Joslyn v Berryman - [2003] HCA 34

HIGH COURT OF AUSTRALIA

McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

Matter No S122/2002

SALLY INCH JOSLYN APPELLANT

AND

ALLAN TROY BERRYMAN & ANOR RESPONDENTS

Matter Nos S125/2002 and S126/2002

WENTWORTH SHIRE COUNCIL APPELLANT

AND

ALLAN TROY BERRYMAN & ANOR RESPONDENTS

Joslyn v Berryman

Wentworth Shire Council v Berryman

[2003] HCA 34

18 June 2003
S122/2002, S125/2002 and S126/2002

ORDER

In each matter:

1. *Appeal allowed.*

2. *Set aside paragraphs 1, 2 and 3 of the order of the Court of Appeal of New South Wales made on 11 April 2001.*

3. *Remit matter to the Court of Appeal of New South Wales for determination of the issues not so far dealt with and the cross-appeal regarding the assessment of the contributory negligence of the first respondent.*

4. *First respondent to pay the costs of the appeal to this Court.*

On appeal from the Supreme Court of New South Wales

Representation:

Matter No S122/2002

D F Jackson QC with G I Charteris for the appellant (instructed by McMahons National Lawyers)

M L Williams SC with P R McGuire for the first respondent (instructed by Carroll & O'Dea)

P R Garling SC with J M Morris for the second respondent (instructed by Phillips Fox)

Matter Nos S125/2002 and S126/2002

P R Garling SC with J M Morris for the appellant (instructed by Phillips Fox)

M L Williams SC with P R McGuire for the first respondent (instructed by Carroll & O'Dea)

D F Jackson QC with G I Charteris for the second respondent (instructed by McMahons National Lawyers)

CATCHWORDS

Joslyn v Berryman
Wentworth Shire Council v Berryman

Negligence – Contributory negligence – Passenger in defective vehicle with intoxicated and inexperienced driver – Whether reasonable person would have foreseen a risk of serious injury – Facts and circumstances relevant to contributory negligence.

Negligence – Contributory negligence – *Motor Accidents Act* 1988 (NSW), s 74(2) – Whether passenger was "aware or ought to have been aware" that driver's ability was affected by alcohol – Objective or subjective test – Facts and circumstances to be taken into account.

Negligence – Contributory negligence – *Motor Accidents Act* 1988 (NSW), s 74(6) – Whether passenger a "voluntary passenger".

Appeal – Contributory negligence – Application of apportionment legislation – Factual considerations – Utility of earlier judicial decisions – Whether relevant to disclose common approaches at trial and on appeal – Whether relevant to disclose purpose of statutory amendments obliging finding of contributory negligence in specified circumstances.

Words and phrases – "aware or ought to have been aware", "just and equitable in the circumstances of the case", "responsibility for the damage", "voluntary passenger".

Law Reform (Miscellaneous Provisions) Act 1965 (NSW), s 10 .
Motor Accidents Act 1988 (NSW), s 74 .

1. McHUGH J. When Sally Inch Joslyn noticed that the first respondent, Allan Troy Berryman, was falling asleep at the wheel of the vehicle in which they were travelling, she insisted that she drive the vehicle. Shortly after Ms Joslyn commenced to drive, the vehicle overturned causing injury to Mr Berryman. The accident occurred at about 8.45am. The driving capacity of both parties was affected by their intoxication. They had been drinking at a party until about 4.00am. The vehicle also had a propensity to roll over, and its speedometer was broken. Section 74(2) of the *Motor Accidents Act* 1988 (NSW) requires a finding of contributory negligence if an injured person was a voluntary passenger in a motor vehicle and "was aware,

or ought to have been aware" that the driver's ability to drive was impaired by alcohol. Section 74(6) of the Act declares that a person "shall not be regarded as a voluntary passenger ... if, in the circumstances of the case, the person could not reasonably be expected to have declined to become a passenger in or on the vehicle." However, s 74 does not otherwise affect the common law rules of contributory negligence.

2. The issues in these appeals are:

    - whether Mr Berryman was guilty of contributory negligence at common law;

    - whether, within the meaning of s 74(6) , Mr Berryman was a "voluntary passenger" in the vehicle;

    - whether, in determining for the purposes of s 74(2) that a passenger was or ought to have been aware that the driver's ability was impaired by alcohol, regard can be had to facts and circumstances occurring before the passenger entered the vehicle;

    - whether Mr Berryman was aware, or ought to have been aware, that Ms Joslyn was incapacitated by reason of her intoxication.

3. In my opinion, Mr Berryman was guilty of contributory negligence at common law and by reason of the direction in s 74 independently of the common law. He was guilty of contributory negligence at common law because a reasonable person in his position would have known that Ms Joslyn was affected by alcohol by reason of her drinking during the previous 12 hours, that the vehicle was defective and that, by becoming a passenger, he was exposing himself to the risk of injury. He was guilty of contributory negligence by reason of the direction in s 74 because he was a voluntary passenger and ought to have been aware that Ms Joslyn's ability to drive was impaired by alcohol.

Statement of the case

4. Allan Troy Berryman suffered severe injuries when a utility motor vehicle in which he was a passenger, but which he owned, left the road and overturned on a country road in New South Wales. He sued the driver, Sally Inch Joslyn, and the Wentworth Shire Council for damages in the District Court of New South Wales, claiming that Ms Joslyn had driven negligently and that the Council was negligent in failing to provide proper warning signs [1] . The action was heard by Boyd-Boland ADCJ. His Honour found Ms Joslyn guilty of negligence. He also found that the Council was guilty of negligence in not erecting a sign that adequately warned of the danger of the curve where the accident occurred. He held Ms Joslyn 90% and the Council 10% responsible for the accident. However, his Honour reduced the damages by 25% because of the contributory negligence of Mr Berryman in allowing Ms Joslyn to drive when he ought to have been aware that she was unfit to drive.

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[1] *Berryman v Joslyn* unreported, District Court of New South Wales, 5 November 1999.

5. Mr Berryman appealed to the Court of Appeal of New South Wales contending that the trial judge erred in finding that he was guilty of contributory negligence. Alternatively, he contended that the trial judge should have found a smaller percentage of contributory negligence. Ms Joslyn and the Council cross-appealed against the percentage of contributory negligence attributed to Mr Berryman. They contended that the trial judge should have made a finding of up to 80% contributory negligence. The Court of Appeal (Priestley JA, Meagher JA and Ipp AJA) allowed Mr Berryman's appeal, holding that he was not guilty of contributory negligence[2].

[2] *Berryman v Joslyn* (2001) 33 MVR 441.

6. This Court gave special leave to Ms Joslyn and the Council to appeal against the judgment of the Court of Appeal.

The material facts

7. The accident occurred at about 8.45am on a Sunday. Shortly before the accident Mr Berryman had been driving the vehicle. Ms Joslyn noticed that he was dozing off. She must have remonstrated with him for doing so because he said to her, "well, you drive the car then." She then took over the driving. Ms Joslyn did not have a driver's licence, having lost her licence after being convicted for driving while under the influence of intoxicating liquor. Mr Berryman knew that she had lost her licence and, according to Ms Joslyn, she had told him that she had not driven for over three years. However, the Court of Appeal appears to have accepted that he was unaware that she had not driven for three years.

8. After driving about one kilometre, Ms Joslyn lost control of the vehicle while driving around a sharp corner. The vehicle overturned. As a result, Mr Berryman suffered serious injuries. The vehicle had a propensity to roll – having overturned on two previous occasions. Ms Joslyn did not know what speed she was travelling when the accident occurred because the speedometer of the vehicle did not work. The trial judge found that it was broken.

9. On the previous night, Mr Berryman had gone to a party at a property near Dareton, a town in south-western New South Wales. He arrived at the party at about 9.00pm. With a short interruption, he drank alcohol until about 4.00am, when he went to sleep on the front seat of his utility. He had no further alcohol that morning. A sample of blood taken on the Sunday morning indicated that at about 8.45am he probably had a blood alcohol level of .19g /100ml. Ms Joslyn had also been a guest at the party. During the evening, she also consumed a large amount of alcohol. At about 4.30am, she was seen to be "quite drunk and staggering about". Eventually, she went to sleep on the ground beside Mr Berryman's vehicle.

10. Later that Sunday morning, Ms Joslyn and Mr Berryman decided to drive to Mildura to have breakfast, a journey that took about 20 minutes. She had had no more than three hours sleep (and may have had only two hours sleep) before embarking on the journey which resulted in Mr Berryman's injuries. She had no further alcohol that morning. A sample of blood taken

from her indicated that at about 8.45am she probably had a blood alcohol level of .138g /100ml. After Ms Joslyn and Mr Berryman had eaten, they commenced to drive back to Dareton. Mr Berryman drove until shortly before the accident.

11. Upon these facts, Boyd-Boland ADCJ said that, having decided to stay overnight, Mr Berryman "should have contemplated his vehicle might be driven by [Ms] Joslyn". His Honour also said that Mr Berryman had had no regard to the consequences of his own alcohol consumption, and that he had allowed Ms Joslyn to drive despite his knowledge of her alcohol consumption. His Honour found that, at the time Mr Berryman allowed Ms Joslyn to drive, he was capable of taking her condition into account. His Honour also said that Mr Berryman "ought also to have realised the lack of experience and qualifications of [Ms] Joslyn particularly given his knowledge of the propensity of his vehicle to roll over."

12. The Court of Appeal held that the relevant facts were confined to those that Mr Berryman observed, or ought to have observed, when Ms Joslyn took over the driving. Meagher JA said "one must view matters as they stood at the time of handing over control of the car, (not as they were in the previous 24 hours), a task which his Honour did not really undertake." [3] M eagher JA went on to say "there is no evidence that either [Mr Berryman or Ms Joslyn] were drunk at the time, and certainly no evidence that at the time Mr Berryman had any reason to think that [Ms] Joslyn was affected by intoxication." [4]

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[3] (2001) 33 MVR 441 at 446 [21] .

[4] (2001) 33 MVR 441 at 446 [21] .

Section 74

13. Section 74(2) directed the trial judge to find Mr Berryman guilty of contributory negligence if he "was aware, or ought to have been aware" that Ms Joslyn's ability to drive the utility "was impaired as a consequence of the consumption of alcohol". Neither in the Court of Appeal nor at the trial was any issue raised as to whether s 74 applied to the facts of the case. Nor was any issue raised as to whether Mr Berryman was "a voluntary passenger in or on a motor vehicle" within the meaning of s 74(6) of the Act . However, upon the facts of the case, these issues are squarely raised. Even if Mr Berryman was not guilty of contributory negligence at common law, s 74 might require a finding that he be deemed guilty of contributory negligence. Accordingly, this Court cannot avoid dealing with the issue, an issue that is squarely raised by the law that governs the case [5] .

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[5] *Attorney-General (NSW); Ex rel McKellar v The Commonwealth* (1977) 139 CLR 527 at 559-560 .

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14. **Following paragraph cited by:**

Robbins v Skouboudis and Suncorp Metway Insurance Limited (22 April 2013) (Martin J)
Robbins v Skouboudis and Suncorp Metway Insurance Limited (22 April 2013) (Martin J)

Apparently treating the case as one turning on common law principles, the Court of Appeal held that Mr Berryman was not guilty of contributory negligence. As I have indicated, the learned judges did so because they thought that Mr Berryman was not aware that Ms Joslyn's ability to drive the vehicle was impaired at the time that he became a passenger. They evidently took the view that, at least in a case like the present, the contributory negligence of a plaintiff has to be evaluated by reference to what the plaintiff knew or could have observed when he or she became a passenger. As will appear, I do not think that the common law test is so limited. But s 74(2) directs the court to determine whether the passenger ought to have been aware of the driver's impairment. This introduces an objective test. So the fact that Mr Berryman was unaware of Ms Joslyn's impaired ability to drive, does not necessarily prevent a finding that he was guilty of contributory negligence under s 74 . However, it is convenient to deal first with the issue of contributory negligence at common law.

The common law rules of contributory negligence

15. The Court of Appeal erred in confining the facts and circumstances relevant to contributory negligence to those observed or observable by Mr Berryman when he became a passenger. Although judges and juries have often taken a benign view of conduct alleged to constitute contributory negligence and some decisions concerned with intoxication support the reasoning of the Court of Appeal, the basic principles of the law relating to contributory negligence show that the relevant facts and circumstances were not as confined as that Court held.

16. **Following paragraph cited by:**

Touch for Health Pty Ltd as Trustee for Knight Superannuation Fund v Property Mentors Australia Pty Ltd (No 3) (02 December 2024) (Neskovcin J)
Content removed (27 November 2024) (Walton J)

320. The first defendant’s submissions with respect to contributory negligence were as follows:

> “65. In the event it is liable, SDN raise a defence of contributory negligence. The question is whether, in the circumstances giving rise to the accident, the plaintiff failed to exercise reasonable standard of care for his own safety: *T and X Company Pty Ltd v Chivas* [2014] NSWCA 235, [4]. This involves an objective test based on the facts and circumstances of the case, including what the plaintiff knew or ought to have known at the time: CLA s 5R(2)(b) ; *Joslyn v Berryman* (2003) 214 CLR 552, [16] ; *Origin Energy LPG Pty Ltd v Bestcare Foods Ltd* [2012] NSWCA 407, [217] .

66. Applying those principles, it was the plaintiff alone that created the risk by spilling the noodle. She alone failed to observe the spill and clean it up in accordance with the work procedures.

67. The "court may determine a reduction of 100% if the court thinks it just and equitable to do so": s 5S of the CLA ."

Gilmour v Blue Care (01 November 2024) (Loury Kc DCJ)
Shearman v Dosen Holdings (28 March 2024) (Magistrate Temby)
Gulati v Insurance Australia Limited t/as NRMA Insurance (13 October 2023)
Miric v Allianz Australia Insurance Limited (08 December 2022)
McGrath v Insurance Australia Limited t/as NRMA Insurance (02 September 2022)
Muscat v Allianz Australia Insurance Limited (29 June 2022) (Maurice Castagnet)

48. McColl JA set out the proper approach to assessment of contributory negligence in *Pollard v Baulderstone Hornibrook Engineering Pty Ltd* [20 08] NSWCA 99 at [13]-[14] :

"At common law, a plaintiff is guilty of contributory negligence when the plaintiff exposes himself or herself to a risk of injury which might reasonably have been foreseen and avoided and suffers an injury within the class of risk to which he or she was exposed: *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552 (at [16]) per McHugh J. As the primary judge recognised, the issue of contributory negligence was governed by s 5R of the *Civil Liability Act* …

The words 'reasonable person in the position of that person' in s 5R are equivalent to the words 'a reasonable person in the plaintiff's position': *Waverley Council v Ferreira* [2005] NSWCA 418; (2005) Aust Torts Reports 81-818 (at [87]); *Carey v Lake Macquarie City Council* [2007] NSWCA 4 (at [10]). Section 5R reflects 'the expectation that, in general, people will take as much care for themselves as they expect others to take for them': *Consolidated Broken Hill Ltd v Edwards* [2005] NSWCA 380; (2005) Aust Torts Reports 81-815 (at [70]) per Ipp JA (Giles JA and Hunt AJA agreeing)."

Shakhesi v QBE Insurance (Australia) Limited (06 June 2022)
Stav Investments Pty Ltd v Taylor (09 March 2022) (Ward CJ in Eq)

543. Turning then to the claim in contributory negligence, I am not persuaded that this has been established. A finding of contributory negligence turns on an examination of the factual circumstances in order to determine whether the plaintiffs contributed to their own loss by failing to take reasonable care of their person, property or economic circumstances (see *Astley v Austrust Ltd* (1999) 197 CLR 1; [1999] HCA 6 at [30] per Gleeson CJ, McHugh, Gummow and Hayne JJ). Contributory negligence is to be determined objectively: a plaintiff will be guilty of contributory negligence where they expose themselves to a risk which might reasonably have been foreseen and avoided, and suffer damage within the

class of risk to which they exposed themselves (*Joslyn v Berryman* (2003) 214 CLR 552; [2003] HCA 34 at [16] and [32] per McHugh J).

Al-Kes-Butrus v NRMA (19 October 2021)
Cutting Edge Services Pty Ltd v Raymond and Therese Penfold; Raymond and Therese Penfold v The Hollard Insurance Company Pty Ltd (15 October 2021) (N Adams J)
Turner v Carrington Ginning Pty Limited (30 April 2021) (Cavanagh J)

103. In *Pollard v Baulderstone Hornibrook Engineering Pty Ltd* , [4] McColl JA set out the proper approach to the assessment of contributory negligence in a case such as this:

> "[13] At common law, a plaintiff is guilty of contributory negligence when the plaintiff exposes himself or herself to a risk of injury which might reasonably have been foreseen and avoided and suffers an injury within the class of risk to which he or she was exposed: *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552 (at [16]) per McHugh J. As the primary judge recognised, the issue of contributory negligence was governed by s 5R of the *Civil Liability Act* , which provides:
>
> > (1) The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.
> >
> > (2) For that purpose:
> >
> > > (a) The standard of care required of the person who suffered harm is that of a reasonable person in the position of that person, and
> > >
> > > (b) The matter is to be determined on the basis of what that person knew or ought to have known at the time.
>
> [14] The words 'reasonable person in the position of that person' in s 5R are equivalent to the words 'a reasonable person in the plaintiff's position': *Waverley Council v Ferreira* [2005] NSWCA 418; (2005) Aust Torts Reports ¶81-818 (at [87]); *Carey v Lake Macquarie City Council* [2007] NSWCA 4 (at [10]). Section 5R reflects 'the expectation that, in general, people will take as much care for themselves as they expect others to take for them': *Consolidated Broken Hill Ltd v Edwards* [2005] NSWCA 380; (2005) Aust Torts Reports ¶81-815 (at [70]) per Ipp JA (Giles JA and Hunt AJA agreeing)."

Kelly v Thorn; Monteleone v Thorn (No 8) (19 February 2021) (Cavanagh J)
Hubbard v CPB Contractors Pty Limited (No 2) (31 December 2020) (Cavanagh J)
Sloan v Service Stream Limited (28 July 2020) (Schammer J)
Ajia v TJ & RF Fordham Pty Ltd trading as TRN Group (20 July 2020) (Scotting DCJ)

In determining if a person is guilty of contributory negligence it is necessary to have regard to their personal responsibility for his or her own safety: *Consolidated Broken Hill Ltd v Edwards* [2005] NSWCA 380 at [67]-[68] . Contributory negligence is determined objectively from the facts and circumstances of a case, which includes what the injured person knew or ought to have known at the time: *Joslyn v Berryman* (2003) 214 CLR 552 at [16] .

Makaroff v Nepean Blue Mountains Local Health District (14 June 2019) (Harrison AsJ)
State of New South Wales v Charter Hall Retail Management Limited (formerly Macquarie Countrywide Management Limited) (25 March 2019) (Scotting DCJ)
Lee v Dow (17 August 2017) (Dicker SC DCJ)

132. At paragraphs 144-146 of *Stojan (No 9) Pty Ltd v Kenway* [2009] NSWCA 364 McColl JA (with whom Ipp and Basten JJA agreed) stated as follows:

> [144] Pursuant to s 5R of the Civil Liability Act the principles are applicable in determining whether a person has been negligent also applied in determining whether the plaintiff was guilty of contributory negligence in failing to take precautions against the risk of the harm which befell her. The standard of care required of the plaintiff was that of a reasonable person in her position, and the matter was to be determined on the basis of what she knew or ought to have known at the time: s 5R(2) .
>
> [145] Section 5R(1) reflects the "fundamental idea that people should take responsibility for their own lives and safety" and also the proposition expressed by Callinan and Heydon JJ in *Vairy* (at [220]) that "the duty that [an injured plaintiff] owes is not just to look out for himself, but not to act in a way which may put him at risk, in the knowledge that society may come under obligations of various kinds to him if the risk is realized": *Consolidated Broken Hill Ltd v Edwards* [2005] NSWCA 380; (2005) Aust Torts Reports 81-815 at [68]–[70]); per Ipp JA (Giles JA and Hunt AJA agreeing); see also *Gordon Martin Pty Ltd v State Rail Authority (NSW)* [2009] NSWCA 287 (at [39]–[41]) per Beazley JA (Giles and Ipp JJA agreeing).
>
> [146] The question whether a person has been guilty of contributory negligence is determined objectively. The Council and Stojan bore the burden of proving that the plaintiff had been guilty of contributory negligence: *Gordon Martin Pty Ltd v State Rail Authority (NSW)* (at [42]); *Joslyn v Berryman* [2003] HCA 34 ; (2003) 214 CLR 552 (at [16] , [18]) per McHugh J; *Flower v Ebbw Vale St, Iron and Coal Co Ltd* [1936] AC 206 (at 216); *Commissioner for Railways v Halley* (1978) 20 ALR 409 (at 419).

