Preti v Conservation Land Corporation and Ors [2007] NTSC 25

PARTIES:	NATALE PRETI v CONSERVATION LAND CORPORATION And: SAHARA TOURS PTY LTD (ACN 050 989 216) And: PARKS AND WILDLIFE COMMISSION
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
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Compensation (Fatal Injuries) Act

Baker v Dalgleish Steam Shipping Co [1992] 1 KB 361; *Graham Barclay Oysters Pty Ltd and Anor v Ryan and Others* (2002) 211 CLR 540; *Mulligan v Coffs Harbour City Council* (2005) 223 CLR 486; *Nguyen v Nguyen* (1990) 169 CLR 245; *Public Trustee v Zoanetti* (1945) 70 CLR 266; *Swain v Waverley Municipal Council* (2005) 220 CLR 517; *Swan v Williams (Demolition) Pty Ltd* (1987) 9 NSWLR 172; *Vairy v Wyong Shire Council* (2005) 223 CLR 422; *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; *Wyong Shire Council v Shirt* (1980) 146 CLR 40, cited

REPRESENTATION:

Counsel:

Plaintiff:	R Meldrum QC and S Gearin
First, Second and Third Defendants:	M Grant and J Kelly

Solicitors:

Plaintiff:	Morgan Buckley
First, Second and Third Defendants:	Povey Stirk

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Preti v Conservation Land Corporation and Ors [2007] NTSC 25
No 5 of 2002 (20200969)

BETWEEN:

NATALE PRETI
Plaintiff

AND:

CONSERVATION LAND CORPORATION
First Defendant

AND:

SAHARA TOURS PTY LTD (ACN 050 989 216)
Second Defendant

AND:

PARKS AND WILDLIFE COMMISSION
Third Defendant

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 20 April 2007)

Introduction

[1] Mauro Santo Preti ("the deceased") died on 18 January 1999 at Ellery Creek Big Hole when his head hit a submerged obstacle after he lost his balance and dived into the water. He lost his balance when he was struck by a

French tourist who was attempting to swing on a rope that was attached to the branch of a tree on the bank of the waterhole.

[2] The plaintiff is the father and personal representative of the deceased. He claims damages against the second and third defendants on his own behalf and on behalf of Filomena Preti, the mother of the deceased; Silvia Preti, the divorced wife of the deceased; Melissa Preti, the daughter of the deceased; Gregory Nearco Preti, the son of the deceased; Fabio Preti, the brother of the deceased; and Viviana Villasuso Fernandez Preti (Viviana Preti), the sister of the deceased.

[3] The claim is made under the Compensation (Fatal Injuries) Act (NT). The plaintiff alleges that the deceased died as a result of the negligence of the second and third defendants. The plaintiff's claim against the first defendant was dismissed on 24 August 2006.

The particulars of negligence

[4] The second defendant is sued in its capacity as a tour operator whose tour guide took the deceased to Ellery Creek Big Hole as part of a five day adventure tour of Central Australia. The plaintiff alleges that the second defendant owed a duty of care to the deceased to:

1. Ensure that the deceased was not placed in a situation of danger which it knew or ought to have known existed;

2. Advise the deceased of the danger of submerged rocks in the waterhole;

3. Advise the deceased of the danger of swinging from a rope into the waterhole where there were submerged rocks; and

4. Advise the deceased of the danger of being in the path of people swinging from a rope into the waterhole where there were submerged rocks.

[5] The plaintiff pleads that the second defendant breached its duty of care to the deceased because the second defendant:

1. Failed to warn the deceased of the danger of submerged rocks when it knew or ought to have known of that danger;

2. Encouraged or permitted members of the tour group to swing from a rope into a waterhole where there were submerged rocks; and

3. Encouraged and or permitted the deceased to remain in a position where he was in the path of people swinging from a rope into the waterhole where there were submerged rocks.

[6] The third defendant is sued because at all material times the third defendant had the care, control and management of Ellery Creek Big Hole under s 39(6) of the Parks and Wildlife Commission Act. The plaintiff pleads that the third defendant had a duty of care to avoid foreseeable risk of injury to visitors lawfully visiting the Nature Park and swimming in the Ellery Creek

Big Hole. The scope of the third defendant's duty of care to persons entering the Nature Park included the duty to:

1. Warn of any hidden dangers;

2. Warn of the dangers of submerged rocks in the Ellery Creek Big Hole;

3. Ensure that rope or ropes hanging from trees which might encourage visitors to swing from the bank of the waterhole over submerged rocks were removed; and

4. A duty of care not to permit or encourage visitors to engage in or to assist others to engage in, the activity of swinging on a rope from the bank of the waterhole into the water in an area where there were submerged rocks.

[7] The plaintiff pleads that the third defendant breached its duty of care to the deceased by failing to ensure that:

1. Appropriately placed warning signs were erected advising of the dangers associated with submerged rocks in the waterhole;

2. Rope or ropes hanging from the trees were removed so that visitors were not encouraged to swing from the bank of the waterhole over submerged rocks; and

3. Signs were erected which prohibited the use of rope swings to swing into the waterhole.

[8] The plaintiff says that as a result of the negligence of the second and third defendants the deceased was killed when he was struck by a person swinging from a rope and he fell into the waterhole striking his head on submerged rocks.

The scope of the duty of care acknowledged by each defendant

[9] The second defendant concedes that through its tour guide, Mr Hill, it owed the deceased a general duty of care to take reasonable and practical steps to ameliorate unreasonable or unnecessary risks of injury which the deceased might face during the five day adventure tour of Central Australia. The third defendant admits that it owed the deceased, as a tourist lawfully entering the Nature Park, a duty to take reasonable care to avoid the risk of reasonably foreseeable dangers.

[10] However, both the second and the third defendants deny that they breached the duty of care that they owed to the deceased. The second and third defendants argue that the scope of the duties of care that they respectively owed to the deceased must be determined by asking what a reasonable person in the position of each defendant would have done by way of response to the reasonably foreseeable risk that presented at the time of the deceased's death. The measure of careful behaviour is reasonableness not elimination of risk. Reasonableness may require no response to a foreseeable risk. It was not necessary for either defendant to warn the deceased about the risks to which he was exposed or to remove the rope

swing because the deceased was aware of the relevant risks, which were obvious, and he voluntarily chose to participate in the activity of using the rope swing to enter the water. A reasonable person would not have recognised that any action was required by either the second or third defendant to ameliorate the risk of injury which the deceased faced on 18 January 1999 because the probability of the risk of injury was low and could be avoided by the deceased exercising ordinary care for his own safety. The risk faced by the deceased was not an unreasonable risk.

[11] Leading counsel for the second and third defendants, Mr Grant, also made the following concessions of fact. First, the relevant risk is the risk that was presented by the rope swing hanging over the water at Ellery Creek Big Hole. That risk might have manifested itself in a number of ways. A person may have dropped off the rope early, a person may have overbalanced on the stump and suffered an injury, and a person might have fallen out of the tree and collided with another person and so on. Secondly, the risk that eventuated was foreseeable. Thirdly, the deceased's act of standing in a position where he may be hit by another person swinging on the rope did not constitute a novus actus interveniens but may amount to contributory negligence. Fourthly, the relevant causation question is whether a sign or the removal of the rope would have prevented the deceased from undertaking the activity of swinging on the rope. Fifthly, a regime for the removal of the rope swing at Ellery Creek Big Hole would not have been

impractical or unduly expensive or inconvenient or in conflict with the third defendant's other responsibilities.

[12] The defendants did not concede that the evidence established that either the erection of an appropriate sign or the removal of the rope would have prevented the deceased from participating in the activity of swinging on the rope.

Issues for determination as to liability

[13] The central issue for determination by the court about the liability of the second and third defendants is what, if anything, would a reasonable person in the position of each defendant have done by way of response to the reasonably foreseeable risk that was presented by the rope swing hanging over the water at Ellery Creek Big Hole prior to the deceased's death?

