Podbrebersek v Australian Iron & Steel Pty Ltd - [1985] HCA 34

HIGH COURT OF AUSTRALIA

Gibbs C.J., Mason, Wilson, Brennan and Deane JJ.

FRANK PODREBERSEK v. AUSTRALIAN IRON AND STEEL PTY. LIMITED
29 May 1985

Decision

GIBBS C.J., MASON, WILSON, BRENNAN and DEANE JJ. The appellant was the plaintiff in an action brought in the Supreme Court of New South Wales against the respondent company for damages for personal injuries allegedly caused by the negligence of the respondent as long ago as 20 April 1969. On that date the appellant was employed by the respondent as a gas regulator and was engaged in cleaning gas pipes when an explosion of gas caused the injuries for which the appellant seeks damages. For the purpose of cleaning the pipes it was necessary to remove and clean metal pins, about 4 inches long, which intruded into the pipes. Each pin had at one end a screw which corresponded with the thread in a hole in the pipe. When the pin was properly screwed in, its cap closed off the hole in the pipe. There were many pins which had to be removed so that the cleaning operation was a substantial one. It was usual for the employees to unscrew and screw back the pins by finger pressure. At times, however, the accumulation of dirt or damage to the threads or a lack of matching of threads prevented pins from being screwed in for the necessary distance, which was three or four turns. The explosion was caused because a pin had fallen out and had allowed gas to escape. There was evidence from which it could be inferred that the appellant had used only his fingers to screw in the pin which subsequently fell out and caused the gas to escape, so that the pin went into the hole only to the extent of half a turn, whereas by using a spanner the pin could have been screwed in to the requisite distance of three or four turns. There was evidence that several years before the accident the appellant had been trained by a fellow workman, Mr Kalaitzakis, in the work involved in cleaning the pipes and was shown how to use a spanner, and, if necessary, a tool called a "tap", to screw home any pin that could not properly be screwed by finger pressure. The appellant gave evidence which conflicted with that of Mr Kalaitzakis and called a consulting engineer, Mr Osman, who said that it was not a safe practice to use tools to screw in the pins with a spanner, because that would cause damage to the thread and would tend to choke the thread so that the parts would appear to be firmly engaged when in fact they were not.

2. The jury found that the respondent had been guilty of negligence and the appellant of contributory negligence causing the accident. They assessed the damages at $35,000 and determined that the respective shares of responsibility for the damage were as to the respondent 10 per cent and as to the appellant 90 per cent. Accordingly judgment was given in favour of the plaintiff for $3,500. An appeal to the Court of Appeal was dismissed.

3. At the trial the appellant's case was that the respondent had been negligent in two respects, in that (a) it had failed to provide safe equipment, i.e., pins which could be screwed into the pipes for a safe and sufficient distance, and had in fact supplied pins some of which would go in for only half a turn and were, in that respect, unsafe; and (b) it had failed to provide a safe system of work because the appellant was not instructed that when pins could not be satisfactorily screwed in by finger pressure a tool should be used to screw them in further. The respondent's case was that the appellant was guilty of contributory negligence in that he had failed properly to screw in the particular pin which in fact fell out of the pipe. The manner in which the jury apportioned the damages suggested to the Court of Appeal that the jury must have accepted the evidence of Mr Kalaitzakis and could not have been satisfied that the respondent had failed to provide a safe system of work in the manner alleged at the trial. In other words, the only negligence found by the jury was the failure of the respondent to provide pins which fitted more easily. Counsel for the appellant before us could not challenge that conclusion reached by the Court of Appeal.

4. It was submitted on behalf of the appellant that the finding of the jury that the appellant was guilty of contributory negligence was against the evidence and the weight of the evidence, and further that the Court of Appeal had erred in declining to hold that the jury's finding that the

damages recoverable by the appellant ought to be reduced by 90 per cent by reason of his contributory negligence was against the evidence and the weight of the evidence.

5. The first of these submissions took as its starting point the judgment of this Court in McLean v. Tedman (1984) 58 ALJR 541, at p 545; 56 ALR 359, at pp 365-366 . It was correctly submitted that the issue of contributory negligence had to be approached on the footing that the respondent had failed to discharge its obligation to take reasonable care, and that in considering whether there was contributory negligence on the part of the appellant, the circumstances and conditions in which he had to do his work had to be taken into account. The question was whether in those circumstances and under those conditions the appellant's conduct amounted to mere inadvertence, inattention or misjudgment, or to negligence. The failure on the part of the respondent to provide pins that could be screwed by hand for the requisite number of turns could result in danger to an employee only if he failed to ensure that a pin was properly screwed in. The appellant in the course of his evidence gave answers which could have satisfied the jury that he knew at the relevant time both that the pin had been screwed in only half a turn or "only a little bit stuck in" and that it was "very bad" to put in a pin with "only a little bit of a turn" since a pin so installed might fall out, and that about three turns were necessary to ensure that a pin stayed in position. They were entitled to prefer the evidence of Mr Kalaitzakis to that of the appellant and Mr Osman and to draw the conclusion that it was reasonably practicable to ensure that the pin could be screwed in far enough by the use of a spanner or "tap", and that the appellant knew this. Indeed, it should have been obvious to any gas regulator of the appellant's experience - perhaps to anyone of ordinary commonsense - that the use of a tool might assist to turn the pin. It was also obvious that it was dangerous to leave a pin so inadequately screwed in that it might fall out and allow gas to escape. On the evidence the jury were clearly entitled to find contributory negligence.

6. With regard to the apportionment of responsibility, a comparison was made in argument between the position of the respondent - a large company thought to be possessed of sophisticated skills and resources - and the appellant. It was submitted on behalf of the appellant that the respondent's breach of duty meant that it was foreseeable that some pins would fall out and allow gas to escape, thus exposing the appellant and other employees to the danger of an explosion and the risk of death or serious injury. On the other hand, it was said that the sole fault of the appellant was to neglect the instruction given to him by Mr Kalaitzakis. It was further submitted that there was no evidence that any directions had been given by the respondent to the appellant as to the manner in which he should do his work or that there was any established practice about the manner of screwing in the pins. That submission however ignores the fact that the jury may properly have inferred that the instruction given by Mr Kalaitzakis was part of the training arranged by the respondent for its employee, and is inconsistent with the concession that the jury must have found against the appellant on the second head of negligence alleged.

7. The jury may well have considered that the pins were unsafe only if the proper steps were not taken to ensure that they were screwed in to the requisite extent and that if the advice given to the appellant by Mr Kalaitzakis had been followed the injury would have been avoided. The learned members of the Court of Appeal said in their judgment:

> "They (the jury) might have regarded the defendant's fault as simply one which more often required the use of the spanner and thence raised the chance of error in fitting, but

> that compared with this the fault of the plaintiff was very much greater in just leaving in position a pin known to be screwed in only half a turn which he knew was a bad job and must have known was unsafe and in disregard of instructions."

We respectfully agree.

8. A finding on a question of apportionment is a finding upon a "question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds": British Fame (Owners) v. Macgregor (Owners) (1943) AC 197, at p 201. Such a finding, if made by a judge, is not lightly reviewed. The task of an appellant is even more difficult when the apportionment has been made by a jury: Zoukra v. Lowenstern (1958) VR 594 . In the circumstances to which reference has been made, it is not possible to say that it was unreasonable for the jury to place almost the entire responsibility for the damage on the appellant himself, and to make the apportionment that they did.

9. Finally, it was submitted that the learned trial judge had failed to instruct the jury fully and adequately as to the principles of law to be applied in determining the apportionment of damages. The learned judge summed up to the jury at considerable length on the questions of negligence and contributory negligence. When he came to the question of apportionment he dealt with the matter quite shortly; he simply instructed the jury that they should reduce the appellant's damages to such an extent as they considered just and equitable, having regard to the appellant's responsibility for the damage.

10. 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, i.e. of the degree of departure from the standard of care of the reasonable man (Pennington v. Norris (1956) 96 CLR 10, at p 16) and of the relative importance of the acts of the parties in causing the damage: Stapley v. Gypsum Mines Ltd. (1953) AC 663, at p 682 ; Smith v. McIntyre (1958) Tas.SR 36, at pp 42-49 and Broadhurst v. Millman (1976) VR 208, at p 219 and cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance.

11. It may be accepted that the direction given by the learned trial judge to the jury on the question of apportionment was deficient. Even on that assumption however, a new trial should not be ordered. In the first place no attempt was made by counsel for the appellant at the trial to seek further directions on this point: indeed the suggested deficiency in the summing up, which was not mentioned in the notice of appeal to the Court of Appeal, would appear not to have been raised until some 4.1/2 years afterwards when leave to rely on the point was given on the actual hearing of the appeal to that Court. The learned members of the Court of Appeal suggested that counsel's failure to seek a further direction "was based upon a tactical judgment that it would not advance his client's interests to have the relative defaults of the parties discussed by the judge at any greater length". Before us it was submitted that there was nothing to support the view that counsel had made a tactical judgment of that kind. However that may be, it is unlikely in the circumstances of the case and its conduct that an invitation to the jury to compare the extent to which the acts of the parties had contributed to cause the damage would have benefited the appellant. Further, the proceedings

have been characterized by delay of a kind which one hopes is extraordinary and for which no adequate explanation has been suggested. In the Court of Appeal the comment was made that between 1974 and 1978 the prosecution of the appellant's appeal was extremely dilatory and had provoked two applications to strike it out for want of prosecution. The Court of Appeal gave its judgment on 15 September 1978 and since that time further gross delay has occurred in prosecuting this appeal. It is true, as counsel for the appellant pointed out, that the respondent called no evidence at the trial. It was further submitted that there is nothing to show that the respondent would suffer prejudice if a new trial were had. However it was said that the exhibits at the trial have since been lost and it is by no means certain that they can be replaced. There is in any case inevitable prejudice to a party forced to defend an issue arising out of events that occurred more than sixteen years before the trial. It has not been shown that the Court of Appeal wrongly exercised its discretion in refusing to grant a new trial, and the further delay since the Court of Appeal gave its decision provides an additional reason why this Court should not interfere.

12. Mr Brownie has put before us very clearly everything that could be said on behalf of the appellant but the appeal must be dismissed.

Orders

Appeal dismissed with costs.

Cited by:

Elhawat v Workers Compensation Nominal Insurer [2025] NSWCA 88 -
Finniss v State of New South Wales [2023] NSWCA 292 (08 December 2023) (Payne and Stern JJA, Basten AJA)

61. Appellate courts must exercise restraint when interfering with an apportionment assessment: *Joslyn v Berryman* (2003) 214 CLR 552; [2003] HCA 34 at [157] (Hayne J); *Podrebersek v Australian Iron & Steel Pty Ltd* [1985] HCA 34; (1985) 59 ALJR 492 at 493-494 .

Finniss v State of New South Wales [2023] NSWCA 292 -
Finniss v State of New South Wales [2023] NSWCA 292 -
Bondi Beach Foods Pty Ltd v Chadwick [2023] NSWCA 265 (09 November 2023) (Gleeson, Leeming and Payne JJA)

253. These submissions as advanced by Bucket List and Crossguard are unpromising. The "intentional" return to Mr Martin's table is not established on the facts – Mr Chadwick had no choice but to circle around the crowded venue looking for a table, and in doing so necessarily had to walk past Mr Martin's table. The other challenges based on "undue" significance being given to Mr Martin's presence and a failure to have "proper" regard to Mr Chadwick's initiating and continuing a physical assault upon Mr Martin are in truth complaints about the weight to be given to those considerations. It is normally insufficient to make out a case for appellate interference with an evaluative determination to contend that insufficient weight has been given to a relevant matter: see *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* (2019) 99 NSWLR 419; [2019] NSWCA 61 at [12] -[20] , and the present case is no exception, having regard to the deference to be accorded to findings of contributory negligence; cf *Podrebersek v Australian Iron & Steel Pty Ltd* [1985] HCA 34; (1985) 59 ALJR 492 at 493.

Black Head Bowling Club Ltd v Harrower [2023] NSWCA 267 -
Bondi Beach Foods Pty Ltd v Chadwick [2023] NSWCA 265 -
Black Head Bowling Club Ltd v Harrower [2023] NSWCA 267 -
Mikkelsen v Li [2023] VSCA 255 -
Mikkelsen v Li [2023] VSCA 255 -
Mikkelsen v Li [2023] VSCA 255 -
Mikkelsen v Li [2023] VSCA 255 -
Mikkelsen v Li [2023] VSCA 255 -
Viterra Malt Pty Ltd v Cargill Australia Ltd [2023] VSCA 157 -
Payne trading as Sussex Inlet Pontoons v Liccardy [2023] NSWCA 73 -
Payne trading as Sussex Inlet Pontoons v Liccardy [2023] NSWCA 73 -
Payne trading as Sussex Inlet Pontoons v Liccardy [2023] NSWCA 73 -
Ausbao (286 Sussex Street) Pty Ltd v The Registrar General of New South Wales [2023] NSWCA 18 -
Ausbao (286 Sussex Street) Pty Ltd v The Registrar General of New South Wales [2023] NSWCA 18 -
Bellevarde Constructions Pty Ltd v L'Officina by Vincenzo Australia Pty Limited [2022] NSWCA 246 -
Melbourne Water Corporation v Vaughan Constructions Pty Ltd [2022] VSCA 241 (10 November 2022) (Sifris, Kennedy and Walker JJA)

90. Although, as the applicant highlights, *Podrebersek* was concerned with contributory negligence, there is no reason why the reference to 'responsibility' in s 157(4)(b) should be read in a different way to that considered in *Podrebersek*. [52] The legislature is to be taken to have been aware of this position taken by the High Court. Further, consistent with the dictionary definitions, above, the decision suggests that the concept of apportioning 'responsibility' will be concerned with much more than factual causation. More particularly, it suggests that, in assessing comparative 'responsibility', the relevant persons will also be liable so that their 'culpability' may be taken into account.

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[52] See also *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 PS613436T* [2021] VSCA 72, [262] (Beach and Osborn JJA and Stynes AJA), where the approach in *Podrebersek* was applied under the *Wrongs Act* Part IVAA regime.

Melbourne Water Corporation v Vaughan Constructions Pty Ltd [2022] VSCA 241 -
Melbourne Water Corporation v Vaughan Constructions Pty Ltd [2022] VSCA 241 -
Melbourne Water Corporation v Vaughan Constructions Pty Ltd [2022] VSCA 241 -
Melbourne Water Corporation v Vaughan Constructions Pty Ltd [2022] VSCA 241 -
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Melbourne Water Corporation v Vaughan Constructions Pty Ltd [2022] VSCA 241 -
Melbourne Water Corporation v Vaughan Constructions Pty Ltd [2022] VSCA 241 -
Port Sorell Bowls Club Inc v Dann [2022] TASFC 2 -
Port Sorell Bowls Club Inc v Dann [2022] TASFC 2 -
Port Sorell Bowls Club Inc v Dann [2022] TASFC 2 -
Port Sorell Bowls Club Inc v Dann [2022] TASFC 2 -
Jack Bishop Pty Ltd v Trespa Holdings Pty Ltd [2021] VSCA 275 (05 October 2021) (Maxwell P; Sifris and Walker JJA)

26. In *Podrebersek v Australian Iron & Steel Pty Ltd* , the High Court stated:

> A finding on a question of apportionment is a finding upon a 'question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds' ... Such a finding, if made by a judge, is not lightly reviewed ...

> 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, i.e. 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 analysis. [22]

Jack Bishop Pty Ltd v Trespa Holdings Pty Ltd [2021] VSCA 275 -
Jack Bishop Pty Ltd v Trespa Holdings Pty Ltd [2021] VSCA 275 -
Jack Bishop Pty Ltd v Trespa Holdings Pty Ltd [2021] VSCA 275 -
Wollongong City Council v Williams [2021] NSWCA 140 -
Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 -
Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 -
Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T [No 2] [2021] VSCA 122 -
Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T [No 2] [2021] VSCA 122 -
Mount Arthur Coal Pty Ltd v Duffin [2021] NSWCA 49 -
Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T [2021] VSCA 72 -
Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T [2021] VSCA 72 -
Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T [2021] VSCA 72 -
Owners of Strata Plan No 30791 v Southern Cross Constructions (ACT) Pty Ltd (in liquidation) (No 2) [2021] NSWCA 35 (18 March 2021) (Gleeson and McCallum JJA, Emmett AJA)

10. See Podrebersek v Australian Iron and Steel Pty Ltd (1985) 59 ALJR 492; [1985] HCA 34 at [10] .

Gregory Spencer Ward trading as Ward's Stock Transport v Watson [2021] WASCA 44 -
Gregory Spencer Ward trading as Ward's Stock Transport v Watson [2021] WASCA 44 -
Gregory Spencer Ward trading as Ward's Stock Transport v Watson [2021] WASCA 44 -
Gregory Spencer Ward trading as Ward's Stock Transport v Watson [2021] WASCA 44 -
Wreford v Lyle [No 3] [2021] WASCA 20 (11 February 2021) (Quinlan CJ; Murphy and Pritchard JJA)

53. Having regard to these primary findings her Honour reached the following conclusions:[46]

> In the context of a 4WD which was, to Ms Wreford's knowledge, intent on turning right into Mill Point Road, there was, in my view, a foreseeable risk that the 4WD might move forward. If Ms Wreford placed herself in front of the 4WD, the risk was she would be struck by it and injured.
>
> The risk could not be regarded as insignificant. Firstly, the risk that this might occur was, on Ms Wreford's evidence, precisely what she was assessing. In my view the risk was obvious, and would be so to any cyclist in that position. Secondly, any consequences would not be insignificant given the size and weight of a 4WD. The question then is what, in the circumstances, a reasonable person would have done to take precautions against that risk.
>
> In terms of s 5B(2) , there is no doubt that harm would result if care was not taken in this situation and that such harm was likely to be serious to Ms Wreford. The obvious precaution was to stay on the pavement and not move in front of the vehicle at all. This was not a difficult or burdensome thing to do. Ms Wreford gave a very detailed account of the time of which she said that she waited, what she did to attract Mr Lyle's attention and the precise movement of the vehicle and her bicycle. I do not accept the accuracy of that account. In any event the time that she waited is immaterial to the assessment of the risk and her conduct.
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> Ms Wreford does not accept that she took a calculated risk. She asserts that she was acting carefully, because the 'other vehicle', would prevent Mr Lyle's 4WD moving out. Even if there were other traffic, that would not, in my assessment, make her manoeuvre free of risk. However, I do not accept her evidence that there was such another vehicle as already explained. It was Ms Wreford's duty to take care for her own safety. In my view, the risk of riding a push bike in front of a 4WD which was waiting to enter the road, is obvious. On her own account, she knew

that the driver had not seen her. In my assessment, there was a significant risk that the driver had not seen her. Unless she had actually caught his attention, and he had clearly indicated an awareness of her presence, it was tantamount to reckless to move in front of the vehicle when she believed he was intending to turn right.