Jarrett v Bugeja (18 November 2016) (Judge Levy SC)
Alzawy v Coptic Orthodox Church Diocese of Sydney, St Mary and St Merkorious Church (No.2) (19 August 2016) (Garling J)
Hendricks v El Dik (No 4) (08 July 2016) (Mossop AsJ)
T and X Company Pty Ltd v Chivas (22 July 2014) (Beazley P, Basten and Barrett JJA)

Boral Bricks Pty Ltd v Cosmidis (No 2) (07 May 2014) (McColl, Basten and Emmett JJA)
Boral Bricks Pty Ltd v Cosmidis (No 2) (07 May 2014) (McColl, Basten and Emmett JJA)
Boral Bricks Pty Ltd v Cosmidis (No 2) (07 May 2014) (McColl, Basten and Emmett JJA)
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Boral Bricks Pty Ltd v Cosmidis (No 2) (07 May 2014) (McColl, Basten and Emmett JJA)
Campton v Centennial Newstan Pty Ltd [No.2] (07 March 2014) (Garling J)
Simmons v Rockdale City Council (27 September 2013) (Hall J)
Simmons v Rockdale City Council (27 September 2013) (Hall J)
Howarth v Rail Corporation New South Wales (No 1) (20 March 2013) (Beech-Jones J)
Tarres v Rozelle Carriers Pty Ltd (25 November 2011) (Garling J)
Smith v Brambles Australia Ltd (26 August 2011) (Schmidt J)
Hughes v Tucaby Engineering Pty Ltd (24 August 2011) (McMeekin J)
BestCare Foods Ltd v Origin Energy LPG Ltd (formerly Boral Gas (NSW) Pty Ltd) (23 August 2011) (Nicholas J)
Council of the City of Greater Taree v Wells (01 July 2010) (Beazley, McColl and Basten JJA)
Spoilt Pty Ltd v Ticking Pty Ltd (25 June 2010) (Andrews SC DCJ)
Sijuk v Ilvariy Pty Limited, trading as, Craftsman Homes (29 April 2010) (Hall J)
Hodge v CSR Limited (02 February 2010) (Hislop J)
Stojan (No 9) Pty Ltd v Kenway (12 November 2009) (Ipp, McColl and Basten JJA)

> 146. The question whether a person has been guilty of contributory negligence is determined objectively. The Council and Stojan bore the burden of proving that the plaintiff had been guilty of contributory negligence: *Gord on Martin Pty Ltd v State Rail Authority of New South Wales & Anor* (at [42]); *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552 (at [16] , [18]) per McHugh J; *Flower v Ebbw Vale Street, Iron and Coal Co Ltd* [1936] AC 206 (at 216); *Commissioner for Railways v Halley* (1978) 20 ALR 409 (at 419).

TAC v Estate of Ewer (28 October 2009) (Robson J)
Farrell v Farrell (21 October 2009) (Hall J)
State of New South Wales (NSW Police) v Nominal Defendant (31 July 2009) (Allsop P at 1; Beazley JA at 2; Macfarlan JA at 113)

> 54 In *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552 McHugh J explained, at [16] , 558 that:
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> > "… at common law, a plaintiff is guilty of contributory negligence when the plaintiff exposes himself or herself to a risk of injury which might

reasonably have been foreseen and avoided and suffers an injury within the class of risk to which the plaintiff was exposed."

His Honour added:

"In principle, any fact or circumstance is relevant in determining contributory negligence if it proves, or assists in proving, a reasonably foreseeable risk of injury to the plaintiff in engaging in the conduct that gave rise to the injury suffered."

Alam v Rail Corporation New South Wales (26 November 2008) (Gibson DCJ)
The State of South Australia v Ellis (26 September 2008) (Martin CJ; Steytler P; McLure JA)
Hoad v Peel Valley Exporters Pty Ltd (19 September 2008) (Harrison J)
Tolhurst v Cleary Bros (Bombo) Pty Ltd (12 August 2008) (Beazley JA ; Giles JA ; Tobias JA)

90 Endeavour relied on the evidence earlier set out in relation to Mr Tolhurst's appreciation of the danger, for the proposition that Mr Tolhurst "was injured by a risk he deliberately created". Endeavour submitted that it was erroneous *as regards Endeavour* to reason that Mr Tolhurst was not contributorily negligent because he had no real choice but to follow the practice endorsed by his employer. There was error, it was said, because (a) the contributory negligence was to be found in Mr Tolhurst's conduct, not that of Cleary; (b) the test for contributory negligence was objective, found in Mr Tolhurst's exposure of himself to risk which might reasonably have been foreseen and avoided and consequential suffering of loss (citing s 5R of the *Civil Liability Act* 2005 and *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552 at [16] per McHugh J); and (c) in bringing in Mr Tolhurst's employment situation the trial illicitly applied a subjective test. It was said that even if that could be done as between Mr Tolhurst and Cleary, it could not apply to Endeavour's liability "otherwise is to impose some new variety of vicarious liability on Endeavour Coal". In Endeavour's submission, there was contributory negligence whereby Mr Tolhurst's damages should be reduced by 100 per cent (as permitted by s 5S of the *Civil Liability Act*).

Pollard v Baulderstone Hornibrook Engineering Pty Ltd (27 May 2008) (Mason P; Beazley JA; McColl JA)
Livingstone v Mitchell (18 December 2007) (Walmsley AJ)
Elite Protective Personnel Pty Ltd v Salmon (14 November 2007) (Beazley JA; McColl JA ; Basten JA)

31 A person is guilty of contributory negligence if he or she exposes him(her) self to a risk of injury which might reasonably have been foreseen and avoided: *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552 at [16] per McHugh J . The question whether a person has been guilty of contributory negligence is determined objectively. The appellants bore the burden of proving that the

respondent had been guilty of contributory negligence: *Flower v Ebbw Vale Street, Iron and Coal Co Ltd* [1936] AC 206 at 216 ; *Commissioner for Railways v Halley* (1978) 20 ALR 409 at 419 ; *Joslyn v Berryman* at [18] per McHugh J.

Bennett v Manly Council and Sydney Water Corporation (04 April 2006) (Hislop J)
Dos Santos v C Morris Painting & Decorating & Anor (24 March 2006)
Dos Santos v C Morris Painting & Decorating & Anor (24 March 2006)
Ainger v Coffs Harbour City Council (05 December 2005)

80. Ipp JA also took the issue of obviousness of risk into account on the issue of contributory negligence, albeit in the context of s 5R of the *Civil Liability Act* 2002 : in *Edwards* at [64] – [67] . A plaintiff is guilty of contributory negligence if he or she exposes him or herself to a risk of injury which might reasonably have been foreseen and avoided and suffered an injury within the class of risk to which he or she was exposed: *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552 at [16] per McHugh J . Obviousness of risk must go to this issue too. If it were determinative of liability in every case, then, as the Court observed in *Thompson* (at [37]), "there would be little room for a doctrine of contributory negligence".

Rabay v Bristow (15 June 2005) (Handley, McColl and Bryson JJA)
Port Kembla Coal Terminal Ltd v Braverus Maritime Inc (17 September 2004) (Hely J)
Gormley v Forrestania Gold Nl (29 June 2004) (Yeats DCJ)

At common law, a plaintiff is guilty of contributory negligence when the plaintiff exposes himself or herself to a risk of injury which might reasonably have been foreseen and avoided and suffers an injury within the class of risk to which the plaintiff was exposed [6] . In principle, any fact or circumstance is relevant in determining contributory negligence if it proves, or assists in proving, a reasonably foreseeable risk of injury to the plaintiff in engaging in the conduct that gave rise to the injury suffered. For historical reasons associated with the consequences of a finding of contributory negligence, judges and juries in earlier times took a lenient view of what facts constituted contributory negligence. And some modern cases concerned with passengers accepting a lift from intoxicated drivers have also taken a lenient view of the passengers' conduct. But in principle, any fact or circumstance which a reasonable person would know or ought to know and which tends to suggest a foreseeable risk of injury in accepting a lift from an intoxicated driver, is relevant in determining whether the passenger was guilty of contributory negligence in accepting the lift.

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[6] *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601 at 611 ; *Jones v Livox Quarries Ltd* [1952] 2 QB 608 at 615 ; *Froom v Butcher* [1976] QB 286 at 291.

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17. Until the middle of the 20th century, the contributory negligence of a plaintiff was a defence to an action for negligence, even if the negligence of the defendant far outweighed the

contributory negligence of the plaintiff. No one with experience of common law jury trials could fail to believe that juries often – perhaps usually – avoided the harshness of the rule by taking a benign view of the plaintiff's conduct. On some occasions, juries even appeared to compromise by reducing the plaintiff's damages to accord roughly with his or her responsibility for the damage suffered.

18. **Following paragraph cited by:**

Mount Arthur Coal Pty Ltd v Duffin (30 March 2021) (Meagher, Gleeson and Payne JJA)
Smith v Coles Supermarkets Australia Pty Ltd t/as Coles Distribution Centre; Ready Workforce (A Division of Chandler Macleod) Pty Ltd v Coles Supermarkets Australia Pty Ltd (04 September 2020) (Leeming JA, Emmett AJA and Adamson J)
PC Case Gear Pty Ltd v Instrat Insurance Brokers Pty Ltd (in liq) (19 February 2020) (Anderson J)

> 194. In *Astley* , the majority stated that, "[a]t common law, contributory negligence consisted in the failure of a plaintiff to take reasonable care for the protection of his or her person or property": ibid at [21] per Gleeson CJ, McHugh, Gummow and Hayne JJ. This overarching principle continues despite statutory modification: see s 62(1) of the *Victorian Wrongs Act* . The conduct of the plaintiff will be judged on an objective basis: ibid, s 62(2) . The onus is on the defendant to prove that the plaintiff's negligence contributed to the plaintiff's loss: *Anderson v Eric Radio & TV Pty Ltd* [1965] HCA 61; 114 CLR 20 (***Anderson***) at 43 per Windeyer J; *Joslyn v Berryman* [2003] HCA 34; 214 CLR 552 at [18] per McHugh J . It should also be recalled that causation is central to the defence of contributory negligence: *Ackland v Commonwealth of Australia* [2007] NSWCA 250; (2007) Aust Torts Reports 81-916 at [138] per Ipp JA, citing *Caswell v Powell Duffryn Associated Collieries Limited* [1940] AC 152 at 165 per Lord Atkin. That is, for an award of damages to be reduced on the basis of the plaintiff's negligence, that negligence must be a *cause* of the plaintiff's relevant loss.
>
> *PCCG's failure to inform Instrat of risk*

Townsend v O'Donnell (19 October 2016) (Beazley ACJ, McColl JA and Sackville AJA)
Starick v Starick & Edwards, Starick v Edwards (17 June 2010) (Tilmouth J)
Elite Protective Personnel Pty Ltd v Salmon (14 November 2007) (Beazley JA; McColl JA ; Basten JA)
Flatman v Epps (08 September 2006) (Maxwell, P., Neave and Redlich, Jj.A)
Wellington Shire Council v Steedman (22 August 2003) (Phillips and Eames, Jj.A and Warren, A.J.A)

Eventually, judges also came to dislike the harshness of the contributory negligence rule. They weakened it by holding that the onus was on the defendant to prove contributory

negligence, even though historically contributory negligence was said [7] to negative the causal connection between the defendant's negligence and the plaintiff's damage. If that was so, the onus should have been on the plaintiff to negative the plea. The common law judges further weakened the harshness of the rule by inventing the "last opportunity" rule [8] . In employment cases, they went so far as to effectively obliterate the efficacy of the rule. They did so by holding that regard had to be had "to the long hours and the fatigue, to the slackening of attention which naturally comes from constant repetition of the same operation, to the noise and confusion in which the man works, to his pre-occupation in what he is actually doing at the cost perhaps of some inattention to his own safety." [9] For a time, this Court even held [10] that contributory negligence was not a defence to an action for breach of statutory duty. Ultimately, however, it felt compelled [11] to follow a House of Lords decision [12] to the opposite effect.

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[7] *Butterfield v Forrester* (1809) 11 East 60 [103 ER 926].

[8] See *Alford v Magee* (1952) 85 CLR 437 for a discussion of this rule.

[9] *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at 178-179 .

[10] *Bourke v Butterfield & Lewis Ltd* (1926) 38 CLR 354.

[11] *Piro v W Foster & Co Ltd* (1943) 68 CLR 313.

[12] *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152.

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19. In the case of a passenger who accepted a lift from an intoxicated driver, Australian courts showed a marked reluctance to use contributory negligence as the ground upon which the law might or ought to deny a right of action to the passenger. But this reluctance does not seem to have been the product of any sympathy for the passenger. Australian courts recognised that contributory negligence was an appropriate and available category for characterising the passenger's conduct. But generally they preferred to hold either that the driver had not breached any duty of care owed to the passenger or, more often, that the passenger had voluntarily accepted the risk of suffering the relevant harm. Perhaps the Australian courts thought that, if contributory negligence was the ground for denying liability, juries would take a benign view of the conduct of unmeritorious passengers and hold that the passenger's conduct in accepting a lift with an intoxicated driver was not unreasonable.

20. Preferring no breach of duty as the mechanism for determining liability enabled the courts to control the issue – whether there was any evidence of breach of duty being a question for the judge and not for the jury. Moreover, the passenger had the onus of proving breach. The other preferred alternative was to characterise the conduct of the passenger as the voluntary assumption of the risk of harm (*volenti non fit injuria*). That was a jury issue. It therefore gave the court less control of the issue, and the onus was on the defendant to establish the defence. But the defence of *volenti non fit injuria* meant that the plaintiff would invariably fail once it was established that he or she knew of the driver's intoxication. In that respect, it had considerable advantages over contributory negligence in controlling the claims of the

passenger who, together with the driver, had embarked on a drinking spree and then accepted a lift from the driver.

21. The reluctance of Australian courts to use contributory negligence as the ground of disentitlement was surprising having regard to the comments of the editor of the *Law Quarterly Review* concerning such cases and the United States jurisprudence. In *Dann v Hamilton* [13] , Asquith J had held that the defence of *volenti non fit injuria* did not apply to a passenger who knowingly accepted a lift from an intoxicated driver. In *Dann* , the driver "was under the influence of drink to such an extent as substantially to increase the chances of a collision arising from his negligence" [14] . Despite this finding, Asquith J rejected the plea of *volenti.* His Lordship appears to have taken it for granted that the driver owed a duty of care and that it had been breached. Curiously, contributory negligence was not pleaded as a defence. *Dann* was powerfully criticised[15] by Dr A L Goodhart, the editor of the *Law Quarterly Review*, who argued "that judgment should have been entered for the defendant on the ground that the plaintiff was guilty of contributory negligence." Neither Asquith J nor Dr Goodhart appeared to think that no breach of duty was the appropriate ground for denying liability. United States jurisprudence also held that a passenger, like the plaintiff in *Dann* , was disentitled to sue because his or her conduct constituted contributory negligence[16].

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[13] [1939] 1 KB 509 .

[14] [1939] 1 KB 509 at 515.

[15] "Contributory Negligence and Volenti Non Fit Iniuria", (1939) 55 *Law Quarterly Review* 184 at 185.

[16] *Restatement of the Law of Torts*, vol 2 (1934), §466.

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22. Some years before *Dann* was decided, the issue arose for decision in the Full Court of the Supreme Court of New South Wales. In *Finnie v Carroll* [17] , the Full Court held that the trial judge had erred in refusing to direct the jury that the plaintiff could not recover if the jurors concluded that the driver's intoxication caused the collision and the plaintiff knew of that condition [18] . Gordon J, who gave the judgment of the Court, said [19] that the defendant's immunity did not arise from the application of the maxim *volenti non fit injuria*. It arose "because there was no breach of any duty A owed to B to protect him from that danger of which he was fully aware when he accepted the invitation." As in *Dann* , the issue of contributory negligence appears to have been regarded as irrelevant.

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[17] (1927) 27 SR (NSW) 495 .

[18] (1927) 27 SR (NSW) 495 at 498.

[19] (1927) 27 SR (NSW) 495 at 499.

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23. Another 20 years elapsed before the issue came before this Court for the first time in *The Insurance Commissioner v Joyce* [20] (Latham CJ, Rich and Dixon JJ). Latham CJ and Dixon J both held that the passenger's entitlement to sue could be defeated on any one of three grounds: no breach of duty, *volenti non fit injuria* and contributory negligence. Latham CJ held that the passenger's claim failed because of contributory negligence and the voluntary acceptance of an obvious risk [21] . Rich J held that the plea of *volenti non fit injuria* had been made out [22] . Dixon J preferred to decide the case on the basis that a passenger who "knowingly accepts the voluntary services of a driver affected by drink ... cannot complain of improper driving caused by his condition, because it involves no breach of duty." [23]

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[20] (1948) 77 CLR 39 .

[21] (1948) 77 CLR 39 at 48.

[22] (1948) 77 CLR 39 at 49.

[23] (1948) 77 CLR 39 at 57.

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24. **Following paragraph cited by:**

AAI Limited t/as Suncorp Insurance v Lifetime Care and Support Authority of New South Wales (10 February 2021) (Harrison J)

However, Latham CJ and Dixon J disagreed as to the conditions that gave rise to the various defences. Latham CJ said [24] that, if the passenger was sober enough to know and understand the danger of driving with the defendant in a drunken condition, he was guilty of contributory negligence and had also voluntarily assumed an obvious risk. But his Honour also said that, if the passenger was not sober enough to know and understand the danger, he had disabled himself from avoiding the consequences of the negligent driving and was guilty of contributory negligence. In contrast, Dixon J said [25] that "for the plaintiff, who was not driving the car, to drink until he was too stupid to observe the defendant's condition can hardly be considered contributory negligence of which the accident was a reasonable or natural consequence." His Honour also held [26] that the pleas of no breach of duty and *volenti non fit injuria* both required "some degree of actual knowledge on the part of the passenger of the alcoholic conditions he is accepting." Dixon J would have dismissed the defendant's appeal on the ground that the defendant had not established any of the three grounds of disentitlement. On this issue, Dixon J was clearly right and Latham CJ and Rich J wrong. Both Latham CJ and Rich J overlooked that the onus was on the defendant to prove the defences of *volenti* and contributory negligence and that on the evidence it was not possible to say whether those defences were made out. But as I later indicate, I disagree with the analysis by Dixon J of the defence of contributory negligence in the case of an intoxicated passenger.

[24] (1948) 77 CLR 39 at 47.

[25] (1948) 77 CLR 39 at 60.

[26] (1948) 77 CLR 39 at 57.

25. The issue of the appropriate ground of disentitlement again came before the Court in *Roggenkamp v Bennett* [27] where the trial judge had held that the plaintiff, having accepted a lift with an intoxicated driver, had failed to establish a breach of the duty owed to him. Like the trial judge, Webb J held that the defendant had not breached the duty of care that he owed to the passenger. However, McTiernan and Williams JJ dismissed the plaintiff's appeal on the ground that the defence of *volenti non fit injuria* had been established.

[27] (1950) 80 CLR 292 .

26. In *Jansons v The Public Curator of Queensland* [28] , Lucas J also held that the plaintiff's claim failed because the defendant had proved that the plaintiff had voluntarily assumed the risk of injury as the result of the driver's intoxication. And in *Jeffries v Fisher* [29] , the Full Court of the Supreme Court of Western Australia upheld the trial judge's finding that the plaintiff had voluntarily assumed the risk of suffering the harm sustained. But these four cases were the high water mark of the defence of *volenti* in cases where the driver was intoxicated. Since then the defence has failed in numerous cases – invariably on the ground that the passenger failed to appreciate the risk of harm or did not intend to take the risk [30] .

[28] [1968] Qd R 40 .

[29] [1985] WAR 250 .

[30] See, for example, *Duncan v Bell and State Government Insurance Office (Queensland)* [1967] Qd R 425; *Dodd v McGlashan* [1967] ALR 433; *O'Shea v The Permanent Trustee Company of New South Wales Ltd* [1971] Qd R 1; *Sloan v Kirby and Redman* (1979) 20 SASR 263; *Banovic v Perkovic* (1982) 30 SASR 34.

27. It is difficult to escape the conclusion that the introduction of apportionment legislation has influenced the courts in characterising the conduct of the passenger as contributory negligence, rather than as a voluntary assumption of risk or as a determinant of the standard of care owed by the driver to the passenger. Apportionment legislation enables the court to apportion responsibility for the plaintiff's damages according to the respective responsibility of the plaintiff and the defendant for that damage [31] . Since the introduction of

apportionment legislation, contributory negligence has been the preferred characterisation of the conduct of the plaintiff who accepts a lift from a driver known to be intoxicated.

