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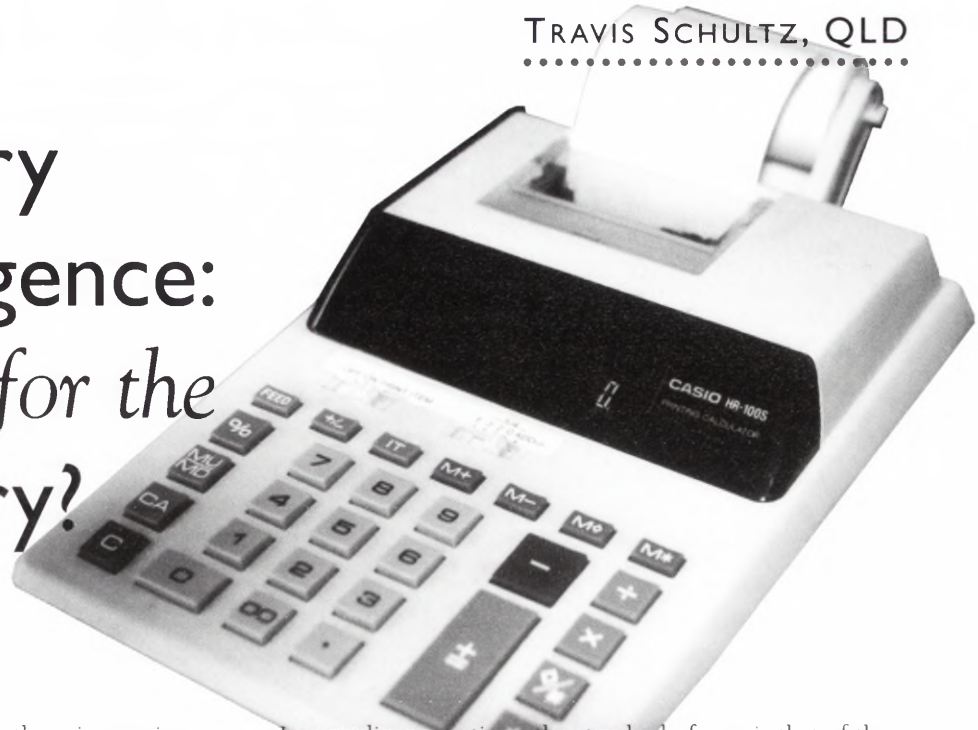
Contributory negligence: *A new slant for the* 21st Century?



Throughout the Australian states there is growing pressure on legislatures to redefine the principles of negligence and to provide firm rules as to the circumstances in which civil liability will exist for a negligent act. Popular public opinion takes the view that citizens should take responsibility for their own actions and should be denied any access to damages where they were simply the author of their own misfortune. Courts likewise seem to be taking a tougher approach to liability as there is at least anecdotal evidence to suggest that courts in Australian states are increasingly prepared to dismiss a plaintiff's claim. The same can be said for contributory negligence – not only is the incidence of an apportionment increasing, but so is the size of the contribution.

AN OVERVIEW

Whether a plaintiff has been guilty of contributory negligence and the extent of that contribution are questions of fact. Much depends upon the circumstances of individual cases and it has been suggested that as a result, little guidance can be obtained from a consideration of the facts of other cases.[1]

Each Australian state has legislation which enables a court to reduce damages payable to a plaintiff on account of contributory negligence. Since *Astley*[2] the legislation has been amended to enable the court to reduce damages on account of contributory negligence in contract claims as well as those in tort.[3]

Just as a plaintiff bears the onus of proving his or her case, a defendant who alleges contributory negligence bears the onus of proof.

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In a negligence action, the standard of care is that of the reasonable person. Thus both the learner driver and the Formula One champion are expected to observe the same standard of care when driving on the highway – that of an experienced, qualified and competent driver.

On the other hand, where contributory negligence is alleged, the plaintiff's conduct is considered having regard to his or her personal circumstances – skills, knowledge and resources. In *McHale v Watson*[4], McTiernan ACJ[5] held that the determination as to whether a child has been contributorily negligent, required consideration of the 'degree of care one would expect, not of the average reasonable man, but of a child the same age and experience'.