I find therefore that Ms Wreford made a serious error of judgment in riding her bicycle in front of Mr Lyle's 4WD when there was an obvious risk to her own safety. Her actions contributed directly to the accident by putting herself into that position and that accident caused her great harm.

I do not accept that the 4WD drove over her head and then reversed back and then drove over her head a second time. Ms Wreford is convinced that this is so, but there is no adequate evidence to support that assertion. The broken helmet produced does not lead inevitably to that conclusion. It is just as likely that the helmet smashed on impact with the road and may thereby have caused her scalp laceration.

It is necessary to apportion responsibility for the harm caused to Ms Wreford according to s 4 of the *Law Reform (Contributory Negligence and Tortfeasors Contribution) Act*. Those provisions give no instruction as to how such an exercise is to be conducted. A commonly cited passage in relation to the apportionment exercise is found in ***Podrebersek v Australian Iron & Steel Pty Ltd*** [1985] HCA 34; (1985) 59 ALJR 492 :

The making of an apportionment as between plaintiff and a defendant of their respective shares in the responsibility for damage involves a comparison both of culpability, ie the degree of departure from the standard of care of a reasonable man and the relative importance of the acts of the parties in causing the damage: ***Stapley v Gypsum Mines Limited*** [1953] AC 663, 682.

The exercise of apportionment requires a judgment of what is just and equitable regarding the relative shares of responsibility of both the person harmed and the other party.

Mr Lyle's failure to see and avoid a collision with Ms Wreford is a significant departure from the standard of care of a person in charge of a vehicle. Ms Wreford was plainly there to be seen. Even if Ms Wreford had not stopped but sought to ride around Mr Lyle, she would have had to cause her bicycle to cross the small grass strip to get off the pavement and onto the bike path and could not have achieved that at any speed on the bicycle she was riding, (photograph exhibit 19). She would have been in his vision to the left and then closer to the vehicle before she was in front of the vehicle. It is perhaps understandable, given that he was looking for traffic at a distance along the Mill Point Road, how he might not have seen her, because a bicycle in that position would be unusual. However, that does not absolve him of his responsibility, which he accepts.

For her part, Ms Wreford's conduct was a significant departure from the standard of care of a reasonable cyclist in those circumstances. Whether she stopped or just sought to ride around the vehicle, the situation is effectively the same. In terms of damage, the driving of [a] Toyota Landcruiser is significantly greater than the riding of a push bike. The obligation to ensure that there were no other parties in the vicinity likely to come in contact with the 4WD before he moved out is a very significant obligation on Mr Lyle and his failure to do so created a significant danger. Ms Wreford made an error of judgment. In those circumstances I apportion blame to Mr Lyle at 70% and Ms Wreford at 30%.

Wreford v Lyle [No 3] [2021] WASCA 20 -
Murray Valley Aboriginal Cooperative Ltd v Marie Havea , , Marie Havea and Murray Valley Aboriginal Cooperative Ltd [2020] VSCA 243 -
Marketform Managing Agency Ltd for and on behalf of the Underwriting Members of Syndicate 2468 for the 2009 Year of Account v Ashcroft Supa IGA Orange Pty Ltd [2020] NSWCA 36 -
Charter Hall Real Estate Management Services (NSW) Pty Limited v State of New South Wales [2020] NSWCA 26 (25 February 2020) (Macfarlan and White JJA, Simpson AJA)

86. Mr McMullen was fully kitted out with breathing apparatus, helmet and sledge axe or Halligan tool as described at [14] above. His accidentally knocking the locking bar (presumably at its lower point where it obtruded beyond the vertical towards the ladder) was accidental inadvertence not amounting to contributory negligence (*Podrebersek v Australian Iron and Steel Pty Ltd* [1985] HCA 34; (1985) 59 ALJR 492 at 493-4).

Charter Hall Real Estate Management Services (NSW) Pty Limited v State of New South Wales [2020] NSWCA 26 -
Marie Stephens v Transport Accident Commission [2019] VSCA 234 -
Kabic v AAI Limited t/as GIO [2019] NSWCA 247 -
Zervas v Burkitt (No 2) [2019] NSWCA 236 -
Clare & Gilbert Valleys Council v Kruse [2019] SASCFC 106 (06 September 2019) (Blue, Lovell and Hinton JJ)

> 119. It is well established that the decision of a trial judge, on a question of apportionment, will not be lightly reviewed. A finding on a question of apportionment is a finding upon a question of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds. [45] If all that is involved is a difference of opinion by a different mind, an appeal court will not interfere with an apportionment. [46] The question is whether the difference is a mere difference of opinion by a different mind or whether the appeal court concludes that the trial judge's apportionment is outside the range reasonably open on the evidence. [47]

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> [46] *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492 at 494 per Gibbs CJ, Mason, Wilson, Brennan and Deane JJ .

Clare & Gilbert Valleys Council v Kruse [2019] SASCFC 106 -
Clare & Gilbert Valleys Council v Kruse [2019] SASCFC 106 -
Ayre v Swan [2019] NSWCA 202 -
Ayre v Swan [2019] NSWCA 202 -
Ayre v Swan [2019] NSWCA 202 -
White v Redding [2019] NSWCA 152 -
South 32 Ltd v Allfab Constructions Pty Ltd [2019] NSWCA 132 -
South 32 Ltd v Allfab Constructions Pty Ltd [2019] NSWCA 132 -
Williams v Metcash Trading Ltd [2019] NSWCA 94 -
Williams v Metcash Trading Ltd [2019] NSWCA 94 -
Lee v McGrath [2019] ACTCA 6 -
Northern Territory v Griffiths [2019] HCA 7 -
Bulent Aycicek v Flowline Industries Pty Ltd [2019] VSCA 37 -
Bulent Aycicek v Flowline Industries Pty Ltd [2019] VSCA 37 -
Bulent Aycicek v Flowline Industries Pty Ltd [2019] VSCA 37 -
Apostolic Church Australia Ltd v Dixon [2018] WASCA 146 -
Coles Supermarkets Australia Pty Ltd v Bridge [2018] NSWCA 183 -
Minister for Immigration and Border Protection v SZVFW [2018] HCA 30 -
Cam & Bear Pty Ltd v McGoldrick [2018] NSWCA 110 -
Cam & Bear Pty Ltd v McGoldrick [2018] NSWCA 110 -
Cam & Bear Pty Ltd v McGoldrick [2018] NSWCA 110 -
Cam & Bear Pty Ltd v McGoldrick [2018] NSWCA 110 -
Cam & Bear Pty Ltd v McGoldrick [2018] NSWCA 110 -
Rail Corporation New South Wales v Donald; Staff Innovations Pty Ltd t/as Bamford Family Trust [2018] NSWCA 82 -
Rail Corporation New South Wales v Donald; Staff Innovations Pty Ltd t/as Bamford Family Trust [2018] NSWCA 82 -
Smith v Pangallo [2017] ACTCA 61 (15 December 2017) (Penfold, Burns and Perry JJ)

> 71. In our opinion, the test found in s 102(1) of the Wrongs Act , requiring a reduction of damages on the basis of contributory negligence assessed on the basis of what is "just and reasonable", does not differ from the requirements of the common law as explained in *Podrebersek* .

Skinner v Redmond Family Holdings Pty Ltd [2017] NSWCA 329 (15 December 2017) (Macfarlan and Gleeson JJA, Barrett AJA)

160. The principles governing appellate review of a trial judge's contribution findings are well-established and involve the same principles as apply in respect of an assessment of contributory negligence. In *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492 , the High Court (Gibbs CJ, Mason, Wilson, Brennan and Deane JJ) said (at 493):

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

Skinner v Redmond Family Holdings Pty Ltd [2017] NSWCA 329 -
Skinner v Redmond Family Holdings Pty Ltd [2017] NSWCA 329 -
Smith v Pangallo [2017] ACTCA 61 -
Smith v Pangallo [2017] ACTCA 61 -
ALDI Foods Pty Ltd v Shop, Distributive & Allied Employees Association [2017] HCA 53 -
Amaca Pty Ltd (Under NSW Administered Winding Up) (ACN 000 035 512) v Pfeiffer [2017] SASCFC 157 (28 November 2017) (Kourakis CJ; Peek and Stanley JJ)

Pfeiffer v Amaca P/L (Under New Administered Winding Up) & Ors [2016] SADC 101; *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492 ; *Joslyn v Berryman* [2003] HCA 34; *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125; *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378; *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356, discussed.

Amaca Pty Ltd (Under NSW Administered Winding Up) (ACN 000 035 512) v Pfeiffer [2017] SASCFC 157 (28 November 2017) (Kourakis CJ; Peek and Stanley JJ)

36. In considering the approach to be taken on appellate review of such a finding, the High Court in *Podrebersek* said: [16]

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

Amaca Pty Ltd (Under NSW Administered Winding Up) (ACN 000 035 512) v Pfeiffer [2017] SASCFC 157 (28 November 2017) (Kourakis CJ; Peek and Stanley JJ)

36. In considering the approach to be taken on appellate review of such a finding, the High Court in *Podrebersek* said: [16]

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

via

[16] [1985] HCA 34 at [8] , (1985) 59 ALJR 492 at 493-494 .

Amaca Pty Ltd (Under NSW Administered Winding Up) (ACN 000 035 512) v Pfeiffer [2017] SASCFC 157 -
Amaca Pty Ltd (Under NSW Administered Winding Up) (ACN 000 035 512) v Pfeiffer [2017] SASCFC 157 -
Amaca Pty Ltd (Under NSW Administered Winding Up) (ACN 000 035 512) v Pfeiffer [2017] SASCFC 157 -
Amaca Pty Ltd (Under NSW Administered Winding Up) (ACN 000 035 512) v Pfeiffer [2017] SASCFC 157 -
Toni Lee Collins v Kristian Staminirovitch [2017] VSCA 342 (23 November 2017) (Santamaria, Kyrou and Kaye JJA)

> 83. In determining that question, the appeal court is required to assume that the jury took the view of the evidence that was most favourable to the verdict. [3] As such, the threshold for an appellant to succeed, on such a ground, is a formidable one, particularly where (as in this case) the appellant is the party who carried the burden of proof on the issues raised on appeal. [4] In a case in which the jury verdict necessarily involved elements of assessment or evaluation, such as in a challenge to an award of general damages, the task confronting an appellant is particularly difficult. [5]
>
> *via*
>
> [5] *Liftronic* 335 [64] (Kirby J); see also *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529, 532.

Nominal Defendant v Buck Cooper [2017] NSWCA 280 -
Nominal Defendant v Buck Cooper [2017] NSWCA 280 -
Singapore Airlines Cargo Pte Limited v Principle International Pty Ltd [2017] NSWCA 216 (30 August 2017) (Beazley P, Meagher and Payne JJA)

> That raises the question whether her Honour's apportionment of 60 per cent liability to SIA Cargo and 40 per cent to Principle warrants appellate interference. The apportionment of liability involves an evaluative judgment, as was explained in Podrebersek v Australian Iron and Steel Pty Ltd (1985) 59 ALJR 492. This includes, relevantly for the purposes of this case, a comparison not only of the particular acts of each party but also "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": at 494 (citations omitted).

Singapore Airlines Cargo Pte Limited v Principle International Pty Ltd [2017] NSWCA 216 -
Singapore Airlines Cargo Pte Limited v Principle International Pty Ltd [2017] NSWCA 216 -
Libra Collaroy Pty Ltd v Bhide [2017] NSWCA 196 -
Raad v VM & KTP Holdings Pty Ltd [2017] NSWCA 190 -
Raad v VM & KTP Holdings Pty Ltd [2017] NSWCA 190 -
Harrington Estates (NSW) Pty Ltd t/as Harrington Grove Country Club v Turner [2016] NSWCA 369 -
Harrington Estates (NSW) Pty Ltd t/as Harrington Grove Country Club v Turner [2016] NSWCA 369 -
Doble Express Transport Pty Ltd (Administrator Appointed) v John L Pierce Pty Ltd [2016] NSWCA 352 (13 December 2016) (Ward JA, Sackville AJA and Hall J)

> 35. His Honour noted that in assessing contributory negligence, it was necessary to have regard to the principles stated in *Podrebersek v Australian Iron and Steel Pty Ltd* . [31] Having quoted from the judgment, his Honour simply said that in all the circumstances he assessed the relevant contributions at 40 per cent for Doble and 60 per cent for Pierce. [32]

Doble Express Transport Pty Ltd (Administrator Appointed) v John L Pierce Pty Ltd [2016] NSWCA 352 (13 December 2016) (Ward JA, Sackville AJA and Hall J)

39. Mr Campbell submitted that if his submissions on causation were rejected, the primary Judge's discretion in relation to contributory negligence miscarried because his Honour failed to compare the culpability of each of the drivers and thus failed to undertake the task mandated by the High Court in *Podrebersek* . Mr Campbell invited the Court, when re-exercising its discretionary judgment apportioning responsibility, to find that Mr Mead (and Doble) bore 20 per cent of the responsibility and Mr Hukins (and Pierce) 80 per cent.

Doble Express Transport Pty Ltd (Administrator Appointed) v John L Pierce Pty Ltd [2016] NSWCA 352 -
Doble Express Transport Pty Ltd (Administrator Appointed) v John L Pierce Pty Ltd [2016] NSWCA 352 -
Nominal Defendant v Dowedeit [2016] NSWCA 332 (01 December 2016) (Meagher, Gleeson and Simpson JJA)

132. It is well-established that the apportionment decision of the trial judge is "not lightly reviewed": *Podrebersek* , 494. This is on the basis that reasonable minds may differ as to where within a particular range the appropriate result is to be found: *Podrebersek* , 493-494 . See also the observations of Tobias AJA in *Axiak v Ingram* at [90] .

Nominal Defendant v Dowedeit [2016] NSWCA 332 -
Nominal Defendant v Dowedeit [2016] NSWCA 332 -
Nominal Defendant v Dowedeit [2016] NSWCA 332 -
Cook v Karden Disability Support Foundation [2016] VSCA 263 (15 November 2016) (Tate, Osborn and Beach JJA)

53. The remaining ground concerns the jury's apportionment of 60 per cent against the applicant. The apportionment was undoubtedly high. The governing principles in respect of the applicant's complaint about the jury's apportionment can be found in the decisions of *Podrebersek* [19] and *Liftronic Pty Ltd v Unver*. [20]

via

[19] (1985) 59 ALJR 492 .

Cook v Karden Disability Support Foundation [2016] VSCA 263 -
Cook v Karden Disability Support Foundation [2016] VSCA 263 -
Cook v Karden Disability Support Foundation [2016] VSCA 263 -
Cook v Karden Disability Support Foundation [2016] VSCA 263 -
Cook v Karden Disability Support Foundation [2016] VSCA 263 -
Cook v Karden Disability Support Foundation [2016] VSCA 263 -
Cook v Karden Disability Support Foundation [2016] VSCA 263 -
Serrao (by his Tutor Serrao) v Cornelius (No.2) [2016] NSWCA 231 -
Nilumbik Shire Council v Victorian YMCA Community Program Pty Ltd [2016] VSCA 192 (11 August 2016) (Tate, Osborn and Santamaria JJA)

41. This statement by the judge, the Council says, only addressed the second limb of the test for apportionment set out in *Podrebersek v Australian Iron & Steel Pty Ltd.* [55] While the first limb of that test deals with the degree of departure from the standard of care, the second limb is concerned with the relative importance of the acts of the parties. The High Court in *Podrebersek* 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, ie 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. [56]

via

[55] (1985) 59 ALR 529 (' *Podrebersek*').

