning of the deceased and Ms Alderson's tenancy of the premises. That is the most natural meaning of the words "I can't recall doing it".
4. I would also reject the appellant's contention that the primary judge mischaracterised his counsel's submission at trial. During closing submissions at trial, the following exchange occurred between senior counsel for the appellant and the primary judge:

"HIS HONOUR: We know that he has in the past pressed the button, which has written on it to press the button to test the battery, and we know he didn't do it.

TURNBULL: That's right."

1. Whilst I have placed no weight on this in the analysis set out above, the primary judge did not err in characterising this as a concession that the appellant did not press the test button at the beginning of, or during, the deceased and Ms Alderson's tenancy of the premises.
2. Ground 3 should be rejected.

Issue two: the date of tampering with the Smoke Alarm (ground 1 of the notice of appeal)

1. As the appellant submitted, a second key issue as to liability before the primary judge was whether the respondents had discharged their onus of establishing that tampering with the Smoke Alarm, to remove the speaker and the battery, occurred prior to the deceased and Ms Alderson's tenancy (there was no suggestion on appeal that the battery and speaker were removed on separate occasions). The primary judge found that they had. The primary judge found that on the evidence there was "absolutely no reason for anyone during the tenancy to have tampered with the alarm to silence the speaker", and also relied upon evidence, set out below, that the Smoke Alarm sounded and caused a nuisance during Ms Proctor's tenancy of the premises.
2. The appellant contends that the finding that the battery and speaker was removed before the deceased and Ms Alderson's tenancy commenced was not open on the evidence. He contends that it was no more than a hypothesis which the evidence did not positively exclude, and that there was no evidence that could prove, on the balance of probabilities, that the tampering with the Smoke Alarm occurred before or after the commencement of

the deceased and Ms Alderson's tenancy. The appellant also contends that the primary judge misstated or overstated the effect of Ms Alderson's evidence, and wrongly placed weight upon her evidence, in reaching this finding. He contends that these errors contributed to the primary judge erroneously finding that the respondents had discharged their onus of proving this key element of their case.

3. It is convenient to start with the appellant's criticism of the weight which the primary judge placed on Ms Alderson's evidence. In this regard, the appellant relies upon the primary judge's rejection of Ms Alderson's evidence as to there being only one smoke alarm at the premises, being in the hallway (and not the loungeroom), and as to electricity having been connected at the premises on 14 February, rather than 15 February (as found by the primary judge). The appellant also contends that Ms Alderson's evidence that she never saw a green light on the Smoke Alarm is inconsistent with the primary judge's finding that the appellant relied upon there being a green light showing on the Smoke Alarm when he attended the premises as well as the evidence as to how the Smoke Alarm operated.
4. The difficulty with these contentions is that the primary judge, who had the benefit of observing Ms Alderson give evidence, found that these mistakes of fact did not undermine her reliability. That finding was open to his Honour. As the primary judge observed, there was limited cause for Ms Alderson to closely observe the smoke alarms prior to the fire. It follows that issue two should be addressed on the basis that the factual mistakes made by Ms Alderson in her evidence did not undermine the reliability of her other evidence.
5. Evidence going to the time of tampering comes from a variety of different sources. This evidence must be considered in the context of the conclusion set out above that the appellant did not check the alarm by pushing the test button at the commencement of, or during, the deceased and Ms Alderson's tenancy of the premises. There was thus no test carried out, either before or during that tenancy, that could have detected whether the speaker was working on the Smoke Alarm.

Ms Proctor's evidence

1. As the primary judge recorded, Ms Proctor gave evidence of the Smoke Alarm sounding and causing a nuisance during her tenancy. In her evidence in chief, she said that it "kept going off" and sounding an alarm and that every time her daughter turned on the dryer in the laundry the Smoke Alarm would go off. She said that when that happened, she would shut the laundry door and open the back door so that the heat would go out the back door and not into the house. In cross-examination, Ms Proctor explained that her daughter was responsible for washing her own (and her partner's) clothes and that her daughter first had the problem with the Smoke Alarm going off a couple of days after she moved the dryer into the premises. Her evidence was that even after they came up with the plan to open the back door and close the laundry door, from time to time the Smoke Alarm still went off because her daughter would "always forget to shut the doors".

2. Ms Proctor also agreed that the Smoke Alarm may have gone off when she was not at the premises, and that she spent the majority of her time at her mother's house up the road because her mother had cancer. When it was put to her that "it became a bit of a nuisance" she said:

"I wouldn't say it was just a nuisance. It was just common sense, really, that the hot air is going to come out into the house and it's going to set the alarms off."