APPORTIONMENT OF RESPONSIBILITY

The apportionment of responsibility between the plaintiff and defendant is made on the basis of culpability. This involves a comparison of the degree of departure of each of them from the standard of care of the reasonable person.[6] The court must also consider the relative importance of the acts of both the plaintiff and defendant which led to the damage occurring.[7] One consideration is the gravity of the risk to which the defendant exposed others and the extent of the plaintiff's own conduct in endangering himself or herself.[8]

In *Bankstown Foundry Pty Ltd v Braistina,*[9] Mason, Wilson and Dawson JJ considered contributory negligence in the context of a master/servant claim. They said:[10]

'A worker will be guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable and prudent man, he would expose himself to risk of injury. But his conduct must be judged in the context of the finding that the employer had failed to use reasonable care to provide a safe system of work, thereby exposing him to unnecessary risks. The question will be whether, in the circumstances ▶

and under the conditions in which he was required to work, the conduct of the worker amounted to mere inadvertence, inattention or misjudgment, or to negligence rendering him responsible in part for the damage: see *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492 at pp. 493-494. In *Podrebersek*, the court said:

"The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, of the degree of departure from the standard of care of the reasonable man ... and of the relative importance of the acts of the parties in causing the damage... It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination."

In *Podrebersek*[11], the High Court considered the approach to be taken in determining whether or not there had been contributory negligence on the part of a plaintiff. The court thought that it must first be determined in light of the defendant's failure to discharge its duty of care, that the plaintiff has been guilty of a negligent want of care for his own safety, rather than that his conduct amounted to mere inadvertence, inattention or misjudgment.

In *McLean v Tedman*[12], the majority of the High Court said:

'The standard of care expected of a reasonable man requires him to take account of the possibility of inadvertent and negligent conduct on the part of others.'

The majority in *McLean* approved the judgment of *Windeyer J* in *Sungravure Pty Ltd v Meani*[13]. He said:

'Whether a person was negligent in that sense [in a contributorily negligent sense] must be determined in every case in the light of all the circumstances. Whether a worker in a factory is alleged to have been wanting in care for his own safety, the jury may, of course, as part of the totality of circumstance, have regard to such things as inattention bred of familiarity and repetition, the urgency of the task, the man's preoccupation with the matter in hand, and other prevailing conditions. They may consider whether any of these things caused some temporary inadvertence to danger, some lapse of attention, some taking of a risk or other departure from the highest degree of circumspection, excusable in the circumstances because not incompatible with the conduct of a prudent and reasonable man.'[14]

TRADE PRACTICES ACT 1974 (CTH)

In *Henville v Walker*[15], the High Court unanimously held that there were no grounds for reading into s82 of the Trade Practices Act the notion of contributory negligence. The case concerned an architect and property developer, Mr Henville, who undertook a property development based on forecasts made by the defendant, a real estate agent, as to the likely sale price of the units and the time that it would take for them to be sold.

The representations were found to have breached s52 of the Trade Practices Act. The plaintiff, however, was thought to have taken less care than he might have in preparing his own feasibility study and estimating the construction and financing costs for the development. The plaintiff's conduct was thought to be relevant to the issue of causation but it could not go to a defence of contributory negligence as that was not available under the legislation. Gaudron J thought that this was the appropriate approach as s82 requires a person to suffer loss or injury *by* contravening conduct. If the plaintiff's own conduct was such as to break the chain of causation then there will be no ability to recover damages under the legislation.

In *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*[16], the Queensland Court of Appeal reduced the damages awarded for a breach of s52 of the Trade Practices Act, on account of contributory negligence. In that case, the plaintiff sued valuers as a result of a negligently prepared valuation of a property on which a lender relied and lent money.

The trial judge had found that the lender's loss was in part caused by its own poor judgment in that it had made insufficient enquiries about the borrower's finances. The Queensland Court of Appeal dismissed an appeal on the basis of an alternate application of s87(1) of the Act.

A majority[17] of the High Court[18] allowed the lender's appeal, holding that the notion of contributory negligence had no application in the context of a claim based on a breach of s52 of the Trade Practices Act.

Gleeson CJ said:

'In a financing transaction, a lender takes security to protect itself against the risk of default by the borrower. One aspect of that risk is that the lender might have failed adequately to assess the borrower's capacity to service the debt. I cannot see why, as a matter of principle, such failure by a lender should be treated, in the application of sec82, as a factor which diminishes the legal responsibility of a valuer by negativing in part the causal effect of the valuer's misleading conduct. The statutory rule of conduct found in s.52, when applied to the relationship between a valuer and a prospective lender, gives rise to a legal responsibility in a case such as the present which extends to the whole of the loss of which the valuer's misleading conduct is a direct cause.'