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[31] *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act* 1947 (WA) , s 4(1); *Wrongs Act* 1954 (Tas) , s 4(1); *Law Reform (Miscellaneous Provisions) Act* 1956 (NT) , s 16(1); *Wrongs Act* 1958 (Vic) , s 26(1); *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW) , s 9(1); *Law Reform Act* 1995 (Q) , s 10(1); *Law Reform (Contributory Negligence and Apportionment of Liability) Act* 2001 (SA) , s 7; *Civil Law (Wrongs) Act* 2002 (ACT) , s 41.

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28. In New South Wales [32] and in South Australia[33], the legislature has even intervened to abolish the defence of *volenti non fit injuria* in motor accident cases. Instead, legislation [34] makes knowledge of the driver's intoxication a matter of contributory negligence and apportionment. But the defence of *volenti* is still available – at least theoretically – in other States and Territories.

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[32] *Motor Accidents Act* 1988 (NSW), s 76 .

[33] *Wrongs Act* 1936 (SA), s 24K(6).

[34] *Wrongs Act* 1936 (SA), s 24K(1); *Motor Accidents Act* 1988 (NSW), s 74 .

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29. **Following paragraph cited by:**

Williams v Nominal Defendant and Rosekelly; Rosekelly v Nominal Defendant and Williams (04 May 2007) (Sidis DCJ)

> 150 It was pointed out that Justice McHugh stated in *Joslyn v Berryman* (2003) 214 CLR 552 at [29] that it was still open to a driver to defend a claim on the basis of no duty to a passenger who accepts a lift with a driver knowing that the driver is seriously intoxicated.

Avram v Gusakoski (06 February 2006) (Malcolm CJ, Pullin JA, Murray AJA)

What then of the issue of no breach of duty in cases where the passenger knows that the driver's ability is impaired by alcohol and suffers injury as the result of that impairment? Has it survived the judicial and legislative demise of the doctrine of *volenti*? While the reasoning of this Court in *Cook v Cook* [35] and *Gala v Preston* [36] stands, the answer must be: "Yes". The plea of no breach of duty – perhaps even a plea of no duty in an extreme case – is still open in the case of a passenger who accepts a lift with a driver known to the

passenger to be seriously intoxicated. In *Cook* and *Gala* , this Court applied the now rejected doctrine of proximity to hold that in exceptional cases the content of the duty of care owed by a driver to a passenger varies in proportion to the passenger's knowledge of the driver's capacity to drive. In *Cook* , the Court held [37] that, where the passenger has invited an inexperienced and unlicensed driver to drive, the standard of care "is that which is reasonably to be expected of an unqualified and inexperienced driver in the circumstances in which [the driver] is placed." In so holding, the majority judgment relied on the no breach of duty statements contained in the judgments of Latham CJ and Dixon J in *Joyce* and the judgment of Webb J in *Roggenkamp* . In *Gala* , Mason CJ, Deane and Gaudron JJ and I held that no relevant duty of care was owed by a driver to a passenger in respect of the driving of a stolen car in circumstances where both parties had consumed large quantities of alcohol. We said [38] :

> "[E]ach of the parties to the enterprise must be taken to have appreciated that he would be encountering serious risks in travelling in the stolen vehicle when it was being driven by persons who had been drinking heavily and when it could well be the subject of a report to the police leading possibly to their pursuit and/or their arrest. In the special and exceptional circumstances that prevailed, the participants could not have had any reasonable basis for expecting that a driver of the vehicle would drive it according to ordinary standards of competence and care."

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[35] (1986) 162 CLR 376 .

[36] (1991) 172 CLR 243 .

[37] (1986) 162 CLR 376 at 384.

[38] (1991) 172 CLR 243 at 254.

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30. **Following paragraph cited by:**

Raad v Cossey (15 March 2022) (Cowdroy AO QC ADCJ)
Nominal Defendant v Buck Cooper (03 November 2017) (McColl and Payne JJA, Garling J)
Cooper v Nominal Defendant (20 January 2017) (Neilson DCJ)

Now that this Court has rejected the doctrine of proximity, it may be that it would no longer follow the reasoning in *Cook* and *Gala* . Moreover, the notion of a standard of care that fluctuates with the sobriety of the driver is one that tribunals of fact must have great difficulty in applying. While *Cook* and *Gala* stand, however, they are authorities for the proposition that, in special and exceptional circumstances, it would be unreasonable to fix the standard of care owed by the driver by reference to the ordinary standard of care owed by a driver to a passenger [39] . In some cases, knowledge by a passenger that the driver's ability to drive is impaired by alcohol may transform the relationship between them into such a category.

[39] *Gala v Preston* (1991) 172 CLR 243 at 253.

31. It is unnecessary in this case to say any more about the authority of *Cook* and *Gala* . Neither in this Court nor in the courts below has Ms Joslyn suggested that she did not breach the duty of care owed to Mr Berryman.

Intoxication and contributory negligence

32. **Following paragraph cited by:**

Chamberlain v Scentre Shopping Centre Management (WA) Pty Ltd (30 November 2023) (Shepherd DCJ)
Cassidy v Metro Trains Melbourne Pty Ltd (18 October 2023) (Fraatz J)

124 Mrs Cassidy is guilty of contributory negligence if Metro Trains can show that she failed to take reasonable care for her own safety, and this failure to take reasonable care results, in part, to her injury. [88] Like negligence, the test is an objective one, [89] disregarding any idiosyncrasies of Mrs Cassidy in question. The surrounding factual context must be considered in determining what is reasonable in the circumstances.

via
[89] *Joslyn v Berryman; Wentworth Shire Council v Berryman* (2003) 214 CLR 552, [32] (per McHugh J)

Osman By His Tutor Osman v Clement (31 August 2022) (Abadee DCJ)
Wassell v Ken Carr Bobcat & Tipper Hire Pty Ltd (03 November 2021) (Robb J)
McDonald v National Express Group Australia (Bayside Trains) Pty Ltd (ACN 087 425 287) (13 July 2021) (Her Honour Judge K L Bourke)
Rodd v Hall (30 September 2019) (Hoeben CJ at CL)
Libra Collaroy Pty Ltd v Bhide (04 August 2017) (McColl, Meagher and Ward JJA)
Fabre v Lui (10 June 2015) (Basten, Macfarlan and Meagher JJA)
T and X Company Pty Ltd v Chivas (22 July 2014) (Beazley P, Basten and Barrett JJA)
T and X Company Pty Ltd v Chivas (22 July 2014) (Beazley P, Basten and Barrett JJA)
Boral Bricks Pty Ltd v Cosmidis (No 2) (07 May 2014) (McColl, Basten and Emmett JJA)
Town of Port Hedland v Hodder (No 2) (26 October 2012) (Martin CJ, McLure P, Murphy JA)
Town of Port Hedland v Hodder (No 2) (26 October 2012) (Martin CJ, McLure P, Murphy JA)

Town of Port Hedland v Hodder (No 2) (26 October 2012) (Martin CJ, McLure P, Murphy JA)
Smith v Zhang (18 May 2012) (Macfarlan and Meagher JJA, Tobias AJA)

> 32. The respondent's failure to see the appellant at the earlier point in time did not make the accident inevitable. Indeed, it remained the position that the accident would not have happened if the appellant had exercised the standard of care required of a reasonable person in her position. The appellant chose to cross the road at a point where there was no pedestrian crossing. At that point and immediately before she stepped onto the roadway it was likely that she could not be seen from a vehicle travelling down the roadway because of her stooped posture and the existence of the low concrete wall. The appellant then stepped onto the roadway in front of an oncoming vehicle either without looking for oncoming traffic or appreciating that she may not be able to see any oncoming traffic. Taking into account the fact that she was old and slow and suffered from these disabilities, her "reasonable best" still required that she stop before stepping onto the roadway so as to give a visual warning of her presence once she was in the line of sight of oncoming vehicles: cf *Joslyn v Berryman* at [32] .

Smith v Zhang (18 May 2012) (Macfarlan and Meagher JJA, Tobias AJA)
Warner (By Her Next Friend Airs) v Kernke (24 December 2010) (Soulio J)
Warner (By Her Next Friend Airs) v Kernke (24 December 2010) (Soulio J)
O'Hagan v Body Corporate 189855 (22 March 2010)
State of New South Wales (NSW Police) v Nominal Defendant (31 July 2009) (Allsop P at 1; Beazley JA at 2; Macfarlan JA at 113)
Kain v Mobbs (29 April 2008) (Harrison J)
AAMI Limited v Hain (01 April 2008) (Beazley JA at 1; Tobias JA at 2; McClellan CJ at CL at 3)

> 46 I have previously indicated that his Honour observed that the respondent saw Mr Wilson “through the eyes of an eighteen year old, having just finished his schooling months before”. If by this remark his Honour was indicating that he was applying a standard of care applicable to an 18 year old, there may be an error (*Joslyn* [32]). However, to my mind the better view is that his Honour was indicating that the respondent did have a limited experience in such matters and accordingly his judgment, alone, may not be sufficient to justify the conclusion that the respondent was not negligent. His Honour follows his reference to the respondent’s evidence with the statement that “other and more experienced individuals did not detect that Mr Wilson was adversely affected”, a clear indication that he was applying the correct test.

Flatman v Epps (08 September 2006) (Maxwell, P., Neave and Redlich, Jj.A)
Chandley v Roberts (14 November 2005) (Maxwell, P., Nettle, J.A and Habersberger, A.J.A)

The test of contributory negligence is an objective one. Contributory negligence, like negligence, "eliminates the personal equation and is independent of the idiosyncrasies of the

particular person whose conduct is in question." [40] One exception to that rule is that, in considering whether a child is guilty of contributory negligence, the standard of care is tailored to the age of the child [41] . It may be the law that, in the case of an aged plaintiff, the standard of care is also tailored to the age of the plaintiff. In *Daly v Liverpool Corporation* [42] , Stable J thought so, saying:

> "I cannot believe that the law is quite so absurd as to say that, if a pedestrian happens to be old and slow and a little stupid, and does not possess the skill of the hypothetical pedestrian, he or she can only walk about his or her native country at his or her own risk. One must take people as one finds them. There is no hypothetical standard of care. We must all do our reasonable best when we are walking about."

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[40] *Glasgow Corporation v Muir* [1943] AC 448 at 457.

[41] *McHale v Watson* (1966) 115 CLR 199.

[42] [1939] 2 All ER 142 at 143.

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33. **Following paragraph cited by:**

Neradovsky v Burnett (02 October 2015) (Rothman J)

This statement suggests that the physical and mental deficits of each plaintiff must be taken into account in determining whether that person was guilty of contributory negligence. Support for such a proposition can be found in the judgment of Jordan CJ in *Cotto n v Commissioner for Road Transport and Tramways* [43] where his Honour said:

> "It is conceived that contributory negligence in the sense in which it is now being considered occurs only when a person fails to take all such reasonable care as he is in fact capable of. I am not aware of any case in which a person has been held to be guilty of contributory negligence through the application of some arbitrary general standard, notwithstanding that he had been as careful as he could."

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[43] (1942) 43 SR (NSW) 66 at 69.

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34. **Following paragraph cited by:**

Dempsey v Am Controls Pty Ltd; Am Controls Pty Ltd v Atlas Metal Processors Pty Ltd; Atlas Metal Processors Pty Ltd v Am Controls Pty Ltd (12 June 2019) (Lonergan J)
Coles Supermarkets Australia Pty Ltd v Bridge (17 August 2018) (Leeming and Payne JJA, Emmett AJA)

29. The question is whether the plaintiff has taken that degree of care for his or her own safety that an ordinary reasonable person would take: *Joslyn v Berryman* (2003) 214 CLR 552; [2003] HCA 34 at [34] , [38] and [70] .

T and X Company Pty Ltd v Chivas (22 July 2014) (Beazley P, Basten and Barrett JJA)

55. A second factor to be taken into account is the requirement in s 5R(2) that the standard of care required of the plaintiff is that of "a reasonable person in the position of" the plaintiff. In assessing the harm caused to the mother, the trial judge noted that the deceased was affected by Asperger's syndrome. This might have raised a question as to whether the deceased's ability to judge the behaviour of other road users was affected and, if so, whether that was a factor to be ignored in assessing contributory negligence. This in turn might have raised a question as to whether, although in assessing damages the tortfeasor must take the plaintiff with his or her personal frailties and idiosyncrasies, that is not so in the case of an assessment of contributory negligence. In *Joslyn* , McHugh J thought that statements of Stable J in *Daly v Liverpool Corporation* [1939] 2 All ER 142 at 143 and of Jordan CJ in *Cotton v Commissioner for Road Transport and Tramways* (1942) 43 SR(NSW) 66 at 69 that a person should not be held to a standard of which he or she was not capable were wrong because they contradicted the "objective test of contributory negligence": *Joslyn* at [34] and [39] . McHugh J noted an exception with respect to age in the case of a child: at [35].

Davis v Swift (04 June 2013) (Gibson DCJ)

60. The relevant principles are explained by Tobias AJA in *Axiak v Ingram* , *s upra*, at [83]-[87] as follows:

"[83] I would accept the respondent's submission that the exercise called for in *Prodrebersek* 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 is 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 *Prodrebersek.*

[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 Div 1 of Pt 1.2 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.

[87] In my view one obtains some guidance as to the appropriate approach from what was said by McHugh J in *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552 at [34] where his Honour referred to

the established rule that "[i]n theory, a plaintiff is required to conform to the same standard of care as a defendant, with due allowance for the fact that here the enquiry is directed to what is reasonable for his own safety rather than the safety of others". No one would now suggest that the standard of care expected of a defendant is that which the defendant "is in fact capable of". To introduce such a standard into the law of contributory negligence would not only contradict the objective test of contributory negligence, it would impose on tribunals of fact the almost insuperable task of determining what standard of care the plaintiff was "in fact capable of"."

Town of Port Hedland v Hodder (No 2) (26 October 2012) (Martin CJ, McLure P, Murphy JA)
Axiak v Ingram (27 September 2012) (Beazley JA at [1], Sackville AJA at [2], Tobias AJA at [3])

In *McHale v Watson* [44] , Kitto J held, correctly in my opinion, that this statement of Jordan CJ does not represent the law. Kitto J said [45] that "[i]n so far as his Honour's observations suggest a subjective standard for contributory negligence they ought not, I think, to be accepted." The statement of Jordan CJ, like that of Stable J in *Daly* , is inconsistent with the established rule that "[i]n theory, a plaintiff is required to conform to the same standard of care as a defendant, with due allowance for the fact that here the enquiry is directed to what is

reasonable for his own safety rather than the safety of others."[46] No one would now suggest that the standard of care expected of a defendant is that which the defendant "is in fact capable of." To introduce such a standard into the law of contributory negligence would not only contradict the objective test of contributory negligence, it would impose on tribunals of fact the almost insuperable task of determining what standard of care the plaintiff was "in fact capable of."

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[44] (1966) 115 CLR 199 .

[45] (1966) 115 CLR 199 at 214-215 .

[46] Fleming, *The Law of Torts*, 9th ed (1998) at 318.

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35. **Following paragraph cited by:**

Chandley v Roberts (14 November 2005) (Maxwell, P., Nettle, J.A and Habersberger, A.J.A)

Ever since *Lynch v Nurdin* [47] , common law courts have accepted that, in determining whether a child is guilty of contributory negligence, the relevant standard of care is that to be expected of an ordinary child of the same age. But otherwise the plaintiff is held to the standard of care expected of an ordinary reasonable person engaging in the conduct that caused the plaintiff's injury or damage. No exception should or could in principle be made in the case of the passenger accepting a lift from an intoxicated driver.

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[47] (1841) 1 QB 29 [113 ER 1041].

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36. It is true that the reasoning in some decisions [48] concerned with a passenger accepting a lift with an intoxicated driver appears to suggest that this class of case, like those concerned with children, is another exception to the general rule that the test for contributory negligence is an objective test. But, in principle, intoxicated drivers cannot be an exception to the general rule. Cases like *Banovic v Perkovic* [49] , *Nominal Defendant v Saunders* [50] and *McPherson v Whitfield* [51] cannot be followed in so far as they hold or suggest that a passenger is guilty of contributory negligence in accepting a lift from an intoxicated driver only if the passenger knew, or was aware of signs indicating, that the driver was intoxicated. In my view, the law on this subject was correctly stated by Cooper J in *Morton v Knight* [52] and by Clarke JA in *McGuire v Government Insurance Office (NSW)* [53] .

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[48] *Banovic v Perkovic* (1982) 30 SASR 34 at 36-37 ; *Nominal Defendant v Saunders* (1988) 8 MVR 209 at 215 ; *McPherson v Whitfield* [1996] 1 Qd R 474.

[49] (1982) 30 SASR 34 .

[50] (1988) 8 MVR 209 .

[51] [1996] 1 Qd R 474 .

[52] [1990] 2 Qd R 419 .

[53] (1990) 11 MVR 385 at 388.

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37. **Following paragraph cited by:**

Chadwick v Allen (28 August 2012) (Tilmouth J)
TAC v Estate of Ewer (28 October 2009) (Robson J)

110. What ought a reasonable person in the position of Mr Bayne have known at the time? As indicated above, McHugh J in *Joslyn v Berryman [45]* sai d that the matters that the passenger ought to have known included facts known by "observation, inquiry or otherwise." [46] McHugh expressed the facts that could have been ascertained by inquiry in several ways. He included "those facts and circumstances that the plaintiff could have discovered by the exercise of reasonable care" [47] and "the relevant facts and circumstances included those which a reasonable person would have ascertained." [48] He said, "The relevant conduct is accepting a lift from a person whose driving capacity is known, or could reasonably be found, to be impaired by reason of intoxication." [49] Finally, he said:

> In other areas of contributory negligence, a plaintiff cannot escape a finding of contributory negligence by pleading ignorance of facts that a reasonable person would have known or ascertained. [50]

via
[46] Ibid at [37] .

TAC v Estate of Ewer (28 October 2009) (Robson J)
TAC v Estate of Ewer (28 October 2009) (Robson J)
TAC v Estate of Ewer (28 October 2009) (Robson J)
TAC v Estate of Ewer (28 October 2009) (Robson J)

The issue in a case like the present is not whether the passenger ought reasonably to have known of the driver's intoxication from the facts and circumstances *known to the passenger*. T he relevant facts and circumstances include those which a reasonable person could have

known by observation, inquiry or otherwise. In cases of contributory negligence outside the field of intoxicated passengers and drivers, the courts take into account as a matter of course those facts and circumstances that the plaintiff could have discovered by the exercise of reasonable care [54] . In *Morton* , Cooper J relied, correctly in my opinion, on the reasoning in the judgments of this Court in *O'Neill v Chisholm* [55] and held that the relevant facts and circumstances included those which a reasonable person would have ascertained. The test applied by all members of the Court in *O'Neill* , including Walsh and Gibbs JJ who found no contributory negligence, was whether the passenger ought to have realised that alcohol had impaired the driver's capacity to drive.

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[54] See, for example, *O'Connor v South Australia* (1976) 14 SASR 187; *Preston Erections Pty Ltd v Rheem Australia Ltd* (1978) 52 ALJR 523; 21 ALR 379; *Purcell v Watson* (1979) 26 ALR 235; *AWA Ltd v Daniels (t/as Deloitte Haskins & Sells)* (1992) 7 ACSR 759.

[55] (1972) 47 ALJR 1 .

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38. **Following paragraph cited by:**

Whitby v Insurance Australia Limited t/as NRMA (18 July 2022)
Benning v Richardson (05 March 2021) (Elkaim J)
Serrao (by his Tutor Serrao) v Cornelius (No.2) (29 August 2016) (Leeming JA at [1]; Sackville AJA at [2]; Emmett AJA at [77])
Mackenzie v The Nominal Defendant (07 June 2005) (Giles JA, Stein AJA and Gzell J)

Hence, the issue is not whether a reasonable person in the intoxicated passenger's condition – if there could be such a person – would realise the risk of injury in accepting the lift. It is whether an ordinary reasonable person – a sober person – would have foreseen that accepting a lift from the intoxicated driver was exposing him or her to a risk of injury by reason of the driver's intoxication. If a reasonable person would know that he or she was exposed to a risk of injury in accepting a lift from an intoxicated driver, an intoxicated passenger who is sober enough to enter the car voluntarily is guilty of contributory negligence. The relevant conduct is accepting a lift from a person whose driving capacity is known, or could reasonably be found, to be impaired by reason of intoxication.