[14] The above question is a question of fact. Resolving the question is not to be undertaken by looking back at what has in fact happened, but by looking forward from a time before the occurrence which resulted in the deceased's death: *Vairy v Wyong Shire Council* (2005) 223 CLR 422. In my opinion both the second and third defendants breached the duty of care that they owed to the deceased. For the reasons stated below the standard of reasonableness required that the third defendant maintain its regime of taking down rope swings at Ellery Creek Big Hole and erect a sign warning about the dangers of using the rope swing such as the sign that was erected at Ellery Creek Big Hole in 2004. The standard of reasonableness required

the second defendant to warn the deceased about the dangers of submerged rocks at the waterhole and to warn the defendant that he should not stand in the path of a person using the rope swing to enter the water.

The facts as to liability

[15] There were five eyewitnesses who gave evidence. They were Jonathan Lonsdale, an Englishman who was a member of the tour group on 18 January 1999, Alan McFarlane and John Frederick Yard, visitors to Ellery Creek Rock Hole who were supervising an under 16 years boys baseball team from New South Wales who were on a sightseeing trip, Peter Leslie Hill, and Birgit Ulbrich, a German medical practitioner who was a member of the tour group on 18 January 1999. Mr McFarlane's wife made a video tape of the members of the tour group swinging on the rope swing. The video tape was tendered in evidence.

[16] In addition, evidence was called from Kurt Bernard Tschirner, who was employed by the third defendant as a senior ranger; David Colin Fuller, who was employed by the third defendant in January 1999 as a senior ranger; Andrew John Bridges, the Director – Southern Region Parks, for the third defendant; and Christopher Mark Day, who was employed by the third defendant as Chief District Ranger.

[17] Having considered all of the evidence as to liability I make the following findings of fact about liability.

[18] Ellery Creek Big Hole is a large permanent waterhole that is part of a creek that is located off Namatjira Drive about 80 kilometres west of Alice Springs. It is surrounded by bush. The waterhole was part of the Ellery Creek Big Hole Nature Park (the "Nature Park"). The Nature Park is owned by the first defendant, the Conservation Land Corporation. At all material times, the Nature Park was controlled and managed by the third defendant. On 22 October 1992 the Nature Park was renamed by gazettal as part of the West McDonnell National Park.

[19] The second defendant is a corporation that is capable of being sued. It carries on an adventure tour business known as Sahara Tours. The five day tour conducted by the second defendant includes a visit to Ellery Creek Big Hole.

[20] The third defendant is a body corporate that is capable of being sued. It was established under s 9 of the Parks and Wildlife Commission Act (NT). The functions of the third defendant are to promote the conservation and protection of the natural environment of the Territory by managing or participating in the management of parks, reserves and sanctuaries established under the Territory Parks and Wildlife Conservation Act or any other Act of the Territory or the Commonwealth. Under s 39(6) of the Parks and Wildlife Commission Act the third defendant has the care, control and management of all land acquired or held by the first defendant.

[21] The deceased was born on 4 January 1961 in Switzerland. He lived in Geneva. His family are Italian and he was fluent in both French and Italian. He was 38 years of age at the date of his death. He left school in 1978. After he left school he worked for his parents in their boulangerie and patisserie shop in Geneva. He completed a three year apprenticeship and he became a qualified baker and pastry chef. Immediately prior to his death the deceased was employed as a car salesman by Mazda in Geneva. The deceased did not speak or understand much English. He spoke the little English that he could in very short simple sentences. The deceased was a strong swimmer and a good diver.

[22] In January 1999 the deceased was holidaying in Alice Springs. While in Alice Springs he purchased the five day tour, on which he died, from the second defendant. The deceased did not request an interpreter or his own personal guide for the tour. The itinerary of the five day tour was as follows. On the morning of the first day the tour would drive from Alice Springs to Ayers Rock (Yulara). In the afternoon of the first day the tour would visit the Olgas and then return to Yulara to camp for the night. On the second day the tour group would participate in activities around Uluru and then drive to Kings Creek Station for the night. On the third day the tour group would drive to Kings Canyon, walk around the rim and visit a swimming spot known as the "Garden of Eden". The walk around the rim is a seven kilometre walk. It included swimming and sightseeing. In the afternoon of the third day the tour group would drive to Wallace Rock Hole

and camp the night. On the fourth day the tour group would travel to Palm Valley and walk through the valley. In the afternoon of the fourth day the tour group would travel to Ormiston Gorge for swimming and to camp for the night. On the final day the tour group would go walking through the gorges in the West MacDonnell ranges including Ellery Creek Big Hole.

[23] The five day tour that the deceased purchased from the second defendant left Alice Springs on 14 January 1999. There were 14 people, including the deceased, on the five day tour which was conducted by Peter Leslie Hill. Mr Hill was employed by the second defendant as a tour guide. He had been working for the second defendant for approximately 12 months prior to 14 January 1999. Mr Hill had lived in Central Australia for about six years. He was a qualified chef and an experienced tour guide. Before working for the second defendant he had worked with VIP Tours in Central Australia for nearly four years.

[24] Before the tour left Alice Springs on 14 January 1999, Mr Hill told the tour group about the itinerary for the first day. He said that they would be camping at a different location each night and that it was very important that they drink a lot of water and stay hydrated in the extreme temperatures that they would experience on the five day tour.

[25] Mr Hill only spoke English. He found that the deceased could understand him if he spoke slowly and clearly. Jonathan Lonsdale, an Englishman on the tour, was able to speak some French. He occasionally interpreted for the

deceased when Mr Hill spoke to the tour group during the five day tour. Mr Hill found the deceased to be very personable and always ready to lend a hand setting up camp and cooking.

[26] At the start of every walk on the five day tour Mr Hill told the 14 members of the tour group about the features they would see on the walk and about any particular dangers that might be present. When the tour arrived at Kings Canyon on the third day of the tour, Mr Hill told the tour group that the waterhole at that location was a rock hole which meant that there were rocks under the water and that they had to be careful getting in and out of the waterhole. He also told them that there was one particular area of the waterhole where there were no rocks and it was safe for shallow diving.

[27] On the afternoon of the fourth day the tour group travelled to Ormiston Gorge and camped the night. Ormiston Gorge contains a permanent waterhole which is located in a gorge that is surrounded by rocks. Everybody swam at the waterhole on the afternoon of the fourth day of the tour. Before the tour group swam Mr Hill told the group that there were rocks under the water and that the water level of the waterholes in Central Australia varied so that sometimes rocks were exposed and sometimes they were concealed under the surface of the water.

[28] On the morning of 18 January 1999, which was the fifth day of the tour, the tour group again went to the Ormiston Gorge waterhole to swim. Mr Hill followed later. After he arrived at the waterhole he had a conversation with

the deceased. The deceased communicated to Mr Hill that he had climbed up the side of the gorge and dived into the water. Mr Hill enquired if he had checked for rocks and if it was safe to dive into the water. Both the deceased and Mr Hill then went up the gorge and dived into the waterhole.

[29] By lunch time on the fifth day of the tour the deceased had swum at the waterhole at Kings Canyon, swum on two occasions at the waterhole at Ormiston Gorge and swum at the waterhole at Glen Helen. Each of these waterholes had rocks below the surface of the water in various places.

[30] After lunch on 18 January 1999 the tour group travelled to Ellery Creek Big Hole which is a permanent waterhole. The waterhole is approximately 20 metres deep and is surrounded by gorges, trees and rocks. The waterhole runs in a northerly direction. There is a sandy beach at its southern end. On 18 January 1999 the water in the waterhole was brown and muddy. A rope was attached to a tree on the eastern edge of the waterhole. The rope was used by visitors to swing from the bank of the waterhole into the water. In places on the eastern side of the waterhole large rocks extended down to the water's edge. There were also rocks under the water in the area of the waterhole where the rope was attached to the tree. The tops of two or three rocks could be seen above the surface of the water.