Nilumbik Shire Council v Victorian YMCA Community Program Pty Ltd [2016] VSCA 192 -
Nilumbik Shire Council v Victorian YMCA Community Program Pty Ltd [2016] VSCA 192 -
Nilumbik Shire Council v Victorian YMCA Community Program Pty Ltd [2016] VSCA 192 -
Nilumbik Shire Council v Victorian YMCA Community Program Pty Ltd [2016] VSCA 192 -
Nilumbik Shire Council v Victorian YMCA Community Program Pty Ltd [2016] VSCA 192 -
Boateng v Dharamdas [2016] NSWCA 183 -
Boateng v Dharamdas [2016] NSWCA 183 -
Boateng v Dharamdas [2016] NSWCA 183 -
Boateng v Dharamdas [2016] NSWCA 183 -
Boateng v Dharamdas [2016] NSWCA 183 -
Jurox Pty Ltd v Fullick [2016] NSWCA 180 -
O'Connor v Insurance Commission of Western Australia [2016] WASCA 95 (09 June 2016) (McLure P; Buss and Mazza JJA)
Podrebersek v Australian Iron & Steel Pty Ltd [1985] HCA 34 ; (1985) 59 ALJR 492
Rankilor v City of South Perth

O'Connor v Insurance Commission of Western Australia [2016] WASCA 95 -
O'Connor v Insurance Commission of Western Australia [2016] WASCA 95 -
ALDI Foods Pty Ltd v Young [2016] NSWCA 109 -
Chu v Russell [2016] TASFC 1 -
Steen v Senton [2015] ACTCA 57 -
Steen v Senton [2015] ACTCA 57 -
Bitupave Ltd t/as Boral Asphalt v Pillinger [2015] NSWCA 298 (30 September 2015) (Ward, Emmett and Gleeson JJA)

284. The Council has adopted Boral's submissions on this issue. Boral maintains that there ought to have been a substantially greater finding of contributory negligence, and that the error is sufficiently significant to warrant appellate interference (having regard to the principles articulated in *Podrebersek v Australian Iron & Steel Pty Ltd* [1985] HCA 34; 59 ALJR 492).

Solomons v Pallier [2015] NSWCA 266 -
Solomons v Pallier [2015] NSWCA 266 -
Joel Roche v Bill Kigetzis [2015] VSCA 207 -
Joel Roche v Bill Kigetzis [2015] VSCA 207 -
Deal v Kodakkathanath [2015] VSCA 191 -
Verryt v Schoupp [2015] NSWCA 128 -
Verryt v Schoupp [2015] NSWCA 128 -
Verryt v Schoupp [2015] NSWCA 128 -
Redbro Investments Pty Ltd v Ceva Logistics (Australia) Pty Ltd [2015] NSWCA 73 -
Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72 -
Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72 -
Central Darling Shire Council v Greeney [2015] NSWCA 51 (16 March 2015) (Macfarlan JA, Sackville AJA and Beech-Jones J)

62. The applicable principles were stated by the High Court in *Podrebersek v Australian Iron & Steel Pty Ltd* [1985] HCA 34; 59 ALJR 492 at 494 as follows:

> "The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man ... 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" (citations omitted).

Davis v Swift [2014] NSWCA 458 (22 December 2014) (Meagher and Leeming JJA, Adamson J)

39. The Court (Tobias AJA, Beazley JA and Sackville AJA agreeing) rejected the respondent's argument:

> [83] I would accept the respondent's submission that the exercise called for in *Podrebersek* can have no application to a case such as the present. Part 1.2 of the Act proceeds upon the assumption that the defendant driver is not at fault. Accordingly, comparisons of culpability and of the relevant importance of the acts of the parties in causing the first appellant's injuries are inappropriate.
>
> [84] I would also accept the respondent's submission that the deeming provision of s 7B (1) has no part to play in the present exercise. That is because it is simply impossible to determine the degree of fault which is to be attributed to the driver which, as submitted by the respondent, may be assumed to be minuscule. Although I accept that submission, it does no more than illustrate the inappropriateness of applying the principles in *Podrebersek* .
>
> [85] It follows that the concept of "contributory negligence" in s 7F of the Act has to be applied in a different manner to the usual comparative analysis of responsibility undertaken in personal injuries cases. This can be done consistently with the objectives of the legislation by inquiring how far the plaintiff has departed from the standard of care he or she is required to observe in the interests of his or her own safety. The reduction of damages under Pt 1.2 Div 1 by reason of contributory negligence will therefore be determined by assessing the extent to which the plaintiff departed from that standard.
>
> [86] It is for this reason that I do not accept the respondent's submission that the first appellant, being the sole cause of the accident and her injuries, mandates a finding of contributory negligence of 100%. On the respondent's argument, a plaintiff guilty of contributory negligence in a "blameless motor accident" case must always be the sole cause of his or her injuries with the consequence that in every case there would be a finding of 100% contributory negligence. The legislature could not have intended such a result.

Davis v Swift [2014] NSWCA 458 -
Davis v Swift [2014] NSWCA 458 -
Davis v Swift [2014] NSWCA 458 -
Davis v Swift [2014] NSWCA 458 -
Davis v Swift [2014] NSWCA 458 -
Grima v RFI (Aust) Pty Ltd [2014] NSWCA 345 -
Allard v Jones Lang Lasalle (Vic) Pty Ltd [2014] NSWCA 325 -
Allard v Jones Lang Lasalle (Vic) Pty Ltd [2014] NSWCA 325 -
Stafford v Carrigy-Ryan [2014] ACTCA 27 -
Stafford v Carrigy-Ryan [2014] ACTCA 27 -

Nominal Defendant v Bacon [2014] NSWCA 275 -
T and X Company Pty Ltd v Chivas [2014] NSWCA 235 (22 July 2014) (Beazley P, Basten and Barrett JJA)

17. The trial judge did not give reasons for his apportionment. Nonetheless, I consider that appellate restraint in respect of apportionment under the combined operation of the *Civil Liability Act* , s 5R and the *Motor Accidents Compensation Act* , s 138(3) is required. In other words, I consider that in the context of these provisions, the appellate restraint referred to in *Podrebersek* applies: *Podrebersek v Australian Iron & Steel Pty Ltd* [1985] HCA 34; 59 ALJR 492 . Accordingly, although I may have found a higher degree of contributory negligence (although not to the extent found by Basten JA with whom Barrett JA agrees) I do not consider appellate intervention is warranted.

T and X Company Pty Ltd v Chivas [2014] NSWCA 235 -
T and X Company Pty Ltd v Chivas [2014] NSWCA 235 -
T and X Company Pty Ltd v Chivas [2014] NSWCA 235 -
T and X Company Pty Ltd v Chivas [2014] NSWCA 235 -
T and X Company Pty Ltd v Chivas [2014] NSWCA 235 -
ABN AMRO Bank NV v Bathurst Regional Council [2014] FCAFC 65 -
ABN AMRO Bank NV v Bathurst Regional Council [2014] FCAFC 65 -
Wealthsure Pty Ltd v Selig [2014] FCAFC 64 -
Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139 (07 May 2014) (McColl, Basten and Emmett JJA)

51. Hayne J also considered the operation of s 74(3) and concluded (at [157]) that it required the decision-maker to undertake the process of apportionment as described in *Podrebersek v Australian Iron & Steel Pty Ltd* [1985] HCA 34; (1985) 59 ALJR 492 (at 494). In *Mackenzie v the Nominal Defendant* [2005] NSWCA 180 (at [60] ff) (special leave refused, *Nominal Defendant v Mackenzie* [2005] HCATrans 844) Giles JA (Stein AJA and Gzell J agreeing) considered the different wording of s 9(1)(b) and s 138(3) and concluded (at [62] - [63]) that the latter still required the court to apply *Podrebersek v Australian Iron & Steel Pty Ltd* . His Honour accepted that s 138(3) was the applicable provision no doubt because the case involved an intoxicated plaintiff in which circumstance s 138(2) as then in force was invoked. However as s 138(1) only captures the "common law and enacted law as to contributory negligence ... except as provided by this section", in my view the apportionment exercise must be undertaken in accordance with s 138(3) . As is apparent from what follows this may be a distinction without a difference.

Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139 -
Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139 -
Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139 -
Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139 -
Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139 -
Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139 -
WB Jones Staircase & Handrail Pty Ltd v Richardson & Ors [2014] NSWCA 127 -
Cheng v Geussens [2014] NSWCA 113 -
John Ronald Waterfall v Stuart Ross Antony [2014] VSCA 44 -
John Ronald Waterfall v Stuart Ross Antony [2014] VSCA 44 -
John Ronald Waterfall v Stuart Ross Antony [2014] VSCA 44 -
John Ronald Waterfall v Stuart Ross Antony [2014] VSCA 44 -
AV8 Air Charter Pty Limited v Sydney Helicopters Pty Limited [2014] NSWCA 46 -
State of Queensland v Kelly [2014] QCA 27 (25 February 2014) (Fraser JA and Philippides and Henry JJ)

53. The knowledge which the respondent gained in his nine or 10 previous runs down the dune was relevant in the assessment of the degree to which the respondent departed from the standard of care of a reasonable person in failing to appreciate and heed the signs warning that running down the dune was dangerous. Whilst the sign did warn against running down the dunes it did not clearly convey that the respondent's activity carried a risk of serious

injury of the kind involved in diving into waters of unknown depth. I am not persuaded that the trial judge made any error of fact or failed to take into account any relevant fact in making the apportionment. That being so, the appellant encounters the difficulty that, as Gibbs CJ, Mason, Wilson, Brennan and Deane JJ pointed out in *Podrebersek v Australian Iron & Steel Pty Ltd* : [35]

> "[a] finding on a question of apportionment is a finding upon a "question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds" ... Such a finding, if made by a judge, is not lightly reviewed."

via

[35] [1985] HCA 34 ; (1985) 59 ALJR 492 at 493-494 .

State of Queensland v Kelly [2014] QCA 27 -
State of Queensland v Kelly [2014] QCA 27 -
Veljanovska v Verduci [2014] VSCA 15 -
Veljanovska v Verduci [2014] VSCA 15 -
Veljanovska v Verduci [2014] VSCA 15 -
Glad Retail Cleaning Pty Ltd v Alvarenga [2013] NSWCA 482 -
QBE v Orcher [2013] NSWCA 478 -
Mikaera v Newman Transport Pty Ltd [2013] NSWCA 464 -
Mikaera v Newman Transport Pty Ltd [2013] NSWCA 464 -
Parkview Constructions Pty Ltd v Abrahim [2013] NSWCA 460 -
Mikaera v Newman Transport Pty Ltd [2013] NSWCA 464 -
Mikaera v Newman Transport Pty Ltd [2013] NSWCA 464 -
Mikaera v Newman Transport Pty Ltd [2013] NSWCA 464 -
Parkview Constructions Pty Ltd v Abrahim [2013] NSWCA 460 -
Mikaera v Newman Transport Pty Ltd [2013] NSWCA 464 -
Settlement Group Pty Ltd v Purcell Partners [2013] VSCA 370 -
Settlement Group Pty Ltd v Purcell Partners [2013] VSCA 370 -
Smith v Gellibrand Support Services Inc [2013] VSCA 368 -
Smith v Gellibrand Support Services Inc [2013] VSCA 368 -
Egan v Mangarelli [2013] NSWCA 413 (05 December 2013) (Barrett and Ward JJA, Tobias AJA)

158. In my view it is clear from the foregoing that, as required by *Podrebersek* , the primary judge, in making an apportionment as between the appellant and the first respondent as to their respective shares in the responsibility for the former's damage, made the necessary comparison both as to culpability, ie of the degree of departure of each party from the standard of care of the reasonable man, and of the relative importance of the acts of each in causing the damage.

Egan v Mangarelli [2013] NSWCA 413 -
Egan v Mangarelli [2013] NSWCA 413 -
Egan v Mangarelli [2013] NSWCA 413 -
Egan v Mangarelli [2013] NSWCA 413 -
Kiriwellage v Best & Less Pty Ltd [2013] VSCA 355 -
Kiriwellage v Best & Less Pty Ltd [2013] VSCA 355 -
Sexton v Homer [2013] NSWCA 414 -
Kiriwellage v Best & Less Pty Ltd [2013] VSCA 355 -
Marien v Gardiner [2013] NSWCA 396 -
Marien v Gardiner [2013] NSWCA 396 -

Motorcycling Events Group Australia Pty Ltd v Kelly [2013] NSWCA 361 -
Motorcycling Events Group Australia Pty Ltd v Kelly [2013] NSWCA 361 -
Australian Winch and Haulage Company Pty Ltd v Collins [2013] NSWCA 327 -
Duffy v Salvation Army (Victoria) Property Trust [2013] null 0 -
Northern New South Wales Local Health Network v Heggie [2013] NSWCA 225 -
Northern New South Wales Local Health Network v Heggie [2013] NSWCA 225 -
Nominal Defendant v Green; Nominal Defendant v Golding; Nominal Defendant v Campbell; [2013] NSWCA 219 (17 July 2013) (McColl and Basten JJA, Sackville AJA)

48. Secondly, it is commonly said that an appellate court should be reluctant to interfere with a trial judge's finding as to contributory negligence, on the basis that reasonable minds may differ as to where within a particular range, the appropriate result is to be found: *British Fame (Owners) v Macgregor (Owners)* [1943] AC 197 at 201, adopted in *Podrebersek* at 493-494 and applied by this Court in *Mousa v Marsh* [2001] NSWCA 317 at [12] and in *Mobbs v Kain* [2009] NSWCA 301; 54 MVR 179 at [112]-[113] . The existence of a principle of restraint is important; its operation, however, may vary depending on the circumstances. *British Fame* was an Admiralty case determined by a judge with particular expertise in the area; *Podrebersek* was a jury case. Further, it is important to identify the nature of the challenge by the party seeking appellate intervention: see *Tarabay v Leite* [2008] NSWCA 259 at [24]-[35] (in my judgment, in which Allsop P and Bell JA agreed). The role of an intermediate appellate court in respect of such matters, like the role of Court of Criminal Appeal in relation to sentencing, is to ensure a degree of consistency in approach on the part of trial judges. Thus, where a finding is outside an appropriate range, this Court, on an appeal governed by s 75A of the *Supreme Court Act 1970* (NSW) , should usually intervene.

Nominal Defendant v Green; Nominal Defendant v Golding; Nominal Defendant v Campbell; [2013] NSWCA 219 (17 July 2013) (McColl and Basten JJA, Sackville AJA)

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Nominal Defendant v Green; Nominal Defendant v Golding; Nominal Defendant v Campbell; [2013] NSWCA 219 -
Nominal Defendant v Green; Nominal Defendant v Golding; Nominal Defendant v Campbell; [2013] NSWCA 219 -
Nominal Defendant v Green [2013] NSWCA 219 -
Nominal Defendant v Green [2013] NSWCA 219 -
Nominal Defendant v Green; Nominal Defendant v Golding; Nominal Defendant v Campbell; [2013] NSWCA 219 -
Nominal Defendant v Green; Nominal Defendant v Golding; Nominal Defendant v Campbell; [2013] NSWCA 219 -
Nominal Defendant v Green [2013] NSWCA 219 -
P & M Quality Smallgoods Pty Ltd v Leap Seng [2013] NSWCA 167 -
Rosa v Galbally & O'Bryan [2013] VSCA 116 -

Scott v Williamson; Picken v Williamson [2013] NSWCA 124 -
Scott v Williamson; Picken v Williamson [2013] NSWCA 124 -
Willett v State of Victoria [2013] VSCA 76 -
Willett v State of Victoria [2013] VSCA 76 -
Willett v State of Victoria [2013] VSCA 76 -
Pasqualotto v Pasqualotto [2013] VSCA 21 -
Wodonga Regional Health Service v Hopgood [2012] VSCA 326 -
Potts v Frost [2012] TASFC 6 -
Idameneo (No 123) Pty Ltd v Gross [2012] NSWCA 423 -
Eire Contractors Pty Ltd v O'Brien [2012] NSWCA 400 (11 December 2012) (McColl and Barrett JJA, Preston CJ of LEC)

174. Grounds of challenge in those areas on appeal are not made out. This is particularly so in relation to apportionment between Eire and Reed and absence of contributory negligence when it is remembered that, in each such context, the decision is a quasi-discretionary one so that error of the kind referred to in *House v R* [1936] HCA 40; (1936) 55 CLR 499 at 504-5 must be found in order to warrant appellate intervention: *Podrebersek v Australian Iron & Steel Pty Ltd* [1985] HCA 34; (1985) 59 ALJR 492 .