39. **Following paragraph cited by:**

Taaga v Cic Allianz Insurance Limited (13 February 2023)
Raad v Cossey (15 March 2022) (Cowdroy AO QC ADCJ)

Ellis, Executor of the Estate of Paul Steven Cotton (Dec) v The State of South Australia (08 December 2006) (EM Heenan J)

In other areas of contributory negligence, a plaintiff cannot escape a finding of contributory negligence by pleading ignorance of facts that a reasonable person would have known or ascertained. A pedestrian or driver who enters a railway crossing in the face of an oncoming train cannot escape a finding of contributory negligence because he or she was not, but should have been, aware of the train. Nor does it make any difference that the pedestrian or driver had defective hearing or sight. Contributory negligence is independent of "the idiosyncrasies of the particular person whose conduct is in question." [56] Similarly, the fact that the passenger's intoxicated condition prevents him or her from perceiving the risks attendant on driving with an intoxicated driver does not absolve the passenger from complying with the standard of care required of an ordinary reasonable person. If an intoxicated pedestrian falls down a manhole that a sober person would have seen and avoided, it seems impossible to hold that the pedestrian was not guilty of contributory negligence because the pedestrian's condition prevented him or her from seeing the danger. At all events, it seems impossible to so hold without introducing a subjective standard into this area of law. And I can see no reason in principle or policy for distinguishing between the intoxicated pedestrian and the intoxicated passenger.

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[56] *Glasgow Corporation v Muir* [1943] AC 448 at 457.

Mr Berryman was guilty of contributory negligence at common law

40. Once it is accepted that the relevant circumstances were not confined to what Mr Berryman perceived or should have perceived when he became a passenger in his vehicle, a finding of common law contributory negligence on his part is inevitable. The relevant facts which an ordinary reasonable person would know or would infer point overwhelmingly to Mr Berryman's lack of care for his safety in becoming a passenger. First, Ms Joslyn had lost her driver's licence and probably had not driven for some time. Second, she was insisting on driving a vehicle whose speedometer did not work and which had a tendency to roll over and she had had no experience of driving the vehicle. Third, Ms Joslyn had been drinking for about the same length of time as Mr Berryman who was unfit to drive. Fourth, the amount of alcohol consumed by Ms Joslyn, the time that had elapsed since she stopped drinking and her lack of sleep confirmed that she also was probably unfit to drive. Mr Berryman's inability to keep awake and his agreement to stop driving increased the probability that her drinking and lack of sleep made her unfit to drive.

41. Upon these facts, a reasonable person would have foreseen that, as a passenger in a car driven by Ms Joslyn, he or she was exposed to a risk of serious injury as the result of the defective nature of the vehicle, her drinking, her lack of sleep, her probable lack of recent driving experience and her lack of experience of driving this defective vehicle. Moreover, there was no reason why the hypothetical ordinary person, as the owner of the vehicle, could not have

parked it by the side of the road until he or Ms Joslyn was capable of driving. In those circumstances, the learned trial judge was correct in finding Mr Berryman guilty of contributory negligence at common law.

Voluntary passenger

42. I now return to the issue whether Mr Berryman was guilty of contributory negligence under s 74 of the Act . That depends in the first place on whether Mr Berryman was a voluntary passenger in the motor vehicle. In my opinion, he was. Under s 74(6) , he was a voluntary passenger unless he "could not reasonably be expected to have declined to become a passenger" in the vehicle. A number of factors indicate that it was reasonable for him to have declined to become a passenger in his own vehicle. First, he knew Ms Joslyn did not have a licence and that she had been drinking for about the same length of time as he had. Second, given his own blood alcohol level, his inability to keep awake and his agreement to stop driving, I infer that he knew that his capacity for driving was affected by the alcohol that he had consumed. Third, because that is so, he either knew or ought to have known that the driving ability of Ms Joslyn was also likely to be affected by the liquor that she had consumed. Fourth, there was no reason why he could not have parked his vehicle by the side of the road until he or Ms Joslyn was capable of driving. In those circumstances, he has failed to establish that he could not reasonably be expected to have declined to become a passenger in his vehicle.

Contributory negligence under s 74 of the Act

43. Under s 74(2) of the Act , Mr Berryman was guilty of contributory negligence if he "was aware, or ought to have been aware" that the driver's ability to drive was impaired by alcohol. The question posed by s 74 is a narrower one than that posed by the common law. Under the common law, the defective nature of the vehicle and Ms Joslyn's lack of experience with that vehicle were factors that, combined with her alcohol consumption, made an overwhelming case of contributory negligence. In combination, they pointed to a reasonably foreseeable risk of injury to a person accepting a lift from her. The statutory test is not concerned with foreseeability of risk. It poses the simple question whether Mr Berryman knew or ought to have known that Ms Joslyn's driving ability was impaired by the alcohol that she had consumed.

44. **Following paragraph cited by:**

Australian Securities and Investments Commission v State One Stockbroking Limited (20 November 2018) (Colvin J)
Nominal Defendant v Lane (17 November 2004) (Giles, Ipp and Tobias JJA)

The use of the term "ought" in s 74(2) suggests a test of objective reasonableness. Accordingly, the question posed by this limb of s 74(2) is, would a reasonable person have known that intoxication impaired Ms Joslyn's ability to drive? Section 74(2) is silent, however, as to the circumstances that the reasonable person may take into account in

determining that question. Are they confined to the circumstances known to the passenger? Do they include circumstances that the passenger ought to have known? Are they confined to circumstances that exist at the time that the driver commences to drive the passenger?

45. Counsel for Mr Berryman contended that at common law – he did not deal with the question under s 74(2) – "a driver must be exhibiting obvious signs of intoxication before a finding of contributory negligence can be made in these circumstances." If that was so, the relevant circumstances under s 74 are confined to those that demonstrate "obvious signs of intoxication". But, as I have pointed out, at common law the circumstances were not so limited, and there is no reason to give the "ought to have known" limb of s 74(2) a more restricted scope than exists at common law.

46. The trial judge found that Ms Joslyn was not showing objective signs of intoxication shortly after the accident. He inferred that she was not showing these signs when she took over driving. Given this finding, it is difficult to conclude that Mr Berryman knew, when he became a passenger, that her driving ability was impaired. Indeed, his agreement to give up driving and to allow her to drive suggests that he thought that she was competent to drive. At all events, it suggests that he believed that she was in better condition than he was to drive. But, accepting that he was not aware that her driving condition was impaired, he "ought to have been aware" that it was.

47. In determining whether he "ought to have been aware", the relevant facts and circumstances must include all those facts and circumstances occurring in the previous 12 hours of which he was, or ought to have been, aware. They included the fact that Ms Joslyn had been drinking heavily until at least 4.00am when Mr Berryman left the party. When he went to bed at about 4.00am, "the people who were still at the party were all staggering drunk". Those people included Ms Joslyn, although Mr Berryman said in evidence that he could not recall what condition she was in.

48. Given the fact that Ms Joslyn was certainly "staggering drunk" at 4.00am and the accident occurred about 8.45am, I think that Mr Berryman ought to have been aware that Ms Joslyn's driving ability was impaired. She must have been very intoxicated at 4.00am. At about 4.30 am, she was seen to be "quite drunk and staggering about". A sample of blood taken from her indicated that at about 8.45am, she probably had a blood alcohol level of .138g /100ml. Mr Berryman was neither aware, nor ought he have been aware, of this fact. But that Ms Joslyn should have such a high reading, nearly five hours after Mr Berryman left the party, shows how intoxicated she must have been at 4.00am. A reasonable person in Mr Berryman's position would have been aware that she was probably still affected by alcohol when he became a passenger in the vehicle. Add to this, that Mr Berryman's driving ability was impaired by reason of the alcohol that he had consumed, and it is an almost necessary conclusion that he ought to have been aware of a similar impairment in Ms Joslyn's driving ability.

49. In my opinion, Mr Berryman was guilty of contributory negligence for the purposes of s 74 of the Act .

Order

50. The appeals of Ms Joslyn and the Council should be allowed with costs. The judgment of the Court of Appeal of the Supreme Court of New South Wales in each case should be set aside. The proceedings in each matter should be remitted to the Court of Appeal for the hearing and determination of each appeal and cross-appeal to that Court in accordance with the reasons of this Court.

51. GUMMOW AND CALLINAN JJ. This case is concerned with the application of s 74 of the *Motor Accidents Act* 1988 (NSW) ("the Act") to a case in which an intoxicated owner of a motor vehicle who relinquished its management to a similarly inebriated person suffered injuries as a result of the latter's negligent driving.

The facts

52. Mr Berryman who was then 22 years of age, drank sufficient alcohol in the company of Sally Inch Joslyn on Friday evening, 25 October 1996, to be so intoxicated as to feel "fairly crook" on the following morning. He worked during the day on Saturday, rested for a time, and then, at about 9pm went to a party at a property near Dareton in south-western New South Wales. With one interruption, at about 11.30pm, Mr Berryman spent his time at the party, until about 4am, drinking alcohol. By that hour he must have been, indeed he admitted that he was, and as the objective evidence of the amount of alcohol in his bloodstream some hours later established, beyond doubt, quite drunk. He went to sleep on the front seat of his utility motor vehicle. In his evidence he claimed to have no further recollection until he heard a scream, and realized that he was a passenger in his vehicle which was turning over.

53. Mr Berryman had been friendly with Ms Joslyn before the Friday night preceding the accident. He was aware that she had lost her driving licence on her conviction for driving a motor vehicle with a blood alcohol content of 0.15g/100ml.

54. Ms Joslyn said that she and Mr Berryman spent the Friday evening drinking together until after midnight at hotels in Wentworth. Afterwards they returned to Ms Joslyn's residence where they continued drinking.

55. Ms Joslyn took a bottle of whisky with her to the party on the following Saturday evening. She travelled as a passenger in a car with three other women. Ms Joslyn drank from the bottle at the party. Whether anyone else also did so she was unable to say. Again, as the objective evidence of alcohol in her blood showed, she too must have been seriously adversely affected by the consumption of it. The reading, some hours later, was in her case, 0.102g/100ml. Indeed Ms Joslyn was observed by others at the party to be "quite drunk and staggering about" at 4.30am.

56. Early in the morning of the Sunday Ms Joslyn had placed her swag on the ground beside Mr Berryman's vehicle and had gone to sleep. Ms Joslyn said she did not know where the keys to the vehicle were when she fell asleep but she knew she had them when she woke not long after daylight, having heard Mr Berryman moving about in his vehicle. No one else was up at that time. There was a discussion between her and Mr Berryman, to whom she gave the keys

to his vehicle which he drove, with Ms Joslyn as a passenger into Mildura, along the road upon which the vehicle was later to overturn. The journey took some 15 to 20 minutes. When they arrived at a McDonald's café, Mr Berryman entered, ordered food, paid, drove towards the river, stopped and ate the food. He did not drink alcohol in that time.

57. Ms Joslyn said Mr Berryman had commenced the drive back to Dareton, but, at some time after they entered Hollands Lake Road she noticed he was dozing off. She must have reproached him for doing so for he said, "Well, you drive the car then." He stopped the vehicle and exchanged places with Ms Joslyn. She then commenced to drive it and did so to the point of the accident.

58. Ms Joslyn had last driven a vehicle three years earlier. She had at some time previously told Mr Berryman of that. She did not see the curve until the last minute. "It was just there all of a sudden and it turned really sharply and the car wouldn't go round the bend."

59. By the time the vehicle entered the curve Ms Joslyn had been driving, she estimated, for a couple of minutes at most. She could not say at what speed she travelled as the speedometer of the vehicle was broken.

60. Describing the curve where the vehicle left the road and overturned, she said that it looked as if it were just a simple curve "and then it goes right back around sharply". That was something she realized when she was already in the curve. Mr Berryman suffered serious injuries in the accident.

The trial

61. Mr Berryman sued for damages in the District Court of New South Wales. The action was tried by C J Boyd-Boland ADCJ. His Honour made these rather generous findings in favour of Mr Berryman:

> "Having made the decision, along with others, before the party commenced, to stay overnight at the party, the Plaintiff should have had in contemplation that he might have to later become a passenger in his own motor vehicle because of the alcohol he anticipated consuming. Although I think he did not give the matter consideration, he should have contemplated his vehicle might be driven by Miss Joslyn who was his companion for the evening and ought to have considered the prospect of a journey such as that undertaken to Mildura. He did not do so. He had no regard to the consequences of his own alcohol consumption but more significantly, as it turned out, despite saying in evidence he would not have allowed Miss Joslyn to drive, because of his knowledge of her alcohol consumption, he did just that. It was obvious to him before he went to sleep that Miss Joslyn would not be fit to drive on the following morning. I believe, at the time of change over of drivers, he did not consider that issue, but should have done so and was capable of so doing. The failure to take these matters to account was contributory negligence. The Plaintiff ought also to have realised the lack of experience and qualifications of Miss Joslyn particularly given his knowledge of the propensity of his vehicle to roll over.

> My assessment of the degree of the Plaintiff's contributory negligence has been reduced from what it would otherwise be because I find ... at the time of the hand-over Miss Joslyn exhibited none of the obvious signs of intoxication which one would expect to be present. That, it seems to me, could have influenced the Plaintiff if he had properly put his mind to the issue of Miss Joslyn's capacity. It warrants a reduction in the assessment of his contributory negligence which, but for that factor, I would have fixed at $33^1/3\%$. The level of reduction would be the same against [Ms Joslyn and the Council] there being no real difference in their arguments and in the defences pleaded on this issue. I find it appropriate to reduce the Plaintiff's verdict by virtue of his contributory negligence by 25%. His verdict against [Ms Joslyn and the Council] will be reduced accordingly."

62. His Honour then turned to the case against the Wentworth Shire Council ("the Council")[57] :

> "Having found, on a balance of probabilities, it was the Council who erected a sign which was inadequate and misleading, and failed to erect signs which were proper, given the nature of the curve, I find, in this instance, the Council carried out that work without due care and skill for the safety of the road users. The work which Council performed was not carried out in accordance with the standard at the time …
>
> We are not concerned, as the [Council] argues, with standards for road construction, nor whether this road was constructed to contemporary standards. We are not dealing with some very minor back road but one in use to the extent of 200 vehicles per day ... We are dealing with the failure by Council to properly signpost and warn of the danger of a road with a compound curve ... and I find that the Council failed to do that and was thus guilty of misfeasance. The primary cause of this accident remains the conduct of [Ms Joslyn] whose approach to the curve was nothing less than reckless, for the reasons already stated. However I find the [Council] to be liable to contribute an amount of 10% to the verdict of the Plaintiff and there will be a verdict in favour of the Plaintiff and [Ms Joslyn] accordingly."

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[57] The case was tried before this Court decided *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

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63. The trial judge next rejected a defence of joint illegal enterprise, a matter which is not the subject of an appeal to this Court. Judgment was entered for Mr Berryman with costs against Ms Joslyn for the sum of $1,496,314.77 and against the Council for the sum of $750,000. His Honour further ordered that Ms Joslyn have credit in respect of the first judgment sum for any amount paid by Ms Joslyn pursuant to s 45 of the Act .

The appeal to the Court of Appeal

64. Mr Berryman appealed to the Court of Appeal of New South Wales on the ground that the trial judge should either have not found any contributory negligence on his part, or ought to have found it in a smaller percentage than he did. Ms Joslyn and the Council each cross-appealed against the percentage of contributory negligence attributed to Mr Berryman, the Council asserting that it should have been up to 80%, and Ms Joslyn against the apportionment of liability against her of 90%.

65. The Court of Appeal (Priestley JA, Meagher JA and Ipp AJA)[58] upheld Mr Berryman's appeal by holding that he was not guilty of any contributory negligence at all. The leading judgment was given by Meagher JA with whom the other members of the Court agreed.

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[58] *Berryman v Joslyn* (2001) 33 MVR 441.

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66. In giving his judgment Meagher JA made no reference to the Act . His Honour's conclusions are to be found in the following passage [59] :

> "His Honour, as I have said, made a finding of 25% contributory negligence against the plaintiff. The only action of his which could possibly have amounted to contributory negligence was permitting Miss Joslyn to drive instead of him. In this regard, one must view matters as they stood at the time of handing over control of the car, (not as they were in the previous 24 hours), a task which his Honour did not really undertake. One must also, if one concludes that at the time of handing over Mr Berryman was too drunk to appreciate what was happening, a situation as to which there is no evidence in the present case, judge the question of contributory negligence on the hypothesis that the plaintiff did have sufficient foresight to make reasonable judgments. But, although at the time of the accident the blood alcohol levels of Miss Joslyn and Mr Berryman were estimated as being 0.138g/100ml and 0.19g/100ml respectively, there is no evidence that either of them were drunk at the time, and certainly no evidence that at the time Mr Berryman had any reason to think that Miss Joslyn was affected by intoxication. Indeed, quite to the contrary. Of the people who were present who gave evidence, all said that Miss Joslyn showed no signs of intoxication. His Honour so found. Despite, therefore, one's reluctance to overrule a trial judge's finding on apportionment (*Podrebersek v Australian Iron and Steel Pty Ltd* [60]), it seems quite impossible to justify his Honour's conclusion on contributory negligence. I would be in favour of reducing it from 25% to 0%."

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[59] (2001) 33 MVR 441 at 446 [21] .

[60] (1985) 59 ALJR 492; 59 ALR 529.

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67. The Court of Appeal entered judgment, of $1,995,086.36 and $750,000 against Ms Joslyn and the Council respectively. The Council's appeal against Ms Joslyn was dismissed with costs. The Court of Appeal held that the maintenance and control of the road resided in the Council: accordingly there was no basis for a review of the trial judge's finding of negligence against the Council for failing to erect adequate signage. The Council's defence of "joint illegal activity" asserted against Mr Berryman and Ms Joslyn was again rejected.

The appeal to this Court

68. The grants of special leave to Ms Joslyn and the Council to appeal to this Court were confined to the question whether the Court of Appeal was justified in holding that Mr Berryman was not guilty of contributory negligence.

69. In 1988 important changes were made to the law relating to contributory negligence in New South Wales by the enactment of the Act . Section 74 deals as follows with contributory negligence in respect of motor accidents. Subsection (1) states:

> "The common law and enacted law as to contributory negligence apply to claims in respect of motor accidents, except as provided by this section."

The "enacted law" included at the time of trial s 10(1) of the *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW) which introduced the principle of apportionment. Sub-section (2) of s 74 requires that a finding of contributory negligence be made in the cases enumerated in pars (a)-(d) of that sub-section. Paragraphs (c) and (d) deal with failures to wear seat belts and protective helmets. Paragraph (a) requires a finding of contributory negligence:

> "where the injured person or deceased person has been convicted of an offence in relation to the motor accident under [specified road transport legislation] unless the plaintiff satisfies the court that the concentration of alcohol in the person's blood or the alcohol or other drug, as the case requires, involved in the commission of the offence did not contribute in any way to the accident".

It is par (b) which speaks to the facts of the present appeals by providing:

> "where:
>
> (i) the injured person (not being a minor) or the deceased person was, at the time of the motor accident, a voluntary passenger in or on a motor vehicle, and
>
> (ii) the driver's ability to drive the motor vehicle was impaired as a consequence of the consumption of alcohol or any other drug and the injured person or the deceased person was aware, or ought to have been aware, of the impairment".

This is to be read with s 74(6) which states:

"A person shall not be regarded as a voluntary passenger in or on a motor vehicle for the purposes of subsection (2)(b) if, in the circumstances of the case, the person could not reasonably be expected to have declined to become a passenger in or on the vehicle."

Finally, s 74(8) provides:

"This section does not exclude any other ground on which a finding of contributory negligence may be made."

70. The reference in s 74(2)(b) to the impairment by alcohol of the ability of the driver to drive as something of which the injured person "was aware, or ought to have been aware" reflects the common law requirement that the standard of care expected of the plaintiff be measured against that of a person of ordinary prudence and not merely by reference to subjective attitudes of the particular plaintiff[61]. Suggestions to the contrary, apparently made by the Full Court of the Federal Court in *Nominal Defendant v Saunders* [62] were in error.

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[61] *Sungravure Pty Ltd v Meani* (1964) 110 CLR 24 at 36-37 ; *Purcell v Watson* (1979) 26 ALR 235 (HC); *Astley v Austrust Ltd* (1999) 197 CLR 1 at 14 [30] .

[62] (1988) 8 MVR 209 at 215-216 .

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71. Section 76 abolished the defence of *volenti non fit injuria* except with respect to motor racing.

"**76 Defence of voluntary assumption of risk**

(1) Except as provided by subsection (2), the defence of volenti non fit injuria is not available in proceedings for damages arising from a motor accident but, where that defence would otherwise have been available, the amount of any damages shall be reduced to such extent as is just and equitable on the presumption that the injured person or deceased person was negligent in failing to take sufficient care for his or her own safety.

(2) If a motor accident occurs while a motor vehicle is engaged in motor racing, the defence of volenti non fit injuria is available in proceedings for damages brought in respect of the death of or injury to:

(a) the driver of the vehicle so engaged, or

(b) a passenger in the vehicle so engaged, other than a passenger who is less than 18 years of age or who otherwise lacked capacity to consent to be a voluntary passenger.

(3) For the purposes of subsection (2), a motor vehicle is engaged in motor racing if it is participating in an organised motor sports event or an activity that is an offence under [specified road transport legislation]."