[31] There is a car park a short distance from the southern end of the waterhole. In January 1999 an unmade gravel path led from the car park to the waterhole. Near the gravel path was a small interpretive shelter that

contained a sign that was headed, “Welcome to Ellery Creek Big Hole”. The writing on the sign provided visitors with information about the geology and flora and fauna of the local area. On the sign next to a symbol of a person swimming in the water was the following statement – “The waterhole is a great place to swim or just cool off and relax on a hot day. However, bathers should take care as the water is deep and during the winter, extremely cold. For your own safety do not climb or jump from rocks.” The sign was placed in the small interpretive shelter in early 1998.

[32] The tour group arrived at Ellery Creek Big Hole at about 1.30pm. Mr Hill parked the tour bus in the car park. While the tour group was still on the bus Mr Hill told them that there was a short walk down to the waterhole, the waterhole had a shaded sandy bank for relaxing and there was a rope swing that they could use to swing into the water. Mr Hill then led the tour group to a narrow sandy area on the eastern bank of the waterhole near the rope swing. It is a reasonable inference that some of the members of the tour group visited the small interpretive shelter located near the unmade gravel path. However, there was no evidence that the deceased went into the shelter or that he read or could read the information that was provided for visitors in the shelter.

[33] When the tour group arrived at the area near the rope swing Mr Hill told the tour group how to use the rope swing. He said that in order to grab the rope high enough so that their legs did not swing into the water the members of the tour group would need to stand on a stump which was located on the

bank at the edge of the waterhole. The stump was about one metre high and about three to four inches in diameter. Alternatively, Mr Hill said that they could climb the sloping trunk of a nearby tree and swing into the water from the tree trunk. The tree was immediately to the east of the stump. He said that once a person swung out over the water the person must let go of the rope at the furthest point from the bank. He said that a person should not let the rope go if the person swung back towards the bank because there were rocks under the water near the bank. Mr Hill told the tour group that after a person landed in the water the person must swim to the north, out of the path of the next person using the rope swing, and towards some submerged rocks at the edge of the water hole. He said in order to climb out of the water a person should swim to the submerged rocks at the edge of the waterhole, hold onto the rocks, stand up on the rocks and then proceed up the bank. Mr Hill emphasised the need to swim to the north after a person had jumped into the water by shouting out to the person and waving the person to his right.

[34] Mr Hill then showed the tour group how to swing on the rope. He swung into the water from the tree trunk. Most of the members of the tour group then started to swing on the rope one by one. One or two people did not swing on the rope. A person would stand next to the stump to help the next person get up onto it. The same person would grab the rope as it swung back to the bank after someone had jumped from the rope into the water or after someone in the water had thrown the end of the rope back to the bank.

Some members of the tour group swung into the water from the stump and others did so from the sloping tree trunk. The men tended to swing from the tree trunk and the ladies tended to swing from the stump.

[35] The water was a brown muddy colour and it was not possible see what was below the surface of the water. Near the rope swing, there were rocks underneath the surface of the water for a distance of one to one and a half metres from the water's edge. The stump was to the west of the sloping tree trunk and towards the water.

[36] There was no evidence which established that the deceased heard or understood what Mr Hill had told the tour group about the use of the rope swing. It was the evidence of Mr Lonsdale that on this occasion he did not interpret what Mr Hill said to the tour group for the deceased. Nonetheless the deceased swung from the rope into the waterhole on at least two occasions. He did so from the tree trunk not the stump. It was quite difficult to climb the tree trunk and a person had to be quite strong to do so. During his evidence Mr Lonsdale said that after a certain distance of climbing the tree trunk with the rope a person is almost forced off the tree trunk and into the swing. The deceased was proficient in the activity of climbing the tree trunk and swinging into the water from the rope. A photograph was tendered in evidence (JL4 of Exhibit P2) which shows the deceased using the rope swing without any difficulty. On each occasion that the deceased jumped into the water from the rope swing he swam back to the

edge of the waterhole, grabbed hold of the rocks below the surface of the water and stood on them to get out of the waterhole.

[37] The deceased was very courteous in helping other members of the tour group to get up on the stump when it was another person's turn to have a swing on the rope. He would stand on the bank of the waterhole and catch the rope as it swung back to the bank, or after it was thrown back to the bank, and hand the rope to the person who was next in turn to use the rope swing. The top of the bank of the waterhole at the base of the stump was about one metre to one and a half metres above the surface of the water. The bank was very steep. There was a narrow sloping earth ledge, which was partly covered with tangled tree roots, about half way down the side of the bank on which people stood in order to catch the rope. The ledge was to the north and slightly west of the stump. In order to assist a person who was going to swing off the stump retain their balance it was necessary for someone to stand quite close to the person who was about to swing on the rope. During his cross examination, Mr Hill gave evidence that in order to retrieve the rope after someone had used it to enter the water it was usually necessary for another person to go down to the ledge on the bank of the waterhole. He said that most people collecting the rope stood on the ledge. He also gave evidence that he showed the tour group that when there was a person who was going to swing on the rope from the stump another person in the tour group should stand near the stump to either reassure or stabilise that person. This resulted in some people including the deceased being on the ledge on

the bank when someone was swinging on the rope from the sloping tree trunk.

[38] After members of the tour group had been swinging from the rope for about 20 minutes Fabrice, a French tourist, a lanky male who weighed about 80 kilograms, attempted to swing out on the rope and into the water from the sloping tree trunk. As he climbed the tree he lost his balance and slipped off the tree trunk still holding the rope. He swung out away from the tree and towards the water in a north westerly direction and collided with the deceased who was standing on the ledge on the bank about two to four metres north of the stump. Fabrice's legs collided with the deceased's upper thighs and midriff. The deceased was facing Fabrice and away from the water at the time of the collision. As a result of the collision the deceased lost his balance. He turned to his right and dived into the water and he struck his head on a rock or some other obstacle that was submerged below the surface of the water. The deceased remained submerged below the water for about twenty seconds. When he surfaced he was face down and blood was coming out of the top of his head. It is a fair inference that the deceased did not have time to avoid being struck by Fabrice because of the speed at which Fabrice swung on the rope after he fell from the tree trunk. But for being struck by Fabrice the deceased would not have dived into the water. His dive was a reaction to the collision.

[39] There were three potentially important factual issues for consideration by the court in determining the liability of the second and third defendants.

First, there was a factual issue about whether Fabrice had attempted to swing on the rope from the tree trunk, the stump or the bank. Mr Lonsdale, Mr Hill, Mr McFarlane and Mr Yard each gave different accounts about where Fabrice had attempted to swing from on the rope swing. Mr Lonsdale said that Fabrice had attempted to swing from the tree trunk. Mr Hill said that Fabrice had attempted to swing from the stump. Mr McFarlane said that Fabrice had run along the bank and in his statements and in his evidence Mr Yard gave a number of different versions of where he thought the person who collided with the deceased came from.

[40] I prefer the evidence of Mr Lonsdale in this regard. His evidence was that he saw Fabrice climb up the sloping tree trunk while holding onto the rope. Fabrice lost his balance and fell off the tree trunk still holding the rope. He veered northwest and knocked into the deceased who was standing on the bank to the right of Fabrice. The deceased lost his balance and "did a pathetic dive into the water". Fabrice swung out on the rope in an uncontrolled manner and dropped into the water. There is a fair inference that the deceased's dive into the water immediately prior to his death did not take him far from the bank. Mr Lonsdale said that he swum some five or ten metres before he reached the deceased in order to try and assist him after he came to the surface.