1. Ms Proctor's evidence was not, however, that the Smoke Alarm continued to go off right up to the end of her tenancy. Her evidence did not go beyond agreeing that "from time to time" the Smoke Alarm "still went off". Contrary to the appellant's contention, her evidence that the Smoke Alarm went off from time to time did not establish that the speaker was still in the Smoke Alarm at the end of Ms Proctor's tenancy.
2. That evidence, which the primary judge accepted, discloses a possible reason why the battery and speaker may have been removed from the Smoke Alarm during Ms Proctor's tenancy. As the primary judge found, a person "would only have had cause to remove the siren if the alarm was annoyingly beeping or sounding its alarm". Whilst this evidence does not itself prove on the balance of probabilities that the Smoke Alarm was tampered with during Ms Proctor's tenancy of the premises, it is evidence that is relevant, together with all other available evidence, to the question of whether the evidence as a whole established that the Smoke Alarm was tampered with before the commencement of the deceased and Ms Alderson's tenancy.
3. Contrary to the appellant's submission, the primary judge was entitled to conclude that the Smoke Alarm was tampered with before the start of the deceased and Ms Alderson's tenancy irrespective of the fact that it was not put to Ms Proctor that she had tampered with the Smoke Alarm. In circumstances where the evidence indicated that a number of people lived at the premises during Ms Proctor's tenancy, and that the person who had an ongoing issue with the Smoke Alarm going off was Ms Proctor's daughter, and not Ms Proctor, an inference could properly be drawn that the Smoke Alarm was tampered with before the start of the deceased and Ms Alderson's tenancy without it having been put to Ms Proctor that she herself tampered with it. And, contrary to the appellant's submission, there is no possible unfairness in the primary judge's conclusion being reached without counsel for the appellant having explored with Ms Proctor the possibility that her daughter may have tampered with the Smoke Alarm.
4. Ms Proctor also gave evidence that she replaced the batteries in the Smoke Alarm six and twelve months into her tenancy and again at the end of the tenancy. The primary judge found, however, that she had a "poor recollection of the smoke alarms, other than of the experience of the lounge room alarm sounding...". This was plainly based upon her evidence including that, when shown the "subject smoke alarms" she did not recognise them, that she had no recollection of the procedure for replacement of batteries in the relevant smoke alarms, and that she had no recollection of using a screwdriver to change the batteries in

circumstances in which the evidence disclosed that a screwdriver was required to do so.

5. Ms Proctor was cross-examined at length as to whether she had any reliable recollection of changing the battery on the Smoke Alarm. In these circumstances it was plain that the reliability of that evidence was being challenged. Contrary to the appellant's submission, the primary judge was entitled to reject her evidence as unreliable without it having been positively put to her that she was wrong: see eg *Scott v Scott* [2022] NSWCA 182 at [61]-[65] (Meagher JA, Ward P and Kirk JA agreeing) considering the rule in *Browne v Dunn* (1893) 6 R 57 at 70-71. Such judgements are quintessentially for the trial judge. It follows that his Honour did not err in attaching no weight to Ms Proctor's evidence of having replaced the batteries in the Smoke Alarm in these circumstances.

Ms Alderson's evidence

1. Ms Alderson's evidence was that on 14 February 2019, before mains power was reconnected to the premises, there were no lights at all on the Smoke Alarm and it was not making any noise. She also gave evidence that she never saw a green light, or any other light, on the Smoke Alarm (which she recalled being in the hallway). She said this worried her "a little" and that when the appellant was at his parent's house next door to the premises, she asked him when he was going to come and replace the battery (the appellant denied that there were any requests from "anybody" concerning the batteries or any other part of the alarms at the property).
2. Given the expert evidence that the Smoke Alarm would have had a green light on it when connected to mains power, Ms Alderson's evidence that she never saw a green light on the Smoke Alarm cannot be correct. That somewhat undermines her evidence to the extent that it suggests that she never saw a red light on the Smoke Alarm either. Her evidence that the Smoke Alarm was not making any noise on 14 February 2019 is, however, corroborated by the appellant's evidence that the Smoke Alarm did not make any noise when he observed it on that day. It is also of some relevance that the primary judge observed that Ms Alderson's evidence was "generally credible", from which I would infer that his Honour accepted her evidence save where he identified it as being wrong.
3. Ms Alderson also gave unchallenged evidence in cross-examination that she never took the battery out of the fire alarm, never touched it, and to her knowledge the deceased never touched the fire alarm. Whilst the appellant had told Ms Alderson to contact him if there were any problems with the Smoke Alarm, she never did so. Ms Alderson's evidence overall supports an inference that, at least to Ms Alderson's knowledge, there were no problems with the Smoke Alarm during the deceased and Ms Alderson's tenancy of the premises. I would, however, agree with the appellant that the primary judge erred in construing Ms Alderson's evidence as evidence that "no one tampered with the smoke alarm during the tenancy". Ms Alderson's evidence did not go that far. I also consider that the primary judge overstated the evidence when he characterised it as "common evidence ... that the lounge room smoke alarm did not beep or sound its siren during [the deceased and Ms

Alderson's] occupation of the Premises". Again, the evidence did not go that far.

