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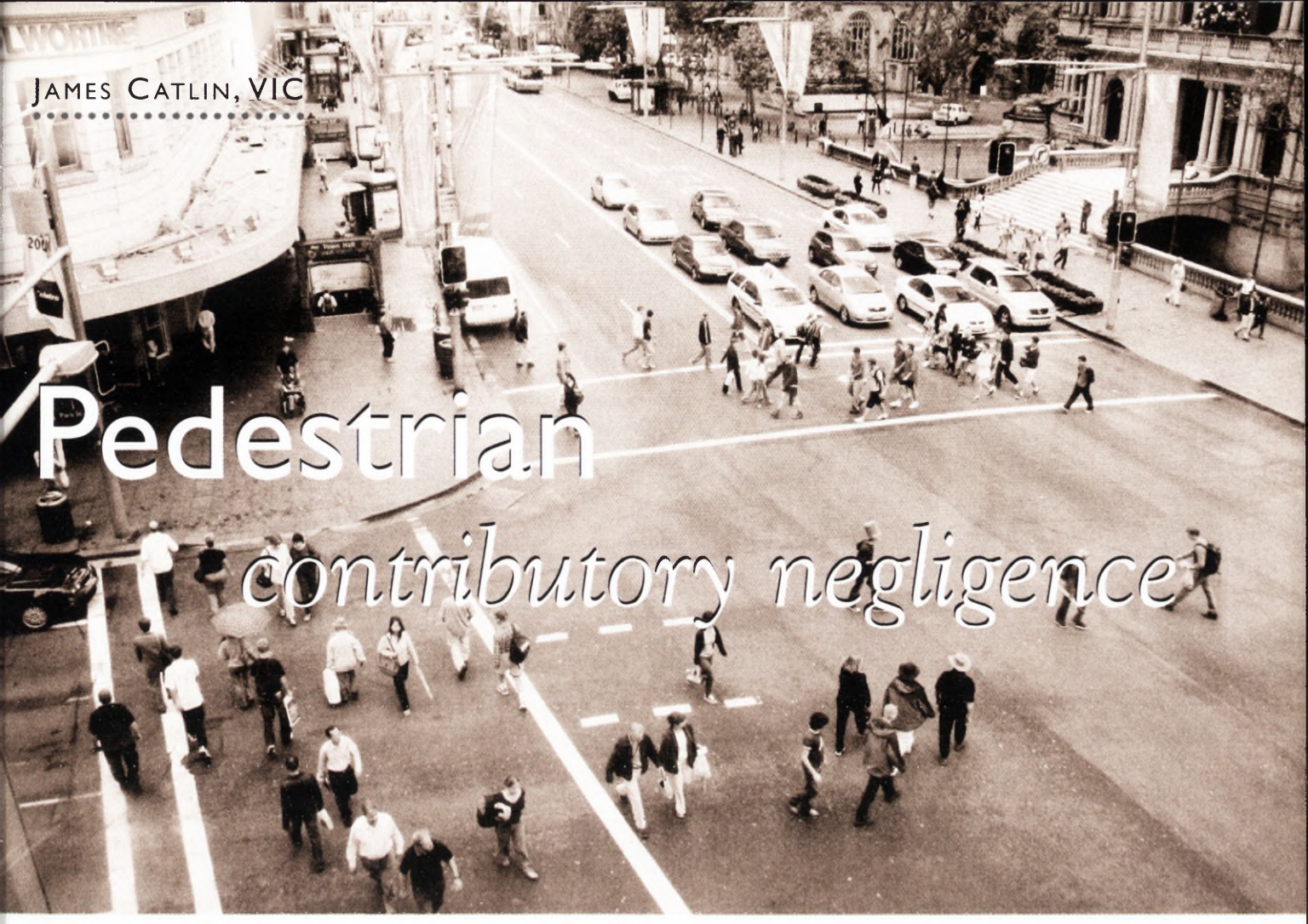

Pedestrian contributory negligence

The factors that determine the existence and degree of contributory negligence in any tortious situation are as endlessly varied as the fact situations themselves, and the courts warn about sub-principles of law being extracted from cases decided on their facts. Motor vehicle accidents recur in reported decisions with such frequency, however, as to enable an analysis of commonly occurring fact situations and their treatment by the courts. This article considers the application of tort law principles to motor vehicle accidents and the existence or not of particular sub-principles governing contributory negligence by pedestrians.