[41] The collision occurred when Mr Lonsdale was in the water. It happened shortly after he had swung on the rope and dropped into the water. Mr Lonsdale had a good view of what was happening on the bank. He was

facing the bank and treading water about 10 metres from the bank when the collision occurred. He was paying particular attention to what was happening on the rope swing because he was waiting for Fabrice to swing out and drop into the water before he returned to the bank. Mr Lonsdale did not want to be in the water in a position where Fabrice may land on top of him. He was closer to the rope swing and had a better view than either Mr McFarlane or Mr Yard. In my opinion Mr Yard was attempting to reconstruct where Fabrice swung from. Either he did not see or does not remember where Fabrice swung from before he collided with the deceased.

[42] In my opinion Mr Hill was mistaken about where Fabrice swung from. Mr Hill was on the bank away from the water and east of where the deceased was standing prior to the collision. Although he would have had a clear view of the deceased and what was happening, he was not paying particular attention to what was happening until the collision occurred. He is the only witness who said that Fabrice let go of the rope before the collision occurred and if Fabrice had fallen off the stump in the manner described by Mr Hill it would be expected that Fabrice and the deceased would have ended up in a similar position. Mr Lonsdale's description of what happened is consistent with where both the deceased and Fabrice ended up in the water.

[43] Secondly, there was a factual issue about whether the deceased dived into the water or fell into the water. Mr Lonsdale, Mr Hill and Mr McFarlane all gave evidence that the deceased dived into the water after Fabrice collided with him. Mr Yard was the only witness who gave evidence to the contrary.

I prefer the evidence of Mr Lonsdale, Mr Hill and Mr McFarlane in this regard. Their evidence is supported by the head injury sustained by the deceased. The deceased sustained a five by five centimetre gash to the top of his head.

[44] Thirdly, there was a factual issue about whether the deceased knew about the risks that he faced. On the balance of probabilities I find as follows. The deceased knew that there was a risk of injury if a person dived into the water at Ellery Creek Big Hole because a person might strike his head on a submerged obstacle. He was an intelligent adult who had very recently swum at other waterholes where there had been rocks under the water and Mr Hill had previously warned him at another waterhole to watch out for submerged rocks. The water was brown and muddy and it was not possible to see below the surface of the water. There were rocks on the eastern bank of the waterhole and the top of one or two rocks could be seen in the water in an area near the stump. The deceased had scrambled over rocks near the bank of the waterhole on at least two occasions in order to get out of the water after he had swung out on the rope and dropped into the water.

[45] The deceased also knew that there was a risk that someone could slip off the sloping tree trunk and that if a person stood on the ledge on the bank of the waterhole the person may be struck by a person swinging on the rope and knocked into the water. The deceased climbed the tree trunk. The slope of the tree trunk was quite steep, the tree trunk was not overly wide, apart from the tree trunk there was nothing else to hold onto other than the rope and,

from a certain height upwards, holding the rope put a considerable strain on the person climbing the tree. The women in the tour group did not swing from the tree trunk. It is commonsense that if a person stands on the edge of a bank in an area in front of someone swinging on a rope the person on the bank may be struck by the person swinging on the rope and knocked into the water. The video clearly showed that all of the members of the tour group stood back when Mr Hill swung on the rope from the sloping tree trunk into the water.

[46] Other visitors were aware of the risks involved in swinging on the rope. Mr McFarlane gave evidence that he did not allow the members of the baseball team to swing on the rope swing because he did not want the boys doing anything that could put them in danger. Mr Yard gave evidence that he also did not allow the boys to swing on the rope because he did not know what was underneath the water, the water may be cold, he did not know how well the boys could swim and he thought that they may skylark. Both Mr McFarlane and Mr Yard thought it might be dangerous for the boys to swing on the rope. Ms Ulbrich gave evidence that she had been careful when diving into the waterholes that the tour group had visited in case there were submerged rocks or in case the water was too shallow. She had been aware of such dangers since she was young. She also knew that when she was walking and climbing around the edges of rock holes she had to be careful because if she slipped and fell there was a risk she may hit submerged rocks or the bottom of a waterhole. Mr Bridges also gave

evidence after he saw the video of Mr Hill swinging into the water that he considered the activity to be dangerous.

[47] I do not accept Mr Lonsdale's evidence that he did not think that there was a risk that someone could lose his balance and fall when climbing the sloping tree trunk. His evidence to this effect defies commonsense and is inconsistent with his evidence that it was quite difficult to climb the tree; one needed to be quite strong to do so; it was difficult to hold onto the rope when climbing the tree and one could only climb approximately one metre before the tension became so great that a person was forced to swing off the tree trunk.

[48] In any event, in my opinion, the deceased ought to have known that it may be dangerous to dive into the water because it was not possible to see if there were any submerged rocks in the water and there was a risk that if he stood on the area of the bank in front of somebody who was about to swing on the rope from the sloping tree trunk there may be a collision and he may be knocked into the water.

[49] At the time of the deceased's death Mr Hill had led approximately 50 tours to Ellery Creek Big Hole. On most of those occasions the members of each tour had used the rope swing. They had done so without incident. Nonetheless Mr Hill was aware of the risks created by the rope swing and the rocks below the surface of the water at Ellery Creek Big Hole.

[50] On 19 and 21 January 1999 the rope swing used by the deceased, and another rope swing, at Ellery Creek Big Hole were removed by employees of the third defendant. Mr Bridges either gave the instructions or concurred with the instructions to take the ropes down from the trees at Ellery Creek Big Hole. The decision to take the ropes down was made to dissuade people from using rope swings to swing into the waterhole. In 2004 staff of the third defendant erected a bollard at Ellery Creek Big Hole on which was placed two signs intended to indicate "no jumping from trees into the water" and "no swinging from ropes into the water". Each of the signs shows stylized rocks under the water. The sign indicating no swinging from ropes into the water was custom made for Ellery Creek Big Hole and has been placed where it is likely to be seen by anyone walking towards the area where the deceased had his accident. The decision to erect this sign was made following a recommendation by rangers stationed in the Nature Park who advised that they were having difficulty guaranteeing that there would not be a rope at that site. Mr Hill gave evidence that if such signs had been erected in January 1999 he would have asked the tour group of which the deceased was a member not to swing on the rope swing that existed at that time.

[51] Mr Fuller gave evidence that if he had seen the rope swing on a patrol of Ellery Creek Big Hole he would have removed it because it had an adverse impact on the amenity of the area and it created the potential for an

accident. Someone could swing into danger, hit somebody else or some other injury may occur.

[52] Despite the current practice of removing rope swings and the new signs, rope swings continue to be put up at Ellery Creek Big Hole. Every time a rope swing has been removed by the staff of the third defendant it has eventually been replaced with another rope swing. It was common ground between the parties that on the day before the trial started there was a rope swing at Ellery Creek Big Hole.

[53] Rope swings have been put up by visitors to Ellery Creek Rock Hole and taken down by staff employed by the third defendant from time to time for at least 25 years. The earliest date that the available records of the third defendant contain any mention of rope swings is 8 September 1991. On that day Mr Greg Campbell wrote to the Regional Manager of the third defendant in Alice Springs. Mr Campbell stated that in his opinion the swings were not safe and their potential use or misuse may impose responsibility on the third defendant. An officer of the third defendant replied to Mr Campbell by letter. In the letter the officer stated that "the staff at Ormiston Gorge also have concerns about the safety of the rope swings and have recently decided as and when they are put up the ropes will be removed. We did look at cutting the branches back to do away with the problem but this action would also destroy the natural beauty of the Big Hole."

[54] The diaries of various employees of the third defendant for the years 1991, 1992, 1993, 1994 and 1995 contain entries which establish that from time to time during those years staff of the third defendant removed rope swings within the Nature Park. The first record of an attempted removal of a rope at Ellery Creek Big Hole is a diary entry for 22 October 1991. This practice appears to have fallen into vicissitude. The last mention of a rope swing in the diaries prior to 19 January 1999 is 4 October 1995 and Mr Hill gave evidence that the rope swing at Ellery Creek Big Hole had been there for at least 12 months prior to 18 January 1999.