72. That the defence of *volenti non fit injuria* was abolished is not without significance. Its abolition requires, as no doubt the legislature intended, that courts focus on the question whether there has been any, and if any, how much contributory negligence.

73. To decide the appeals without reference to the Act , in particular, the key provision, s 74 , as the Court of Appeal did, necessarily involved an error of law calling for the intervention of this Court. But that is not the only error of law. To have regard to the alleged absence of indicia of intoxication at the time of the relinquishment of the steering wheel by Mr Berryman to Ms Joslyn only, and as if it were conclusive of what the former knew or ought to have known of the latter's condition, was to substitute a subjective test of the reasonableness of Mr Berryman's conduct for the objective test that s 74(2)(b) of the Act requires and the common law, which posited the standards of a reasonable person, formerly required in New South Wales in motor vehicle accident cases.

74. In our opinion the Court of Appeal also manifestly erred in fact. This is therefore a case in which this Court should intervene to review the factual findings both at first instance and in the Court of Appeal.

75. Both Mr Berryman and Ms Joslyn were undoubtedly intoxicated from at least 4am on the day of the accident until, and after the accident. Despite that evidence was given that Ms Joslyn was not in fact manifesting obvious signs of intoxication not long after the accident, it seems to us to be highly unlikely that signs would not have been there to be seen by those able to see, or not otherwise distracted by more pressing concerns. However, in view of the clearly objective test posed by s 74(2)(b) of the Act , of what the injured person "ought" to have known, it is unnecessary to explore that matter any further.

76. Of what ought Mr Berryman have been aware? Clearly he ought to have been aware of all of the matters to which we referred in outlining the facts of this case, which include, as a matter of irresistible inference, that he must have set out to become, and did become intoxicated, in company with others of a similar mind and of whom Ms Joslyn was one. What a person ought to have known is not comprehended simply by what a person knew or observed at the moment before an accident, or at the moment at which that person became a passenger in a vehicle in the charge of, or driven by an intoxicated person. A person in the position of Mr Berryman ought to have known, and in fact would have known (if he had not precluded himself from knowing by his own conduct) that Ms Joslyn's capacity must have been impaired, and probably grossly so, by the amount of alcohol she had drunk, not only during the immediately preceding evening, but also on the night before that. Furthermore Mr Berryman either knew, or ought to have known that the effects of two consecutive evenings of immoderate consumption would have had a compounding effect of tiredness and reduced attentiveness upon both of them.

77. The Court of Appeal erred in failing to have regard to, and to apply s 74 of the Act . It further erred in looking to Ms Joslyn's condition as it momentarily appeared to others after the accident. The Court of Appeal should have had regard to the events in which the passenger and the driver had participated over the preceding 36 or so hours before the accident.

78. Factually the Court of Appeal erred in not finding that Mr Berryman's and Ms Joslyn's faculties, and accordingly their capacities to observe, react, assimilate, and deal with information and to drive a motor vehicle must have been seriously impaired by the consumption of alcohol.

79. The appeals to this Court by Ms Joslyn and the Council have been heard together. The appeals should be allowed with costs. Orders 1, 2 and 3 made by the Court of Appeal on 11 April 2001 should be set aside. Each matter should be remitted to the Court of Appeal to deal with the issues not so far dealt with as well as Ms Joslyn's appeal respecting the assessment of only 25% contributory negligence against Mr Berryman.

80. KIRBY J. These appeals come from a judgment of the New South Wales Court of Appeal [63] . They concern a defence of contributory negligence in personal injuries claims brought by the common first respondent (Mr Allan Berryman). He suffered very serious injuries as a result of a motor vehicle accident that happened on 27 October 1996. His injuries occurred when he was travelling as a passenger in his motor vehicle driven by the appellant in the first appeal (Ms Sally Joslyn). That vehicle overturned in the course of negotiating a bend in a road for which, it was found, there had been inadequate warning signage provided by the appellant in the other appeals, the Wentworth Shire Council ("the Council"). In her filed defence, Ms Joslyn admitted a breach of the duty of care that she owed to Mr Berryman.

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[63] *Berryman v Joslyn* (2001) 33 MVR 441.

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81. The primary judge (Boyd-Boland ADCJ), sitting without a jury in the District Court of New South Wales, found negligence on the part of Ms Joslyn. He also found negligence in the Council. The primary judge entered judgment against the appellants in favour of Mr Berryman in a sum totalling more than $2 million. He found that Ms Joslyn was liable to contribute 90% towards Mr Berryman's damages and the Council 10%. He upheld each appellant's defence of contributory negligence. Ordinarily, he said, he would have reduced Mr Berryman's damages by a third [64] . However, he ultimately found it appropriate to "reduce the … verdict by virtue of [Mr Berryman's] contributory negligence by 25%"[65].

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[64] *Berryman v Joslyn* unreported, District Court of New South Wales, 5 November 1999 ("reasons of the primary judge").

[65] Reasons of the primary judge at 19.

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82. On appeal to the Court of Appeal, the finding of the primary judge that the defence of contributory negligence had been established by the appellants was reversed[66]. Many other issues were canvassed. However, special leave to appeal to this Court was confined to "the contributory negligence issue". During argument before this Court that issue was further limited to whether an error had been made in the decision of the Court of Appeal that the defence of contributory negligence had not been established. Although there have been cases in which this Court has reassessed contributory negligence for itself [67] , in the present appeals this Court made it plain that any reassessment would have to be performed by the Court of Appeal, a course necessitated by the issues on the record.

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[66] Per Meagher JA; Priestley JA and Ipp AJA concurring.

[67] eg *Pennington v Norris* (1956) 96 CLR 10 at 17.

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83. In the Court of Appeal, Ms Joslyn and the Council had challenged the primary judge's assessment of contributory negligence. Ms Joslyn had urged that a much greater deduction (of up to 80%) was required. So far, her challenge to the *quantification* of the deduction for contributory negligence has not been answered. Nor has Mr Berryman had consideration of his alternative argument that, contributory negligence being assumed, the *apportionment* of 25% should be reduced. Those issues fell away when the Court of Appeal concluded that the evidence did not warrant the conclusion that contributory negligence had been established.

84. **Following paragraph cited by:**

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 (10 March 2020) (Ward CJ in Eq, Leeming and Payne JJA)
Smith v Zhang (18 May 2012) (Macfarlan and Meagher JJA, Tobias AJA)

> 21. Because the task of apportioning responsibility involves the weighing of a number of considerations and the making of judgments about which minds might reasonably differ, it is well established that appellate courts should not interfere in the absence of some error of principle or of fact or where the apportionment is plainly wrong: *British Fame (Owners) v Macgregor (Owners)* [1943] AC 197 at 201 ; *Pennington v Norris* at 15-16 ; *Podrebersek v Australian Iron & Steel Pty Ltd* [1985] HCA 34; (1985) 59 ALJR 492 at 494 ; *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552 at [84] , [157] ; *Anikin v Sierra* at [50] ; *Nominal Defendant v Rooskov* [2012] NSWCA 43 at [122]-[123], [163] .

Hathaway & Anor v Thorpe bht Kinghorn (30 June 2006) (Santow JA at 1; Ipp JA at 2; McColl JA at 3)

> 32. In *Anikin* the plaintiff was seriously injured when he was struck by a bus on a slightly downhill section of a four-lane roadway at a position where the streetlights nearest the point of impact were not illuminated. The plaintiff was dressed in dark clothing, except for a white strip on the toe of his shoes. The bus driver was driving at about 70 to 80 km per hour. The primary judge found the plaintiff to have been guilty of contributory negligence to the extent of 25 percent. The Court of Appeal (Santow JA dissenting) set aside the primary judge's finding that the bus driver was negligent. On the issue of contributory negligence the primary judge had accepted that the plaintiff had the capacity to see the approaching bus, to which the joint judgment added (at [53]) that his capacity "may have been greater than that of the bus driver who was approaching at a greater speed, an object which was both unexpected and less readily visible." Accepting (at [50]) that the primary judge's decision was "not lightly reviewed" (*Podrebersek v Australian Iron and Steel Pty Ltd* [1985] HCA 34; (1985) 59 ALJR 492 at 494 ; *Liftronic Pty Ltd v Unver* [2001] HCA 24; (2001) 75 ALJR 867 at 868 ; *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552 (at [84] , [157]), the High Court was of the view that there was no basis for appellate intervention in the apportionment for contributory negligence.

Because of the broadly expressed criteria for the adjustment of awards of damages for contributory negligence, it is comparatively rare for appellate courts to interfere in the assessment of a trial judge on that issue [68] . However, these appeals enlist this Court's attention because they concern an instance of alleged contributory negligence where the injured person was a passenger in a motor vehicle who was affected by the consumption of alcohol at the time of his journey [69] . The appeals present a question as to the approach that should be taken to the assessment of the deduction for contributory negligence where a person in a motor accident, not actually responsible for driving the vehicle causing the accident, is nonetheless said to be liable to lose part of the damages otherwise recoverable as the consequence of "fault" on that person's part. Specifically, a question is presented as to the relevance of the passenger's intoxication for the decisions made by that person where it appears that such intoxication may have diminished, or removed, the passenger's capacity to make rational and self-protective decisions regarding his or her safety. Of special relevance to the resolution of these questions in the present appeals is the application to one of them of legislation enacted to govern contributory negligence decisions in respect of motor accidents involving claims by passengers who are intoxicated when injured in such accidents.

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[68] eg *A V Jennings Construction Pty Ltd v Maumill* (1956) 30 ALJR 100 at 101 ; *Pod rebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492 at 494; 59 ALR 529 at 532 ; *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 311.

[69] See *The Insurance Commissioner v Joyce* (1948) 77 CLR 39; *O'Neill v Chisholm* (1972) 47 ALJR 1.

The background facts

85. The factual background is described in the reasons of Gummow and Callinan JJ ("the joint reasons")[70]. If the lens of the facts is widened so as to take into account the entire course of the conduct of Mr Berryman and Ms Joslyn, from the moment they respectively arrived at the property of Mr and Mrs Crisp until the moment Mr Berryman was injured, a different response might follow from that which results from narrowing the lens to focus exclusively on the events immediately before the accident happened.

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[70] Joint reasons at [52]-[60].

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86. The broader focus might commence with the fact that on Friday 25 October 1996, two days before the accident, Mr Berryman and some friends commenced consuming alcoholic drinks and continued to do so until the Sunday morning, a few hours before Mr Berryman was injured. The occasion for this sustained course of alcohol consumption was the approaching 21st birthday of a friend, Mr Rowan Crisp [71] . It was for that purpose that Mr Berryman, Ms Joslyn and others had gathered at the Crisp home.

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[71] *Berryman* (2001) 33 MVR 441 at 444 [16] .

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87. There is no doubt that, objectively, at the time of the accident, all of the named actors were affected by the alcohol they had consumed. Evidence, accepted by the primary judge, demonstrated this clearly. A sample of blood taken from Ms Joslyn at 11.00am on Sunday 27 October 1996, after the accident, showed a blood alcohol concentration of 0.102g /100mL. Recalculated to the probable level at approximately 8.45am, the time of impact, this, according to Professor Starmer, disclosed a blood alcohol level of 0.138g/100mL in Ms Joslyn's case[72]. In the case of Mr Berryman the respective levels were 0.16g/100mL at 10.35am, with an estimated level at the time of impact of 0.19g/100mL[73].

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[72] Reasons of the primary judge at 13.

[73] Reasons of the primary judge at 13-14.

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88. Both Mr Berryman and Ms Joslyn were found to have been seasoned drinkers[74]. This would have reduced somewhat the effect of alcohol consumption on their cognitive and motor capacities. However, the primary judge accepted the evidence of Professor Starmer that, at the time of the accident, the "crash-risk" had been increased in the case of Ms Joslyn "more than 20-fold", over and above that of a sober driver. Moreover, he accepted Professor Starmer's opinion that the "risk of a crash would have been even greater in [her] case because she had not driven for three years after she had lost her license for a drink driving offence"[75]. As well, because Ms Joslyn had slept for no more than three hours and possibly as little as two before setting out with Mr Berryman, the primary judge also accepted Professor Starmer's opinion that the effect on her of alcohol consumption was likely to have been increased by the effects of hangover. She was impaired, fatigued, in control of a vehicle which the evidence showed was prone to roll over and which had a broken speedometer. She was also inexperienced in driving.

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[74] Reasons of the primary judge at 14.

[75] Reasons of the primary judge at 14.

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89. In the case of Mr Berryman, even greater physiological effects of alcohol intake were identified by the evidence. He had gone to sleep at about 4.00am on Sunday 27 October 1996 in a state of high intoxication. Before he did so, he had been mainly "talking with the boys" at the party but had also spent time talking in close proximity to Ms Joslyn. He agreed that at the time he went to bed at 4.00am "the people who were still at the party were all staggering drunk". One of those people was Ms Joslyn, although Mr Berryman qualified his recollection by saying that he could not recall her condition. Nevertheless, it appears incontrovertible that, over the lengthy period of Mr Berryman's consumption of alcohol, he would have been aware, in a general sense, that Ms Joslyn was also drinking heavily over the same time.

90. There followed intervals of sleep, longer (and commencing somewhat earlier) in the case of Mr Berryman. When, upon waking at about 7.00am Mr Berryman set out with Ms Joslyn for Mildura for breakfast, he would, objectively, have known that he, and probably Ms Joslyn, were still affected by the alcohol they had consumed. Mr Berryman agreed that he would not have willingly allowed her to drive his vehicle on the Sunday morning. He knew, from something told to him before the accident, that Ms Joslyn did not have a driver's licence. He was aware of the propensity of his vehicle to roll if approaching a corner too fast. He was also aware that alcohol consumption could adversely affect the ability of a driver to accomplish such manoeuvres. He knew that it was against the law to permit an unlicensed driver to drive a motor vehicle and that it was illegal to permit someone seriously affected by alcohol to do so. Answers affirming these points were given in evidence by Mr Berryman in the course of reconstructing events.

91. To the foregoing facts had to be added evidence from witnesses, accepted as reliable by the primary judge, concerning the appearance of Ms Joslyn when she was observed soon after the accident. Thus the primary judge accepted the testimony of Constable Favelle, Mr Smythe and Mr Walker and of Ms Deane that Ms Joslyn did not show signs of intoxication at the

accident scene. This was despite "the presence of beer bottles and the upturned Esky, at the accident scene, [which] would have raised, in the minds of those attending … the question of the part consumption of alcohol played in the accident"[76]. It was the evidence of the witnesses that led his Honour to conclude that "at the time [Mr Berryman] authorised Miss Joslyn to take over the driving of the vehicle it is unlikely she was exhibiting, to [him], obvious signs of intoxication"[77].

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[76] Reasons of the primary judge at 15-16.

[77] Reasons of the primary judge at 16.

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92. It was on the basis of these findings that Mr Berryman presented his challenge to the finding of contributory negligence to the Court of Appeal. According to Mr Berryman the "real cause" of the accident and of the damage he had suffered in consequence, was solely the actions of Ms Joslyn in commencing to drive the vehicle and in doing so in the manner that she did and with her knowledge of her lack of a driver's licence, want of recent driving experience and objective condition of intoxication. According to Mr Berryman, the damage he had suffered could not reasonably be attributed to any fault on his part in handing Ms Joslyn the keys of his car on the return journey from Mildura. He had done this after Ms Joslyn observed him falling asleep at the wheel and said something to him. Mr Berryman argued that, in such circumstances, Ms Joslyn had the responsibility to refuse to drive, to allow him to sleep it off or to wait for, or summon, help. It was his submission that the crucial time to judge the issue of contributory negligence was the moment when he handed her the keys. Objectively, in the state in which he was at that time, combining intoxication and fatigue, he was not in a position to make a rational decision appointing Ms Joslyn as his driver. To the extent that his previous consumption of alcohol was relevant, it had disabled him from making responsible choices. He was not, therefore, to be treated as at fault for the damage that had followed.

Findings at trial and on appeal

93. *Findings at trial*: The primary judge recognised that the resolution of the issue of contributory negligence depended, in part, upon the period of time to which regard was to be had in resolving the issues presented[78]. After referring to a number of cases in which like questions had arisen [79] , he concluded that, in this case, he was required to open the lens of the facts and take the broader focus[80].

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[78] Reasons of the primary judge at 16.

[79] eg *Williams v Government Insurance Office (NSW)* (1995) 21 MVR 148; *McPherson v Whitfield* [1996] 1 Qd R 474.

[80] Reasons of the primary judge at 18.

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94. His Honour therefore addressed his attention to a period starting "well before [Mr Berryman] went to bed on Sunday morning" up to the time Ms Joslyn commenced to drive. He found that, objectively, Mr Berryman "ought to have recognised her capacity to drive was affected by her excess consumption of alcohol and the other factors referred to by Professor Starmer which included fatigue and lack of experience"[81]. Although he accepted that Mr Berryman did not actually give the matter consideration, he found that he should have contemplated the prospect of a journey such as was undertaken to Mildura and that, had he done so, it would have been obvious to him before he went to sleep, that Ms Joslyn would not be fit to drive his vehicle on the following morning. He went on[82]:

> "I believe, at the time of change over of drivers, he did not consider that issue, but should have done so and was capable of so doing. The failure to take these matters to account was contributory negligence. [Mr Berryman] ought also to have realised the lack of experience and qualifications of Miss Joslyn particularly given his knowledge of the propensity of his vehicle to roll over."

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[81] Reasons of the primary judge at 18-19.

[82] Reasons of the primary judge at 19.

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95. It was in these circumstances that the primary judge turned to the apportionment. He fixed the reduction for contributory negligence at 25% rather than a third because "at the time of the hand-over Miss Joslyn exhibited none of the obvious signs of intoxication which one would expect to be present".

96. *Findings on appeal*: The reasons of the Court of Appeal were given by Meagher JA. After reciting the long interval during which the main actors had been consuming alcohol, followed by the short intervals of sleep, the visit to Mildura and the changeover of driving on the return journey to the Crisps' home, Meagher JA went on [83] :

> "The only action of [Mr Berryman's] which could possibly have amounted to contributory negligence was permitting Miss Joslyn to drive instead of him. In this regard, one must view matters as they stood at the time of handing over control of the car, (not as they were in the previous 24 hours), a task which his Honour did not really undertake. One must also, if one concludes that at the time of handing over Mr Berryman was too drunk to appreciate what was happening, a situation as to which there is no evidence in the present case, judge the question of contributory negligence on the hypothesis that the plaintiff did have sufficient foresight to make reasonable judgments. But, although at the time of the accident the blood alcohol levels of Miss Joslyn and Mr Berryman were estimated as being 0.138 g/100 ml and 0.19 g/100 ml respectively, there is no evidence that either of them were drunk at the time, and certainly no evidence that at the time Mr Berryman had any reason to think that Miss Joslyn was affected by intoxication. Indeed, quite to the contrary. Of the people who were present who

gave evidence, all said that Miss Joslyn showed no signs of intoxication. His Honour so found."

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[83] *Berryman* (2001) 33 MVR 441 at 446 [21] .

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97. It was with these words (and a sideways glance at the rule of restraint in disturbing apportionments for contributory negligence [84]), that Meagher JA concluded that contributory negligence had not been proved. The defence should therefore have been dismissed. The apportionment was overruled. The cross-appeal seeking an increase in the apportionment was rejected.

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[84] His Honour referred to *Podrebersek* (1985) 59 ALJR 492; 59 ALR 529. See *Berry man* (2001) 33 MVR 441 at 446 [21] .

The issues

98. The following issues arise for decision by this Court:

(1) Whether the Court of Appeal erred in disturbing the conclusion of the primary judge on contributory negligence given the advantages enjoyed by that judge and the rule of restraint established in regard to such factual decisions. (The rule of restraint issue);

(2) Whether the Court of Appeal erred in law in failing to base its decision on the contributory negligence issue upon the legislation governing that issue as it applied to each of the appeals before it. (The statutory provisions issue); and

(3) Whether the Court of Appeal otherwise erred in its determination of the facts upon the basis of which it concluded that contributory negligence had not been proved in the circumstances of the case. (The factual evaluation issue).

99. I will deal with each of these issues in turn. However, first, it is useful to say something about the approaches taken in earlier cases to problems of a similar kind.

Conflicting approaches to cases of intoxicated passengers

100. **Following paragraph cited by:**

AAMI Limited v Hain (01 August 2008) (Gummow and Heydon JJ)

Course of authority: In *Liftronic Pty Ltd v Unver* [85] , I pointed out that "contributory negligence, and apportionment, are always questions of fact" [86] . It is a mistake to endeavour to elevate into rules of law observations "however eloquent, uttered by judges, however eminent, about the facts of some other case" [87] . Nevertheless, as more decisions upon such questions fall to be made by judges rather than by juries as they once were, and as judicial reasons are examined on appeal, it is probably inevitable and in the interests of judicial consistency (which is a hallmark of justice [88]), that trial judges and appellate courts should look to the way earlier decision-makers have resolved like factual questions. Those decisions do not yield binding principles of law. However, they do provide some guidance as to the approach that has been taken to the solution of problems, the recurring features of which take on a monotonous similarity when different cases are compared.