4. There is no evidence that the Smoke Alarm ever made any noise during the deceased and Ms Alderson's tenancy of the premises. The appellant in his written submissions in reply on the appeal made it clear that the "appellant does not challenge that the smoke alarm made no sound when Ms Alderson was at home".
5. Whilst Ms Alderson also said that the deceased "would not have touched it", given that she gave no basis for this opinion, I would attach little weight to her opinion as to this. I would add, although nothing in my judgment turns on this, the appellant is correct in his contention that the primary judge erred in characterising Ms Alderson's evidence as being that the deceased did not know how to replace a smoke alarm battery. Her evidence was merely that, to her knowledge, the deceased had not changed the battery in the Smoke Alarm.
6. Ms Alderson was not present at the premises during the two days prior to the fire as she and the children were at her mother's house at that time, and she had no contact with the deceased over this period. Thus, whilst I would infer that the likelihood is that the deceased would have told her if the Smoke Alarm had gone off or if he had tampered with it prior to the last two days, there remains the possibility that something happened in the two days before the fire which caused the deceased to do so.
7. The appellant submitted that this possibility meant that no conclusion could be drawn on the balance of probabilities that the Smoke Alarm was not tampered with by the deceased during the two days before the fire. In this regard the appellant also relies upon the fact that there was evidence that the deceased was a smoker and was having a smoke on the balcony when his mother called in at around 8 pm on the evening of the fire. Whilst the statement of Detective Senior Constable Phillpott says that Mr Schweickle, fire investigator for New South Wales Fire and Rescue, had been told that the deceased did not smoke inside the house, senior counsel for the appellant submitted that there was nonetheless a distinct possibility that at some time during the two days before the fire the deceased smoked a cigarette in the lounge room which set off the Smoke Alarm and that in response the deceased tampered with the Smoke Alarm.
8. Given the analysis of the expert evidence set out below, it is unnecessary to reach any conclusion as to the inferences to be drawn from this evidence. Had it been necessary to do so, I would have accepted the appellant's contention that the possibility that the deceased tampered with the Smoke Alarm in the two days before his death cannot be excluded. Nonetheless, applying a test of the balance of probabilities, I would have concluded that Ms Alderson's evidence, together with the evidence of Ms Proctor discussed above, supported a conclusion that the Smoke Alarm was not tampered with after the start of the deceased's and her tenancy. There is evidence of the Smoke Alarm causing a degree of nuisance during Ms Proctor's tenancy, and no evidence of it going off at all during the deceased and Ms Alderson's tenancy. As I have already set out, Ms Alderson's evidence also supports the

inference that neither she nor the deceased tampered with the Smoke Alarm in the period up to the last two days before the fire. Whilst none of this evidence excludes a degree of doubt, it suffices to show that it is more likely than not that tampering occurred prior to 14 February 2019.

Expert evidence

1. Mr Munday and Mr Kelly gave evidence as to the expected operation of the Smoke Alarm, based upon their observations of the operation of the exemplar smoke alarm. Both experts prepared individual reports and a joint report and also gave oral evidence. The following inferences as to the condition of the Smoke Alarm at various points in time can be drawn from this evidence, when considered in the context of the evidence set out above.
2. By way of context, both experts examined the Smoke Alarm and said that the speaker and battery had been removed prior to the fire. They also explained from their respective tests that the alarm activated in the fire, and from Mr Munday's tests it was apparent that this would have involved a red flashing light but no audible sound (the speaker having been removed).
3. First, the experts both said that if the Smoke Alarm had no mains power or battery power, there would have been no green or red light showing and it would not beep. The experts also agreed that if the Smoke Alarm had been operational, and operating under functioning battery power only, the green light would not be illuminated, a red light would be seen and there would be an intermittent sound warning that the power was off.
4. The appellant's observations during the period when the premises were vacant, and when he attended the premises on 14 February 2019 (prior to mains power being reconnected), strongly suggest that there was no battery power to the Smoke Alarm at that time. His evidence was clear that there was no audible beeping on either occasion. Ms Alderson similarly said that there was no noise from the Smoke Alarm prior to power being reconnected to the premises.
5. Moreover, given the obvious benefit to his case of such evidence, if the appellant had seen a flashing red light when he made his observations (which would have indicated that at that time the Smoke Alarm had a functioning battery), it would have been expected that the appellant would have been asked about this and have said so during his evidence in chief. As is apparent from the extracts from his oral evidence in chief set out at [22] and [24] above, he did not mention seeing a red light on the Smoke Alarm when he observed it during the period of vacancy and on 14 February 2019, and his counsel did not ask him to continue his answer after interrupting it. This gives rise to an inference that he did not observe any flashing red light on the Smoke Alarm when he inspected it during the period when the premises were vacant: *Commercial Union Assurance Co of Australia Limited v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418, applying the principles in *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8 to the situation where a party fails to ask questions of a witness in chief;

Russo v Aiello (2003) 215 CLR 643; [2003] HCA 53 at [11] (Gleeson CJ).