[55] A risk management strategy was adopted by the third defendant in 1996. The purpose of the strategy was to address broad areas where it was expected that losses may occur. The strategy consists of the document entitled Risk Management Strategy, the third defendant's policies, supporting instructions and guidance found in the administration manual. The Risk Management Strategy document operates by way of providing focus and direction. In effect as an aide memoir. It does not attempt to provide prescriptive curative detail in all potential loss circumstances. It encourages management and staff to incorporate in the planning process an awareness of the possibility of loss circumstances and the need to consider risk minimisation. The document acknowledges that to entirely eliminate risk of loss situations would require an amount of effort and resources beyond the third defendant's budget. The safety policy of the third defendant as endorsed at the board meeting of May 1996 recognised the

necessity of safeguarding the health and safety of staff, the need to protect Commission property and equipment from loss or damage, and its responsibilities in providing a safe as practicable experience for visitors to properties and reserves in the third defendant's care.

[56] The third defendant accepts that its safety responsibilities towards visitors were to ensure that facilities are developed and managed to meet reasonable safety standards and to provide as far as practicable, advice to users on safety matters in outdoor pursuits on property controlled and managed by the third defendant. Further, the Risk Management Strategy recognised that the third defendant owed visitors a duty to ensure that they are not exposed to situations where there is a real risk of incurring injury or, where this is not possible, as is often the case in a natural environment, are appropriately warned regarding the situation.

[57] The Risk Management Strategy provided that all parks and reserves should be subject to plans of management which were to identify safety issues as such issues impacted upon a particular park or reserve. Until the plan of management was published, estate managers were to take up safety issues as they arose and they were to incorporate rectification measures in their development and operational planning. The location of signage was particularly important. Appropriate warning signs should be placed in proximity to hazards. General warnings should be placed at park entry points and repeated where visitors were likely to congregate. If visitors were encouraged to undertake a certain activity the third defendant must

ensure that it could be conducted safely, or if not, the hazards associated with the activity were brought to the attention of visitors.

[58] The 1996 Risk Management Strategy document recognised that the third defendant had several arrangements whereby commercial or other entities operate in parts of the estate managed by the third defendant. In all such cases it was the policy of the third defendant that any damages or loss to persons arising as a result of the operations of the third party be clearly recognised as the responsibility of the third party.

[59] In the 12 months before the death of the deceased staff employed by the third defendant would visit Ellery Creek Big Hole about once a month. After each patrol of Ellery Creek Big Hole members of staff were required to complete an east patrol form about their attendance which recorded what they did, what remained to be attended to and what was observed. At the end of each day when they returned to Ormiston Gorge they were required to make a diary entry about their days activities. The matters required to be covered by the east patrol form included a check of the traffic counter, cars in the car park, people in cars, toilets, barbecues, litter, interpretive signs and a fence check. There was no requirement to check for and report on rope swings. Monthly reports were also filed. The monthly reports would summarise the significant events that had occurred during the month in the area covered by staff at Ormiston Gorge including Ellery Creek Big Hole. Sometime after the death of the deceased, the east patrol reports were modified so that the task list for Ellery Creek Big Hole specifically included

a check for rope swings. After the death of the deceased staff of the third defendant were required to remove any rope swings at Ellery Creek Big Hole.

[60] Senior counsel for the plaintiff submitted that diary entries made by the staff of the third defendant at Ormiston Gorge from 1987 to 2006 (Exhibit P30) established that visitors to Ellery Creek Big Hole ultimately learned that they should not put up rope swings. He said that the diary entries show that the first rope swing was taken down on 22 October 1991. It was replaced 13 days later on 6 November 1991. It then took five months from 17 November 1991 to 5 April 1992 before another rope swing was put up again. It took six months from 5 April 1992 to 11 October 1992 before yet another rope swing was put up at Ellery Creek Big Hole. The rope swing then remained down until 24 January 1993. The rope swing was then down for nine months until 6 October 1993; 12 months until 6 October 1994 and 12 months until 4 October 1995. When the practice of removing rope swings resumed on 19 January 1999 the rope swing remained down for four months until 1 May 1999, for seven months until 15 January 2000, for 10 months until 25 November 2000, for 13 months until the end of 2002, for nine months until 29 September 2003and for four months until January or February 2004. There is some force in this submission.

[61] A visitor safety risk assessment undertaken by Ms Kay Bailey (Exhibit P13) established that, apart from the incident which resulted in the death of the deceased, between 1981 and 2006 there was no other incident of death or

injury reported that involved directly or indirectly the use of a rope swing. It is a fair inference that the overall risk of injury from the use of rope swings is low. However, low risk of injury is not of itself necessarily determinative of the content or scope of a duty of care.

Causation

[62] Having considered all of the above circumstances I find that if a sign such as the one that was placed on a bollard by the third defendant in 2004 warning visitors to the Nature Park not to swing on a rope swing from trees over the water was erected prior to the death of the deceased he would not have participated in the activity of swinging from the rope swing over the water at Ellery Creek Big Hole. There was evidence from Mr Hill that the deceased had checked for rocks previously before diving into waterholes and Mr Hill's evidence was that if such a sign had been erected at Ellery Creek Big Hole he would have persuaded the tour group not to swing from the rope swing. He said that if it filtered back to his employer that he had been ignoring such signs he would be in jeopardy of losing his job.
Mr Lonsdale's evidence was that the tour group relied on what Mr Hill told them. According to Mr Hill's evidence the deceased was a courteous and cooperative tourist.

[63] I also find that it is more likely than not that if the third defendant had maintained its regime of removing rope swings the deceased would not have

been able to participate in this activity at Ellery Creek Big Hole before his death because there would have been no rope swing available for him to use.

[64] If the deceased and others were warned and reminded by Mr Hill not to position themselves in the area of the bank between the water and someone swinging on the rope into the water the accident, which resulted in the death of the deceased, would more than likely not have happened. Such a warning is very similar to the warning and reminder that Mr Hill gave the tour group about swimming to the north once they were in the water so that the person swinging on the rope would not collide with them once they were in the water.

The Law about the standard of care

[65] Determining the content of the duty of care owed to the deceased and whether there has been a breach of the requisite standard of care involves a two step process. First, it is necessary to ask whether a reasonable person in the defendants' position would have foreseen that the person's conduct or omissions involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. Secondly, if the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other

conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable person placed in the defendants' position: *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47 – 48.

[66] However, merely balancing the magnitude of the risk with the cost and inconvenience of preventing it does not of itself determine the content of the duty: see *Swain v Waverley Municipal Council* (2005) 220 CLR 517 at pars [79] – [81]; *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at [39]. The duty of care is not a duty to ensure that no harm befalls the entrant. It is a duty to take reasonable care: *Vairy v Wyong Shire Council* (supra) at par [118]. What Hayne J stated in *Vairy v Wyong Shire Council* (supra) at pars [124] and [126] is instructive. He said that:

> [B]ecause the inquiry is prospective, it would be wrong to focus exclusively upon the particular way in which the accident that has happened came about. In an action in which a plaintiff claims damages for personal injury it is inevitable that much attention will be directed to investigating how the plaintiff came to be injured. The results of those investigations may be of particular importance in considering questions of contributory negligence. But the apparent precision of investigations into what happened to the particular plaintiff must not be permitted to obscure the nature of the questions that are presented in connection with the inquiry into breach of duty. In particular, the examination of the causes of an accident that *has* happened cannot be equated with the examination that is to be undertaken when asking whether there was a breach of a duty of care which was a cause of the plaintiff's injuries. The inquiry into the causes of an accident is wholly retrospective. It seeks to identify what happened and why. The inquiry into breach, although made after the accident, must attempt to answer what response a reasonable person, confronted with a foreseeable risk of injury, would have

made to that risk. And one of the possible answers to that inquiry must be "nothing".