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[85] (2001) 75 ALJR 867 at 885 [90]; 179 ALR 321 at 345.

[86] Citing *McLean v Tedman* (1984) 155 CLR 306 at 315 ; *SS Heranger (Owners) v SS Diamond (Owners)* [1939] AC 94 at 101 ; *Hicks v British Transport Commission* [1958] 2 All ER 39; Balkin and Davis, *Law of Torts*, 2nd ed (1996) at 338 n 37.

[87] *Sungravure Pty Ltd v Meani* (1964) 110 CLR 24 at 37 per Windeyer J.

[88] cf *Lowe v The Queen* (1984) 154 CLR 606 at 610-611 per Mason J.

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101. When appeals such as the present ones reach this Court, it is also desirable for the Court to inform itself of the way in which the issues for decision are being approached by courts subject to its authority. This will help this Court to provide to judges, lawyers, insurance assessors and litigants appropriate guidance for the making of decisions with a measure of confidence that they will not be subject to correction for errors of law or of approach to commonly repeated facts.

102. Furthermore, an understanding of this decisional background is specially relevant in these appeals. It helps to explain the reasons for, and purposes of, the provisions of the enacted law that was adopted, in part at least, to overcome some of the approaches disclosed in the cases. These sometimes evidence the judicial reluctance to find contributory negligence against intoxicated drivers and passengers that ultimately provoked Parliament to enact the statutory law that is critical to the decision in at least one of these appeals.

103. The seeds of the controversy were first considered by this Court in *The Insurance Commissioner v Joyce* [89] . Like the present case, that was one in which, after a motor vehicle accident had occurred, objective evidence demonstrated that the driver had been affected by consumption of alcoholic liquor. The question arose as to whether the claim for damages of the passenger, who had been sitting beside the driver, was defeated in consequence. Attention was given to three legal bases on which such a case might fail [90] :

(1) that no duty of care was owed to a passenger where a driver was known to be intoxicated;

(2) that the defence provided by the voluntary assumption of risk applied in such circumstances; and

(3) that the defence of contributory negligence (which at common law was a complete answer to a plaintiff's claim) forbade recovery.

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[89] (1948) 77 CLR 39 .

[90] *Joyce* (1948) 77 CLR 39 at 45-47 per Latham CJ, 56-59 per Dixon J; cf *Cook v Cook* (1986) 162 CLR 376 at 386 and Hogg, "Guest Passengers: A Drunk Driver's Defences", (1994) 2 *Torts Law Journal* 37.

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104. Differing views were expressed in *Joyce* concerning the preferable basis for resolving a challenge to such a plaintiff's entitlement to succeed. However, it was upon the issue of contributory negligence (which, at that time [91] , was somewhat controversial in such cases in England [92]) that conflicting opinions were stated, reflections of which have been seen in Australian judicial approaches ever since. Thus, Latham CJ was prepared to regard the category of contributory negligence as apposite to the circumstances where both driver and passenger were intoxicated. However, he went on [93] :

> "If in the last stage of the journey the plaintiff was sober enough to know and understand the danger of driving with [the driver] in a drunken condition, he was guilty of contributory negligence, and he also voluntarily encountered an obvious risk and his action should fail.
>
> But if he was not sober enough to know and understand such a danger, then there is no reason to believe that his inability to appreciate the danger was other than self-induced. If he drank himself into a condition of stupidity or worse, he thereby disabled himself from avoiding the consequences of negligent driving by [the driver], and his action fails on the ground of contributory negligence."

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[91] Following *Dann v Hamilton* [1939] 1 KB 509.

[92] See eg Goodhart, "Contributory Negligence and Volenti Non Fit Iniuria", (1939) 55 *Law Quarterly Review* 184 noted in *Joyce* (1948) 77 CLR 39 at 58 per Dixon J.

[93] *Joyce* (1948) 77 CLR 39 at 47.

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105. It was this last approach to the consequence of self-induced defects of cognition and understanding, fatigue and incapacity that caused Dixon J, in his dissenting opinion, to express a contrary view [94] :

> "But for the plaintiff, who was not driving the car, to drink until he was too stupid to observe the defendant's condition can hardly be considered contributory negligence of which the accident was a reasonable or natural consequence."

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[94] *Joyce* (1948) 77 CLR 39 at 60.

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106. Similar divisions of opinion, upon the same subject, have appeared in later decisions of this Court and other courts in somewhat similar factual circumstances. In *O'Neill v Chisholm* [95] , this Court, by majority[96], restored the trial judge's decision to reduce a plaintiff's damages by a third on the basis that he had been lacking in care for his own safety in becoming a passenger in the defendant's vehicle, taking into account the defendant's then visible state of insobriety. Crucial to the approach of all members of the Court in *O'Neill* was an investigation of what the plaintiff passenger "knew or ought to have known" of the condition of the driver so far as his sobriety was concerned. It was only on the question of whether the objective evidence warranted a finding of contributory negligence that the judges differed.

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[95] (1972) 47 ALJR 1 .

[96] Barwick CJ, McTiernan and Stephen JJ; Walsh and Gibbs JJ dissenting.

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107. In the Supreme Court of South Australia in *Banovic v Perkovic* [97] , the trial judge had rejected the defence of contributory negligence on the ground that the driver had not demonstrated outward signs of intoxication. It was on that evidentiary footing that King CJ, in the Full Court, affirmed that there was "no basis for a finding of contributory negligence" [98] . Cox J agreed [99] . So did Walters J, with expressed reluctance in light of the objective blood alcohol

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[97] (1982) 30 SASR 34 . See also *Spicer v Coppins* (1991) 56 SASR 175 in which contributory negligence (which had been rejected at trial) was found on appeal by the majority: Legoe and Matheson JJ; Bollen J dissenting.

[98] *Banovic* (1982) 30 SASR 34 at 38.

[99] *Banovic* (1982) 30 SASR 34 at 42.

[100] *Banovic* (1982) 30 SASR 34 at 38.

evidence [100] . The decision illustrates the importance commonly attached by trial courts in such circumstances, to the appearance of the driver at the time the journey is commenced and whether there are then observable signs of intoxication.

108. In *Morton v Knight* , in the Supreme Court of Queensland, Cooper J found that contributory negligence had been established in the case of an intoxicated passenger who accepted a lift home from a driver who was found to have been "observably drunk to a marked degree", when that condition was such as to have been obvious to a reasonable sober person [101] . Co oper J dismissed the argument that a passenger could rely on his or her own self-induced insobriety to sustain a conclusion of unawareness about the driver's condition. While his Honour found contributory negligence to be proved, he described the passenger's conduct as "passive", resulting from "placing himself in a position of danger within the car" and thus having no "causative potency" so far as the negligent conduct of the driver or the accident were concerned [102] .

[101] [1990] 2 Qd R 419 at 423.

[102] *Morton* [1990] 2 Qd R 419 at 430, citing *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 KB 291 at 326.

109. In 1990, the New South Wales Court of Appeal considered an appeal by a passenger against a 20% reduction of damages for contributory negligence following injuries sustained in a car accident on the basis of objective evidence, despite the passenger's denial of any awareness that the driver was seriously affected by alcohol at the time of the accident. Clarke JA held that the passenger "ought reasonably to have recognised" the driver's unfitness to drive, treating the passenger's own intoxication as no excuse [103] .

[103] *McGuire v Government Insurance Office (NSW)* (1990) 11 MVR 385 at 388.

110. In 1995 in the Queensland Court of Appeal, in *McPherson v Whitfield* , Macrossan CJ (with the concurrence of McPherson JA) drew a distinction between the case where the passenger knew, or ought reasonably to have known, that the driver would be in charge of a vehicle in which he or she might travel as a passenger and the case where such reliance on the driver was unforeseeable [104] . In his reasons in *McPherson* , Lee J, in considering the relevance of a passenger's state of intoxication and in support of the approach of King CJ in *Banovic* (an d other decisions [105]), rejected the approach taken by Cooper J in *Morton* . He said [106] :

"To say that a sober person in those circumstances would have detected the driver's condition is not to the point. It is the passenger's conduct which must be judged and unless the defendant can point to some specific causative act of contributory negligence on his part his allegations in that respect must fail."

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[104] [1996] 1 Qd R 474 at 478-479 .

[105] eg *Nominal Defendant v Saunders* (1988) 8 MVR 209 at 210, 214-215 ; *Spicer* (1991) 56 SASR 175 at 179-180, 182-184 ; *Owens v Brimmell* [1977] QB 859 at 866-867 .

[106] *McPherson* [1996] 1 Qd R 474 at 484.

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111. In *Williams v Government Insurance Office (NSW)* [107] the New South Wales Court of Appeal dealt with a case in some ways similar to the present. There, the plaintiff and defendant had been drinking together for some time. They then travelled together in the plaintiff's vehicle. However, as the defendant's husband, who had been driving the vehicle, was falling asleep in consequence of his alcohol consumption, the defendant protested. The plaintiff handed the keys to the defendant and got in the back seat of the car to lie down. The defendant drove off and the accident occurred, injuring the plaintiff.

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[107] (1995) 21 MVR 148 .

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112. The trial judge in *Williams* found contributory negligence and reduced the plaintiff's damages by 80%. All members of the Court of Appeal upheld the conclusion that contributory negligence had been established [108] . In my reasons I suggested that the primary responsibility for the plaintiff's damage rested on the driver [109] :

"The keys put [the driver] in a position of choice. Driving the vehicle assigned to her extremely heavy and obvious obligations. Handing her the keys did not exempt her thereafter from her own responsibility. It *permitted* her to drive the vehicle. It did not *oblige* her to drive."

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[108] *Williams* (1995) 21 MVR 148 at 158. Cole JA (with whom Meagher JA agreed) found no error in the apportionment. I would have reduced the apportionment to 40%.

[109] *Williams* (1995) 21 MVR 148 at 158 (emphasis in original). In my reasons I referred to *Teubner v Humble* (1963) 108 CLR 491 at 504.

113. In *Nominal Defendant v Saunders* , the trial judge in the Supreme Court of the Australian Capital Territory found that the signs of the driver's intoxication "were there for the plaintiff to see but he was too drunk to see them" [110] . His Honour dismissed the defence of contributory negligence on the basis that the defendant carried the onus to prove contributory negligence and, because the passenger was not conscious of the intoxicated condition of the driver, had failed to do so. The Full Court of the Federal Court rejected the appeal against that dismissal, with reasoning similar to the decision of the Court of Appeal in the present case. In his reasons, Fox J observed [111] :

> "The mere fact that a driver is inebriated at the time of the accident does not establish the defence [of contributory negligence], nor does the mere fact that the passenger is in such a condition at that time do so. It is to be remembered too that the allegation of negligence will normally relate, not to the drunkenness, but to the manner of driving. The defence will be based on what the passenger knew as to the driver's condition or behaviour, or what he would have known had he at a relevant time been taking reasonable care for his own safety … Whether or not the danger should have been apprehended, and what should have been done about it are matters to be measured according to the test of the reasonable man."

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[110] (1988) 8 MVR 209 at 213.

[111] *Saunders* (1988) 8 MVR 209 at 209-210 .

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114. Spender and Miles JJ in *Saunders* regarded it as critical to ascertain whether the evidence established that the passenger "knew that it was likely that he would be the passenger of [the driver]" [112] . Their Honours' reasoning, in rejecting contributory negligence, treated as determinative the onus resting on the defendant to establish the defence and the need for the defendant to prove that the journey with the intoxicated driver was reasonably foreseeable before the passenger became incapable of deciding whether or not to so proceed.

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[112] *Saunders* (1988) 8 MVR 209 at 216.

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115. *Two emerging approaches*: Broadly speaking, therefore, two approaches have emerged in the decisions of Australian courts relevant to the defence of contributory negligence where that defence is raised against the claim of a passenger who agrees to travel with a driver who, after an accident, is shown objectively to have been intoxicated.

116. On the one hand there are cases (of which *Morton* [113] is the clearest instance) in which the approach taken by the judges invites consideration of the entire context of the passenger's conduct, including its "causative potency", while rejecting any suggestion that a passenger's

self-intoxication can be a complete answer to the defence of contributory negligence constituted by the passenger's entering the vehicle and proceeding on a journey when he or she ought to have known (but for such intoxication) that the driver was not in a condition to drive [114] .

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[113] [1990] 2 Qd R 419 .

[114] [1990] 2 Qd R 419 at 429.

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117. On the other hand are the cases which focus more particularly on the conduct immediately preceding the accident. They consider (including by reference to the passenger's own state of sobriety, capacity and appreciation) whether he or she was then, and could with reasonable foreseeability have anticipated being, in a position to decline the proffered opportunity to travel in the vehicle driven by an intoxicated driver. Illustrations of this approach include *Banovic* [115] , *Saunders* [116] and *McPherson* [117] .

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[115] (1982) 30 SASR 34 .

[116] (1988) 8 MVR 209 .

[117] [1996] 1 Qd R 474 .

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118. Once judges replaced juries in cases of this kind and were obliged by law to give reasons for their decisions, it was inevitable that such reasons would expose, in common factual situations, differing judicial consideration of mixed questions of fact and law. This Court should not ignore the differences with the solecism that each case turns on its own facts. Of course it does. But where the facts are common, and frequently repeated, the emergence of substantially differing judicial approaches to their legal consequences demands elucidation and authoritative choice by this Court of the preferable opinion. Subject to what follows, the resolution of the issues raised by the present appeals affords the opportunity to clarify the general approach that the law requires.

The rule of restraint issue

119. **Following paragraph cited by:**

Manhattan Homes Pty Limited v Burnett (11 September 2024) (Leeming JA at [1]; Harrison CJ at CL at [7]; Price AJA at [114])
Amaca Pty Ltd (Under NSW Administered Winding Up) (ACN 000 035 512) v Pfeiffer (28 November 2017) (Kourakis CJ; Peek and Stanley JJ)

37. The reason why such a finding is not lightly reviewed was explained by Kirby J in *Joslyn v Berryman* ,[17] who identified three factors which justify restraint in disturbing decisions on, *inter alia*, apportionment, namely: [18]

(1) the issue of apportionment is essentially a factual question and therefore the primary judge will have relevant advantages over an appellate court that will often be critical for the determination of the issue; [19]

(2) the apportionment legislation confers upon the court a power to apportion the recoverable damages “to such extent” as the court determines “having regard to” a consideration expressed in very general language (“the extent of each contributory’s responsibility for the harm”) that evokes the exercise of a quasi-discretionary judgment upon which different minds may readily come to different conclusions; and

(3) the broad criteria by which such decisions are made at trial (including by reference to what the court thinks “fair and equitable” in the case) 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
[18] [2003] HCA 34 at [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.

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[118] That rule is described by Barwick CJ in *O'Neill* (1972) 47 ALJR 1 at 3.

[119] *O'Neill* (1972) 47 ALJR 1 at 3, 4, 6.

[120] *Liftronic* (2001) 75 ALJR 867 at 878 [64.4]; 179 ALR 321 at 335.

[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 .

[122] Relevantly *Law Reform (Miscellaneous Provisions) Act 1965 (NSW)*, ss 10(1) and 10(2) .

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120. In *Liftronic* , also a contributory negligence appeal, Meagher JA, in the Court of Appeal, was insistent upon the rule of restraint [123] . His dissent in that respect was later upheld by a majority of this Court[124]. I disagreed, pointing out that restraint had to be distinguished "from paralysed inertia or repudiation of jurisdiction" [125] . I remain of the view that unthinking application of restraint can amount to a negation of the judicial duty. Once error is shown, whether of law or fact, the appellate court is authorised to alter any apportionment for contributory negligence made at trial which is shown to have been affected by such error.

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[123] A point noted in *Liftronic* (2001) 75 ALJR 867 at 885 [90]; 179 ALR 321 at 345.

[124] per Gleeson CJ, McHugh, Gummow and Callinan JJ; myself dissenting.

[125] *Liftronic* (2001) 75 ALJR 867 at 879 [65.3]; 179 ALR 321 at 337.

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121. Correctly, Ms Joslyn and the Council urged the advantages which the primary judge enjoyed in reaching his conclusion about contributory negligence and in evaluating all of the circumstances of the case. The trial lasted eleven days. The primary judge's opinion as to Mr Berryman's "share in the responsibility for the damage" depended upon his evaluation of the entirety of the evidence. This fact presented a sound reason for restraint. However, I am not convinced that the Court of Appeal overlooked this consideration. Reference was expressly made to the decision of this Court in *Podrebersek v Australian Iron & Steel Pty Ltd* [

126] in which the rule of restraint is stated. The Court of Appeal accepted the necessity to demonstrate error. It follows that the complaint raised by the first issue fails.

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[126] (1985) 59 ALJR 492 at 493-494; 59 ALR 529 at 532.

The statutory provisions issue

122. *Differential statutory application*: Of greater concern is the omission of the Court of Appeal to refer to, and apply, new statutory provisions that had been enacted by the New South Wales Parliament to govern conclusions on the issue of contributory negligence where that defence was raised in the case of a motor accident.

123. So far as the given reasons of the Court of Appeal are concerned, no distinction was drawn between the general provisions of the enacted law amending the common law doctrine of contributory negligence [127] and the particular provisions enacted to govern contributory negligence in cases of motor accidents. It may be that the omission can be explained by the failure of the parties to direct the attention of that Court to the legislation. It may be that it was because the Court, from many like cases, was well familiar with the applicable law. However, with respect, the statute needed to be referred to, not least because of the different statutory regimes that applied respectively to the appeal and cross-appeal concerning Mr Berryman's claim against Ms Joslyn and the appeal concerning his claim against the Council. In the former, the relevant statutory regime was s 74 of the *Motor Accidents Act* 1988 (NSW) . In the latter, the relevant regime was the *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW) (" the 1965 Act").

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[127] In the *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW), Pt 3 . That Act was amended by the *Law Reform (Miscellaneous Provisions) Amendment Act* 2000 (NSW) . These amendments were not in force at the date relevant to these proceedings.

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124. *The 1965 Law Reform Act* : The familiar language of the 1965 Act needs to be stated because it is mentioned in the particular case of contributory negligence in respect of motor accidents, being part of the "enacted law" referred to in the provisions governing motor accidents [128] . At the applicable time, s 10 of the 1965 Act stated, relevantly:

> "10(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall 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 …

(2) Where damages are recoverable by any person by virtue of the foregoing subsection subject to such reduction as is therein mentioned, the court shall find and record the total damages which would have been recoverable if the claimant had not been at fault."

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[128] *Motor Accidents Act* , s 74(1) . The terms of the section are set out in the joint reasons at [69].

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125. A number of comments may be made on these provisions. The primary object of the 1965 Act was to reverse the rule of the common law that forbade recovery if contributory negligence was shown on the part of the plaintiff in however small a degree. It is in the second part of s 10 (1) , in establishing the substituted rule, that the new approach is established.

126. Secondly, s 10(1) read with s 10(2) ("if the claimant had not been *at fault*") is not concerned, as such, with moral culpability [129] . Courts are not authorised under the 1965 Act to punish a claimant because he or she became intoxicated by consumption of alcoholic liquor or because courts regard that state as morally reprehensible. The focus of the sub-section is different, and more limited [130] . As in the application of any statutory provision, a court must give it effect in terms of its language and to achieve its expressed object.

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[129] *Pennington* (1956) 96 CLR 10 at 16.

[130] *Talbot-Butt v Holloway* (1990) 12 MVR 70 at 74.

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127. Thirdly, s 10(1) does not address attention to the extent to which any act or omission on the part of the claimant caused the accident, as such. To approach the issue of contributory negligence in that way would be to misread the provision. The "responsibility" for which s 10 (1) provides is that which is "just and equitable having regard to the claimant's share in the responsibility *for the damage*". Such "damage", as the opening words of s 10(1) make clear, is the damage which the person has suffered as a "result partly of his own fault and partly of the fault of any other person or persons". In judging the question of culpability, the decision-maker will have regard to the fact that the respective acts of a driver and a passenger will ordinarily have posed quite different dangers. Thus, "the defendant who was driving the [vehicle] … was in charge of a machine that was capable of doing great damage to any human being who got in its way"; on the other hand "the plaintiff's conduct posed no danger to anyone but" himself [131] .

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[131] *Talbot-Butt* (1990) 12 MVR 70 at 88 per Handley JA referring to *Pennington* (19 56) 96 CLR 10 at 16 ; *Karamalis v Commissioner of South Australian Railways* (1977) 15

ALR 629 at 635 ; *Cocks v Sheppard* (1979) 53 ALJR 591; 25 ALR 325. See also *Williams* (1995) 21 MVR 148 at 156.