6. It follows that the expert evidence, together with the evidence of the appellant and Ms Alderson, strongly suggests that there was either no battery in the Smoke Alarm, or the battery was completely depleted, when the appellant made his observations during the period that the premises were vacant and in the period prior to power being reconnected to the premises.
7. Second, the experts both gave oral evidence that if there is a low or dead battery in a smoke alarm such as the Smoke Alarm and the mains power is switched on, the alarm will emit an intermittent alarm or sound to indicate low or depleted battery charge. The experts also agreed that if the Smoke Alarm had been operational and operating under mains power but with the battery removed, it would have been showing only a continuous green light. The primary judge found that it would also have been showing a flashing red light but this finding was erroneous as it did not reflect the expert evidence as set out in the joint report (although Mr Munday said in his individual report that the red light would have flashed at 10 second intervals in this scenario. Mr Kelly makes no reference to a red flashing light in his individual report). As to the sound that would have been emitted if there was mains power but no battery in the Smoke Alarm (if fully operational), Mr Kelly's evidence was that the siren would sound at approximately 30 second intervals indicating "no battery status", and Mr Munday described the beeping as being at approximately 40 second intervals.
8. Having regard to the inference that I would draw that there was either no, or a completely depleted, battery in the Smoke Alarm at the commencement of the deceased and Ms Alderson's tenancy, the evidence of Ms Alderson that she never heard the Smoke Alarm make any noise, and the evidence of the appellant that he did not hear any audible sound during any of his observations of the Smoke Alarm, it necessarily follows that the speaker on the Smoke Alarm must have been removed prior to 15 February 2019 when the mains power was connected to the premises. Irrespective of whether there was no battery in the Smoke Alarm, or the battery in the smoke alarm was dead or low, an audible sound should have been emitted from the Smoke Alarm if it had an operative speaker at that time. Whilst it is possible that an intermittent sound was emitted and neither Ms Alderson nor the appellant noticed this, this seems to me to be highly unlikely. Having regard to the expert evidence, the evidence as a whole shows that it is more likely than not that the Smoke Alarm had been tampered with before the start of the deceased and Ms Alderson's tenancy. Consistent with *Luxton v Vines* (1952) 85 CLR 352 at 358; [1952] HCA 19 (Dixon, Fullagher and Kitto JJ), that suffices to meet the civil standard of proof.
9. Both experts also examined the smoke alarm from the bedroom at the premises. Mr Munday found that there was a failure in the circuitry, which may have occurred before the fire, and had this been the case it would have been non-functional at the time of the fire. He clarified in his oral evidence that he did not find any physical evidence to suggest that the alarm could not or was not working prior to the fire. Mr Kelly identified that the Smoke Alarm was not functional at the time of his testing but he did not find any technical fault and his

evidence was that he had looked at the components and hadn't seen any failure indicated and, on that basis, assumed that it was working before the fire. Mr Munday said he was unable to determine whether the failure in the circuitry of the smoke alarm from the bedroom occurred prior to or as a result of the fire. Mr Kelly also found that, at the time of his examination, the 9 volt battery in this smoke alarm had an output of a "couple of volts. I don't remember specifically how many, but it still had a small amount of charge left in it", which he said may have been a consequence of the fire.

10. When asked whether the level of charge in that battery would have been sufficient for the smoke alarm to have emitted the low voltage warning beep when it was reconnected to the power supply, Mr Kelly replied that he did not know what level the battery charge would have been when the power was reconnected in order to say whether it would have indicated a flat battery or not. There are certainly questions that arise as regard the smoke alarm from the bedroom. If the battery was functional, then it would have been expected to make an audible sound whilst the premises were vacant and in the period prior to mains power being connected on 14-15 February 2019, yet there is no evidence to suggest that any of the appellant, the deceased or Ms Alderson heard any sound from this alarm. If the battery was not functional, then it would have been expected that this smoke alarm would have made an audible sound during the deceased and Ms Alderson's tenancy.
11. No answers to these questions about the smoke alarm from the bedroom can be derived from the evidence before the primary judge. The appellant's submission that the evidence of Mr Kelly's testing of the battery in the smoke alarm in the bedroom showed that "the batteries were almost certainly still operative at the time that the fire occurred" must, however, be rejected. Mr Kelly's evidence as set out above is inconsistent with such a conclusion being drawn from his test results and Mr Munday was not asked about this.
12. This analysis of the expert evidence, and its significance, makes it unnecessary to consider what, if any, conclusions can be drawn as to whether or not the red light on the Smoke Alarm was intermittently flashing at any time after the mains power was connected to the premises on 15 February 2019.

Conclusion as to ground one

1. It necessarily follows that ground one of the notice of appeal should be dismissed. Whilst the primary judge reached his conclusion by a different process of reasoning, there is no error in his Honour's conclusion that a reasonable and definite inference should be drawn that the Smoke Alarm was tampered with before the start of the deceased and Ms Alderson's tenancy of the premises. Moreover, contrary to the appellant's contention, the reasoning of Gummow, Hayne and Heydon JJ in *Roads and Traffic Authority v Royal* [2008] HCA 19 at [31] does not in any way suggest error in the primary judge's conclusion. Their Honours were, in that paragraph, addressing whether, on the facts of that case, it would be proper to infer that causation was established from the fact of breach of duty combined with the occurrence of an accident of the kind that might thereby be caused. No such reasoning was engaged in by

the primary judge in this case.

2. To the extent that the finding that the Smoke Alarm was tampered with before the start of the deceased and Ms Alderson's tenancy implicitly involves a finding that some unidentified person at some unidentified time tampered with the smoke alarm, I accept the appellant's contention that this involves serious misconduct and that the civil standard of proof should be approached consistently with s 140(2) of the Evidence Act 1995 (NSW) and the principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362; [1938] HCA 34 (Dixon J) and *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 67 ALJR 170. Notwithstanding the seriousness of the implicit finding of serious misconduct, the evidence set out above establishes on the balance of probabilities that the Smoke Alarm was tampered with prior to the start of the deceased and Ms Alderson's tenancy.
3. Given my conclusion, it is unnecessary to consider the appellant's complaints about the primary judge's approach to the issue before him as to whether the defendant was entitled, on his pleadings, to raise contentions as to when the Smoke Alarm was tampered with. It is also unnecessary to consider the appellant's criticisms of the primary judge's approach to the issue of causation.