Meandarra Aerial Spraying Pty Ltd v Gej & MA Geldard PTY LTD [2012] QCA 315 -
Meandarra Aerial Spraying Pty Ltd v Gej & MA Geldard PTY LTD [2012] QCA 315 -
Coregas Pty Ltd v Penford Australia Pty Ltd [2012] NSWCA 350 -
Town of Port Hedland v Hodder (No 2) [2012] WASCA 212 (26 October 2012) (Martin CJ, McLure P, Murphy JA)

Podrebersek v Australian Iron & Steel Pty Ltd [1985] HCA 34 ; (1985) 59 ALJR 492

Town of Port Hedland v Hodder (No 2) [2012] WASCA 212 (26 October 2012) (Martin CJ, McLure P, Murphy JA)

160. It seems a fair inference that the injustice of assessing the question of contributory negligence without regard to Mr Hodder's various disabilities affected the approach taken by the trial judge to the question of apportionment. As I have already noted, somewhat inconsistently with his conclusion that he was obliged to eschew subjective considerations, in the context of apportionment, he took into account the fact that Mr Hodder 'had never dived before and had no knowledge, training or ability that would allow him to dive in a safe manner' [361]. Even allowing for the established reluctance of an appellate court to interfere with the discretionary apportionment of contributory negligence - see ***Podrebersek v Australian Iron & Steel Pty Ltd*** [1985] HCA 34; (1985) 59 ALJR 492, 493 494 , if Mr Hodder's contributory negligence is to be assessed on the assumption that he was an ablebodied 23yearold man of normal intellectual ability, the apportionment of only 10% of the liability to his contributory negligence is so far outside the range of a reasonable discretionary judgment as to manifest error. It is to be remembered that the trial judge found that the risks created by the presence of the diving blocks at the shallow end of the pool were obvious, and would have been known to any person of normal faculties, because both the sign indicating the shallowness of the pool, and the distance between the bottom of the pool and the top of the water were evident to anyone with normal eyesight. If one proceeds upon the unreal assumption that Mr Hodder is a normal adult to whom these risks were or should have been obvious, an apportionment of liability for contributory negligence of greater than 10% would have been appropriate. It seems a fair inference that the trial judge apportioned such a low level of liability to Mr Hodder because of an implicit recognition of the injustice of assessing the question of whether he failed to take reasonable care for his own safety, and the extent of his culpability on an entirely unreal and hypothetical basis.

Town of Port Hedland v Hodder (No 2) [2012] WASCA 212 -
Jones Lang LaSalle (NSW) Pty Ltd v Taouk [2012] NSWCA 342 -
Jones Lang LaSalle (NSW) Pty Ltd v Taouk [2012] NSWCA 342 -

Axiak v Ingram [2012] NSWCA 311 -
Axiak v Ingram [2012] NSWCA 311 -
Axiak v Ingram [2012] NSWCA 311 -
Axiak v Ingram [2012] NSWCA 311 -
Axiak v Ingram [2012] NSWCA 311 -
Axiak v Ingram [2012] NSWCA 311 -
O'Neill v Liddle [2012] NSWCA 267 -
O'Neill v Liddle [2012] NSWCA 267 -
Indigo Mist Pty Ltd v Palmer [2012] NSWCA 196 -
Indigo Mist Pty Ltd v Palmer [2012] NSWCA 196 -
Utility Services Corporation Ltd v SPI Electricity Pty Ltd [2012] VSCA 158 -
Smith v Zhang [2012] NSWCA 142 -
Smith v Zhang [2012] NSWCA 142 -
Smith v Zhang [2012] NSWCA 142 -
Smith v Zhang [2012] NSWCA 142 -
Smith v Zhang [2012] NSWCA 142 -
Smith v Zhang [2012] NSWCA 142 -
Izzard v Dunbier Marine Products (NSW) Pty Ltd [2012] NSWCA 132 -
Nominal Defendant v Meakes [2012] NSWCA 66 -
Nominal Defendant v Meakes [2012] NSWCA 66 -
Nominal Defendant v Rooskov [2012] NSWCA 43 (20 March 2012)

122. Concerning the principles for appellate review of first instance decisions on the amount of apportionment there should be for contributory negligence, I venture to reiterate the principles I collected (with the agreement of Beazley JA and Pearlman AJA) in ***Manly Council v Byrne*** [2004] NSWCA 123 at [103]-[105] :

> "103 In ***Podrebersek v Australian Iron and Steel Pty Ltd*** (1985) 59 ALR 529 at 532 Gibbs CJ, Mason, Wilson, Brennan and Deane JJ said:
>
> > 'A finding on a question of apportionment is a finding upon a 'question not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds': ***British Fame (Owners) v MacGregor (Owners)*** [1943] AC 197 at 201. Such a finding, if made by a judge, is not lightly reviewed.'
> >
> > In ***Phillis and Another v Daly*** (1988) 15 NSWLR 65 at 78 McHugh JA said:
> >
> > 'Determining the apportionment of responsibility for damage is a task upon which minds notoriously differ. Appellate courts are reluctant to interfere with an an assessment of responsibility unless the judge or jury has acted upon a wrong principle or the apportionment is manifestly erroneous.'
> >
> > See also at 75 per Mahoney JA.
>
> 104 In ***Australian Breeders Co-operative Society Ltd v Jones and Others*** (1997) 150 ALR 488 at 546-7 Wilcox and Lindgren JJ say:
>
> > 'The law reports contain many warnings about appellate courts interfering with determinations of trial judges regarding apportionment of culpability. Perhaps the leading statement on the subject is that of Lord Wright in ***British Fame (Owners) v MacGregor (Owners)*** [1943] AC 197 , a case concerning relative culpability for a collision at sea. At 201 his Lordship said:

"... it would require a very strong case to justify any such review of or interference with this matter of apportionment where the same view is taken of the law and the facts. It is a question of the degree of fault, depending on a trained and expert judgment considering all the circumstances, and it is different in essence from a mere finding of fact in the ordinary sense. It is a question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds. It is for that reason, I think, that an appellate court has been warned against interfering, save in very exceptional circumstances, with the judge's apportionment. The accepted rule was clearly stated by Lord Buckmaster, with the assent of the other Lords, in *Kitano Maru (Owners) v Otranto (Owners) (The "Otranto")* [1931] AC 194 at 204, in these words: 'Upon the question of altering the share of responsibility each has to take, this is primarily a matter for the judge at the trial, and unless there is some error in law or in fact in his judgment it ought not to be disturbed'."

That statement has been adopted in the High Court of Australia: see *Pen nington v Norris* (1956) 96 CLR 10 at 16 and *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529 at 532. In ***Macquarie Pathology Services Pty Ltd v Sullivan*** (CA (NSW), 28 March 1995, unreported) Kirby P observed that "[a]n apportionment will only be set aside and redetermined if the trial judge has either obviously proceeded on a misunderstanding of the evidence or, alternatively, has clearly assessed the evidence incorrectly in evaluating the parties' comparative blameworthiness". Clarke JA said:

'It is well established that a trial judge is invested with a very wide discretion in making his apportionment and that he must be allowed much latitude in arriving at a judgment as to what is just and equitable. In these circumstances the onus cast on an appellant who seeks to disturb an apportionment is a high one ... Obviously where one party can point to an error of fact or of law on the part of the trial judge it may not be difficult to argue that his or her determination as to what is just and equitable may be flawed.'

105 For more recent reiterations of an appellate court's reticence in altering a trial judge's assessment of proportions of contributory negligence see *Tabvena v Oag* [2002] NSWCA 61 at [8] , *Sierra v Anikin* [2003] NSWCA 11 at [14], [17], [97], [105] ."

Nominal Defendant v Rooskov [2012] NSWCA 43 (20 March 2012)

122. Concerning the principles for appellate review of first instance decisions on the amount of apportionment there should be for contributory negligence, I venture to reiterate the principles I collected (with the agreement of Beazley JA and Pearlman AJA) in *Manly Council v Byrne* [2004] NSWCA 123 at [103]-[105] :

"103 In *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALR 529 at 532 Gibbs CJ, Mason, Wilson, Brennan and Deane JJ said:

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

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'It is well established that a trial judge is invested with a very wide discretion in making his apportionment and that he must be allowed much latitude in arriving at a judgment as to what is just and equitable. In these circumstances the onus cast on an appellant who seeks to disturb an apportionment is a high one ... Obviously where one party can point to an error of fact or of law on the part of the trial judge it may not be difficult to argue that his or her determination as to what is just and equitable may be flawed.'

105 For more recent reiterations of an appellate court's reticence in altering a trial judge's assessment of proportions of contributory negligence see *Tabvena v Oag* [2002] NSWCA 61 at [8] , *Sierra v Anikin* [2003] NSWCA 11 at [14], [17], [97], [105] ."

117. The principles in accordance with which a plaintiff's damages are reduced by reason of the plaintiff's contributory negligence, under the relevant enacted law as to contributory negligence (the ***Law Reform (Miscellaneous Provisions) Act 1965***)) were stated by five members of the High Court in ***Podrebersek v Australian Iron & Steel Pty Ltd*** [1985] HCA 34; (1985) 59 ALJR 492 at 494 :

> "The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man (***Pennington v Norris*** (1956) 96 CLR 10 at 16) and of the relative importance of the acts of the parties in causing the damage: ***Stapley v Gypsum Mines Ltd*** [1953] AC 663 at 682 ; ***Smith v McIntyre*** [1958] Tas SR 36 at 42-49 and ***Broadhurst v Millman*** [1976] VR 208 at 219 and cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination."

Nominal Defendant v Rooskov [2012] NSWCA 43 -
Nominal Defendant v Rooskov [2012] NSWCA 43 -
Parlin Pty Ltd v Choiceone Pty Ltd [2012] WASCA 19 -
Parlin Pty Ltd v Choiceone Pty Ltd [2012] WASCA 19 -
Parlin Pty Ltd v Choiceone Pty Ltd [2012] WASCA 19 -
Parlin Pty Ltd v Choiceone Pty Ltd [2012] WASCA 19 -
Clarence Valley Council v Macpherson [2011] NSWCA 422 -
Clarence Valley Council v Macpherson [2011] NSWCA 422 -
Mitchell Morgan Nominees Pty Ltd v Vella [2011] NSWCA 390 (15 December 2011) (Bathurst CJ, Giles, Campbell and Macfarlan JJA, Sackville AJA)

86. On the assumption on which I am proceeding the causative contributions were similar, since Mitchell Morgan would not have paid out the $1,001,7348.85 but for the fraud and (on the further assumption as to sufficiency in value of the Enmore property) would have got it back out of the Enmore property but for the negligence. Their intentional wrongdoing weighs heavily against the fraudsters. In my opinion the 12.5 per cent was well open to his Honour and, as a finding "not lightly reviewed" (*Podrebersek v Australian Iron & Steel Pty Ltd* at 494 ; see also *Ghunaim v Bart* [2004] NSWCA 28) I would not interfere with it.

Answering the questions

Mitchell Morgan Nominees Pty Ltd v Vella [2011] NSWCA 390 -
Mitchell Morgan Nominees Pty Ltd v Vella [2011] NSWCA 390 -
Gulic v O'Neill [2011] NSWCA 361 (25 November 2011) (Campbell and Whealy JJA, James J)

14. Mr Baran is on surer ground, however, when he argues that the apportionment was wrongly made. In my opinion, her Honour's finding failed to give adequate recognition to the degree to which, in all the circumstances, the respondent had been responsible for this accident. It was highly negligent on his part to attempt to make right hand turn across 3 lanes of traffic in circumstances where he simply did not know whether a vehicle was travelling in the kerb-side lane. I recognise, of course, the force of the principle that requires that intermediate and ultimate appellant courts show restraint in reviewing a primary judge's apportionment of contributory negligence (**Podrebersek v Australian Iron & Steel Ltd** (1985) 59 ALR 529 at 532 - 533 ; **Roads & Traffic Authority NSW v Dederer** [2007] HCA 42; 234 CLR 330 at 379 per Kirby J; **Manly Council v Byrne** [2004] NSWCA 123 at [103] - [105] and the cases there

mentioned; **Turkmani v Visvalingam & Ors** [2009] NSWCA 211; 53 MVR 176 per Beazley JA). Nevertheless, this is one of those rare cases where there is a marked misapplication of the apportionment exercise, requiring intervention.

Nominal Defendant v Stephens [2011] NSWCA 312 (19 October 2011) (Giles JA at [1] Whealy JA at [2] Hall J at [88])

82. The statutory provisions relevant to the issue of contributory negligence are section 138 of the **Motor Accidents Compensation Act 1999** and section 9 of the **Law Reform (Miscellaneous Provisions) Act 1965** . There is no dispute that the primary judge recognised that the respondent's damages recoverable in respect of the present motor accident were to be reduced by the percentage the court considered "just and equitable in the circumstances of the case". The 1965 Act required that damages might be reduced "to such extent as the court thinks just and equitable, having regard to the claimant's share in the responsibility for the damage". Mr Rewell did not suggest that the primary judge had overlooked these provisions. Senior counsel also accepted that the authorities require that an appellant court be mindful of the need for restraint in disturbance of decisions about contributory negligence. As long ago as 1985, the High Court in **Podrebersek v Australian Iron and Steel Pty Limited** (1985) 59 ALR 529 at 532 - 533 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, ie 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.

Hill v Richards [2011] NSWCA 291 (27 September 2011) (Giles and Campbell JJA, Handley AJA)

56. It is well established, see *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529 , that -

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

Lym International Pty Ltd v Marcolongo [2011] NSWCA 303 (22 September 2011) (Basten and Campbell JJA, Sackar J)

266. An apportionment between a plaintiff and a defendant of their respective shares in the responsibility for damage was held, in ***Podrebersek v Australian Iron & Steel Pty Ltd*** (1985) 59 ALJR 492 at 494 , as involving:

    "... a comparison both of culpability, ie 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 ..."

Mungis (No 2) Pty Limited v Still [2011] NSWCA 261 -
Sellers-McGee v Hamwood [2011] QCA 168 -
Sellers-McGee v Hamwood [2011] QCA 168 -
Allianz Australia Insurance Ltd v Swainson [2011] QCA 136 (21 June 2011) (Fraser JA, Ann Lyons and Martin JJ)

30. The plaintiff argued that the trial judge's reasons justified the apportionment. The Court was reminded of the hurdle faced by an appellant who seeks to challenge a finding of this kind:

> "A finding on a question of apportionment is a finding upon a 'question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds': *British Fame (Owners) v Macgregor (Owners)* [1943] A.C. 197 at 201. Such a finding, if made by a judge, is not lightly reviewed. ...
>
> ...
>
> 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, i.e. of the degree of departure from the standard of care of the reasonable man (*Pennington v. Norris* (1956) 96 C.L. R. 10 at 16) and of the relative importance of the acts of the parties in causing the damage: *Stapley v. Gypsum Mines Ltd* [1953] A.C. 663 at 682 ; *Smi th v. McIntyre* [1958] Tas.S.R. 36 at 42-49 and *Broadhurst v. Millman* [1976] V. R. 208 at 219 and cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance." [24]

via

[24] *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492 at 493-494 . See also *Joslyn v Berryman* (2003) 214 CLR 552; [2003] HCA 34 at [157] per Hayne J; *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867; [2001] HCA 24 at [2] per Gleeson CJ.

Allianz Australia Insurance Ltd v Swainson [2011] QCA 136 -
Fugro Spatial Solutions Pty Ltd v Cifuentes [2011] WASCA 102 (20 April 2011) (Martin CJ; McLure P; Mazza J)

187. Section 7(1)(c) and s 7(2) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA) provides that any tortfeasor liable in respect of damage suffered by any person may recover a contribution from any other tortfeasor who is also liable in respect of that damage. The amount of any contribution will be assessed by the court, according to what is just and equitable. The making of an apportionment involves a comparison of both culpability, in the sense of the degree of departure from the standard of care demanded of each tortfeasor, and of the relevant importance of their acts in causing the damage. It is the whole conduct of each tortfeasor, in relation to the circumstances of the accident, which must be subject to comparative examination: ***Podrebersek v Australian Iron and Steel Pty Ltd*** (1985) 59 ALJR 492, 494.

Fugro Spatial Solutions Pty Ltd v Cifuentes [2011] WASCA 102 -
Fugro Spatial Solutions Pty Ltd v Cifuentes [2011] WASCA 102 -
Dao v The Queen [2011] NSWCCA 63 -
Dao v The Queen [2011] NSWCCA 63 -

Dao v The Queen [2011] NSWCCA 63 -
Dao v The Queen [2011] NSWCCA 63 -
Asim v Penrose [2010] NSWCA 366 (21 December 2010) (Tobias, Macfarlan and Young JJA)
Podrebersek v Australian Iron & Steel Pty Limited (1985) 59 ALJR 492
Tabet v Gett

Asim v Penrose [2010] NSWCA 366 -
Zanner v Zanner [2010] NSWCA 343 -
Zanner v Zanner [2010] NSWCA 343 -
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Zanner v Zanner [2010] NSWCA 343 -
Agresta v Agresta [2010] NSWCA 330 -
Agresta v Agresta [2010] NSWCA 330 -
Metzke and Allen v Sali [2010] VSCA 267 -
Metzke and Allen v Sali [2010] VSCA 267 -
Fassbender v HW & MTA Bohlmann [2010] VSCA 204 (20 August 2010) (Warren CJ, Nettle JA and Emerton AJA)

17. As the trial judge correctly observed, the issue of contributory negligence has to be approached on the footing that the respondents failed to discharge their obligation to take reasonable care and that, in considering whether there was contributory negligence by the appellant, the circumstances and conditions in which he had to do his work have to be taken into account. The question is whether in those circumstances and under those conditions there was evidence from which the jury could find that the appellant's own conduct amounted to negligence and not mere inadvertence, inattention or misjudgement. [2]

via

[2] At [9], referring to *McLean v Tedman and Brambles Holdings Limited* (1984) 155 CLR 306; *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALR 529 .