128. Fourthly, a clue is given to the operation of s 10 by the definition of "fault" in s 9 of the 1965 Act. This clarifies the object to which s 10(1) is directed. By that definition, relevantly, "fault" means "negligence, or other act or omission which gives rise to a liability in tort or would, apart from this Part, give rise to the defence of contributory negligence". In a motor vehicle accident in which a passenger alone was injured, it is difficult to see how surrendering the keys to a vehicle to a person who then assumed the responsibility of driving the vehicle would constitute the kind of negligence or act or omission giving rise to a liability in tort except in a temporal sense. However, the presence of that definition appears to postulate an application of s 10(1) that looks at "fault" in a broad, and not a narrow, way. Such an approach would also be in harmony with the language and apparent object of the sub-section. In particular, it is comparable with the statutory direction to resolve issues of "responsibility" by reference to what is "just and equitable". This is enacted law that contemplates bold strokes of judgment in the assignment of "responsibility". It recognises that a search for mathematical precision or an objective evaluation of culpability is illusory.

129. *The Motor Accidents Act* : Greater guidance is afforded where the defence of contributory negligence is to be decided in accordance with the *Motor Accidents Act* [132] . That Act was enacted by the New South Wales Parliament to introduce reform of the previous law designed to enhance recovery in the case of "motor accidents" but to ensure that damages were more affordable. It repealed the original legislation [133] and returned the law in that State to a "modified

[132] Section 74 of the Act has been superseded by s 138 of the *Motor Accidents Compensation Act* 1999 (NSW) .

[133] *Transport Accidents Compensation Act* 1987 (NSW) .

[134] New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 29 November 1988 at 3827 (Attorney-General Dowd).

[135] New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 29 November 1988 at 3832 (Attorney-General Dowd).

common law scheme for compensating motor accident victims"[134]. The concern that led to the provision regulating contributory negligence in connection with defined motor accidents was said to be that "a crisis point" had been reached in the award of damages in such cases[135] . It was for this reason that the provisions that became ss 74 and 76 were included in the *Motor Accidents Act* .

130. The Attorney-General, supporting in Parliament the introduction of those provisions, described the Bill as "another significant reform to common law rules, which should have a large impact by placing responsibility for safe conduct on all road users"[136]. By s 76 of the Act , the defence of voluntary assumption of risk (*volenti non fit injuria*) was abolished (save, later, in certain presently irrelevant cases of motor racing) [137] . Instead of considering cases to which that defence would otherwise have applied, an approach of apportionment was to be substituted. It was to be applied "on the presumption that the injured person … was negligent in failing to take sufficient care for his or her own safety". Thus, in proceedings for damages arising from a "motor accident" in New South Wales, one of the three legal categories mentioned in *Joyce* was abolished. Effectively, it was subsumed within contributory negligence as that defence had earlier been reformed by statute.

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[136] New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 29 November 1988 at 3833 (Attorney-General Dowd).

[137] The relevant provisions are set out in the joint reasons at [71].

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131. Of equal importance in the *Motor Accidents Act* were three changes introduced by s 74 of that Act. That section was enacted to supplement "[t]he common law and enacted law" [138] . First, s 74 obliges ("shall") a court to make a finding of contributory negligence in specified cases. Three of those cases are immaterial to the present appeals but indicate the *genus* with which Parliament was concerned: convictions of certain offences under traffic law; injuries to certain persons who were not wearing a seatbelt as required by law; and injuries to persons not wearing a protective helmet when required [139] . The category that is expressly relevant to the appeal of Ms Joslyn is stated in s 74(2)(b) . That paragraph reads, relevantly:

> "A finding of contributory negligence shall be made in the following cases:
>
> …
>
> (b) where:
>
> (i) the injured person … was, at the time of the motor accident, a voluntary passenger in or on a motor vehicle, and
>
> (ii) the driver's ability to drive the motor vehicle was impaired as a consequence of the consumption of alcohol … and the injured person … was aware, or ought to have been aware, of the impairment".

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[138] *Motor Accidents Act* , s 74(1) .

[139] *Motor Accidents Act* , s 74(2)(a) , (c), (d).

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132. The parliamentary instruction that a court "shall" make a finding of contributory negligence in the specified cases may not be ignored when it applies to the facts. It represents the expressed will of the legislature acting within its powers. Clearly enough, it was enacted to arrest, or correct, any disinclination that might exist on the part of the decision-maker to give effect to such a finding. Once the precondition in the identified categories is fulfilled, the duty of the decision-maker ("shall") is enlivened. The finding of contributory negligence must then be made.

133. **Following paragraph cited by:**

Boral Bricks Pty Ltd v Cosmidis (No 2) (07 May 2014) (McColl, Basten and Emmett JJA)

> 50. However there are differences between s 138(3) of the MAC Act and s 9 (1)(b) of the 1965 Act. As Kirby J explained in *Joslyn v Berryman* (at [133]), albeit by reference to s 74(3) of the MAA (which as I have said is relevantly on all fours with s 138(3) of the MAC Act):
>
> "Secondly, in s 74(3) of the Motor Accidents Act , Parliament has avoided the more complex statement of the criteria found in s 10(1) of the 1965 Act. There is no reference to the respective 'faults' of the persons involved. Nor is there a reference to the 'responsibility for the damage'. In s 74(3) provision is simply made for the reduction of the damages recoverable 'as the court thinks just and equitable in the circumstances of the case'. It is not entirely clear whether this more limited formula replaced the previous statement of the 'enacted law' set out in the 1965 Act. On the face of things, it appears to do so and thus leaves wholly at large the reduction for contributory negligence, made by reference to nothing more than what 'the court thinks just and equitable'"

Mackenzie v The Nominal Defendant (07 June 2005) (Giles JA, Stein AJA and Gzell J)

Secondly, in s 74(3) of the *Motor Accidents Act* , Parliament has avoided the more complex statement of the criteria found in s 10(1) of the 1965 Act. There is no reference to the respective "faults" of the persons involved. Nor is there a reference to the "responsibility for the damage". In s 74(3) provision is simply made for the reduction of the damages recoverable "as the court thinks just and equitable in the circumstances of the case". It is not entirely clear whether this more limited formula replaced the previous statement of the "enacted law" set out in the 1965 Act. On the face of things, it appears to do so and thus leaves wholly at large the reduction for contributory negligence, made by reference to nothing more than what "the court

thinks just and equitable". If this is the effect of s 74(3) , as I think it is, it introduces into appellate review of decisions on apportionment for contributory negligence in cases of motor accidents an even greater obstacle to the demonstration of appealable error[140].

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[140] See also *Motor Accidents Act* , s 74(8) .

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134. Thirdly, perhaps as a means of safeguarding parties against arbitrary determinations under s 74 (3) , provision is made by s 74(4) of the *Motor Accidents Act* for the court to state its reasons "for determining the particular percentage". Typically, statements of reasons enhance the availability of appellate reconsideration where the reasons disclose that extraneous or irrelevant considerations have been given effect [141] .

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[141] cf *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 666 ; *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 388.

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135. *An erroneous oversight*: Enough has been said of the provisions of the relevant statutes, which were differentially applicable to the claims of Mr Berryman against Ms Joslyn and the Council, to indicate why the failure of the Court of Appeal expressly to address attention to the statutory language constituted error. In particular, in the case of the judgment against Ms Joslyn, in respect of what was undoubtedly a "motor accident" within the *Motor Accidents Act* , if the applicable law was to be applied accurately, it was essential for the primary judge and the Court of Appeal to give explicit attention to the requirements of s 74 of that Act.

136. Prima facie, the requirement of s 74(2)(b) of the *Motor Accidents Act* was engaged. At the very least, even if, because of alcohol consumption, it could be said that "the driver's ability to drive the motor vehicle was impaired as a consequence of the consumption of alcohol" (as seems clearly to have been established in the case of Ms Joslyn) but that the "injured person" (Mr Berryman) was not in fact "aware" of that impairment at the relevant time of her driving the motor vehicle by reason of his own intoxication and fatigue, the question would remain, within s 74(2) , whether Mr Berryman "ought to have been aware … of the impairment".

137. In this case, the issue of contributory negligence was not therefore to be decided by reference to general considerations affecting contributory negligence at common law, as modified by the apportionment statute. It was governed by "enacted law". The duty of the Court of Appeal was therefore to apply that enacted law. This is yet another instance in which applicable statute law has been overlooked in favour of judge-made law [142] . When a statute applies (as it did here) it is fundamental that it must be given effect according to its terms. There is nothing to suggest that any of the considerations of the relevant statutes were addressed by the Court of Appeal. Instead of attention being focussed on the meaning of s 74 (2)(b)(ii) (as should have been the case) the appeals were determined without reference to the considerations that the governing sub-paragraph of statute law required.

[142] Some of the recent instances include *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 89 [46] ; *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 545 [63] ; *Allan v Transurban City Link Ltd* (2001) 208 CLR 167 at 184-185 [54] ; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 111-112 [249] and *Conway v The Queen* (2002) 209 CLR 203 at 227 [65] ; cf Hayne, "Letting Justice be Done Without the Heavens Falling", (2001) 27 *Monash University Law Review* 12 at 16.

138. Nor can this be regarded an immaterial error. The clear purpose of s 74(2) of the *Motor Accidents Act* was to address what must be taken to have been a determination on the part of the New South Wales Parliament that findings of contributory negligence *should* be made in certain identified cases and, by inference, that the disinclination of the courts to so find, evident in the cases to some of which I have referred, was to be corrected in furtherance of the solution to the "crisis point in the calculation of damages" mentioned by the Attorney-General and in pursuance of the "large impact" deemed desirable "by placing responsibility for safe conduct on all road users"[143].

[143] New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 29 November 1988 at 3832-3833 (Attorney-General Dowd).

139. When, in that statutory context, it is asked whether Mr Berryman "was aware, or ought to have been aware" of the fact that Ms Joslyn's ability as a driver to drive the motor vehicle was "impaired as a consequence of the consumption of alcohol" a different answer might be given than if the issue was wholly at large or was to be determined solely by reference to the considerations of "responsibility for the damage" mentioned in the 1965 Act. In the *Motor Accidents Act* , once the conditions were fulfilled (including those stated in s 74(2)(b)) the requirement to make a finding of contributory negligence was obligatory.

140. Applying this statutory provision, contributory negligence was therefore complete in the present case. All that had to be shown was that Mr Berryman was "aware, or ought to have been aware" of Ms Joslyn's "impairment". This did not require demonstration by the appellants of the fact that he was aware or ought to have been aware of the precise degree of incapacity that existed or of total inability on the part of Ms Joslyn to drive the vehicle. According to the undisputed evidence, Mr Berryman was certainly aware that Ms Joslyn had been consuming alcoholic drinks for many hours. To his knowledge, she had only a short interval of sleep when they set out for Mildura. Mr Berryman was also aware of the particular propensities of his vehicle that were relevant to any other driver's ability to drive it. To the extent that, because of impairment of cognition and fatigue, Mr Berryman did not actually focus upon, and consider, the issue of Ms Joslyn's ability to drive the motor vehicle, the question remains whether he "ought to have been aware" of these considerations.

141. It could not be said that the possibility of a journey to Mildura for breakfast, of his falling asleep at the wheel and handing the ignition keys to Ms Joslyn was something unforeseeable to Mr Berryman when he proceeded upon his course of alcohol consumption on the evening and morning before his accident. Already, as the primary judge found, he had left the party by his vehicle at about 11.00 to 11.30pm "to secure cigarettes"[144]. His continued use of the vehicle, although he was increasingly affected by alcohol consumption, was thus readily foreseeable. It was far from unlikely that the hand-over to Ms Joslyn of the keys of the vehicle would occur and that she would then accept the implied invitation and continue the return journey which Mr Berryman felt incapable of completing. In the circumstances it cannot be said that he was other than "a voluntary passenger in … a motor vehicle" from the moment he exchanged his place at the wheel with Ms Joslyn.

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[144] Reasons of the primary judge at 12.

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142. *The oversight establishes error*: It follows that, to find that there was no contributory negligence at all on the part of Mr Berryman, and in particular to do so without reference to the applicable statute law, constituted legal error. That error requires that the appeals be upheld and that the appeals and cross-appeal to the Court of Appeal be redetermined by that Court. That must be done by reference to the statute law governing each appeal to that Court.

The factual evaluation issue

143. In the light of the foregoing conclusion, and the consequential need to return the proceedings to the Court of Appeal, it is strictly unnecessary to resolve all the other complaints made for Ms Joslyn (supported by the Council) in respect of the factual errors that were said to underpin the conclusion that was reached, reversing that of the primary judge. Although a different statutory regime governs the resolution of the defence of contributory negligence in the proceedings between Mr Berryman and the Council, there is no reason to think that the conclusion of the Court of Appeal was right in the Council's case, although wrong in the "motor accident" proceedings concerning Ms Joslyn.

144. The mere fact that, at the time Ms Joslyn took the keys and accepted Mr Berryman's express or implied invitation to drive his vehicle, she did not appear to be affected by alcohol intoxication is much less significant in this case than it might be in other factual circumstances. If, for example, a passenger, without knowledge of a driver's insobriety, accepted an invitation to travel in a vehicle, the initial appearances of the driver could be very important to the statutory question of what was "just and equitable in the circumstances of the case" [145] . Similarly, it could be important to what a court thinks is "just and equitable having regard to the claimant's share in the responsibility for the damage" [146] .

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[145] *Motor Accidents Act* , s 74(3) .

[146] The 1965 Act, s 10(1) .

145. Such considerations were scarcely determinative in Mr Berryman's case because, before he became seriously inebriated as he did, he was able to, and did, observe Ms Joslyn engaged in a similar pattern of extended consumption of alcohol. Although Mr Berryman went to sleep at 4.00am, and may not have seen Ms Joslyn, as described, "staggering drunk" at about that time, it cannot seriously be suggested that it was not open to the primary judge to infer that Mr Berryman was aware of her extensive drinking. Her deceptive appearance of sobriety at the time he offered her his keys and exchanged positions with her at the wheel, whilst not irrelevant, could not in the circumstances enjoy the factual significance which the Court of Appeal assigned to them [147] . Other witnesses who saw her after the accident might say that she showed no signs of intoxication. But Mr Berryman knew differently. This will commonly be the case where a driver and passenger have engaged, together or close by, in an extended bout of alcohol consumption over a continuous interval [148] .

[147] *Berryman* (2001) 33 MVR 441 at 446 [21] .

[148] As in *Saunders* (1988) 8 MVR 209; *McGuire* (1990) 11 MVR 385; *Morton* [1990] 2 Qd R 419; *Williams* (1995) 21 MVR 148; *McPherson* [1996] 1 Qd R 474.

146. A second factual error lay in the Court of Appeal's conclusion that the only action on the part of Mr Berryman that could possibly have amounted to contributory negligence was permitting Ms Joslyn "to drive instead of him" [149] . With respect, this represented an undue narrowing of the questions to be resolved, whether under the legislation governing motor accidents or under the general legislation provided in the 1965 Act. Even if the particular requirements of the *Motor Accidents Act* were ignored, the 1965 Act looks at the issue of "responsibility" more globally. As a price for relieving a claimant from the total disqualification which the common law had previously provided in the case of contributory negligence, the 1965 Act authorises the court, deciding the claimant's entitlement of damages, to reduce any such damages that would otherwise be recoverable by reference to "his own [partial] fault". All that is provided by way of criteria is the definition of "fault"; the direction to the consideration of the "claimant's share in the responsibility for the damage"; and the authorisation to make the deduction "to such extent as the court thinks just and equitable".

[149] *Berryman* (2001) 33 MVR 441 at 446 [21] .

147. Having regard to the matters which Mr Berryman knew when he made it possible for Ms Joslyn to drive his vehicle, it is impossible to say that the trial judge erred in determining that his conduct in setting out on the journey to Mildura and later enabling Ms Joslyn to drive part of the return, engaged s 10(1) of the 1965 Act in respect of his claim against the Council. To the extent that Mr Berryman disabled himself from making rational choices by drinking so

much alcohol that he was greatly affected by it and seriously fatigued, it was open to the primary judge to conclude that it was "just and equitable" that his recovery should be reduced because he shared in the responsibility for the damage that followed. In short, Mr Berryman ought to have known that in setting out to Mildura what happened might occur, as it quickly did. In providing the keys and exchanging places with Ms Joslyn he made that possibility an actuality.

148. **Following paragraph cited by:**

TAC v Estate of Ewer (28 October 2009) (Robson J)

I do not say that Mr Berryman's "share in the responsibility for the damage" was as large as that of Ms Joslyn. My general view on such matters remains as I stated it in *Williams* [150] . The comparable roles of Ms Joslyn and Mr Berryman in the "causative potency" of the events leading to Mr Berryman's damage appear to me to be quite different [151] .

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[150] (1995) 21 MVR 148 .

[151] cf *Talbot-Butt* (1990) 12 MVR 70 at 88.

Ascertaining the responsibility of an intoxicated passenger

149. That returns me to the earlier cases of intoxicated passengers. With respect, I differ from Hayne J [152] concerning the utility of considering the decisions in which factual issues of this kind have been decided. This is a staple diet of trial courts and intermediate courts throughout Australia. Two broad approaches can be seen in the cases. The analysis of the relevant provisions of the *Motor Accidents Act* and the 1965 Act assists in identifying the preferable one. It is the approach that gives effect to the purposes of the apportionment legislation that is to be favoured. This Court has a responsibility to make that clear. Of the judicial approaches discussed, the one that takes the broader focus of considering the entire course of conduct by the intoxicated passenger is preferable to that which narrows the lens to focus exclusively on the events immediately preceding the accident. This is the approach that the statutes in issue here, and both of them, require.

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[152] See reasons of Hayne J at [158].

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150. The Court of Appeal reached the finding of no contributory negligence on the part of Mr Berryman by adopting the narrower approach. That affirmed, in effect, Mr Berryman's submission that at the time immediately before the accident, he was, as a result of alcohol consumption and fatigue, deprived of the ability to make rational choices and therefore could

not be held to have been at fault in law for the damage that ensued. But the words of the statutory provisions and their objects invite consideration of all the relevant facts in a less restrictive allocation of responsibility for the damage. Section 10(1) of the 1965 Act looks at fault in a broad way and s 74(2) of the *Motor Accidents Act* confers a discretion on the judge to decide the issue of contributory negligence by reference to whether the passenger "ought to have been aware" of the driver's impairment, the exercise of which also requires a broad focus, by reference to the objective evidence as well as the question of foreseeability of risk to a passenger in a car driven by an intoxicated driver.

151. The parties will now have the opportunity to canvass their respective factual arguments on the challenges to the apportionment made by the primary judge – Mr Berryman asserting that such apportionment was appealably excessive and Ms Joslyn asserting that it was appealably inadequate. Each will advance their respective arguments, as will the Council, on the footing that the primary judge, who considered the broader factual context, was correct to find some contributory negligence on the part of Mr Berryman proved. Such contributory negligence was established, both under the *Motor Accidents Act* (in the claim against Ms Joslyn) and under the 1965 Act (in the claim against the Council).

Orders

152. Each appeal should therefore be allowed with costs. I agree in the orders proposed in the joint reasons.

153. HAYNE J. The facts and circumstances giving rise to these appeals are set out in the joint reasons of Gummow and Callinan JJ. I do not repeat them. I agree that each of the appeals to this Court should be allowed with costs. I do not agree, however, that the primary judge was shown to have erred in assessing the level of contributory negligence as he did. I would therefore restore the judgment of the primary judge.

154. As the reasons of the other members of the Court demonstrate, the evidence at trial warranted, indeed compelled, the conclusion that Mr Berryman was contributorily negligent. The primary judge found the ability of the driver of the vehicle at the time of the accident, Ms Joslyn, to drive the vehicle was impaired as a consequence of her consumption of alcohol. (He found as a fact that her blood alcohol level at the time of the accident was about 0.138 grams per 100 millilitres.)

155. On these findings of fact, s 74(2)(b) of the *Motor Accidents Act* 1988 (NSW) was engaged. Sec tion 74(2) required the primary judge to make a finding of contributory negligence. The question was then what reduction in damages recoverable did the court think "just and equitable in the circumstances of the case" [153] . The primary judge gave careful attention to this question and concluded that a reduction of 25 per cent was appropriate.

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[153] *Motor Accidents Act* 1988 (NSW), s 74(3) .