Issue three: whether reasonable care required that the appellant press the test button on the smoke alarm (ground 2 of the notice of appeal)

1. There is no challenge to the primary judge's findings that the appellant, as landlord of a domestic premises leased to the deceased and Ms Alderson for occupation by their family, owed a duty to take reasonable care to avoid foreseeable risk of harm to those persons, and that this duty reasonably required that he would inspect the premises to assess their safety. The appellant also does not challenge the primary judge's finding at J[149]-[150] that this duty included a duty to assess whether the Smoke Alarm was working. The appellant's challenge is to the primary judge's conclusion that reasonable care required that the appellant press the test button on the Smoke Alarm when he inspected it. The appellant contends that this finding "elevates the significance of the need to press the test button", although he concedes that pressing the test button on the smoke alarm was an available means to test that the Smoke Alarm was operational, as an alternative to the means in fact adopted by the appellant. The appellant's key contention is that what he did to check that the Smoke Alarm was operational at the start of the deceased and Ms Alderson's tenancy was reasonable.
2. The factual context within which the primary judge found that the appellant was in breach of duty includes the following.
3. First, there is no evidence of the appellant pushing the test button on the Smoke Alarm at any time after the commencement of Ms Proctor's tenancy in 2016. The appellant also knew that the Smoke Alarm had been in place at the premises from October 2002, so was over 16 years old by the start of the deceased and Ms Alderson's tenancy of the premises. In any event, as the appellant knew, the premises were vacant with no mains power between April

2018 and February 2019. He also knew that he needed to check the Smoke Alarm at the commencement of the deceased and Ms Alderson's tenancy of the premises. That is clear from the entries he made on the condition report for the premises on 14 February 2019. In his evidence in chief he said that he had to do so to "confirm what the condition of the batteries were". I would in any event infer that reasonable precautions for the safety of inhabitants of the premises at the start of a tenancy would include checking that the battery on the Smoke Alarm had adequate charge for its ongoing functioning in circumstances where the Smoke Alarm had not been checked for some time and had been without mains power for close to a year.

4. Second, as is positively relied upon in the appellant's written submissions on appeal, the appellant was aware that if the battery on the Smoke Alarm was in good working order a red light on its face would flash every 60 seconds and that if the battery was low, missing or flat, the siren would sound more frequently. But the appellant gave no evidence of looking for, or seeing, any flashing red light on the Smoke Alarm at any time. Breach of duty must, thus, be considered on the premise that the appellant did not check for one key indicator of whether or not the battery was functioning. The other key indicator, that there was no audible sound coming from the Smoke Alarm, could be consistent either with the battery functioning or with a non-functioning speaker.
5. Third, the appellant was aware of the test button on the Smoke Alarm and that this was a button to press to see "if a battery is installed and a speaker is working". The appellant's evidence was that he had done that at some time during his ownership of the premises. It is clear from the evidence of the experts, and I would infer from the above also known by the appellant, that without pushing the test button it was not possible to check whether the Smoke Alarm had a functioning speaker.
6. The upshot of this evidence is that the appellant knew that there was a simple and easy check that he could perform to ensure that the speaker was working, and that without performing that check he could not be sure either that the speaker was working or, in the period prior to mains power being connected, that the battery in the Smoke Alarm was functioning. Even if this required that he use a ladder or step on a chair, pushing the test button on the Smoke Alarm was not an onerous endeavour. The significance of doing so is greater in circumstances where the appellant gave no evidence of checking to see whether the red light on the Smoke Alarm was flashing. He thus could not rely upon that as an indicator of battery function.
7. As the primary judge found, the nature of the risk of a faulty smoke alarm meant that it was discrete or hidden, which made the appellant's duty to perform the inspection more onerous, compared to the level of care required for an obvious and less dangerous risk: *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361; [2011] HCA 11 at [43] (French CJ and Gummow J).

8. Applying the principles in s 5B of the Civil Liability Act, there is no error in the primary judge's conclusion that the appellant was in breach of the duty of care he owed to the occupants of the premises. The risk that the Smoke Alarm may not operate properly in the event of a fire was foreseeable and highly significant. If it occurred, serious harm would likely be caused. The precaution was not onerous.
9. Ground 2 of the notice of appeal should be rejected.