When a plaintiff sues for damages alleging personal injury has been caused by the defendant's negligence, the inquiry about breach of duty must attempt to identify the reasonable person's response to foresight of the risk of occurrence of the injury which the plaintiff suffered. That inquiry must attempt, after the event, to judge what the reasonable person *would* have done to avoid what is now known to have occurred. Although that judgment must be made after the event it must seek to identify what the response would have been by a person looking forward at the prospect of the risk of injury.

[67] In *Swain v Waverley Municipal Council* (supra), Gleeson CJ observed at [5]:

> "In the legal formulations of the duty and standard of care, the central concept is reasonableness. The duty is usually expressed in terms of protecting another against unreasonable risk of harm, or of some kind of harm; the standard of conduct necessary to discharge the duty is usually expressed in terms of what would be expected of a reasonable person, both as to foresight of the possibility of harm, and as to taking precautions against such harm. Life is risky. People do not expect, and are not entitled to expect, to live in a risk-free environment. The measure of careful behaviour is reasonableness, not elimination of risk. Where people are subject to a duty of care, they are to some extent, their neighbours' keepers, but they are not their neighbours' insurers."

[68] The inquiry that the court is required to undertake involves identifying with precision what a reasonable person in the position of the second and third defendants would have done by way of response to the reasonably foreseeable risk at the time it presented: *Graham Barclay Oysters Pty Ltd and Anor v Ryan and Others* (2002) 211 CLR 540 per Gummow and Hayne JJ at [191] to [192]. A person need only act to protect another from an unreasonable risk of harm in circumstances where "a reasonable person would have recognised that action was required": *Woods v Multi-Sport*

Holdings Pty Ltd (supra) per Gleeson CJ at pars [39] to [41]; Kirby J at par [109]; Hayne J at pars [143] to [145].

[69] The expectation that persons will take care for their own safety is one factor to be taken into account: *Vairy v Wyong Shire Council* (supra) at pars [8], [79], [80] and [222]; *Mulligan v Coffs Harbour City Council* (2005) 223 CLR 486 at pars [17] to [26]. This consideration may be particularly relevant where the risks are obvious and a person has deliberately chosen to participate in a risky activity: *Mulligan v Coffs Harbour City Council* (supra) at pars [52], [73] to [78].

The plaintiff's submissions about the standard of care

[70] The plaintiff submits that a reasonable person in the position of the second and third defendants would have recognised that action was required because the rope swing at Ellery Creek Big Hole was peculiarly dangerous. Mr Meldrum QC argued that Mr Bridges, Mr Fuller and a number of other witnesses who gave evidence considered that the use of the rope swing was dangerous. The location of the rope swing was distinguishable from other places where rope swings exist. There was a high frequency of the use of the rope swing at Ellery Creek Big Hole. On occasion more than one tour group would congregate in the area of the rope swing. There was a narrow bank in the vicinity of the rope swing. There were two places from which people launched themselves into the water with the use of the rope swing. Both were risky and the stump was between the water and the sloping tree

trunk. The stump was narrow and some people found it difficult to balance on the stump before they swung out into the water with the rope. The slope of the tree trunk was steep and it was difficult to climb with the rope beyond a certain point. There was a risk of collision between the participants because people stood on the ledge on the bank between the water and the sloping tree trunk from which people swung on the rope. They did so to return the rope to the person who was going to use it next and to assist others who were swinging from the stump instead of the sloping tree trunk. The bank was treacherous because it was steeply sloping and there was a narrow ledge on which people stood to assist others who were using the rope swing. There were rocks in the water immediately to the west of the bank at the base of the stump and the sloping tree trunk from which the rope swing was used. Not all of the rocks could be seen at all times because the water was brown and muddy after it had rained and the level of the water varied. Inadvertence or miscalculation was not uncommon when people who were not familiar with each others capacities gathered in groups and participated in such activities at such locations. The consequences of an accident, as this case demonstrated, could be catastrophic.

[71] That action was required to ameliorate the risk presented by the rope swing was demonstrated by the fact that staff of the third defendant had acted reasonably and prospectively when they introduced a regime of removing the rope swings at Ellery Creek Big Hole in 1991.

The reasonable response to the risk presented by the rope swing

[72] I accept the submissions of Senior Counsel for the plaintiff that current community standards of reasonableness required the second and third defendants to respond to the risk presented by the rope swing at Ellery Creek Big Hole in order to perform the duty of care that they respectively owed the deceased. The third defendant should have maintained its regime of removing the rope swing and should have erected signs warning about the danger of swinging on the rope swing and diving into the water similar to the signs that were placed on the bollard in 2004. The tour guide employed by the second defendant should have warned the tour group not to use the rope swing and at the very least should have given the tour group the following warnings. First, the members of the tour group should have been told not to dive into the water because there may be submerged rocks or other obstacles below the surface of the water. Secondly, the members of the tour group should have been warned and reminded not to stand to the west of anybody attempting to swing on the rope swing and to keep a look out for the person using the rope swing. Such a warning is a similar warning to that which the tour group was given prospectively about swimming to the north once they had entered the water with the use of the rope swing. Thirdly, the members of the tour group should have been warned not to attempt to swing on the rope from the sloping tree trunk if there was anybody standing to the west of the sloping tree trunk on either the bank or the ledge on the bank.

[73] There are several reasons why the second and third defendants were required to respond to the risk presented by the rope swing at Ellery Creek Big Hole. First and foremost there was a risk of collision between participants in the use of the rope swing. A person standing on the ledge on the bank may be struck by a person swinging on the rope. The risk of collision presented itself in a number of ways. The risk of collision was not necessarily overcome by a person exercising ordinary care for themselves because a person may swing from the tree trunk either deliberately or inadvertently before a person on the bank of the waterhole had an opportunity to move out of the way. The risk was accentuated by the following factors: the manner of using the rope swing; there were two specific places from which people may use the rope swing to enter the water; the stump was almost immediately west of the sloping tree trunk; it was necessary for a person to stand on the ledge on the bank in order to capture the rope when it was returned; the bank was steep and narrow; the ledge was treacherous; people would congregate to use the rope swing; it was necessary to give assistance to a person who chose to swing on the rope from the stump because of the narrow diameter of the stump; it was necessary to stand on either the ledge or the edge of the bank to give assistance to a person using the stump; the steep and variable slope of the tree trunk; and the pressure that the rope exerted on a person while a person was climbing the sloping tree trunk. The height of the bank and the existence of submerged rocks meant that the consequences of an accident could be catastrophic.

[74] While obviousness of risk is a factor to be taken into account, obviousness of risk per se is not necessarily determinative of questions of breach of duty: *Vairy v Wyong Shire Council* (supra) per Hayne J at 469. The question for consideration by the court is do community standards of reasonableness require a response to the foreseeable risk.

Contributory negligence

[75] I find that the deceased was guilty of contributory negligence and that his actions contributed towards his death. The deceased voluntarily exposed himself to the risks that the rope swing presented. He was aware of the risk created by the narrow ledge on the bank and the submerged rocks. He must have also been aware of the risk of collision that existed if a person stood on the ledge on the bank to the west of somebody about to swing from the sloping tree trunk. Given the direction that the deceased was facing prior to the collision with Fabrice he must have seen that Fabrice was about to try to climb the sloping tree trunk in order to use the rope to swing into the water. He had climbed the sloping tree trunk at least twice to swing on the rope into the water and he was aware of the difficulties encountered when climbing the sloping tree trunk. Those difficulties would be known to any person who attempted to climb the sloping tree trunk with the rope.

[76] In my opinion it is fair and equitable to reduce the amount of damages recoverable by the claimants by 50 per cent as a result of the deceased's contributory negligence.

Contribution and apportionment between the defendants

[77] No issue of contribution or apportionment arises between the defendants.