Fassbender v HW & MTA Bohlmann [2010] VSCA 204 -
Fassbender v HW & MTA Bohlmann [2010] VSCA 204 -
Fassbender v HW & MTA Bohlmann [2010] VSCA 204 -
Fassbender v HW & MTA Bohlmann [2010] VSCA 204 -
Mayhew v Lewington's Transport Pty Ltd [2010] VSCA 202 (12 August 2010) (Warren CJ, Neave JA and Beach AJA)

29. In personal injury in the course of employment cases, the law has long recognised the distinction between contributory negligence on the one hand and mere inadvertence, inattention or misjudgement on the other hand. In *Podrebersek v Australian Iron and Steel Pty Ltd* ,[6] the High Court (Gibbs CJ, Mason, Wilson, Brennan and Deane JJ) said: [7]

> It was correctly submitted that the issue of contributory negligence had to be approached on the footing that the respondent [employer] had failed to discharge its obligations to take reasonable care, and that in considering whether there was contributory negligence on the part of the appellant [worker], the circumstances and conditions in which he had to do his work had to be taken into account. The question was whether in those circumstances and under those conditions the appellant's conduct amounted to mere inadvertence, inattention or misjudgement, or to negligence. [8]

via

[7] At 59 ALJR 493 .

Mayhew v Lewington's Transport Pty Ltd [2010] VSCA 202 (12 August 2010) (Warren CJ, Neave JA and Beach AJA)

29. In personal injury in the course of employment cases, the law has long recognised the distinction between contributory negligence on the one hand and mere inadvertence, inattention or misjudgement on the other hand. In *Podrebersek v Australian Iron and Steel Pty Ltd* , [6] the High Court (Gibbs CJ, Mason, Wilson, Brennan and Deane JJ) said: [7]

> It was correctly submitted that the issue of contributory negligence had to be approached on the footing that the respondent [employer] had failed to discharge its obligations to take reasonable care, and that in considering whether there was contributory negligence on the part of the appellant [worker], the circumstances and conditions in which he had to do his work had to be taken into account. The question was whether in those circumstances and under those conditions the appellant's conduct amounted to mere inadvertence, inattention or misjudgement, or to negligence. [8]

via

[6] (1985) 59 ALJR 492 .

Mayhew v Lewington's Transport Pty Ltd [2010] VSCA 202 -
Mayhew v Lewington's Transport Pty Ltd [2010] VSCA 202 -
Mayhew v Lewington's Transport Pty Ltd [2010] VSCA 202 -
Laresu Pty Ltd v Clark [2010] NSWCA 180 (04 August 2010) (Tobias and Macfarlan JJA, Handley AJA)

> 79 The result was that the primary judge did not express a view as to whether there was any contributory negligence on the part of Mr Clark and the position is not in my view capable of being remedied by this Court making a finding as to contributory negligence and apportionment of damages between Mr Clark on the one hand and the Owner and Managing Agent on the other. A finding of that type is an evaluative one involving a significant degree of subjectivity, a "weighing [of] different considerations" and "individual choice or discretion" (*Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALJR 492 at 494 citing *British Fame (Owners) v Macgregor (Owners)* [1943] AC 197 at 201). Mr Clark was entitled to have the primary judge express a view about the issue if the defendants relied upon that defence. If his Honour had done so, the ability of the Owner and the Managing Agent to have that decision reviewed on appeal would have been limited (see for example *Podrebersek* at 494 ; *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552 at [157] per Hayne J; *Costa v Public Trustee of NSW* [2008] NSWCA 223 at [18(3)], [40] – [41] and [103]). In consequence of the Owner and Managing Agent not arguing the point at first instance, Mr Clark has in my view been denied the opportunity of obtaining an evaluative decision of the primary judge that one cannot assume would be the same as that at which this Court would arrive. Mr Clark has to this extent been prejudiced. As a consequence I do not consider that it is in the interests of justice that the Owner and the Managing Agent be permitted to raise the matter for the first time on appeal.

Laresu Pty Ltd v Clark [2010] NSWCA 180 -
Laresu Pty Ltd v Clark [2010] NSWCA 180 -
Pingel v Toowoomba Newspapers Pty Ltd [2010] QCA 175 -
Pingel v Toowoomba Newspapers Pty Ltd [2010] QCA 175 -
Council of the City of Greater Taree v Wells [2010] NSWCA 147 -
Tamarack Pty Ltd v Beswick [2010] TASFC 5 -

Hanson Construction Materials Pty Limited v Tawhai [2010] NSWCA 55 -
Pacific Steel Constructions Pty Ltd v Barahona [2009] NSWCA 406 -
Pacific Steel Constructions Pty Ltd v Barahona [2009] NSWCA 406 -
Stojan (No 9) Pty Ltd v Kenway [2009] NSWCA 364 -
Drexel London (a firm) v Gove (Blackman) [2009] WASCA 181 -
Drexel London (a firm) v Gove (Blackman) [2009] WASCA 181 -
Drexel London (a firm) v Gove (Blackman) [2009] WASCA 181 -
Mobbs v Kain [2009] NSWCA 301 -
Mobbs v Kain [2009] NSWCA 301 -
State of New South Wales (NSW Police) v Nominal Defendant [2009] NSWCA 225 (31 July 2009) (Allsop P at 1; Beazley JA at 2; Macfarlan JA at 113)
Podreberserk v Australian Iron & Steel Pty Ltd [1985] HCA 34; (1985) 59 ALR 529 (referred to)

State of New South Wales (NSW Police) v Nominal Defendant [2009] NSWCA 225 -
State of New South Wales (NSW Police) v Nominal Defendant [2009] NSWCA 225 -
Turkmani v Visvalingam [2009] NSWCA 211 -
Turkmani v Visvalingam [2009] NSWCA 211 -
Turkmani v Visvalingam [2009] NSWCA 211 -
Liverpool City Council v Estephan [2009] NSWCA 161 (03 July 2009) (Giles JA at 1; McColl JA at 123; Basten JA at 124)

66 I go then to apportionment. The trial judge noted in another connection, but clearly had in mind when arriving at his apportionment, that s 5(2) of the *Law Reform (Miscellaneous Provisions) Act 1946* required him to arrive at apportionment in accordance with responsibility for the damage, saying -

> "174. ... This is made clear in the judgment of Hayne J (with whom Gaudron, McHugh, Gummow and Kirby JJ concurred) in *Wynbergen v Hoyts Corporation Pty Ltd* (1977) 72 ALJR 65 at 68 when discussing the latter provision:
>
> > 'No doubt the marking of the apportionment which the legislation requires involves comparison of culpability of the parties, ie, the degree to which each has departed from the standard of what is reasonable, but that is not the only element to be considered. Regard must be had to the "relative importance of the acts of the parties in causing the damage" and it is "the *whole* conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination" (italics added)'
>
> His Honour was quoting from *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALJR 492 . The same point is clear from [124] to [128] of the judgment of Kirby J in *Josyln v Berryman* [2003] HCA 34."

Liverpool City Council v Estephan [2009] NSWCA 161 -
Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167 -
Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167 -
Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167 -
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Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167 -
BMW Australia Finance Limited v Miller & Associates Insurance Broking Pty Ltd [2009] VSCA 117 (05 June 2009) (Ashley and Neave JJA; Robson AJA)

197. In *Podrebersek v Australian Iron & Steel Pty Ltd* [100] the High Court approved the statement in *British Fame (Owners) v Macgregor (Owners)* [101] that apportionment is a finding upon a 'question, not of principle or of positive findings of fact or law, but of proportion, of balance

and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds.' The High Court said that making an apportionment 'involves a comparison of culpability, that is the degree of departure from the standard of care of a reasonable man, and of the relative importance of the acts of the parties causing the damage.' [102] In *Portland Aluminium Pty Ltd v Husson* [103] Chernov JA, with whom Maxwell P and Neave JA agreed, said:

> The approach to be adopted in making an apportionment between the parties of their respective share in responsibility for the injury is conveniently summarised in *Podrebersek v Australian Iron & Steel Pty Ltd* [104] and *Liftronic Pty Ltd v Unver.* [105] It requires a comparison both of culpability and the relative importance of the acts of the parties in causing the injury, requiring the whole of the relevant conduct of each of the negligent parties to be subject to comparative examination. The tasks involve matters of proportion, balance and relative emphasis [106] and are, in this regard, similar to the exercise of a broad discretion.[107] [108]

See also the discussion of Whelan J in *Sali v Metzke and Allen* on apportioning damage flowing from the negligence of two tort feasors. [109]

via

[100] (1985) 59 ALR 529 , 532.

BMW Australia Finance Limited v Miller & Associates Insurance Broking Pty Ltd [2009] VSCA 117 -
Scope Machinery Pty Ltd v Ross [2009] WASCA 100 -
Scope Machinery Pty Ltd v Ross [2009] WASCA 100 -
BMW Australia Finance Limited v Miller & Associates Insurance Broking Pty Ltd [2009] VSCA 117 -
BMW Australia Finance Limited v Miller & Associates Insurance Broking Pty Ltd [2009] VSCA 117 -
BMW Australia Finance Limited v Miller & Associates Insurance Broking Pty Ltd [2009] VSCA 117 -
Conceicao v Visypak Operations Pty Ltd [2008] NSWCA 307 (11 November 2008) (Beazley JA ; Giles JA; Gyles AJA)

> 11 The question of contributory negligence is of course more difficult. It is all the more difficult because the trial judge did not advert to it as such in his judgment. However, counsel for the appellant points out that paragraph [23], to which I have already referred, was framed as a choice between the act as a careless mis-step and fall or due to the system of work. It is put for the appellant that, at the most, it would be a careless mis-step or fall and that at the end of a twelve-hour shift, if there were some misjudgment involved in the method of making the jump, then that is the very sort of casual, careless inadvertence which a system of work should guard against: *Bankstown Foundry Pty Limited v Braistina* (1986) 160 CLR 301, *Podrebersek v Australian Iron & Steel Pty Limited* (1985) 59 ALR 529; (1985) 59 ALJR 492 , and *McLean v Tedman* (1984) 155 CLR 306. I would not allow the cross-appeal on the issue of contributory negligence as in my view there would be no proper basis for making such a finding.

Conceicao v Visypak Operations Pty Ltd [2008] NSWCA 307 -
Tarabay v Leite [2008] NSWCA 259 (23 October 2008) (Allsop P ; Basten JA ; Bell JA)

> 50 As with the question of apportionment, the assessment of contributory negligence is one to which the principle of restraint applies: see *Podrebersek* . However, in this case the plaintiff challenges the factual finding made by his Honour with respect to the way in which he was carrying the sheet of plywood. The evidence, it was submitted, did not support the finding.

Tarabay v Leite [2008] NSWCA 259 -

Tarabay v Leite [2008] NSWCA 259 -
Tarabay v Leite [2008] NSWCA 259 -
Tarabay v Leite [2008] NSWCA 259 -
Tarabay v Leite [2008] NSWCA 259 -
Tarabay v Leite [2008] NSWCA 259 -
The State of South Australia v Ellis [2008] WASCA 200 -
The State of South Australia v Ellis [2008] WASCA 200 -
The State of South Australia v Ellis [2008] WASCA 200 -
The State of South Australia v Ellis [2008] WASCA 200 -
BI (Contracting) Pty Limited v University of Adelaide [2008] NSWCA 210 (19 September 2008) (Beazley JA ; Bell JA ; McClellan CJ at CL)

> 113 The principles governing apportionment under the South Australian legislation are the same as those under the New South Wales legislation. It is necessary to compare the culpability and the relevant importance of the acts of each party in causing the damage: *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529 at 532-533 . It is not asserted that his Honour misstated the principles but, rather, that his determination was affected by error of the type described in *House v The King* [1936] HCA 40; 55 CLR 499 at 505 in that:
>
> > (a) His Honour allowed extraneous or irrelevant matters to guide or effect him including matters which were not the subject of evidence;
> > (b) Upon the facts the outcome is unreasonable or plainly unjust."
> > (Orange 50.H-J)

BI (Contracting) Pty Limited v University of Adelaide [2008] NSWCA 210 -
Costa v The Public Trustee of NSW [2008] NSWCA 223 -
Costa v The Public Trustee of NSW [2008] NSWCA 223 -
Bartholomaeus v Newcombe [2008] WASCA 136 -
Bartholomaeus v Newcombe [2008] WASCA 136 -
Bartholomaeus v Newcombe [2008] WASCA 136 -
J Blackwood & Son v Skilled Engineering [2008] NSWCA 142 (24 June 2008) (Beazley JA at 1; Giles JA at 2; Campbell JA at 17)

> 94 Even so, it is necessary to identify whether the Appellant owed a duty of care to the Worker at all, and the content of any such duty so far as is relevant to the facts of the particular case. It is unnecessary for the purposes of this case to enter into the debate about whether the content of a duty of care is properly seen as part of the question of existence of a duty, or part of the question of breach: ***Sheather v Country Energy*** [2007] NSWCA 179 at [20]–[21] per Hodgson JA cf at [55]–[68] per Ipp JA. One way or another, both the existence of a duty and its content must be identified, because it is only by making that identification that one can be clear about whether any such duty of care has been broken, and if so, the respects in which the Appellant and the Respondent have each failed in their duty to the Worker. Identifying the respects in which they have each failed in their respective duties to the Worker is necessary to be able to form a view about the causal contribution that each of those failures has made to the injury that the Worker has suffered, and the culpability of those failures. Any apportionment of responsibility between the Appellant and the Respondent requires such an assessment of the causal significance of any breach of duty of each of them, and of their culpability concerning any such breach of duty. Those factors of causal significance and culpability were identified by the High Court in ***Podrebersek v Australian Iron & Steel Pty Limited*** [1985] HCA 34; (1985) 59 ALJR 492 at 494 and (1985) 59 ALR 529 at 532–533 as ones relevant to apportionment of responsibility between a defendant and plaintiff who has been guilty of contributory negligence. When the wording of the statutory test by reference to which apportionment for contributory negligence is made is the same as the statutory test by reference to which apportionment of contribution between tortfeasors is made, those factors are equally relevant to apportionment of contribution between tortfeasors.

J Blackwood & Son v Skilled Engineering [2008] NSWCA 142 -
J Blackwood & Son v Skilled Engineering [2008] NSWCA 142 -

Fremantle Ports v P & O Ports Ltd [2008] WASCA 126 -
Fremantle Ports v P & O Ports Ltd [2008] WASCA 126 -
Fremantle Ports v P & O Ports Ltd [2008] WASCA 126 -
Gorman v Scofield [2008] WASCA 78 -
Gorman v Scofield [2008] WASCA 78 -
Preti v Sahara Tours Pty Ltd [2008] NTCA 2 -
Gorman v Scofield [2008] WASCA 78 -
Preti v Sahara Tours Pty Ltd [2008] NTCA 2 -
Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 -
Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 -
Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 -
Alcoa Portland Aluminium Pty Ltd v Husson [2007] VSCA 209 -
Alcoa Portland Aluminium Pty Ltd v Husson [2007] VSCA 209 -
Alcoa Portland Aluminium Pty Ltd v Husson [2007] VSCA 209 -
Taylor v Scriven [2007] WASCA 208 (10 October 2007) (Wheeler JA)

43. Ground 4 challenges the trial Judge's apportionment of liability at 45%/55% against the appellant. His Honour said:

> The making of an apportionment of liability between Mr Scriven and Mr Taylor involves an assessment of both their culpability and the relative importance of their acts in causing Mr Taylor's death: ***Podrebersek v Australian Iron & Steel Pty Ltd*** (1985) 59 ALR 529 . It is my view that the appropriate reduction for contributory negligence of Mr Taylor in failing to keep a proper lookout and failing to fasten his helmet is 55 per cent, so that the plaintiff is entitled to damages of 45 per cent of the loss suffered by the death of his father. [74]

Sangha v Baxter [2007] NSWCA 264 (28 September 2007) (Ipp JA ; Campbell JA ; Young CJ in Eq)

96 I agree with the submission that the learned trial judge did not take into account all the factors he should have taken into account when assessing contributory negligence and, accordingly, it is open to this Court, despite what was said by the High Court in **Podrebersek** to examine the situation for itself.

Sangha v Baxter [2007] NSWCA 264 -
Sangha v Baxter [2007] NSWCA 264 -
Monie v Commonwealth of Australia [2007] NSWCA 230 -
Monie v Commonwealth of Australia [2007] NSWCA 230 -
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -
McNeilly v Imbree [2007] NSWCA 156 (02 July 2007) (Beazley JA; Tobias JA; Basten JA)

14 The approach which I have taken is slightly different from the finding of the trial judge. For that reason, it is open to review his Honour's assessment of contributory negligence. In doing so, I approach the matter on the basis that the assessment of contributory negligence is an evaluative exercise upon which minds may differ and in respect of which an appellate court should exercise care before interfering with an assessment made by a trial judge. See generally: *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492; [1985] HCA 34. In *Podrebersek* the High Court explained what was involved in the task of assessing contributory negligence, at 494 , in these terms:

> "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, i.e. of the degree of departure from the standard of care of the reasonable man (*Pennington v Norris* (1956) 96 CLR 10 at 16) and of the relative importance of the acts of the parties in causing the damage: *Stapley v Gypsum Mines Ltd.* (1953) AC 663 at 682 ; *Smith v McIntyre* (1958) Tas SR 36 at 42-49 and *Broadhurst v Millman* (1976) VR 208 at 219 and cases there cited."