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The threshold principle is that the driver of a motor vehicle must take reasonable care to avoid pedestrians who they may reasonably foresee might be harmed by their behaviour. Despite the central economic and social role played by vehicular traffic and the commitment of substantial budgetary funds to road improvement and efficient traffic flow, a pedestrian has, *prima facie*, right of way on any road.

As King CJ in the South Australian Court of Appeal noted in *Nosworthy v Berg*,[1] '...the standard expected of a motorist who undertakes an operation requiring skill and alertness and which is capable of causing harm to others is greater than that expected of a pedestrian whose activity does not require skill or a great deal of alertness and which has little potential for harm to others.'

In that case the driver was apportioned 60% of the liability despite the following:

- Driving at a reasonable speed.
- Driving properly at low light beam.
- The driver's limited opportunity to observe the (drunk) pedestrian (hitchhiker).

Alternately put: 'In the typical case of a pedestrian run down by a motorist in daylight, due to inadvertence of one or both of them or undue speed of the motorist, because of the high duty of care imposed upon motorists, vis-à-vis pedestrians, courts have often required the motorist to bear the higher proportion of blame.'[2]

As a matter of strict legal principle there is no *prima facie* right of way. There is a balancing process described by Windeyer J in *Teubner v Humble*:[3]

'The question is how far in the circumstances did the motorist depart from the standard of care of a reasonable man driving a motor car, and the pedestrian from the standard of care of ▶

a reasonable pedestrian.'

In *Stocks v Baldwin*,[4] the New South Wales Court of Appeal adapted the balancing process stated by Mason J in *Wyong Shire Council v Shirt*.[5]

'In the balancing process to which Mason J referred at least four things are to be borne in mind: The extent of the damage that may be done by the driver to a pedestrian; the degree of likelihood that a pedestrian will suddenly come into the path of an oncoming vehicle; the consequent extent of the precautions which a driver must take against that eventuality; and the extent of what a driver is able to do when confronted with such a danger.'

In *Derrick v Cheung*,[6] the High Court stated: 'As Mahoney P acknowledged in *Stocks v Baldwin*, the determination of whether there was a breach of the duty of care is not determined by a "syllogistic process from facts to conclusion". Rather, it involves making value judgments, as referred to by Mason J in *Wyong Shire Council v Shirt*.'

It is the author's ultimate contention that the effect of the balancing process and pattern of value judgements has been to apportion blame to drivers for injury to pedestrians in situations where they are very much the author of their own misfortunes, and to in effect accord them virtual right of way. What follows is an examination of the weight various recurring fact situations are given in the balancing process and of the associated values.

WHERE IS THE ROAD?

This aspect might be characterised as the forseeability of pedestrian presence. In the case of *Pennington v Morris*[7] the collision took place in a minor entertainment precinct. There were three hotels in the vicinity and it was shortly after closing time. Despite the pedestrian crossing the road other than at a designated crossing, the driver was found to be 80% negligent.

In *Alldrigge v Mulcahey*,[8] the defendant knew that the pedestrian had a practice of walking on one of the main roads in the relevant town where the collision took place. The pedestrian was on the road when the collision took place. There was held to be no contributory negligence.

In *Makim v Clark*,[9] the court again found that it was not surprising that pedestrians were walking on the road.

In *Cook v Hawkes*,[10] the court held that because the street was a 'busy city street' pedestrians might be expected to come onto the street in disregard of the traffic rules, and that the driver's duty of care was increased by reason of him having to be extremely vigilant.

The sub-principle underlying these judicial statements is that the greater the associated pedestrian presence, the greater the effective sharing of the road with pedestrians. This principle is reflected in the recent mandating of a 10-kilometre reduction in metropolitan speed limits in built up areas and outside schools, and a 40-kilometre speed limit for shopping strips.

"Pedestrians can behave with such suicidal folly that no reasonable driver could ever anticipate their behaviour."

WHAT PART OF THE ROAD?

The deference to pedestrians is especially evident in cases where the pedestrian is not so much crossing the road as using it as a footpath, which by definition it is not. In *Rowles v Dunstan*,[11] the pedestrian was walking along the highway on a dark night with his back to the traffic. The driver was held to be one third negligent.

At the crossing but against the lights

Not surprisingly, the courts impose a standard of slowing down when approaching a pedestrian crossing where a pedestrian is visible, even when the driver has the green light.