Issue four: the deceased's intoxication and s 50 of the Civil Liability Act (raised by the notice of cross-appeal)

1. As already stated, the primary judge found that the deceased was, at the time of the fire, intoxicated to the extent that his capacity to exercise reasonable care and skill was impaired so as to engage s 50(1) of the Civil Liability Act. His Honour also found that, whilst it was likely that the deceased would have died even had he not been intoxicated (such that s 50(2) of the Civil Liability Act was not engaged), his low or even minimal level of impairment could not be found to have not contributed in any way to the cause of death. Thus, s 50(3) of the Civil Liability Act was engaged and contributory negligence was presumed under s 50(4) of the Civil Liability Act. The respondents contend that the primary judge's findings under both s 50(1) and (3) of the Civil Liability Act are erroneous.
2. Whilst the respondents accept that the deceased had a level of intoxication from various sources in his system, the respondents submit that on the evening of 8 April 2019 the deceased was not impaired as regards his ability to do "the sort of things people do in their own home". Thus, they contend, the threshold in s 50(1) of the Civil Liability Act was not crossed.
3. As relevant, s 50 of the Civil Liability Act provides:

50 No recovery where person intoxicated

- (1) This section applies when it is established that the person whose death, injury or damage is the subject of proceedings for the recovery of damages was at the time of the act or omission that caused the death, injury or damage intoxicated to the extent that the person's capacity to exercise reasonable care and skill was impaired.
- (2) A court is not to award damages in respect of liability to which this Part applies unless satisfied that the death, injury or damage to property (or some other injury or damage to property) is likely to have occurred even if the person had not been intoxicated.
- (3) If the court is satisfied that the death, injury or damage to property (or some other injury or damage to property) is likely to have occurred even if the person had not been intoxicated, it is to be presumed that the person was contributorily negligent unless the court is satisfied that the person's intoxication did not contribute in any way to the cause of the death, injury or damage.

- (4) When there is a presumption of contributory negligence, the court must assess damages on the basis that the damages to which the person would be entitled in the absence of contributory negligence are to be reduced on account of contributory negligence by 25% or a greater percentage determined by the court to be appropriate in the circumstances of the case.
1. Section 48 of the Civil Liability Act defines being "intoxicated" as being "under the influence of alcohol or a drug (whether or not taken for a medicinal purpose and whether or not lawfully taken)".
 2. As to the application of s 50(1) of the Civil Liability Act, the first question to address is what act or omission caused the death of the deceased for the purposes of the subsection. The respondent's contention that this was the appellant's negligence at the time of inspecting or observing the Smoke Alarm should be rejected. As was explained by Ipp JA, with whom Beazley JA (as her excellency then was) and Hunt AJA agreed, in *Russell v Edwards* (2006) 65 NSWLR 373; [2006] NSWCA 19 at [40], for the purposes of s 50(1) of the Civil Liability Act it is necessary to identify one proximate or direct cause (out of potentially many operative causes) of the relevant harm. Relevantly, for that purpose the act or omission that caused the death of the deceased was the failure of the Smoke Alarm to operate as it should have after the fire started on 8 April 2019, which had the effect that the deceased could not escape from the premises. The respondents' contention to the contrary should be rejected. Although unnecessary for my decision, I would add that I would, in any event, agree with the observation of Basten AJA in *Payne trading as Sussex Inlet Pontoons v Liccardy* [2023] NSWCA 73 ("*Payne v Liccardy*") at [80] that it is implausible that Parliament intended, in s 50(1) of the Civil Liability Act, to exclude the application of s 8(b) of the Interpretation Act 1987 (NSW) and to require focus upon only a single act or omission as the cause of injury.
 3. The respondents also contend that the relevant question under s 50(1) of the Civil Liability Act is whether the person (here the deceased) had the capacity to exercise reasonable care and skill in the position that they were in prior to the risk of harm eventuating. Thus, they say the relevant question here was whether the appellant had proved that the deceased's capacity to exercise reasonable skill and care was impaired when he was alone, asleep in his lounge room. They contend that it is wrong to approach s 50(1) of the Civil Liability Act by asking whether the appellant had proved that the deceased's capacity to exercise reasonable care and skill to protect himself from the fire that was burning in the premises on the evening of 8 April 2019 was impaired.
 4. The question under s 50(1) of the Civil Liability Act is whether the deceased's capacity to exercise reasonable care and skill in the position in which he found himself was impaired. In *Amanda's On The Edge Pty Ltd v Dries* [2011] NSWCA 358 ("*Amanda's On The Edge*") the plaintiff had consumed some alcohol and had fallen six feet from the top of a concrete wall adjacent to a garden bed where he was walking without any lighting. Allsop P (Beazley and Giles JJA agreeing) explained at [36] that the "extent" of intoxication required for a finding under s 50(1) of the Civil Liability Act:

"will depend on the circumstances and the subject or subjects in respect of which reasonable care and skill may be impaired. Operating machinery, driving a car or flying a plane may be tasks where very little alcohol would be required for the person's capacity to exercise skill and care to be impaired (adequately satisfied by six beers and two bourbons). Here, the care and skill was walking over open ground to get to a destination. There was no reason for him, in the dark, to suspect such a danger as befell him."