Callinan J observed that there would necessarily be injustice flowing from this approach, but considered that this reading of s82 of the Act was inescapable. He urged law reform, noting that the same result would arise where a defendant's conduct played only a relatively minor part in the plaintiff's loss, and a plaintiff's own conduct had been a major contributing factor.

RECENT DECISIONS

It is hoped that the following examination of recent cases from the various state courts will provide guidance in assessing the circumstances in which contributory negligence will be a 'live' issue and how it will be dealt with by the courts.

Western Australia

In *The Commonwealth of Australia v O'Calloghan*[19], the

plaintiff had visited his local CES office. He approached the enquiry counter where there was no-one else waiting and asked the counter clerk for the necessary certificate. He was told to take a number as people were being served in the order of their arrival. This angered the plaintiff who left, swearing loudly. He banged on the glass doors in order to open them when one shattered causing him a significant arm injury. The glass did not meet the current Australian standards which had come into force after the building had been constructed. The trial judge found the plaintiff 50 per cent contributorily negligent but found a breach of duty on the part of the Commonwealth. The Western Australian Court of Appeal allowed an appeal, finding the plaintiff entirely responsible for his own injuries.

New South Wales

In *Fitzgerald v Dansey*[20], the trial judge found the plaintiff to have been 50 per cent responsible for his own injuries. The plaintiff and defendant were both moderately affected by alcohol. The defendant was a driver of a utility. The plaintiff crawled through a window to get into the rear of the utility being driven by the defendant. The defendant driver of the vehicle knew the plaintiff was in the back of the ute and continued driving. Unbeknown to the defendant, the plaintiff had stood up in the back of the utility. The defendant drove around a bend in the road at between 70 and 80 kph and the plaintiff fell out. In the Court of Appeal, Sperling J (with whom Powell JA agreed) thought that the apportionment was very favourable to the plaintiff. He thought that it was open to the trial judge to have found the plaintiff more responsible than the defendant but it was not appropriate to interfere with the findings of fact of the trial judge and his decision in this regard.

In *Cook v Hawes*[21], the plaintiff was a pedestrian in the Sydney CBD who crossed the road at a pedestrian crossing which was controlled by traffic lights. He was colour-blind and entered the crossing against a red 'Don't Walk' signal. He crossed the road very quickly. He was hit by a courier van travelling at about 50 kph. The trial judge found that the defendant had been negligent but found the plaintiff to have been 50 per cent responsible. The New South Wales Court of Appeal allowed an appeal apportioning liability 75 per cent to the plaintiff and only 25 per cent to the van driver.

In *South Tweed Heads Rugby League Football Club Limited v Cole & Anor*[22], the plaintiff had been drinking heavily at the football club and was severely intoxicated. She had been drinking heavily from 9.30am when she attended a champagne breakfast. She continued to purchase alcohol from the bar however she was refused service at the bar in the afternoon because of her intoxicated state. She was ejected between 5.30pm and 6.00pm for being intoxicated. The club had offered to call her a taxi as well as offering her use of the club bus and driver. One of the men the plaintiff was with that evening told the club manager that he would look after her. Some time later, at about 6.20pm, the plaintiff left the club and went to cross the road when she was struck by a car. The trial judge found that the driver of the car had failed to keep a proper lookout. He also found the club liable for continuing to serve the plaintiff when she was intoxicated. The driver was found 30 per cent responsible, the club 30 per cent responsible and the plaintiff was found to have been 40 per cent responsible for her own injuries.

The Court of Appeal, however, upheld an appeal and dismissed the plaintiff's claim altogether. Ipp AJA (with Heydon and Santow JJA agreeing) thought that there was inadequate evidence to support the inference that the driver had driven negligently. The plaintiff had not established that had the driver kept a proper lookout, the driver would have seen the plaintiff in time to avoid the collision. Insofar as the club was concerned, it owed the plaintiff only the ordinary general duty of care owed by an occupier to a lawful tenant.

Victoria

In *Toomey v Scolaro's Concrete Constructions Pty Ltd & Ors*[23], the plaintiff was a member of the Australian Lacrosse Team. He had been at a buck's party with other lacrosse players and had been returning to his brother's unit. He was intoxicated, as were other members of the group. As the group made their way up some stairs to the unit, two other members of the party were ▶

wrestling playfully. One of them bumped the plaintiff and he fell over a balcony. He fell approximately two floors, landing on his head and is now confined to a wheelchair with incomplete quadriplegia. The railing over which the plaintiff fell did not comply with the Building Code despite the fact that the building was quite recently constructed. The railing was a height of only some 93 centimetres rather than being at 1 metre.