In *Yu v Yu*,[12] the pedestrian hurried across a seven-lane road, against the 'don't walk' sign, and was struck by a vehicle which was travelling with the green light. The Court of Appeal overturned the district court's decision of no negligence and held that the driver had been 35% negligent, commensurate with the general 'slow down rule' if a pedestrian is visible on the crossing.

In *Pickard v Haeberle-Turner*,[13] the Queensland Full Court assessed contributory negligence at 75% for a pedestrian who walked into the path of a car travelling at 60 kilometres an hour. The decision is only explicable on the basis of the 'slow down rule'.

VISIBILITY OF THE PEDESTRIAN – LIGHTING

In *Stock*, the court held that a driver at night must be able to stop within the limits of their vision. The absence of daylight imposes new duties on a driver to use high beams in dark road areas.

In *Makim*, the absence of high beams was held to be a significant basis for concluding the driver had failed to keep a proper look out.

In *Sierra v Anikin*,[14] despite the pedestrian wearing dark clothing at night, the court indicated that it would have assessed contributory negligence at 60%. While the bus's lights were on low beam and the court made no reference to high beams, the role of high beams is implicit in the common discussion of when the driver first sees a pedestrian, their potential reaction time and reasonableness of actual reaction time. High beams will tend to illuminate a pedestrian at a greater distance both directly in front and laterally.

In *Noseworthy*, the accident also took place at night, the vehicle's lights were on low beam and the busy main road was moderately lit. The Court of Appeal said:

'The [driver's] departure from a standard of care required of a motorist was by no means gross. The presence of a pedestrian at that point was an unexpected hazard. The appellant was driving at a reasonable speed and was properly driving at low beam. He had only a limited opportunity to observe a pedestrian. He failed to take that opportunity, but the degree of fault involved in that failure is by no means as great as that involved in any driving area.'

The court took no account of the fact that the pedestrian was in the lateral range of the driver's headlights and was, in the circumstances, an 'unexpected hazard'.

RATIONALITY OF PEDESTRIAN BEHAVIOUR

Heydon JA's statement in *Knight* is hard to surpass:

'While a legal regime in which defendants were always entitled to assume that other persons would behave lawfully, and in particular carefully, would not be irrational, that regime does not correspond with the current law. A driver is not entitled to drive "on the assumption that other users of the road, whether drivers or pedestrians, will behave with reasonable care". That is because: "It is common experience that many do not. A driver is not, of course, bound to anticipate folly in all its forms, but he is not...entitled to put out of consideration the teachings of experience as to the form those follies commonly take": *London Passenger Transport Board v Upson*.[15] "[A] prudent man will guard against the possible negligence of others when experience shows such negligence to be common": *Grant v Sun Shipping Co Ltd*.[16] "The assumption that other users of the highway will act reasonably and safely is so often falsified that it cannot be said as a general rule that a user of the highway can reasonably act on that assumption": *Purcell v Watson*.'[17]

'It is a common experience for motorists to see pedestrians moving across roads dangerously, either relying on their fleet-footedness and self-perceived sense of timing, or being oblivious to the dangers of the traffic. Negligence in motorists is not negated by the fact that pedestrians "could avoid the possibility of injury by taking due care...the reasonable man does not ▶

assume that others will always take due care; he must recognise that there will be occasions when others are distracted by emergency or some other cause from giving sufficient attention to their own safety": *Webb v State of South Australia*.'[18]

In *Knight*, an intoxicated pedestrian 'bolted into traffic' onto a lone road divided by a median strip. The driver was held 40% negligent, despite having satisfied the conventional criteria for safe driving, including keeping a proper lookout. This decision might be explained by the infrequency of traffic lights on long arterial roads in Sydney, which forces pedestrians to try their luck.

In *Noseworthy*, the inferences from the pedestrian's high blood alcohol content of .158 were not enough to spare the driver 60% liability.

> "Pedestrians are accorded virtual right of way."

In *Stewart v Carnell*,[19] the court was less forgiving of the irrational behaviour of the pedestrian who had darted across the road during peak hour traffic. *Stewart* would be regarded as going against the general pattern of apportionment of liability to motorists despite the non-compliance with their duty of reasonable care, notwithstanding that the case is often cited as a sub-principle on rational behaviour thus:

'There are limits on the extent to which irrational behaviour of pedestrians in apparent disregard of their own safety should reasonably be anticipated by reasonably careful motorist.'[20]

In *Weydling v Halsey*,[21] the pedestrian attempted to thread his way through traffic while running to hail a tram. The court held 60% contribution.