1. This explanation of the operation of s 50(1) of the Civil Liability Act was cited with approval by Beech-Jones JA (with whom Brereton JA and Basten AJA agreed) in *Payne v Liscardy* at [43]. In that case, the negligence was in the boat captain having manoeuvred a boat such that the plaintiff, who had jumped in the water, had to swim across a body of water adjacent to the propeller in order to board the boat. As he did so his leg was damaged by the propeller. Beech-Jones JA, at [63], found that the question under s 50(1) of the Civil Liability Act was whether the plaintiff's capacity to exercise reasonable care and skill when swimming towards the stern of a boat with a propeller motor was impaired. This was because the act of swimming towards a propeller motor required the exercise of a reasonable level of judgment about one's own safety.
2. Further guidance as to the proper approach to s 50(1) of the Civil Liability Act comes from the judgments of Basten and Brereton JJA in *New South Wales v Ouhammi* (2019) 101 NSWLR 160; [2019] NSWCA 225 ("Ouhammi"), a case where the plaintiff was injured when he fell to the floor and lurched towards the door of a police cell where he was detained at the same time as the police officer closed the door, injuring the plaintiff's thumb. At [39], Brereton JA said:

"There was evidence that he was unsteady on his feet when being taken to the police vehicle; further, his lurching towards the door of the holding cell was consistent with an impaired capacity to exercise reasonable care for himself."

1. By contrast, at [119], Basten JA held that the care and skill required of the plaintiff was "no more than that required to be confined in a robustly safe cell" and his Honour was not satisfied that his "indisputably high level of intoxication was such that his capacity to exercise reasonable care and skill in those circumstances was impaired."
2. It is necessary to reconcile what at first blush appears to be a tension between the approach taken in *Amanda's On The Edge* and that taken in *Payne v Liscardy*. In the former, this Court did not approach s 50 of the Civil Liability Act by asking whether the plaintiff had an impaired capacity to exercise reasonable care and skill in the vicinity of a six foot drop between the garden and the driveway, the presence of which was the specific risk created by the negligence. Allsop P expressly relied in this regard upon the fact that there was no reason for the plaintiff to suspect such a danger. By contrast, in *Payne v Liscardy*, this Court found that the focus of s 50 of the Civil Liability Act was the plaintiff's capacity to exercise reasonable care and skill in the situation of risk (the need to swim towards the propeller) created by the defendant's negligence. Central to this conclusion was the characterisation of

the plaintiff's conduct as "swimming towards the stern of a boat with a propeller". The essence of that reasoning appears to be that the potential danger was readily apparent and thus formed part of the characterisation of the relevant activity being undertaken by the plaintiff.

3. Consistent with the approach in *Amanda's On The Edge* and *Payne v Liccardy*, application of s 50(1) of the Civil Liability Act requires, as a preliminary step, characterisation of the conduct or activity in which a plaintiff is engaged in the relevant circumstances. That is also consistent with the approach of both *Basten and Brereton JJA in Ouhammi*, albeit that the issue of characterisation in that case did not require any consideration of whether the particular danger which eventuated was relevant to the issue under s 50(1) of the Civil Liability Act. Whether the plaintiff had any reason to suspect the danger, or the danger was readily apparent, may be relevant to that characterisation.
4. Turning to the facts of this case, on autopsy the deceased was found to have a blood alcohol concentration (BAC) of 0.051%, and the presence of cannabis (delta-9-THC acid) and prescribed medications at therapeutic levels were detected. This was explicable given that the deceased had attended a birthday celebration on the evening of 8 April 2019 at which he had some alcoholic drinks and smoked 3-4 joints/cones of cannabis. The presence of amitriptyline (Endep) and its metabolite nortriptyline was detected at toxic levels, but the two expert pharmacologists, Drs Robertson and Dauncey, both said that this was likely due to post-mortem redistribution given the evidence that the deceased took Endep, which he was prescribed for back pain and mild depression, at some time after 8 pm on 8 April 2019 (when his mother dropped it in to him) and in the absence of evidence of excessive use. Dr Dauncey said that no firm deduction could be made as to the sedative effect of Endep on the deceased in the 15 minutes or so before the fire as it was not known at what time he took it or how much he took.
5. As to the effect of alcohol and the relevant medications, the only effect relevant to the deceased's capacity to exercise reasonable care and skill that Drs Robertson and Dauncey identified was potential sedation. As to this, Dr Robertson's view was that, on the assumption that the deceased had only taken a therapeutic dose of Endep, there was nothing in the evidence that would suggest that the deceased would not have been able to respond to the noise of a smoke detector and that it was possible, but not probable, that the substances in his blood would have impaired his capacity to wake to a smoke alarm. Dr Dauncey's evidence in the joint report was that the combined effect of the alcohol and Endep "could have prolonged the time it took him to wake" and that common sense would say that the substances in the deceased's blood would have slowed down the rate of waking to the sound of a smoke alarm but said that this was not her area of expertise. As is apparent, Dr Dauncey did not suggest that her opinion in this regard was based on anything other than common sense.