McNeilly v Imbree [2007] NSWCA 156 -
McNeilly v Imbree [2007] NSWCA 156 -
McNeilly v Imbree [2007] NSWCA 156 -
Insurance Australia Limited T/As NRMA Insurance Limited v John David Dickason [2007] ACTCA 13 -
Skulander v Willoughby City Council [2007] NSWCA 116 -
Skulander v Willoughby City Council [2007] NSWCA 116 -
Sheldrick v State of New South Wales [2007] NSWCA 105 -
Sheldrick v State of New South Wales [2007] NSWCA 105 -
Sheldrick v State of New South Wales [2007] NSWCA 105 -
Shire of Toodyay v Walton [2007] WASCA 76 -
Shire of Toodyay v Walton [2007] WASCA 76 -
Royal v Smurthwaite [2007] NSWCA 76 -
Royal v Smurthwaite [2007] NSWCA 76 -
Metron Medical Australia Pty Ltd v Windahl [2007] VSCA 40 -
Metron Medical Australia Pty Ltd v Windahl [2007] VSCA 40 -
Freidin v St Laurent [2007] VSCA 16 -
Shire of Corrigin v Hunter Holdings Pty Ltd [2007] WASCA 31 -
Shire of Corrigin v Hunter Holdings Pty Ltd [2007] WASCA 31 -
Homestyle Pty Ltd v Perrozzi [2007] WASCA 16 -
Homestyle Pty Ltd v Perrozzi [2007] WASCA 16 -
Homestyle Pty Ltd v Perrozzi [2007] WASCA 16 -
Kappadoukas v Fransepp Pty Ltd [2006] NSWCA 366 -
Evans v Lindsay [2006] NSWCA 354 (11 December 2006) (Beazley JA; Ipp JA; Bryson JA)

81. In *Podrebersek v Australian Iron & Steel Pty Limited* (1985) 59 ALJR 492, the High Court stated at 493-4 :

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

...

The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man (*Pennington v Norris* (1956) 96 CLR 10 at 16) and of the relative importance of the acts of the parties in causing the damage: *Stapley v Gypsum Mines Ltd* [1953] AC 663 at 682 ; *Smith v McIntyre* [1958] Tas SR 36 at 42-49 and *Broadhurst v Millman* [1976] VR 208 at 219 and cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance."

Evans v Lindsay [2006] NSWCA 354 -
Vale v Eggins [2006] NSWCA 348 -
Vale v Eggins [2006] NSWCA 348 -
Vale v Eggins [2006] NSWCA 348 -
Evans v Lindsay [2006] NSWCA 354 -
Evans v Lindsay [2006] NSWCA 354 -
TAB Ltd v Beaman [2006] NSWCA 345 -
TAB Ltd v Beaman [2006] NSWCA 345 -

Shellharbour City Council v Rigby [2006] NSWCA 308 (27 November 2006) (Beazley JA; Ipp JA; Basten JA)

> *Podrebersek v Australian Iron & Steel Pty Limited* (1985) 59 ALJR 492 (followed); *Joslyn v Berryman* (2003) 214 CLR 552; [2005] HCA 34 (referred to); *Liftronic Pty Limited v Unver* (2001) 75 ALJR 867; [2001] HCA 24 (referred to)

Shellharbour City Council v Rigby [2006] NSWCA 308 -
Shellharbour City Council v Rigby [2006] NSWCA 308 -
Shellharbour City Council v Rigby [2006] NSWCA 308 -
Shellharbour City Council v Rigby [2006] NSWCA 308 -
Shellharbour City Council v Rigby [2006] NSWCA 308 -
Shellharbour City Council v Rigby [2006] NSWCA 308 -
Shellharbour City Council v Rigby [2006] NSWCA 308 -
Azzopardi v. Constable; Azzopardi v. Thompson [2006] NSWCA 319 -
Azzopardi v. Constable; Azzopardi v. Thompson [2006] NSWCA 319 -
Edwards v Nominal Defendant [2006] QCA 475 -
Edwards v Nominal Defendant [2006] QCA 475 -
Edwards v Nominal Defendant [2006] QCA 475 -
Patrick Operations Pty Ltd v Comcare [2006] NSWCA 142 -
Patrick Operations Pty Ltd v Comcare [2006] NSWCA 142 -
Hathaway & Anor v Thorpe bht Kinghorn [2006] NSWCA 163 -
Paltidis v The State Council of the Young Men's Christian Association of Victoria Inc [2006] VSCA 122 (08 June 2006) (Chernov, Nettle and Ashley, Jj.A)

> 67. In so concluding, I have not relied upon the jury's finding that the plaintiff was guilty of contributory negligence; nor have I relied upon the jury's apportionment of 70% against the plaintiff. Contrary to the submission for the plaintiff, I consider that it was open to the jury, properly instructed, to have found contributory negligence against the plaintiff. Further, although in my opinion the jury was insufficiently directed with respect to the task of apportionment, I would not hold, being mindful of authorities such as *Podrebersek v Australian Iron & Steel Pty Ltd* [18] that the apportionment was so evidently wrong as to bespeak a wrong approach in principle arising either from misdirection with respect to contributory negligence or insufficient direction with respect to apportionment. On the other hand, to say, if another case been put before the jury, that it might have found contributory negligence, and that it might conceivably have assessed contributory negligence at 70%, does not deny that a miscarriage in fact occurred in the circumstances which I have described.

Paltidis v The State Council of the Young Men's Christian Association of Victoria Inc [2006] VSCA 122 -
Dowthwaite Holdings Pty Ltd v Saliba [2006] WASCA 72 -
Dowthwaite Holdings Pty Ltd v Saliba [2006] WASCA 72 -
Casey City Council v Kohn [2006] VSCA 82 -
Casey City Council v Kohn [2006] VSCA 82 -
Casey City Council v Kohn [2006] VSCA 82 -
State of New South Wales v Amery [2006] HCA 14 -
Randwick City Council v Muzic [2006] NSWCA 66 -
Randwick City Council v Muzic [2006] NSWCA 66 -
VicRoads v Seiler [2006] VSCA 47 -
VicRoads v Seiler [2006] VSCA 47 -
Avram v Gusakoski [2006] WASCA 16 -
Avram v Gusakoski [2006] WASCA 16 -
Avram v Gusakoski [2006] WASCA 16 -
Avram v Gusakoski [2006] WASCA 16 -
A D & S M McLean Pty Ltd v Meech [2005] VSCA 305 -
A D & S M McLean Pty Ltd v Meech [2005] VSCA 305 -
Forstaff Blacktown Pty Ltd v Brimac Pty Ltd [2005] NSWCA 423 -

Forstaff Blacktown Pty Ltd v Brimac Pty Ltd [2005] NSWCA 423 -
Di Vincenzo v McKrill [2005] WASCA 222 (22 November 2005) (Steytler P; Roberts-Smith JA; Miller AJA)

95 Counsel for the first respondent referred to *Apex Holiday Centre (Inc) v Lynn* [2005] WASCA 58 and in particular to the judgment of E M Heenan J at [31] . His Honour was dealing with circumstances in which a person had gone in the middle of the night to a toilet block some distance from the holiday cottage and descended what his Honour described as "plainly, steep, old and dangerous steps". His Honour said:

> "In doing this she simply succumbed to the trap which was posed by this dangerous condition and this does not, in my view, amount to contributory negligence: see *Sungravure v Meani* (1964) 110 CLR 24; *Podrebersek v Australian Iron and Steel* (1985) 59 ALJR 492 ; *McLean v Tedman* (1984) 155 CLR 306 and *Pennington v Norris* (*supra*)."

Roads and Traffic Authority v McGregor [2005] NSWCA 388 -
Roads and Traffic Authority v McGregor [2005] NSWCA 388 -
Kingswood Golf Club Ltd v Smith [2005] VSCA 224 -
Kingswood Golf Club Ltd v Smith [2005] VSCA 224 -
Kingswood Golf Club Ltd v Smith [2005] VSCA 224 -
Kingswood Golf Club Ltd v Smith [2005] VSCA 224 -
BI (Contracting) Pty Ltd v The Public Trustee Of South Australia and ANORCSR Limited v The Public Trustee Of South Australia and ANOR [2005] NSWCA 306 (09 September 2005) (Mason P, Handley and Beazley JJA)

Podrebersek v Australian Iron & Steel Pty Ltd (1985) 59 ALJR 492
Rolls Royce Industrial Power (Pacific) Ltd v James Hardie & Co Pty Ltd

BI (Contracting) Pty Ltd v The Myer Emporium Ltd [2005] NSWCA 305 -
BI (Contracting) Pty Ltd v The Myer Emporium Ltd [2005] NSWCA 305 -
BI (Contracting) Pty Ltd v The Public Trustee Of South Australia and ANORCSR Limited v The Public Trustee Of South Australia and ANOR [2005] NSWCA 306 -
Copmanhurst Shire Council v Watt [2005] NSWCA 245 -
Theden v Nominal Defendant [2005] QCA 236 -
Theden v Nominal Defendant [2005] QCA 236 -
Theden v Nominal Defendant [2005] QCA 236 -
Reck v Queensland Rail [2005] QCA 228 -
Reck v Queensland Rail [2005] QCA 228 -
Boral Resources (NSW) Pty Ltd v Watts [2005] NSWCA 191 -
Mackenzie v The Nominal Defendant [2005] NSWCA 180 -
Mackenzie v The Nominal Defendant [2005] NSWCA 180 -
Mackenzie v The Nominal Defendant [2005] NSWCA 180 -
Mackenzie v The Nominal Defendant [2005] NSWCA 180 -
Mackenzie v The Nominal Defendant [2005] NSWCA 180 -
Mackenzie v The Nominal Defendant [2005] NSWCA 180 -
Mackenzie v The Nominal Defendant [2005] NSWCA 180 -
Mackenzie v The Nominal Defendant [2005] NSWCA 180 -
Mackenzie v The Nominal Defendant [2005] NSWCA 180 -
Mackenzie v The Nominal Defendant [2005] NSWCA 180 -
AFS Catering Pty Ltd v Stonehill [2005] NSWCA 183 -
AFS Catering Pty Ltd v Stonehill [2005] NSWCA 183 -
Martin v Clarke [2005] WASCA 66 -
Martin v Clarke [2005] WASCA 66 -
Martin v Clarke [2005] WASCA 66 -
Apex Holiday Centre (Inc) v Lynn [2005] WASCA 58 (31 March 2005) (Wheeler, Em Heenan and Simmonds JJ)

31 In my view this is a situation in which, rising in the middle of the night to go to the toilet blocks

some distance away, the respondent was confronted with a situation of avoiding disturbance to the others sleeping in her unit, so she carefully made her way through the darkened room to the doorway, found this and, largely by feel, opened the door and attempted to descend the steps. In the darkness she missed her footing on what were, plainly, steep, old and dangerous steps. In doing this she simply succumbed to the trap which was posed by this dangerous condition and this does not, in my view, amount to contributory negligence: see ***Sungravure v Meani*** (1964) 110 CLR 24; ***Podrebersek v Australian Iron and Steel*** (1985) 59 ALJR 492 ; ***McLean v Tedman*** (1984) 155 CLR 306 and ***Pennington v Norris*** (*supra*).

Apex Holiday Centre (Inc) v Lynn [2005] WASCA 58 -
Apex Holiday Centre (Inc) v Lynn [2005] WASCA 58 -
Apex Holiday Centre (Inc) v Lynn [2005] WASCA 58 -
Apex Holiday Centre (Inc) v Lynn [2005] WASCA 58 -
Apex Holiday Centre (Inc) v Lynn [2005] WASCA 58 -
Apex Holiday Centre (Inc) v Lynn [2005] WASCA 58 -
Hirst v Nominal Defendant [2005] QCA 65 (18 March 2005) (Jerrard and Keane JJA and Douglas J,)

Podrebersek v Australian Iron and Steel Pty Ltd (1985) 59 ALJR 492 , cited

Hirst v Nominal Defendant [2005] QCA 65 -
Roads and Traffic Authority v Ryan; Blue Mountains City Council v Ryan [2005] NSWCA 34 -
Roads and Traffic Authority v Ryan; Blue Mountains City Council v Ryan [2005] NSWCA 34 -
Cleere v Matic Service Pty Ltd [2004] NSWCA 453 (10 December 2004) (Beazley and Hodgson JJA, Barrett J)

Podrebersek v Australian Iron and Steel Pty Ltd (1985) 59 ALJR 492

Cleere v Matic Service Pty Ltd [2004] NSWCA 453 -
Liverpool City Council v Millett & Anor; Liverpool City Council v WadeLiverpool City Council v Millett & Anor [2004] NSWCA 340 (09 December 2004) (Mason P, Sheller and Tobias JJA)

144 The primary judge found that Mr Millett was guilty of contributory negligence and reduced the amount of his damages by 10%. The relevant principles applicable to an apportionment of responsibility as between plaintiff and defendant are well known: see *Podrebersek v Australian Iron & Steel Pty Limited* (1985) 59 ALJR 492 at 494. What is required is the comparison of both culpability, i.e. the degree of departure from the standard for care of the reasonable person, and of the relevant importance of the acts or omissions 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.

Anikin v Sierra [2004] HCA 64 -
Liverpool City Council v Millett & Anor; Liverpool City Council v WadeLiverpool City Council v Millett & Anor [2004] NSWCA 340 -
Liverpool City Council v Millett & Anor; Liverpool City Council v WadeLiverpool City Council v Millett & Anor [2004] NSWCA 340 -
Anikin v Sierra [2004] HCA 64 -
Liverpool City Council v Millett & Anor; Liverpool City Council v WadeLiverpool City Council v Millett & Anor [2004] NSWCA 340 -
Liverpool City Council v Millett & Anor; Liverpool City Council v WadeLiverpool City Council v Millett & Anor [2004] NSWCA 340 -
Liverpool City Council v Millett & Anor; Liverpool City Council v WadeLiverpool City Council v Millett & Anor [2004] NSWCA 340 -
Newcastle City Council v McShane [2004] NSWCA 425 -
Pelley v Maitland Benevolent Society [2004] NSWCA 323 -
Geroheev Pty Ltd v Wheare [2004] WASCA 206 -
Geroheev Pty Ltd v Wheare [2004] WASCA 206 -
Moore v Scolaro's Concrete Constructions Pty Ltd [2004] VSCA 152 -
Moore v Scolaro's Concrete Constructions Pty Ltd [2004] VSCA 152 -
Moore v Scolaro's Concrete Constructions Pty Ltd [2004] VSCA 152 -

F H Faulding & Co Limited t/as Faulding Pharmaceuticals v Masters [2004] NSWCA 253 -
F H Faulding & Co Limited t/as Faulding Pharmaceuticals v Masters [2004] NSWCA 253 -
Woolworths (WA) Pty Ltd v Berkeley Challenge Pty Ltd [2004] WASCA 196 -
Woolworths (WA) Pty Ltd v Berkeley Challenge Pty Ltd [2004] WASCA 196 -
Franna Cranes Pty Ltd v Turkington [2004] WASCA 187 (19 August 2004) (Murray J, Steytler J, McLure J)
Podrebersek v Australian Iron and Steel Pty Ltd (1985) 59 ALJR 492
Union International (WA) Pty Ltd v Mazurak

Franna Cranes Pty Ltd v Turkington [2004] WASCA 187 (19 August 2004) (Murray J, Steytler J, McLure J)
Podrebersek v Australian Iron and Steel Pty Ltd (1985) 59 ALJR 492
Union International (WA) Pty Ltd v Mazurak

Franna Cranes Pty Ltd v Turkington [2004] WASCA 187 -
Wyong Shire Council v Vairy [2004] NSWCA 247 -
Wyong Shire Council v Vairy [2004] NSWCA 247 -
Wyong Shire Council v Vairy [2004] NSWCA 247 -
Manly Council v Byrne [2004] NSWCA 123 -
Manly Council v Byrne [2004] NSWCA 123 -
Manly Council v Byrne [2004] NSWCA 123 -
Manly Council v Byrne [2004] NSWCA 123 -
Zauner Constructions Pty Ltd v Harvey [2004] NSWCA 8 -
Zauner Constructions Pty Ltd v Harvey [2004] NSWCA 8 -
Zauner Constructions Pty Ltd v Harvey [2004] NSWCA 8 -
Zauner Constructions Pty Ltd v Harvey [2004] NSWCA 8 -
Zauner Constructions Pty Ltd v Harvey [2004] NSWCA 8 -
Zauner Constructions Pty Ltd v Harvey [2004] NSWCA 8 -
Berryman v Joslyn; Wentworth Shire Council v Joslyn [2004] NSWCA 121 -
Berryman v Joslyn; Wentworth Shire Council v Joslyn [2004] NSWCA 121 -
Berryman v Joslyn; Wentworth Shire Council v Joslyn [2004] NSWCA 121 -
Berryman v Joslyn; Wentworth Shire Council v Joslyn [2004] NSWCA 121 -
Moller v Trollope Silverwood and Beck Pty Ltd [2004] VSCA 22 (05 March 2004) (Batt and Vincent, Jj.A and Harper, A.J.A)

16. This is true not only of issues of negligence and contributory negligence as such, but also of the respective significance of each when both have been found. In *Podrebersek v Australian Iron & Steel Pty Ltd* [5] the High Court said:

> "A finding on a question of apportionment is a finding upon a 'question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds' ... Such a finding, if made by a judge, is not lightly reviewed. The task of an appellant is even more difficult when the apportionment has been made by a jury."