The loss suffered

[78] The plaintiff makes a claim for all ambulance and medical expenses associated with the death of Mauro Santo Preti and for the funeral and burial expenses of the deceased including repatriation of the deceased's body to Switzerland. The plaintiff and Filomena Preti make claims for solatium and for wages paid to Fabrio Preti between August 1999 and 8 September 2004. It was said that this amount represented the loss that the deceased parents suffered as a result of the loss of their expectation that the deceased would take over the bakery on his parents' retirement and provide them with an income from the bakery in their retirement years. In the alternative Natale Preti and Filomena Preti claimed an amount for the loss of gratuitous assistance provided by the deceased to them in their bakery business. As the deceased's parents are uneducated it was claimed that the deceased took care of all their commercial transactions including letter writing and bookkeeping. In addition it was claimed that the deceased worked a number of hours each week in his parents business as a pastry chef.

[79] Silvia Preti makes claims for solatium; pecuniary loss for maintenance paid to her by the deceased under court orders; and pecuniary loss for the past education expenses of Melissa Preti and Gregory Preti. Melissa Preti and Gregory Preti make claims for solatium; loss of care and guidance; and for

pecuniary loss of financial assistance and support in the nature of paid holidays, paid entertainment and tuition. Fabio Preti and Viviana Preti each make a claim for solatium.

Determinations about damages

[80] Evidence was received from the following witnesses and deponents about the quantum of damages: Natale Preti, Filomena Preti, Jean Maeder, Silvia Preti, Fabio Preti, Melissa Preti, Gregory Preti, Viviana Preti and Mr Hugh Sarjeant. Having considered all of the evidence about quantum I make the following determinations.

[81] Natale Preti was born on 18 December 1937. He is now 69 years of age. Filomena Preti is the mother of the deceased. She was born on 24 February 1941. She is now 66 years of age. Natale and Filomena Preti owned a boulangerie and patisserie at rue du 31 Decembre, Geneva, Switzerland. They owned and ran the shop for 40 years. They sold it to their son, Fabio Preti, on 1 September 2004. Before the death of the deceased Mr and Mrs Preti senior had planned that when they became too old to work in their shop they would retire and their sons would take over the boulangerie and patisserie business. In return for the business the deceased and Fabio Preti would pay Mr and Mrs Preti senior a small pension.

[82] After his divorce the deceased moved back to live with his parents in their apartment above the boulangerie and patisserie shop in Geneva. The deceased continued to work as a car salesman but he often helped out in his

parents' business. He usually worked about eight hours per week for his parents. The deceased helped his parents with their finances and their dealings with various regulators and government officials. He kept the records of the business, calculated what taxes needed to be paid and prepared all the necessary records for the accountant. The deceased did not receive any payment for his work in the shop or for the bookkeeping and accounting assistance he provided to his parents.

[83] As a result of the death of the deceased it was decided that Fabio Preti should leave his job in Zurich and return to Geneva to run the patisserie and bolongarie. To do so it was also necessary for Fabio to obtain the necessary qualifications as a pastry chef. In August 1999 Fabio Preti commenced working for his mother and father. He started his apprenticeship in September 2000. He completed that apprenticeship by 20 June 2003 and took over the business on or about 1 September 2004. On that date Fabio Preti completed the purchase of the business from his parents. It was also agreed that between the times Fabio Preti moved back to Geneva from Zurich and he purchased his parents' business he would be paid CHF 4500 per month gross by his parents.

[84] The plaintiff claimed on behalf of himself and Filomena Preti the cost of five years wages paid to Fabio Preti. The total amount claimed was CHF 270,000 plus interest of CHF 54,000. It was said that but for his death, the deceased, who was a qualified pastry chef, would have purchased his parents' business on the same terms that his brother did. In order to

substitute Fabio Preti as a purchaser his parents had to employ him full time in the business and pay him his previous wage. In my opinion the claim cannot be sustained. I accept the defendants' submissions that the court cannot be satisfied that the original arrangement pursuant to which the deceased was to acquire his parents' business provided a financial benefit over and above what the deceased's parents would have obtained if they had simply sold the business on the open market.

[85] In the alternative to the claim referred to in par [84] above, the plaintiff made a claim on behalf of himself and Filomena Preti for the gratuitous services provided by the deceased. Such a claim would ordinarily be maintainable. However, in determining whether there was a pecuniary benefit to the deceased's parents it is necessary to deduct any savings that may arise as a result of the deceased's death: *Nguyen v Nguyen* (1990) 169 CLR 245 at 247; *Swan v Williams (Demolition) Pty Ltd* (1987) 9 NSWLR 172 per Samuels JA at 187(G) – 188(A) to (G). In this case the deceased received free board in his parent's home including lunch on most days. I accept the defendants' submission that there is insufficient evidence to determine whether or not the value to the deceased's gratuitous services exceeded the cost of providing the deceased with free board. Allowing a rate of CHF 25 per hour for a pastry chef and CHF 20 per hour for an administrative assistant the value of the deceased gratuitous services would be about CHF 190. The only available evidence as to the cost of board was that contained in exhibit 34, the Schedule of Earnings. The evidence was

that it cost CHF 287.50 per week for student accommodation in a bedroom in Geneva with all meals provided.

[86] In my opinion Natale Preti would be entitled CHF 10,000 for solatium and Filomena Preti would be entitled to CHF 15,000 for solatium. Both parents would be entitled to CHF 13,964 for the burial or cremation expenses of the deceased. In my opinion the transport costs of the deceased's body fall within the reasonable expenses of burial or cremation of the deceased.

[87] The deceased married Silvia Preti on 12 November 1982. The deceased and Silvia Preti had two children, a daughter, Melissa Preti who was born on 29 October 1987 and a son, Gregory Nearco Preti who was born on 15 September 1989. The deceased and Silvia Preti divorced on 2 November 1990.

[88] Sylvia Preti was born on 7 August 1962. She is now 44 years of age. She left school at 18 years of age. She has a French/English/Italian Certificate and a French/English Translators Diploma. To obtain the diploma Ms Preti completed a five year course at Istituto Jiusti in Milan, Italy. Between 1991 and 1993 she completed a number of data processing courses. Between 1998 and 2003 she completed several management courses. Ms Preti started work in 1983 as a financial clerk. Since then she has worked as an executive secretary, administrative secretary, administrative assistant, publicity and public relations officer and an intellectual property associate.

Ms Preti commenced a new relationship with Laurent Bateman in 1999. They have a three year old daughter named Julie.

[89] Upon annulling the marriage of Mauro Preti and Silvia Preti the court in Switzerland made a number of orders. It conferred on Silvia Preti parental authority and custody over the two children, Melissa and Gregory Preti. It granted the deceased large visiting rights which, failing agreement, were to be exercised every two weekends and during half of school vacations. It condemned the deceased to pay to Silvia Preti every month and in advance (excluding family and study allowances) a contribution to the maintenance of each child of CHF 400 until the age of 5 years, CHF 500 between the age of 5 and 10 years, CHF 600 between the ages of a 10 and 15 years and CHF 700 between 15 years and the coming of age, 18 years, or longer but until the age of 25 years completed if the child undertakes studies or professional training, carried out seriously and regularly. The maintenance allowances are based on the Geneva Index numbers of the cost of living. The age of majority in Switzerland is 18 years. Following his divorce the deceased always paid the maintenance he was ordered to pay by the court to Silvia Preti on behalf of his children less the amount indexed in accordance the Geneva Index numbers of the cost of living.

[90] There was an issue between the parties about whether the calculation of the loss of maintenance resulting from the death of the deceased should be calculated in such a manner as to include the indexed amounts provided for by the court order which would involve an increase of 15 per cent for past

amounts of maintenance and 30 per cent for future amounts of maintenance. I accept the defendants' submissions that the 15 per cent and 30 per cent indexed amounts should not be allowed by way of damages. To establish a claim for loss of dependency a claimant must show a reasonable expectation of future benefit: *Public Trustee v Zoanetti* (1945) 70 CLR 266 per Dixon J at 272; *Baker v Dalgliesh Steam Shipping Co* [1922] 1 KB 361 at 367. There was no reasonable expectation that the deceased would have paid the indexed amounts. Silvia Preti's evidence was that the deceased did not pay the indexed amounts and she did not ask that he pay the indexed amounts because the deceased helped out with the children in other ways and she and the deceased were friends.