In *Harper v Blake*,[22] the plaintiff and his girlfriend were in the midst of a midnight argument, which reached the point of the plaintiff threatening to commit suicide. The two were visibly in dispute, but the plaintiff's diagonal run across the road was held to be beyond the capacity of a motorist to anticipate. This case is notable in that not only could the motorist see the state the plaintiff was in, but was also able to stop within a car's length of the plaintiff. The irrationality of the behaviour was held to override the other factors, which in other cases have resulted in some negligence being attributed to the defendant.

In *Wilkes v Redford*,[23] the pedestrian crossed a busy highway at night without looking. The court held 75% contributory negligence. The pedestrian was also wearing dark clothes and was intoxicated.

In *Derrick v Cheung*, the High Court reversed the finding that it was reasonably foreseeable (in the sense that it was a possibility) that a small child might be on or near the road. In the court's words, there was 'no particular perceivable risk which the [defendant] should have taken into account but did not', 'no particular danger was observable', and 'no particular danger was apparent'.

It is the author's contention that these conclusions are reasonably open in many cases involving pedestrians and that *Derrick* suggests a more onerous interpretation of a pedestrian's duty will be enforced by the High Court where it is given the opportunity.

For example, in the 2003 case of *Murphy v Furka*[24] the pedestrian emerged from a gap in front of a stationary delivery van. The court held:

'A driver must take reasonable care with his driving and that proposition entails a further proposition that he must be aware of the fact that pedestrians in crossing the road often behave irrationally. It is also clear that pedestrians can, in given circumstances, behave with such suicidal folly that no reasonable driver could ever anticipate their behaviour and on the facts of this case I am afraid the plaintiff's behaviour falls within that later category.'[25]

TYPE OF VEHICLE

A court will defer further to a pedestrian where a vehicle requires greater control to meet the necessary reaction time of a reasonable driver, all other factors being considered.

In *Tsuji v Metro Mix Pty Ltd*,[26] the plaintiff was struck down and injured by a five-tonne tipper truck travelling at 60 kilometres an hour. The court noted that a truck of that size was more lethal than a normal vehicle and, accordingly, the driver had an obligation to be more alert for foolish behaviour by a pedestrian.

In *Stafford v McDonald*,[27] a motorcyclist struck a pedestrian at a tourist lookout. It was held that the rider should have reduced his speed to 75 kilometres an hour as he could not brake as required while leaning into a turn.

FUTURE COURSE

As McKechnie J of Western Australia's Supreme Court noted,[28] it is not clear that there are any new principles stated in *Derrick*. However, a more conservative approach has arguably been signalled. This is reflected in *Ma v Keane*[29] where the plaintiff walked onto the street not seeing any vehicle and stopped just short of the centre line, looked straight at the defendant's vehicle, and then kept walking.

It was open to the court to find that having seen the plaintiff cross to the centre of the road, stop, look at their car, the defendant should have either slowed to such a pace that an accident would not have occurred or perhaps stopped. This would reflect the findings in many of the cases above. The court, however, found no negligence. It remains to be seen whether a more conservative approach is taken by other state Supreme Courts. PL

Endnotes: **1** (1991) 14 MVR 105 at 108. **2** *Woods v Leane* [2002] SADC5; author's emphasis. **3** (1963) 108 CLR 491 at 504. **4** (1996) 24 MVR 416. **5** (1980) 146 CLR 40 at 47-8. **6** (2001) 181 ALR 301. **7** (1956) 96 CLR 10. **8** (1950) 81 CLR. **9** (1991) 14 MVR 310. **10** (2002) 35 MVR 91. **11** (1991) 15 MVR 109. **12** (1998) 26 MVR 509 NSWCA. **13** (1991) 14 MVR 401. **14** [2003] NSWCA 11. **15** [1949] AC 155 at 173 per Lord Uthwatt. **16** [1948] AC 549 at 567per Lord du Parcq. **17** (1979) 26 ALR 235 at 240 per Gibbs CJ. **18** (1982) ALR 465 at 467 per Mason, Brennan and Deane JJ. **19** (1984) 2 MVR 147. **20** at 151. **21** (1990) 12 MVR 570. **22** (1999) 29 MVR 389 NSWCA. **23** [1999] QSC 119. **24** (2000) 31 MVR 117 NSWCA. **25** at 119. **26** (1999) 28 MVR 401. **27** [2003] TASSC 33. **28** *Richards v Mills* [2003] WASCA 97. **29** [2003] NSWCA 50; see also *Murphy v Furka*.