6. Whilst in the concluding paragraphs of Dr Dauncey's individual report she had suggested that the deceased's capacity to "wake quickly, assess the situation, respond swiftly and efficiently and to work out the best strategy for getting out of the room" would probably have been impaired irrespective of whether there was a functioning fire alarm, her more detailed account, earlier in her report (albeit only dealing with the effect of alcohol) was that alcohol would likely have slowed the time it took for the deceased to waken but only "possibly impaired his capacity to quickly respond if there was any such opportunity". She also said that the deceased, having taken both Endep and alcohol, would probably have slept more soundly with the result that his response to the noise, smell and heat of the fire or the smoke alarm would have slowed. This evidence must be seen in the context of Dr Dauncey's evidence in the joint report, set out above, in which she indicated that her evidence as to this was based upon what "common sense would say".
7. In response to a question in their joint report as to whether the substances in the deceased's blood would have impaired his capacity successfully to navigate his way out of the house, Dr Robertson said that there was nothing from a drug perspective that would have created confusion or disorientation. Dr Dauncey said that "the major issue in this case was being overcome by smoke, however his situation would not have been helped if he was in any way sedated by those substances. There is no way to provide an answer to this question".
8. Neither expert gave oral evidence but their individual and joint reports were tendered.
9. There are three ways in which the activity or conduct in which the deceased was engaged could potentially be characterised in this case. First, as contended for by the respondents, the relevant activity or conduct could be characterised as simply sleeping on the sofa in the loungeroom of his house. Second, it could be characterised as sleeping on the sofa in the loungeroom of his house but cognizant of the risk that there was always the possibility that a fire or other hazard may arise. Third, the deceased's activity or conduct could be characterised as waking to a house on fire and a roomful of heat and smoke and having to navigate his way out of the house.
10. Consistent with the approach taken in the case law set out above, it is significant that the deceased had no reason to suspect that on the evening of 8 April 2019 there would be a fire in his house, still less that the Smoke Alarm would not sound. Unlike the plaintiff in *Payne v Liscardy*, he did not undertake an activity which required any particular degree of skill or judgment. He simply went to sleep on the sofa after attending a friend's birthday celebration and having had some drinks, some cannabis and most likely only taking a therapeutic dose of his prescription medication. Just as this Court in *Amanda's On The Edge* did not characterise the plaintiff's activity as walking in the vicinity of, or having to navigate, a six foot drop, which was a danger that the plaintiff had no reason to suspect, the deceased's conduct or activity should not be characterised by reference to the need to navigate his house to escape the fire. That formed no part of the conduct or activity in which he was engaged but was rather a superimposed danger which he had no reason to suspect.

11. It follows from this analysis that the primary judge erred in concluding that, at the time of the act or omission that caused his death, the deceased was intoxicated to the extent that his capacity to exercise reasonable care and skill was impaired for the purposes of s 50(1) of the Civil Liability Act. Whilst it is not entirely clear what findings the primary judge relied upon in support of that ultimate conclusion, the only evidence that he relied upon in his analysis leading to this conclusion was that which went to a "possibility or (in Dr Dauncey's opinion only) a probability" that the alcohol and drugs in the deceased's system may have prolonged the time he took to wake, and "taken at its worst for" the respondents, the expert evidence supported there being "a possibility of there being some low degree of impairment of his ability to exercise reasonable care and skill to navigate his escape from the house". Given the primary judge's (unchallenged) finding that the deceased was not so impaired by intoxication that his ability to hear the Smoke Alarm and escape the premises was relevantly affected, the primary judge must have based his ultimate conclusion as to s 50(1) of the Civil Liability Act by characterising the relevant conduct or activity of the deceased as including waking to the sound or heat of the fire and having to navigate his way out of a room filled with heat and smoke.
12. As there was no evidence that the deceased's capacity to exercise reasonable care and skill whilst sleeping on the sofa at his home on the evening of 8 April 2019 was impaired, s 50 of the Civil Liability Act was not engaged. I would add that, even if the appropriate characterisation of the deceased's conduct or activity for this purpose was that he was sleeping on the sofa in the lounge room of his house but cognizant of the risk that there was always the possibility that a fire or other hazard may arise, the primary judge's unchallenged finding set out above would lead to a conclusion that the deceased's capacity to exercise reasonable care and skill was not impaired. Further, even if the relevant enquiry was one in the context of the deceased having to escape from the premises whilst the room was full of heat and smoke, and not in response to an operating smoke alarm, I would not have found that s 50(1) of the Civil Liability Act was engaged. The question, under the subsection, is whether the deceased's capacity to exercise "reasonable care and skill" was impaired. I would not have found that the evidence which, at its highest, suggested that his awakening to a fire or smoke alarm would have been slower than might otherwise have been the case, sufficed to establish that his capacity to exercise "reasonable" care and skill was impaired.

Conclusion

1. Neither party submitted that this Court should not take the usual approach of ordering that costs follow the event.
2. Given that the orders made by the primary judge on 22 July 2024 are of some complexity, the parties should take reasonable steps to agree orders to reflect the respondents' success on the cross-appeal, and failing agreement, the parties should have leave to file submissions of no more than three pages as to the orders that should be made, in accordance with the timetable set out below.

3. The orders I propose are:

1. Appeal dismissed.
2. Cross-appeal allowed.
3. The appellant to pay the respondents' costs of the appeal and cross-appeal.
4. The parties are to take reasonable steps to agree short minutes of order as to what further orders should be made to reflect the respondents' success on the cross-appeal which should be filed by 5 February 2025. Failing agreement:
 1. The respondents to file submissions of no more than 3 pages in support of their proposed orders by 4 pm on 7 February 2025; and
 2. The appellant to file submissions of no more than 3 pages in support of their proposed orders by 4 pm on 12 February 2025.
1. PRICE AJA: I agree with Stern JA.

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Decision last updated: 20 December 2024

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