[91] I accept the defendants' calculations as to past and future maintenance contained in the defendants' document dated 19 April 2007. The maintenance payments are calculated net of taxation as Silvia Preti paid tax on the maintenance that she received from the deceased. For arrears of maintenance I award the sum of CHF 100,028 plus interest of CHF 32,551.00. Interest has been calculated at a rate of 4 percent over a period of eight years one months and nine days. For future maintenance for Melissa Preti I award the sum of CHF 2,420. For future maintenance for Gregory Preti I award the sum of CHF 15,472. I assess that Silvia Preti is entitled to solatium in the sum of CHF 5000.

[92] I find that the academic year in Switzerland ends in August and begins in September. There was no disagreement between the parties about the rates

of taxation. There was no disagreement between the parties about the 4 per cent rate of interest which was applied to arrears of maintenance.

[93] I accept the defendants' submissions that the evidence did not establish an expectation that the deceased would have paid any additional amount for the cost of his children's education.

[94] Melissa Preti is now 19 years of age. In September 2004 Melissa became a student at a private academy in Geneva called the languages and Commercial Academy. She is studying commerce and marketing. She will finish her studies in August 2007. The cost per annum of her school fees is CHF 10,000. In addition the costs of books and other incidentals are about CHF 1,000 per annum. She lives in an apartment while attending the private academy. Her mother pays CHF 800 for the rent of the apartment.

[95] Melissa's parents divorced when she was only three years of age. However, she saw a lot of her father after the divorce. She usually saw him every Friday evening. He would pick her and her brother up at about 6.00pm and they would go out for a special treat such as the movies or dinner, karaoke, skating or other outdoor activity. They would spend the night where her father lived with his parents and then on Wednesday they would see him at about 6.00 pm as well. She would spend every second weekend with her father. They would go skating, skiing or horse riding. Melissa and her father and brother would also go on holidays together.

[96] As a result of the death of her father Melissa Preti suffered a significant depressive state with continuous weeping, bleak ideas, sleeping trouble and nightmares. She also suffered from bulimia which was very hard to control. As a result she was treated by Dr Jean Maeder and received therapy involving the teaching of relaxation techniques from Dr Maeder's wife who is a registered sophrology practitioner. In my opinion Melissa Preti should receive CHF 10,000 for the loss of care and guidance of the deceased. She should receive CHF 20,000 as solatium.

[97] Gregory Preti is now 17 years of age. He completed his junior high school in June 2004. He is currently doing an apprenticeship. He will finish his studies at the end of 2009. He will be 20 years of age at that time. The evidence of Gregory Preti was that he would earn CHF 600 per month as a first year apprentice. I accept the defendants' submission that no amount should be allowed for protective clothes, shoes and tools for Gregory's apprenticeship. The evidence did not establish what was required or how much such items would cost.

[98] Gregory Preti remembers spending Tuesdays with his father and doing homework with him. He also remembers spending every second weekend with his father. As a result of the death of his father Gregory Preti was deeply and durably perturbed. He showed signs of aggression, revolt, sleeping problems, loss of appetite and an attitude of seclusion with regressive aspects. He was treated by Dr Jean Maeder by way of reassurance and sleeping medication. It took about 12 months for the severe

symptoms in relation to both Gregory and Melissa Preti to dissipate. In my opinion Gregory Preti should receive CHF 10,000 for the loss of care and guidance of the deceased and CHF 20,000 for solatium.

[99] In addition to paying maintenance to Silvia Preti the deceased also paid for other expenses for the children such as sporting equipment and holidays. The plaintiff claimed CHF 5000 per child per annum for these other expenses. I accept the defendants' submission that the evidence does not support such a large claim. The principal witness who gave evidence about these matters was Silvia Preti. Her evidence was vague and unsubstantiated. On the basis of the available evidence I am satisfied that the children had a reasonable expectation of receiving holidays, payments for sporting gear and half of the costs of special lessons such as karate and dance classes. A reasonable estimate of the costs of such extras is CHF 3000 per child per annum. Such amounts would have been paid by the deceased until Melissa Preti and Gregory Preti completed their education. I assess arrears of such extras for both Melissa Preti and Gregory Preti for a period of eight years and three months in the sum of CHF 24,750 each. Both Melissa Preti and Gregory Preti would be entitled to an amount of interest on this sum of CHF 8,168. Save for the starting amount of CHF 3,000 instead of CHF 5,000, I have adopted the plaintiff's calculations in this regard.

[100] I accept the plaintiff's submission that, based on the history of the way in which the deceased cared for his children and his financial capacity, both Melissa Preti and Gregory Preti had a reasonable expectation that the

deceased would have continued make financial contributions in the future towards their support and welfare and that doing the best one can the present value of such future payments would be a figure in the order of CHF 20,000 for each of the deceased's children.

[101] The deceased had a sister, Viviana Preti who was born on 17 March 1963 and a brother, Fabio Preti who was born on 10 March 1973. Viviana Preti is now aged 44 years. Fabio Preti is now 34 years of age. Fabio Preti left home to go to Zurich in 1995. In Zurich he worked as the manager of a Macdonald's hamburger shop earning a salary of CHF 4500 per month net after tax which is about CHF 4950 gross.

[102] For Fabio Preti I assess CHF 6000 for solatium. For Viviana Preti I assess CHF 6000 for solatium.

[103] The amounts of damages that I have assessed are summarised in the following table:

SUMMARY OF ASSESSED DAMAGES

Silvia Preti		
Past maintenance	CHF 100,028	
Interest on past maintenance	CHF 32,551	
Future maintenance Melissa	CHF 2,420	
Future maintenance Gregory	CHF 15,472	
Solatium	CHF 5,000	CHF 155,471

Melissa Preti		
Past pecuniary loss	CHF 24,750	
Interest on past pecuniary loss	CHF 8,168	
Future pecuniary loss	CHF 20,000	
Loss of care and guidance	CHF 10,000	
Solatium	CHF 20,000	CHF 82,918
Gregory Preti		
Past pecuniary loss	CHF 24,750	
Interest on past pecuniary loss	CHF 8,168	
Future pecuniary loss	CHF 20,000	
Loss of care and guidance	CHF 10,000	
Solatium	CHF 20,000	CHF 82,918
Natale Preti & Filomena Preti		
Funeral and Cremation expenses	CHF 13,964	
Solatium – Natale	CHF 10,000	
Solatium – Filomena	CHF 15,000	CHF 38,964
Fabio Preti		
Solatium	CHF 6,000	CHF 6,000
Viviana Preti		
Solatium	CHF 6,000	CHF 6,000
TOTAL ASSESSED DAMAGES		CHF 372,271

[104] I have determined to make no deduction for contingencies or vicissitudes.

[105] As a result of the contributory negligence of the deceased all amounts of damages must be reduced by 50 per cent. I award the claimants the following amounts of damages:

DAMAGES AWARDED

Silvia Preti	CHF 77,736	
Melissa Preti	CHF 41,459	
Gregory Preti	CHF 41,459	
Natale Preti & Filomena Preti –		
Funeral/Cremation	CHF 6,982	
Solatium – Natale	CHF 5,000	
Solatium – Filomena	CHF 7,500	
Fabio Preti	CHF 3,000	
Viviana Preti	CHF 3,000	
TOTAL DAMAGES AWARDED	CHF 186,136	

Orders

[106] I make the following orders:

1. Judgment for the plaintiff against the second and third defendants in the sum of CHF 186,136.

2. The judgment sum of CHF 186,136 is apportioned between the claimants in accordance with the table appearing in par 105 above.

[107] I will hear the parties further as to costs.