Moller v Trollope Silverwood and Beck Pty Ltd [2004] VSCA 22 -
Moller v Trollope Silverwood and Beck Pty Ltd [2004] VSCA 22 -
Moller v Trollope Silverwood and Beck Pty Ltd [2004] VSCA 22 -
Moller v Trollope Silverwood and Beck Pty Ltd [2004] VSCA 22 -
Ghunaim v Bart [2004] NSWCA 28 (24 February 2004) (Giles, Ipp and McColl JJA)

46 In *Podrebersek v Australian Iron & Steel Pty Limited* [1985] HCA 34, (1985) 59 ALJR 492 at 493 – 494 G ibbs CJ, Mason, Wilson, Brennan and Deane JJ in their joint judgment said: "[a] finding on the issue of apportionment is a finding upon a 'question, not of principle or of positive findings of fact, or law, but of proportion, of balance and relative emphasis, and of weighing different

considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds' ...such a finding, if made by a judge, is not lightly reviewed."

Ghunaim v Bart [2004] NSWCA 28 -
Ghunaim v Bart [2004] NSWCA 28 -
Ghunaim v Bart [2004] NSWCA 28 -
Ghunaim v Bart [2004] NSWCA 28 -
Signet Engineering Pty Ltd v Melvan [2003] WASCA 313 (11 December 2003) (Murray J, Wheeler J, McKechnie J)
Podrebersek v Australian Iron and Steel Pty Ltd (1985) 59 ALJR 492

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Signet Engineering Pty Ltd v Melvan [2003] WASCA 313 -
Signet Engineering Pty Ltd v Melvan [2003] WASCA 313 -
Tonks v Tonks [2003] VSCA 195 -
Tonks v Tonks [2003] VSCA 195 -
Tonks v Tonks [2003] VSCA 195 -
Kschammer v R W Piper & Sons Pty Ltd [2003] WASCA 298 -
Kschammer v R W Piper & Sons Pty Ltd [2003] WASCA 298 -
Kschammer v R W Piper & Sons Pty Ltd [2003] WASCA 298 -
Surf Coast Shire Council v Webb & Anor; Webb v Norquay Nominees Pty Ltd & Anor [2003] VSCA 162 (27 October 2003) (Batt and Chernov, Jj.A and Ashley, A.J.A)

31. It was next argued for the Shire that the apportionment by the jury of liability as between the three parties was against the evidence and the weight of it. In particular, it was said on its behalf in relation to the apportionment between itself and Norquay that, since Norquay placed its commercial waste in the bin with full knowledge that its conduct in that regard was unlawful and that this action caused the bin to be unduly heavy, it should be regarded as being the substantial wrongdoer and, consequently, should have been held liable for the bulk of the plaintiff's injury. It was pointed out that Norquay's acts in that regard were deliberate and, therefore, involved it in a high degree of culpability on its part. Furthermore, it was claimed, given that the jury must have concluded that Norquay loaded 40 kilograms of rubbish into the bin notwithstanding that it received a complaint about it from the plaintiff (and a direction from the Shire to cease such conduct) the apportionment made by them demonstrates that they did not take the culpability of Norquay's conduct sufficiently into account in arriving at that conclusion. Mr. Kaye highlighted that, on the plaintiff's evidence, the primary cause of the injury was the overloading of the bin by Norquay. Counsel accepted that, as a general rule, appellate courts are slow to disturb an apportionment made by a jury – see, for example, *Podrebersek v. Australian Iron & Steel Pty. Ltd* [17] – but here, it was said, the error for which the Shire contends is obvious enough and justifies appellate intervention.

via

[17] (1985) 59 A.L.J.R. 492 at 494.

Surf Coast Shire Council v Webb & Anor; Webb v Norquay Nominees Pty Ltd & Anor [2003] VSCA 162 -
Rexstraw v Johnson [2003] NSWCA 287 (09 October 2003)

134. More recently, this Court restated the principles with respect to both the original exercise of the discretion and the review of that discretion on appeal in *Rolls Royce Industrial Power (Pacific) Limited v James Hardie & Co Pty Limited* (2001) 53 NSWLR 626, where Stein JA (with whom Davies AJA agreed) observed (at 637):

"It is appropriate to start with the obvious statement that to set aside an apportionment of liability under s 5 , it must be shown that the failure to properly exercise the discretion involved an apportionment which was unreasonable or plainly unjust, *Oxley County Council v MacDonald* [1999] NSWCA 126 at [55] referring to *House v The King* (1936) 55 CLR 499 at 505. As Hayne J reminded us in *Wynbergen v Hoyts Corporation Pty* Ltd (1997) 72 ALJR 65 at 68; 149 ALR 25 at 29, the task involves comparison of the culpability of the parties and the relative importance of the acts of the parties in causing the damage. Further, the whole conduct of each negligent party must be subjected to comparison: *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALJR 492 at 494 ; 59 ALR 529 at 532-533 ."
In *Podrebersek,* the court said (at 493-494; 532):

> "A finding on a question of apportion(ment) is a finding upon a 'question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds'..."

(The decision of this Court in *Rolls Royce* was the subject of an appeal to the High Court of Australia sub. nom. *Amaca Pty Limited v The State of New South Wales* (2003) HCA 44 where the appeal was allowed on an issue which, although relevant to the present case, did not touch upon the correctness of the above expression of principle by Stein JA.)

Rexstraw v Johnson [2003] NSWCA 287 (09 October 2003)

133. The principles guiding the exercise of the discretion to apportion liability under s 5 of *The La w Reform Act* were authoritatively stated by the High Court of Australia in *Podrebersek v Australian Iron & Steel* (1985) 59 ALJR 492 where Gibbs CJ, Mason, Wilson, Brennan and Deane JJ said (at 494 , omitting citations):

"The making of an apportionment as between a plaintiff and a defendant with their respective shares in the responsibility for the damage involves a comparison both of culpability, ie. of the degree of departure from the standard of care of the reasonable man 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. The significance of the various elements involved in such an examination will vary from case to case: for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance."

Boyce v Deem [2003] QCA 403 (12 September 2003) (McMurdo P, Jerrard JA and Muir J,)

14. As was said in the judgment of the Court in *Podrebersek v Australian Iron & Steel Pty Ltd* – [1]

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

Boyce v Deem [2003] QCA 403 -
Boyce v Deem [2003] QCA 403 -
Wellington Shire Council v Steedman [2003] VSCA 115 (22 August 2003) (Phillips and Eames, Jj.A and Warren, A.J.A)

25. The appellant carried the onus of proof as to contributory negligence [6] . The question whether contributory negligence has been proved is a question of fact [7] and an appeal court must exercise restraint in disturbing such a finding, having regard to the fact that issues of credibility would be relevant to the decision of the trial judge [8] , as, indeed, was the case here. Additionally, his Honour had the advantage of a view of the scene, although by the time of trial the hump had been removed.

via

[8] *Podrebersek v. Australian Iron and Steel Pty. Ltd.* (1985) 59 ALJR 492, at 493-494 ; *O'Neill v. Chisholm* (1973) 47 ALJR 1, at 3, 4, 6.

Daly v D a Manufacturing Co P/L [2003] QCA 274 -
Daly v D a Manufacturing Co P/L [2003] QCA 274 -
Daly v D a Manufacturing Co P/L [2003] QCA 274 -
Daly v D a Manufacturing Co P/L [2003] QCA 274 -
Joslyn v Berryman [2003] HCA 34 (18 June 2003) (McHugh, Gummow, Kirby, Hayne and Callinan JJ)

119. The first issue to be decided concerns the rule of restraint [118] . Three factors reinforce the need for restraint in disturbance of decisions about contributory negligence and apportionment:

> (1) The issue of contributory negligence is essentially a factual question, and therefore the primary judge (or jury) will have relevant advantages over an appellate court that will often be critical for the determination of the issue [119] ;
>
> (2) The apportionment legislation conferred upon the decision-maker a power to reduce the recoverable damages "to such extent" as the court determines "having regard to" a consideration expressed in very general language ("the claimant's share in the responsibility for the damage") that evokes the exercise of a quasi-discretionary judgment [120] upon which different minds may readily come to different conclusions [121] ; and
>
> (3) The broad criteria by which such decisions are made at trial (including by reference to what "the court thinks just and equitable" in the case [122]) make it difficult, absent a demonstrated mistake of law or fact, to establish the kind of error that, alone, will authorise an appellate court to set aside the decision and any apportionment of the trial judge and to substitute a different decision or apportionment on appeal.

via

[121] *British Fame (Owners) v Macgregor (Owners)* [1943] AC 197 at 201 applied in *Podrebersek* (1985) 59 ALJR 492 at 494 ; 59 ALR 529 at 532 ; cf *Liftronic* (2001) 75 ALJR 867 at 878 [64.3]; 179 ALR 321 at 334-335 .

Joslyn v Berryman [2003] HCA 34 (18 June 2003) (McHugh, Gummow, Kirby, Hayne and Callinan JJ)

158. As Kirby J pointed out in *Liftronic Pty Ltd v Unver* [164] , contributory negligence and apportionment are always questions of fact. It is, therefore, wrong to elevate what was said in past cases about the facts of those cases to any principle of law [165] . That is, it is wrong to attempt to deduce from what has been said in such cases, often decided in a different legal context from that provided in this case by the *Motor Accidents Act* , any general principles to be applied in cases where passengers suffer injury as a result of the negligence of a drunken driver. Each case turns on its own special facts. It is, therefore, neither necessary nor appropriate to review any of the regrettably large number of decisions, in Australia and elsewhere, in which factual issues of that kind have been decided. The applicable rule is that prescribed by the *Motor Accidents Act* . The manner of making the necessary apportionment is described in *Podrebersek* .

Joslyn v Berryman [2003] HCA 34 (18 June 2003) (McHugh, Gummow, Kirby, Hayne and Callinan JJ)

157. Findings about apportionment of responsibility are not lightly to be disturbed [155] . In *Podrebersek v Australian Iron & Steel Pty Ltd* [156] , five members of the Court said:

> "A finding on a question of apportionment is a finding upon a 'question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds': *British Fame (Owners) v Macgregor (Owners)* [157] . Such a finding, if made by a judge, is not lightly reviewed. The task of an appellant is even more difficult when the apportionment has been made by a jury: *Zoukra v Lowenstern* [158] ."

So much follows from the nature of the task that is undertaken in making such an apportionment. As was said in *Podrebersek* [159] :

> "The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man (*Pennington v Norris* [160]) and of the relative importance of the acts of the parties in causing the damage: *Stapley v Gypsum Mines Ltd* [161] ; *Smith v McIntyre* [162] and *Broadhurst v Millman* [163] and cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance."

Section 74(3) of the *Motor Accidents Act* required the primary judge to undertake this process. No error is shown in his Honour's conclusion.

Joslyn v Berryman [2003] HCA 34 -
Joslyn v Berryman [2003] HCA 34 -
Joslyn v Berryman [2003] HCA 34 -
Joslyn v Berryman [2003] HCA 34 -
Joslyn v Berryman [2003] HCA 34 -
Joslyn v Berryman [2003] HCA 34 -
Joslyn v Berryman [2003] HCA 34 -
Joslyn v Berryman [2003] HCA 34 -
Joslyn v Berryman [2003] HCA 34 -
Joslyn v Berryman [2003] HCA 34 -

Richards v Mills [2003] WASCA 97 -
Richards v Mills [2003] WASCA 97 -
Richards v Mills [2003] WASCA 97 -
Richards v Mills [2003] WASCA 97 -
Jones v Bradley [2003] NSWCA 81 -
Jones v Bradley [2003] NSWCA 81 -
Jones v Bradley [2003] NSWCA 81 -
Sierra v Anikin [2003] NSWCA 11 -
Sierra v Anikin [2003] NSWCA 11 -
Sierra v Anikin [2003] NSWCA 11 -
Sierra v Anikin [2003] NSWCA 11 -
Moore v Woodforth [2003] NSWCA 9 -
Edith Cowan University v Czatryko [2002] WASCA 334 -
Edith Cowan University v Czatryko [2002] WASCA 334 -
Del Romano v Turner [2002] VSCA 166 -
Del Romano v Turner [2002] VSCA 166 -
Del Romano v Turner [2002] VSCA 166 -
I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd [2002] HCA 41 -
Trio Insulations P/L v Metal Deck Roofing P/L & Ors; Metal Deck Roofing P/L v Benward P/L & Ors [2002] NSWCA 294 (29 August 2002)

44. At the start it was freely acknowledged by Mr Stevens QC, who appeared with Mr McManus for Trio, that a very heavy burden lies on an appellant who seeks to overturn a judge's finding on apportionment and what the High Court said in ***Podrebersek v Australian Iron & Steel Pty Ltd*** (1985) 59 ALJR 492, 494 was acknowledged. However, Mr Stevens put that there were proper grounds in the instant case for this Court interfering with the apportionment, principally that:-

(a) Palmer J made egregious errors of fact
(b) Palmer J did not give adequate reasons for his decision
(c) Palmer J failed to give appropriate significance to the fact that it was Metal Roofing that had been granted the WorkCover permit to remove the asbestos and was generally in charge of the project.

Tabvena v Oag [2002] NSWCA 61 (23 August 2002) (Meagher and Powell JJA, Mathews AJA)
(i) In ***Podrebersek v Australian Iron & Steel Pty Limited*** (1985) 59 ALJR 492 , the High Court of Australia delivered a judgment which made it quite clear that a finding of the proportions of contributory negligence (either by a trial judge or by a jury) attracts a special sacrosanctity; and in ***Liftronic Pty Ltd v Unver*** (2001) 75 ALJR 867 the High Court was constrained to repeat that ***Podrebersek's*** case meant what it said. The trial judge's proportions could therefore not be disturbed.

Tabvena v Oag [2002] NSWCA 61 -
Tabvena v Oag [2002] NSWCA 61 -
Tabvena v Oag [2002] NSWCA 61 -
Tabvena v Oag [2002] NSWCA 61 -
McDonalds Australia Limited v Therma Truck Pty Limited [2002] NSWCA 268 -
McDonalds Australia Limited v Therma Truck Pty Limited [2002] NSWCA 268 -
Miller v BP (Fremantle) Ltd [2002] WASCA 201 -
Miller v BP (Fremantle) Ltd [2002] WASCA 201 -
Spencer v Balranald Shire Council [2002] NSWCA 102 -
Spencer v Balranald Shire Council [2002] NSWCA 102 -
Cook v Hawes [2002] NSWCA 79 -
Kelly v Carroll [2002] NSWCA 9 (05 February 2002) (Beazley and Heydon JJA, Ipp AJA)
Podrebersek v Australian Iron and Steel Pty Ltd (1985) 59 ALR 529
Sibley v Kais

Kelly v Carroll [2002] NSWCA 9 -

Reed v Fleming [2001] WASCA 424 (20 December 2001) (Steytler J, Hasluck J, Olsson Auj)

> 52 It is also salutary to commence a review of the competing arguments as to apportionment of liability by recalling what fell from the High Court in ***Watt V Bretag*** (1982) 56 ALJR 760 at 761. The majority there made the point that the apportionment legislation "gives a very wide discretion, and much latitude must be allowed to a trial Judge in deciding what is just and equitable (***Pennington v Norris*** (1956) 96 CLR 10 at 15 - 16). It is only in exceptional circumstances that it is right for an A ppell ate Court to interfere with a trial Judge's apportionment". Reference was made to what had been said in ***A V Jennings Construction Pty Ltd v Maumill*** (1956) 30 ALJR 100 at 101 and ***British Fame (Owners) v Macgregor (Owners)*** [1943] AC 197 at 198 - 199 . Similar sentiments were echoed in ***Podrebe rsek v Australian Iron and Steel Pty Ltd*** (1985) 59 ALR 529 at 532 and have consistently been applied ever since. This Court is only justified in interfering with an apportionment if it is satisfied that any apportionment of liability made at trial was plainly wrong.