Although the plaintiff proved his case in negligence, he was found to have been 30 per cent responsible for his own injuries. He could have taken steps to avoid the wrestling men and steps could have been taken to avoid falling over the balcony.

Tasmania

In *McDonald v Woolworths (Victoria) Pty Ltd*[24], the plaintiff was a 73-year-old woman who was shopping in a Woolworths store in Tasmania. She was attempting to retrieve an apple pie from the freezer section. After getting the pie, she turned to walk off and tripped and fell when her foot struck some cartons of stock that had been left on the floor. At the time of the accident, an employee of Woolworths had been restocking the freezer area. He had adopted the normal 'closed store' procedure of leaving the stock in piles on the floor rather than the normal 'open store' procedure which did not involve stock being left in piles on the floor. He had done this because on that particular day, stock had arrived later than normal and he wanted to get it in the freezer as quickly as possible. The trial judge found that the store had been negligent in adopting the 'closed store' procedure. There was no reason why the stock could not have been left in a trolley rather than on the floor, in accordance with the normal 'open store' restocking policy.

The trial judge nonetheless found that the plaintiff had not kept a proper lookout. She was not entitled to assume that there would be no obstructions in the aisle. Although the inadvertence of customers was something which Woolworths had to take into account, the plaintiff was still found to have been 20 per cent responsible for her own injuries.

In *Wade v Aust Railway Historical Society & Ors*[25], the plaintiff was the rider of a motorcycle which collided with a train at a level crossing. The Full Court of the Supreme Court of South Australia found that the local council had been negligent in failing to erect traffic control signs at the level crossing and in failing to clear vegetation which obscured a motorist's view of oncoming trains. The court, however, refused to overturn the trial judge's finding of contributory negligence on the part of the plaintiff. The trial judge had found the plaintiff 70 per cent responsible for his own injury in failing to have proper regard to road conditions and the approaching level crossing.

Queensland

In *Goode v Thompson and Suncorp Metway Insurance Limited*[26], the plaintiff was a twelve-year-old child who was hit by a car whilst attempting to cross the road. He was returning home from school when he was hit by a car. The driver of the car was found to have been negligent in failing to keep a proper lookout, slowing down or sounding the horn. Despite the plaintiff's immature years, he was found by the trial judge to have been 20 per cent responsible for his own injuries. The insurer appealed quantum issues but not the apportionment of liability.

In *Kibble v FAI General Insurance Company Limited & Anor*[27], the plaintiff was a rider of a motorcycle which was hit by a motorist at a 'T' junction. The driver of the car was found to have been negligent in that the driver failed to give way at a 'Give Way' sign and was partly travelling on the incorrect side of the roadway. The plaintiff, however, was still found to have been 30 per cent responsible for the accident as he was travelling at a speed greater than the speed limit as he approached the intersection. The Court of Appeal declined to interfere with the finding of 30 per cent contributory negligence as, although it was high, the figure was reached by the trial judge after hearing all of the evidence and having the benefit of the impression left by witnesses. PL

Endnotes:

1 *Cooper v Bech (No. 2)* [1975] 12 SASR 151, at 157.
2 *Astley v Austrust Ltd* [1999] 73 ALJR 403.
3 *Williams v Commissioner for Road Transport and Tramways (NSW)* [1933] 50 CLR 258.
4 [1965-1966] 115 CLR 199.
5 at page 205.
6 *Pennington v Norris* [1956] 96 CLR 10, at 16.
7 *Winbergen v Hoyts Corp. Pty Ltd* [1997] 149 ALR 25.
8 *Pennington v Norris* [1956] 96 CLR 10; *Karamalis v Commissioner of South Australian Railways* [1997] 15 ALR 629.
9 [1986] 160 CLR 301.
10 at page 310-311.
11 [1985] 59 ALJR 492 (at 493–494).
12 [1984] 155 CLR 306.
13 [1963-1964] 110 CLR 24.
14 at p. 37.
15 [2001] 75 ALJR 1410.
16 [2000] QCA 383 (22 September 2000).
17 Gleeson CJ, Gaudron, McHugh, Gumow, Hayne and Callinan JJ; Kirby J dissenting.
18 [2002] HCA 41 (2 October 2002).
19 [2001] WASCA 276 (7 September 2001).
20 [2001] NSWCA 339 (24 October 2001).
21 [2002] NSWCA 79 (22 March 2002).
22 [2002] NSWCA 205.
23 [2001] VSC 279.
24 [1999] TASSC 41.
25 [2000] SASC 233.
26 [2002] QCA 138.
27 [2001] QCA 338.