Reed v Fleming [2001] WASCA 424 -
Reed v Fleming [2001] WASCA 424 -
Boral Resources (SA) Ltd v Byrnecut Mining Pty Ltd [2001] WASCA 408 -
Boral Resources (SA) Ltd v Byrnecut Mining Pty Ltd [2001] WASCA 408 -
Boral Resources (SA) Ltd v Byrnecut Mining Pty Ltd [2001] WASCA 408 -
Boral Resources (SA) Ltd v Byrnecut Mining Pty Ltd [2001] WASCA 408 -
Rolls Royce Industrial Power (Pacific) Ltd v James Hardie & Co Pty Ltd [2001] NSWCA 461 -
Rolls Royce Industrial Power (Pacific) Ltd v James Hardie & Co Pty Ltd [2001] NSWCA 461 -
Rolls Royce Industrial Power (Pacific) Ltd v James Hardie & Co Pty Ltd [2001] NSWCA 461 -
Rolls Royce Industrial Power (Pacific) Ltd v James Hardie & Co Pty Ltd [2001] NSWCA 461 -
Australian Char Pty Ltd v Wood [2001] NSWCA 437 -
Australian Char Pty Ltd v Wood [2001] NSWCA 437 -
Boral Transport Ltd v Whitehead [2001] NSWCA 395 (13 November 2001) (Sheller, Stein and Heydon JJA)
Podrebersek v Australian Iron & Steel Pty Limited (1985) 59 ALJR 492
Smith v Austin Lifts Ltd

Boral Transport Ltd v Whitehead [2001] NSWCA 395 -
Fitzgerald v Dansey [2001] NSWCA 339 (24 October 2001) (Powell JA, Fitzgerald AJA and Sperling J)
Podrebersek v Australian Iron & Steel Pty Ltd (1985) 59 ALR 529
Precision Plastics Pty Ltd v Damir

Fitzgerald v Dansey [2001] NSWCA 339 -
Mousa v Marsh [2001] NSWCA 317 -
Mousa v Marsh [2001] NSWCA 317 -
Richardson v Sunraysia Institute of TAFE [2001] VSCA 170 -
Richardson v Sunraysia Institute of TAFE [2001] VSCA 170 -
Insurance Commission of Western Australia v Leigh [2001] WASCA 232 -
Insurance Commission of Western Australia v Leigh [2001] WASCA 232 -
State Rail Authority of New South Wales v Barnes [2001] NSWCA 133 -
Achron Pty Ltd v Serco Water (WA) Pty Ltd [2001] WASCA 141 -
Achron Pty Ltd v Serco Water (WA) Pty Ltd [2001] WASCA 141 -
Achron Pty Ltd v Serco Water (WA) Pty Ltd [2001] WASCA 141 -
Liftronic Pty Ltd v Unver [2001] HCA 24 -
Liftronic Pty Ltd v Unver [2001] HCA 24 -
Liftronic Pty Ltd v Unver [2001] HCA 24 -
Liftronic Pty Ltd v Unver [2001] HCA 24 -
Liftronic Pty Ltd v Unver [2001] HCA 24 -
Liftronic Pty Ltd v Unver [2001] HCA 24 -
Liftronic Pty Ltd v Unver [2001] HCA 24 -
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Liftronic Pty Ltd v Unver [2001] HCA 24 -
Liftronic Pty Ltd v Unver [2001] HCA 24 -
Liftronic Pty Ltd v Unver [2001] HCA 24 -
Berryman v Joslyn and AnorWentworth Shire Council v Joslyn and Anor [2001] NSWCA 95 -
Berryman v Joslyn and AnorWentworth Shire Council v Joslyn and Anor [2001] NSWCA 95 -
Brown v Mawbey [2001] NSWCA 88 (10 April 2001)

24. His Honour apportioned responsibility for the accident equally between the parties. The appellant submits that the apportionment for contributory negligence against the respondent should be increased from 50%. The High Court has on a number of occasions stressed that issues of apportionment involve questions of individual discretion where minds may differ. Such a finding made by a judge ought not be lightly reviewed. See, for example, *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492 at 494. In my opinion, His Honour's conclusion was well within the discretionary range of percentages. Indeed, an analysis of the whole of the relevant evidence leads me to conclude that his Honour's assessment was completely appropriate to the circumstances of the conduct of each party. This conclusion also leads me to determine that the cross-appeal, confined to the issue of contributory negligence, should also be dismissed.

Kenyon v Barry Bros Specialised Services Pty Ltd [2001] VSCA 3 (09 February 2001) (Winneke, P., Phillips, J.A and Charles, J.A)

17. I am able in this case to reach this conclusion more easily because of the view which I have that there were deficiencies in the charge given to the jury on these significant issues. In reaching this conclusion, I do not wish it to be thought that I am being unduly critical of this very experienced trial judge, to whose charge no exception was taken. It should not be thought that simply because the question of apportionment involves matters of proportion and relative emphasis that juries do not need some instructions as to how to go about their task. In this case the learned trial judge's charge on this issue was, essentially, confined to the form of the question which the jury was requested to answer, which in turn was a recitation of the relevant provision of the *Wrongs* Act. The jury were not told, as I think was necessary in this case, that the relevant question required them to make a comparison of the degrees of culpability of the appellant and the respondent in terms of their respective degrees of departure from the standards of care expected from them and the relevant importance of their culpability in causing the injury [4] . Furthermore, in this case it was, I think, necessary for the jury to have been told that, in considering questions of contributory negligence and apportionment, to begin their considerations by bearing in mind that they had already concluded that the respondent had failed to discharge its obligation to take reasonable care for the safety of its employee and was in breach of its statutory duty imposed by the relevant regulations. Such directions were necessary in this case because the jury needed to guard against the possibility of confusing contributory negligence of the plaintiff and the significance of any departure by him from the standard of care which the law imposed on him, with mere inadvertence, inattention or misjudgment on his part in complying with a rough and ready system of work in which such inattention or misjudgment may be a ready component [5] .

via

[4] cf *Podrebersek* (supra) at 494 ; *Butler v. Rick Cuneen Logging Pty. Ltd.* [1997] 2 V.R.99.

Kenyon v Barry Bros Specialised Services Pty Ltd [2001] VSCA 3 -
North Sydney Municipal Council v Harrison [2001] NSWCA 4 -
Nelson v BHP Coal Pty Ltd [2000] QCA 505 (14 December 2000) (McPherson JA, Muir and Atkinson JJ,)

51. The principles relevant to a determination of the question of contributory negligence in the circumstances now under consideration are expressed in the following passage from the judgment of Mason, Wilson and Dawson JJ in *Bankstown Foundry Pty Ltd v Braistina* [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, ie. 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.'"

Nelson v BHP Coal Pty Ltd [2000] QCA 505 -
Isherwood v Flavin [2000] NSWCA 232 -
Isherwood v Flavin [2000] NSWCA 232 -
City of Rockingham v Curley [2000] WASCA 202 (04 August 2000) (Wallwork J, Murray J, Anderson J)
Podrebersek v Australian Iron & Steel Pty Ltd (1985) 59 ALR 529; 59 ALJR 492
Public Trustee v Sutherland Shire Council (1992) A Tort Rep 81-149

City of Rockingham v Curley [2000] WASCA 202 (04 August 2000) (Wallwork J, Murray J, Anderson J)

> 163 It is appropriate to approach the question of contributory negligence in the manner endorsed by the High Court in ***Podrebersek v Australian Iron & Steel Pty Ltd*** (1985) 59 ALJR 492 at 493 - 494 . It must first be determined in the 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.

City of Rockingham v Curley [2000] WASCA 202 (04 August 2000) (Wallwork J, Murray J, Anderson J)

> 165 As has been seen the Commissioner's assessment of the degree of responsibility for his own injuries borne by the plaintiff led him to apportion 20 per cent to the contributory negligence. In ***Podrebersek*** the High Court pointed out that this matter of apportionment is essentially a matter of judgment, balancing the degree of contribution to the ultimate harm made by the lack of care of the plaintiff and the defendant. That being so, the Court pointed out that, "Such a finding, if made by a Judge, is not lightly reviewed." Appreciating that that is the case it is, however, my view that the plaintiff's lack of care for his own safety was very considerable, although not as great as the lack of care exhibited by the FPA in the manner discussed above. With respect to the Commissioner, I

am unable to accept the view that 20 per cent against the plaintiff was an appropriate apportionment. To my mind, having regard to the nature of the lack of care exhibited by the plaintiff for his own safety and the direct contribution that made to the harm he so tragically suffered, the minimum

(Page 43)

apportionment of liability to him would be at the level of 33-1/3 per cent and I would so order.

City of Rockingham v Curley [2000] WASCA 202 -
Wylie v The ANI Corporation Limited [2000] QCA 314 -
Wylie v The ANI Corporation Limited [2000] QCA 314 -
Dunnet v Brennan [2000] NSWCA 211 -
City of Rockingham v Curley [2000] WASCA 202 -
City of Rockingham v Curley [2000] WASCA 202 -
Dunnet v Brennan [2000] NSWCA 211 -
Viselka v ABB Daimler Benz Transport (Aust) Pty Ltd [2000] VSCA 105 (09 June 2000) (Phillips, Charles and Callaway, Jj.A)

29. Furthermore the judge was plainly alive to the necessity for him to apportion responsibility between appellant and defendant by making a comparison of the whole conduct of each negligent party in relation to the circumstances of the accident. His Honour quoted the relevant portion of the judgment in *Podrebersek* in which the correct test is set out, before stating what he found to be the appropriate apportionment. In my view his Honour is not shown to have erred in failing to take into account any aspect of the defendant's negligent conduct established in evidence in accordance with the particulars.

Viselka v ABB Daimler Benz Transport (Aust) Pty Ltd [2000] VSCA 105 -
Viselka v ABB Daimler Benz Transport (Aust) Pty Ltd [2000] VSCA 105 -
Tilbee v Wakefield as Adminstratrix of the estate of the late Kenneth Eric Wakefield on behalf of NATRIECE Leanne Wakefield, Sheldon Kenneth Wakefield, Ashleigh NATRIECE Wakefield and Dannika Leanne Wakefield [2000] WASCA 143 -
Tilbee v Wakefield as Adminstratrix of the estate of the late Kenneth Eric Wakefield on behalf of NATRIECE Leanne Wakefield, Sheldon Kenneth Wakefield, Ashleigh NATRIECE Wakefield and Dannika Leanne Wakefield [2000] WASCA 143 -
Tilbee v Wakefield as Adminstratrix of the estate of the late Kenneth Eric Wakefield on behalf of NATRIECE Leanne Wakefield, Sheldon Kenneth Wakefield, Ashleigh NATRIECE Wakefield and Dannika Leanne Wakefield [2000] WASCA 143 -
Esso Australia Ltd v Victorian Workcover Authority [2000] VSCA 74 -
Vinidex Tubemakers Pty Ltd v Thiess Contractors Pty Ltd [2000] NSWCA 67 -
Jakovich Transport and Earthmoving Pty Ltd v Spiral Tube Makers Pty Ltd [2000] WASCA 46 (01 March 2000) (Kennedy J, Pidgeon J, Murray J)

4. At 493 494, the court in ***Podrebersek's*** case said:

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

Jakovich Transport and Earthmoving Pty Ltd v Spiral Tube Makers Pty Ltd [2000] WASCA 46 -
Howlett v Campion [2000] NSWCA 22 -
Howlett v Campion [2000] NSWCA 22 -
City of Brimbank v Halilovic [2000] VSCA 12 -
James Thane Pty Ltd v Conrad International Hotels Corp [1999] QCA 516 -

James Thane Pty Ltd v Conrad International Hotels Corp [1999] QCA 516 -
James Thane Pty Ltd v Conrad International Hotels Corp [1999] QCA 516 -
James Thane Pty Ltd v Conrad International Hotels Corp [1999] QCA 516 -
Union International (WA) Pty Ltd v Mazurak [1999] WASCA 272 -
Union International (WA) Pty Ltd v Mazurak [1999] WASCA 272 -
Union International (WA) Pty Ltd v Mazurak [1999] WASCA 272 -
James Hardie & Coy Pty Ltd v Roberts [1999] NSWCA 314 -
Bitupave Ltd v McMahon [1999] NSWCA 330 -
James Hardie & Coy Pty Ltd v Roberts [1999] NSWCA 314 -
James Hardie & Coy Pty Ltd v Roberts [1999] NSWCA 314 -
James Hardie & Coy Pty Ltd v Roberts [1999] NSWCA 314 -
James Hardie & Coy Pty Ltd v Roberts [1999] NSWCA 314 -
James Hardie & Coy Pty Ltd v Roberts [1999] NSWCA 314 -
James Hardie & Coy Pty Ltd v Roberts [1999] NSWCA 314 -
Bitupave Ltd v McMahon [1999] NSWCA 330 -
James Hardie & Coy Pty Ltd v Roberts [1999] NSWCA 314 -
Bitupave Ltd v McMahon [1999] NSWCA 330 -
Bitupave Ltd v McMahon [1999] NSWCA 330 -
Kato Works Co Ltd v Benz [1999] WASCA 165 -
Hubery v Bunnings Forest Products Pty Ltd [1999] WASCA 107 -
Unver v Liftronic Pty Ltd [1999] NSWCA 275 -
Keating v Rechichi [1999] WASCA 97 (28 July 1999) (Wallwork, Owen and Parker JJ)

12. In ***Wynbergen v Hoyts Corporation Pty Ltd*** (1998) 72 ALJR 65, Hayne J said at 68 :

> "No doubt the making of the apportionment which the legislation requires involves comparison of the culpability of the parties, ie, the degree to which each has departed from the standard of what is reasonable, (*Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492 at 494 ; *Pennington v Norris* (1956) 96 CLR 10 at 16) but that is not the only element to be considered. Regard must be had to the 'relative importance of the acts of the parties in causing damage' (*P odrebersek* (1985) 59 ALJR 492 at 494) and it is 'the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination' (*Podrebersek* (1985) 59 ALJR 492 at 494)."

Keating v Rechichi [1999] WASCA 97 (28 July 1999) (Wallwork, Owen and Parker JJ)

Podrebersek v Australian Iron & Steel Pty Ltd (1985) 59 ALJR 492

Keating v Rechichi [1999] WASCA 97 -
Keating v Rechichi [1999] WASCA 97 -
Keating v Rechichi [1999] WASCA 97 -
Rowes Bus Service Pty Ltd v Cowan [1999] NSWCA 268 -
Rowes Bus Service Pty Ltd v Cowan [1999] NSWCA 268 -
Managrave v Vrazalica [1999] NSWCA 242 (16 July 1999) (Beazley, Stein and Giles JJA)
Podrebersek v Australian Iron and Steel Pty Ltd (1985) 59 ALJR 492
Stocks v Baldwin

Managrave v Vrazalica [1999] NSWCA 242 -
Oxley County Council v Macdonald [1999] NSWCA 126 -
Oxley County Council v Macdonald [1999] NSWCA 126 -
Oxley County Council v Macdonald [1999] NSWCA 126 -
Oxley County Council v Macdonald [1999] NSWCA 126 -
Indigo Shire Council v Pritchard [1999] VSCA 77 (20 May 1999) (Tadgell, Ormiston and Charles, Jj.A)

29. In my view, the proper inference to be drawn from the facts was that the Council had been negligent in the maintenance of the bridge and that this also was a cause of the plaintiff's

injuries. It was a matter which the plaintiff was entitled to have taken into account in assessing apportionment, part of the whole conduct of the Council in relation to the circumstances of the incident which must be subjected to comparative examination; *Podrebersek v. Australian Iron and Steel Pty Limited* (1985) 59 A.L.J.R. 492 at 494. On the question of apportionment, a judge's finding is not lightly reviewed; Podrebersek at 494. It was necessary for his Honour to consider whether the conduct of the plaintiff which the Council called into question was to be characterized on the one hand as contributory negligence or on the other as inadvertence, inattention or misjudgment not amounting to negligent conduct; *Kulczycki v. Metalex Pty Ltd* [1995] 2 V.R. 377 at 410 ; *Butler v. Rick Cuneen Logging* [1997] 2 V.R. 99 at 102.

Robinson v Brennan and Powell Pty Ltd [1999] NSWCA 85 -
Robinson v Brennan and Powell Pty Ltd [1999] NSWCA 85 -
Robinson v Brennan and Powell Pty Ltd [1999] NSWCA 85 -
Robinson v Brennan and Powell Pty Ltd [1999] NSWCA 85 -
Astley v AusTrust Ltd [1999] HCA 6 -
Wegrzyn v Carlton and United Breweries (Queensland) Ltd [1998] QCA 391 -
MacPhee v Wanless [1998] QCA 322 -
Queensland University of Technology v Davis [1997] QCA 437 -
Wynbergen v Hoyts Corporation Pty Ltd [1997] HCA 52 -
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Wynbergen v Hoyts Corporation Pty Ltd [1997] HCA 52 -
Heaney Marketing Pty Ltd v Heaney [1997] QCA 341 (03 October 1997) (McPherson JA. Pincus JA. Shepherdson J.)

Australian Iron & Steel Pty Ltd (1985) 59 ALJR 492 at pp. 493-494 ; 59 ALR 529 at p. 532 :-

Barra Pty Ltd, Kelly v Ramsey [1997] QCA 116 -
Harris v McDonald, FAI General Insurance Co Ltd [1996] QCA 364 -
Tamwoy v Solomon [1995] QCA 447 (10 October 1995)

It was submitted that, quite apart form the provisions of O.26, the matter was one in which the general discretion ought to be exercised in favour of awarding the costs of appeal on a solicitor and client basis. Reference was made to *Calderbank v. Calderbank* [1976] Fam.93; but that decision does not bear upon the circumstances in which costs are awarded on a solicitor and client basis. In *Union Bank of Australia v. Raine* (1893) 5 Q.L.J. 117, Chubb J. held there was no jurisdiction to make such an order in an action at common law. Even if that might now be regarded as taking too narrow a view of this Court's discretion over the costs of an appeal, the circumstances of the present case are not such as to call for an order for costs on a solicitor and client basis. An appeal against an apportionment of liability based on an assessment of contributory negligence at the trial at once confronts the difficulty that the judgment under appeal involves an individual choice or discretion as to which there may well be differences of opinion by different minds. See *Podrebiserk v. Australian Iron & Steel Pty. Ltd.* (1985) 59 A.L.J.R. 492, 493-494 . As the High Court said there, such a finding, if made by a judge, is not lightly reviewed.

Simon Transport Pty Ltd v Towell [1995] QCA 309 (21 July 1995) (Davies JA. Demack J. Shepherdson J.)

' 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 and Steel Pty. Ltd. 59 A.L.J.R. 494 .'

Yorston v Hansen's Maintenance & Construction Pty Ltd [1993] QCA 102 -
Tramontin v Jayform Pty Ltd [1993] QCA 65 -
Burgess v Kerwin [1992] QCA 453 -
Bankstown Foundry Pty Ltd v Braistina [1986] HCA 20 -