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156. There is no basis for concluding that the primary judge erred in making the factual findings which he did. The Court of Appeal did not expressly say that the primary judge had erred in this way. Rather, the Court of Appeal addressed a different question: one which it was said [154] the primary judge did not. The question which the Court of Appeal appears to have considered to be determinative was whether, at the time he handed control of the car to Ms Joslyn, Mr Berryman should have observed that she was affected by intoxication. That is a narrower and different question from the question presented by s 74(2)(b) of the Act . The relevant statutory question – ought the injured person to have been aware of the impairment of the driver's ability to drive as a consequence of the consumption of alcohol – invited attention to wider considerations. They included all matters reasonably bearing upon the injured person's knowledge of impairment, not just observations which it was open to the injured person to make at the time of handing over control of the vehicle or getting into the vehicle as a passenger. The primary judge considered these matters. The Court of Appeal did not.

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[154] *Berryman v Joslyn* (2001) 33 MVR 441 at 446 [21] .

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157. **Following paragraph cited by:**

Finniss v State of New South Wales (08 December 2023) (Payne and Stern JJA, Basten AJA)
Finniss v State of New South Wales (08 December 2023) (Payne and Stern JJA, Basten AJA)
Finniss v State of New South Wales (08 December 2023) (Payne and Stern JJA, Basten AJA)
Whitby v Insurance Australia Limited t/as NRMA (18 July 2022)

47. The approach in *Podrebersek* therefore remains relevant, notwithstanding the changed legislative landscape: see *Joslyn* per Hayne J [157] and *Mackenzie* per Giles JA at [62] . Section 3.38 of the MAI Act does not purport to impinge on the obligation to have regard to the injured person's share in the responsibility for the damage; it should not be read as an exception to s 9(1) *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) to which it is made subject by s 3.38 of the MAI Act.

Shaikh v Risk (03 October 2019) (Dicker SC DCJ)
Mathews v Schuler (23 May 2019) (Dicker SC DCJ)
A Fife and Co Pty Ltd v Pane (02 November 2018) (Dicker SC DCJ)
Hyjer v Lopes (31 January 2018) (Dicker SC DCJ)

182. In *Calcagno v Dent* [2015] NSWDC 308 Mahony DCJ stated the following general principles in relation to contributory negligence under the Act and ss 5R and 5S of the CLA :

[87] Contributory negligence in relation to a motor accident is to be determined by application of both s 138 of the Motor (Accidents Compensation) Act 1999 ("MACA") and ss 5R and 5S of the CLA .

[88] Section 138 of the MACA provides relevantly as follows:

> "**Contributory negligence — generally**
>
> (1) The common law and enacted law as to contributory negligence apply to an award of damages in respect of a motor accident, except as provided by this section.
>
> …
>
> (3) The damages recoverable in respect of the motor accident are to be reduced by such percentage as the court thinks just and equitable in the circumstances of the case.
>
> (4) The court must state its reasons for determining the particular percentage."

[89] Division 8 of the CLA is headed "Contributory negligence". It provides:

> "**Standard of contributory negligence**
>
> 5R (1) The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.
>
> (2) For that purpose;
>
> > (a) The standard of care required of the person who suffered harm is that of a reasonable person in the position of that person, and
> >
> > (b) The matter is to be determined on the basis of what that person knew or ought to have known at the time.
>
> **5S Contributory negligence can defeat claim**
>
> In determining the extent of the reduction in damages by reason of contributory negligence, a court may determine a reduction of 100 per cent if the court thinks it is just and equitable to do so, with the result that the claim for damages is defeated."

[90] In *Gordon v Truong* [2014] NSWCA 97, Basten JA (Macfarlan JA agreeing), set out the principles applicable in determining contributory negligence by application of s 138 of the MACA and ss 5R and 5S of the CLA as follows:

"15 The principles applicable in determining whether a person has been negligent include the "General principles" set out in s 5B . Applying these principles as required by the statute is not without its difficulties. Where the plaintiff and defendant are both drivers in control of similar vehicles, questions of negligence and contributory negligence can readily be assessed according to the same broad standards. However, where the plaintiff is a pedestrian and the defendant a driver of a vehicle, the negligence of the defendant is to be assessed against the risk of harm to the plaintiff, while the contributory negligence of the plaintiff is, generally, to be assessed against a risk of harm to him — or herself. (It is possible that the carelessness of a pedestrian may create a risk of harm to other drivers, for example, if a car is forced to swerve to avoid a pedestrian, but that is not this case). The harm which the motor vehicle is likely cause to the pedestrian is, on one view, precisely the same harm which should have been foreseeable to the pedestrian. However, the precautions which each should reasonably take will be different in kind.

16 The purpose of s 5R may be gleaned from the recommendations in the *Review of the Law of Negligence: Final Report* (September 2002) which are, in this case, reflected in the statute. At par 8.7, the Report stated:

> Should the law allow people to take less care for their own safety than it requires others to take for their safety? … Another way of putting this question is to ask whether the standard of care applicable to victims of the negligent conduct of others should be different from that applicable to the negligent person merely because they are victims?

17 The Report then stated at par 8.11:

> Leading text book writers have asserted that in practice, the standard of care applied to contributory negligence is lower than that applied to negligence despite the fact that, in theory, the standard should be the same. There is a perception (which may reflect the reality) that many lower courts are more indulgent to plaintiffs than to defendant. In some cases judges have expressly applied a lower standard of care for contributory negligence. This may result, for example, in motorists being required to keep a better lookout than pedestrians. In the Panel's view, this approach should not be supported.

18 The penultimate sentence was supported by reference to three judgments in the High Court and two in the South Australian

Supreme Court. The comments of Murphy J in *Watt v Bretag* (1982) 56 ALJR 760at 762–763, are in point. Referring to the South Australian equivalent of the 1965 Act, s 9(1)(b), Murphy J stated:

> The speed and size and weight of the vehicles in contributing to the severity of the damage should be taken into account, not merely those factors which contributed to the collision … For example, where the collision is between a semi-trailer or other juggernaut vehicle and a pedal bicycle, even if the driver and the plaintiff rider each made an equal contribution to causing the collision, it would generally be just and equitable to reduce the plaintiff's damages not by half, but by much less. Similarly, excessive speed may greatly increase the damage, even though the fault of the other driver was the major cause of the collision."

[91] The correct application of these principles was further explained in *Davis v Swift* [2014] NSWCA 458 by Meagher JA (with whom Leeming JA agreed) as follows:

> "23 Section 138(1) of the MAC Act provides that the 'common law and enacted law as to contributory negligence' apply to an award of damages in respect of a motor accident, except as provided by that section. The enacted law relevantly is the Law Reform (Miscellaneous Provisions) Act 1965 (NSW (LR Act), s 9 and the Civil Liability Act 2002 (NSW) (CL Act), ss 5R and 5S . Sections 138 (2) and (3) vary the enacted law; the former by requiring findings of contributory negligence to be made in particular cases; and the latter by describing in more general terms the matters to which regard may be had when apportioning responsibility.
>
> 24 The starting point is s 9(1) which provides that if the claimant 'suffers damage as the result partly of the claimant's failure to take reasonable care (contributory negligence) and partly of the wrong of any other person' the damages recoverable in respect of the wrong 'are to 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'. That description of contributory negligence reflects the common law position that the claimant's lack of care must contribute to the occurrence of the injury or the nature or extent of it: *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601at 611 in a passage cited with approval by the majority in *Astley v Austrust Ltd* [1999] HCA 6; 197 CLR 1 at [21] .
>
> 25 The approach to the reduction of damages in accordance with the language of s 9(1) was described in *Podrebersek v Australian Iron & Steel Pty Limited* [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. 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.

26 Section 138(3) is in different terms to s 9(1) and the other State provisions based on s 1(1) of the Law Reform (Contributory Negligence) Act 1945 (UK). Whereas those provisions require the Court when assessing what is 'just and equitable' to have regard 'to the claimant's share in the responsibility for the damage', s 138(3) provides:

> (3) The damages recoverable in respect of the motor accident are to be reduced by such percentage as the court thinks just and equitable in the circumstances of the case.

27 Section 74(3) of the Motor Accidents Act 1988 (NSW) is in the same terms. In *Nicholson v Nicholson* (1994) 35 NSWLR 308 at 333–334, Mahoney JA suggested a reason for the use of the broader language. The concept of contributory negligence involves the plaintiff's lack of care contributing to the damage. However, the effect of s 74(2) which is in similar terms to s 138(2) , is to require a finding of contributory negligence in cases where the act or omission may not have caused or contributed to the damage claimed. Relevantly in that case, s 74(2)(c) required a finding of contributory negligence 'where the injured person … was … not wearing a seat belt as required' by law. That being the position, the broader language may have been used to allow the Court in such cases to recognise that it would be unjust and inequitable, where there was no such causation or contribution, to reduce the damages otherwise recoverable. The remaining members of the Court, Kirby P with Meagher JA agreeing, also held that the finding of contributory negligence required by s 74(2)(c) did not constrain the inquiry as to what was 'just and equitable' or prevent consideration of all of the circumstances, including whether the absence of a seat belt contributed to the damage claimed.

28 In a case that does not involve a finding of contributory negligence made under s 138(2) or deemed fault on the part of the owner or driver, an assessment of what is 'just and equitable in the circumstances of the case' will involve, as part of that evaluative process, a comparison of the kind described in Podrebersek. See the discussion per Giles JA in *Mackenzie v The Nominal Defendant* [2005] NSWCA 180 ; 43 MVR 315 at [54]–[63] . In *Joslyn v Berryman* [2003] HCA 34 ; 214 CLR 552 at [157] Hayne J considered s 74(3) to require the undertaking of such a comparison: cf Kirby J at [133]].

29 Section 5R of the CL Act, which by s 3B(2)(a) applies to motor accidents, provides that the principles applicable in determining whether a person has been negligent, which include those in s 5B , also apply in determining whether the person who has suffered harm has been contributorily negligent in failing to take precautions against the risk of harm which materialised and resulted in injury. As Basten JA observed in *Gordon v Truong* [2014] NSWCA 97; 66 MVR 241 at [15] , a case involving a collision between a pedestrian and a motor vehicle, the existence and extent of a claimant's contributory negligence is to be assessed by reference to the risk of harm which is the subject of his or her claim for damages, and the precautions that a reasonable person in the claimant's position would have taken against that risk. Section 5S provides that in apportioning responsibility a court may determine a reduction of 100 per cent in the claimant's damages by reason of contributory negligence."

[92] More recently, in *Grills v Leighton Contractors Pty Ltd* [2015] NSWCA 72, Beazley P (Barrett and Gleeson JJA agreeing) said as follows:

"161 The effect of s 5R therefore is to require the court, in determining whether a person is contributorily negligent, to apply the provisions of s 5B and s 5C , being the statutory provisions applicable to determining breach. There may be a question whether any aspect of the common law continues to apply to the determination. However, that question does not need to be determined in this case.

162 As has been remarked in various cases in this Court, there is a conceptual difficulty in applying the general principles identified in ss 5B and 5C to the determination of contributory negligence: the question of breach is directed to whether a person has breached a duty owed to another person; contributory negligence, however, requires a determination whether a person has taken reasonable care for the person's own safety. Once this difference in the fact finding task is recognised, the manner of application of s 5B becomes apparent. Consideration is required to be given to the statutory prescriptions in s 5B . In doing so, it is to be borne in mind that s 5B (2) is not limited to the factors identified in s 5B(2)(a) — (d) and

> that pursuant to s 5R(2) , the standard of care is that of a reasonable person in the position of the plaintiff and the matter is to be determined on the basis of what the person knew. Once a finding of contributory negligence has been made, the Motor Accidents Compensation Act, s 138(3) required the court to reduce the damages recoverable 'by such percentage as the court thinks just and equitable in the circumstances of the case.'"

Rhonda Payne v Lee Ronald Witt (11 April 2017) (Mahony SC DCJ)
Calcagno v Dent (18 December 2015) (Mahony SC DCJ)
Catherine Robertson v Joshua Liebmann (01 October 2015) (Mahony SC DCJ)

39. The correct application of these principles was further explained in *Davis v Swift* [2014] NSWCA 458 by Meagher JA (with whom Leeming JA agreed) as follows:

> "23 Section 138(1) of the MAC Act provides that the 'common law and enacted law as to contributory negligence' apply to an award of damages in respect of a motor accident, except as provided by that section. The enacted law relevantly is the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW (LR Act), s 9 and the *Civil Liability Act 2002* (NSW) (CL Act), ss 5R and 5S . Sections 138(2) and (3) vary the enacted law; the former by requiring findings of contributory negligence to be made in particular cases; and the latter by describing in more general terms the matters to which regard may be had when apportioning responsibility.
>
> 24 The starting point is s 9(1) which provides that if the claimant 'suffers damage as the result partly of the claimant's failure to take reasonable care (contributory negligence) and partly of the wrong of any other person' the damages recoverable in respect of the wrong 'are to 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'. That description of contributory negligence reflects the common law position that the claimant's lack of care must contribute to the occurrence of the injury or the nature or extent of it: *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601 at 611 in a passage cited with approval by the majority in *Astley v Austrust Ltd* [1999] HCA 6; 197 CLR 1 at [21] .
>
> 25 The approach to the reduction of damages in accordance with the language of s 9(1) was described in Podrebersek v Australian Iron & Steel Pty Limited [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, 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 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.

26 Section 138(3) is in different terms to s 9(1) and the other State provisions based on s 1(1) of the *Law Reform (Contributory Negligence) Act 1945* (UK). Whereas those provisions require the Court when assessing what is 'just and equitable' to have regard 'to the claimant's share in the responsibility for the damage', s 138(3) provides:

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28 In a case that does not involve a finding of contributory negligence made under s 138(2) or deemed fault on the part of the owner or driver, an assessment of what is 'just and equitable in the circumstances of the case' will involve, as part of that evaluative process, a comparison of the kind described in Podrebersek. See the discussion per Giles JA in Mackenzie v The Nominal Defendant [2005] NSWCA 180; 43 MVR 315 at [54] – [63] . In Joslyn v Berryman [2003] HCA 34 ; 214 CLR 552 at [157] Hayne J considered s 74(3) to require the undertaking of such a comparison: cf Kirby J at [133]].

29 Section 5R of the CL Act, which by s 3B(2)(a) applies to motor accidents, provides that the principles applicable in determining whether a person has been negligent, which include those in s 5B , also apply in determining whether the person who has suffered harm has been contributorily negligent in failing to take precautions against the risk of harm which materialised and resulted in injury. As Basten JA observed in *G*

ordon v Truong [2014] NSWCA 97; 66 MVR 241 at [15] , a case involving a collision between a pedestrian and a motor vehicle, the existence and extent of a claimant's contributory negligence is to be assessed by reference to the risk of harm which is the subject of his or her claim for damages, and the precautions that a reasonable person in the claimant's position would have taken against that risk. Section 5S provides that in apportioning responsibility a court may determine a reduction of 100 per cent in the claimant's damages by reason of contributory negligence."

Stuart Douglas Parker v Charles Youmaran (11 September 2015) (Hatzistergos DCJ)
Radojka Backo v Kris Akhurst (18 May 2015) (Hatzistergos DCJ)
Verryt v Schoupp (15 May 2015) (Meagher and Gleeson JJA, Sackville AJA)

20. The relevant statutory provisions are referred to in my judgment in *Davis v Swift* [2014] NSWCA 458 at [23] – [26], [28] – [29] :

> [23] Section 138(1) of the MAC Act provides that the "common law and enacted law as to contributory negligence" apply to an award of damages in respect of a motor accident, except as provided by that section. The enacted law relevantly is the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) (LR Act), s 9 and the *Civil Liability Act 2002* (NSW) (CL Act), ss 5R and 5S . Sections 138(2) and (3) vary the enacted law; the former by requiring findings of contributory negligence to be made in particular cases; and the latter by describing in more general terms the matters to which regard may be had when apportioning responsibility.
>
> [24] The starting point is s 9(1) which provides that if the claimant "suffers damage as the result partly of the claimant's failure to take reasonable care (contributory negligence) and partly of the wrong of any other person" the damages recoverable in respect of the wrong "are to 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". That description of contributory negligence reflects the common law position that the claimant's lack of care must contribute to the occurrence of the injury or the nature or extent of it: *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601 at 611 in a passage cited with approval by the majority in *Astley v Austrust Ltd* [1999] HCA 6; 197 CLR 1 at [21] .
>
> [25] The approach to the reduction of damages in accordance with the language of s 9(1) was described 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, 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 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.

[26] Section 138(3) is in different terms to s 9(1) and the other State provisions based on s 1(1) of the *Law Reform (Contributory Negligence) Act 1945* (UK). Whereas those provisions require the Court when assessing what is "just and equitable" to have regard "to the claimant's share in the responsibility for the damage", s 138(3) provides:

> (3) The damages recoverable in respect of the motor accident are to be reduced by such percentage as the court thinks just and equitable in the circumstances of the case.

…

[28] In a case that does not involve a finding of contributory negligence made under s 138(2) or deemed fault on the part of the owner or driver, an assessment of what is "just and equitable in the circumstances of the case" will involve, as part of that evaluative process, a comparison of the kind described in *Podrebersek* . See the discussion per Giles JA in *Mackenzie v The Nominal Defendant* [2005] NSWCA 180; 43 MVR 315 at [54] - [63] . In *Joslyn v Berryman* [2003] HCA 34; 214 CLR 552 at [157] Hayne J considered s 74(3) [of the *Motor Accidents Act 1988* (NSW) , which is in the same terms as s 138(3)] to require the undertaking of such a comparison: cf Kirby J at [133].

[29] Section 5R of the CL Act , which by s 3B(2)(a) applies to motor accidents, provides that the principles applicable in determining whether a person has been negligent, which include those in s 5B, also apply in determining whether the person who has suffered harm has been contributorily negligent in failing to take precautions against the risk of harm which materialised and resulted in injury. As Basten JA observed in *G ordon v Truong* [2014] NSWCA 97; 66 MVR 241 at [15] , a case involving a collision between a pedestrian and a motor vehicle, the existence and extent of a claimant's contributory negligence is to be assessed by reference to the risk of harm which is the subject of his or her claim for damages, and the precautions that a reasonable person in the claimant's position would have taken against that risk. Section 5S provides that in apportioning responsibility a court may determine a reduction of 100 per cent in the claimant's damages by reason of contributory negligence.

Davis v Swift (22 December 2014) (Meagher and Leeming JJA, Adamson J)
Motorcycling Events Group Australia Pty Ltd v Kelly (29 October 2013) (Basten, Meagher and Gleeson JJA)
Robbins v Skouboudis and Suncorp Metway Insurance Limited (22 April 2013) (Martin J)

Allianz Australia Insurance Ltd v Swainson (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 ; *Smith 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.

Zanner v Zanner (15 December 2010) (Allsop P, Tobias and Young JJA)
Laresu Pty Ltd v Clark (04 August 2010) (Tobias and Macfarlan JJA, Handley AJA)
Turkmani v Visvalingam (27 July 2009) (Beazley JA at 1; Hodgson JA at 7; McColl JA at 60)
Bostik Australia Pty Ltd v Liddiard (26 June 2009) (Beazley JA at 1; Ipp JA at 113; Basten JA at 128)

105 In *Liftronic Pty Limited v Unver* [2001] HCA 24; (2001) 75 ALJR 867 Gleeson CJ at [2] cited with approval the passage in *Podrebersek* to which I have just referred. Kirby J pointed out, at [90] , that the questions of contributory negligence and apportionment are always questions of fact. Although *Liftronic* in

volved an apportionment by a jury, the principles stated in *Podrebersek* were confirmed. 106 The principle has been consistently applied. As Hayne J observed in *Joslyn v Berryman* (2003) 214 CLR 552; [2003] HCA 34 at [157] , " *[f]indings about apportionment of responsibility are not lightly to be disturbed* ". His Honour then set out the above passage from *Podrebersek* . 107 For my part, I do not see any appellable error in his Honour's assessment of the respective contributions for which Bostik and Brolton were liable as between themselves. There was sense in his Honour's initial assessment of matters that pointed to equal contribution, although I would not have labelled the relationship between the two as a joint venture. The question for his Honour's consideration was, having regard to the respective relationship of each of Bostik and Brolton to Mr Liddiard and the responsibilities that were inherent in those relationships, what proportion of liability should each bear. 108 There were factors that pointed to an assessment that their relative contributions to Mr Liddiard's injury were equal. In particular, although Brolton had provided Mr Liddiard's services to Bostik, Brolton was his employer and was on site at all times. Although it had provided Mr Liddiard's services to Bostik, it was fully aware of the tasks that Mr Liddiard was undertaking and the manner in which he undertook those tasks. In particular, he was fully aware of the system in place for the collection of the rubbish bins. Mr Liddiard looked to Mr Lynch for employment-related matters, as instanced by his evidence that if he needed help with any matter in the course of his employment, he would approach Mr Lynch. 109 For its part, Bostik was responsible for the premises as I have discussed above, and it had engaged Mr Liddiard's services, through Brolton, to keep those premises in a clean condition. In my opinion, for the reasons I have already given, the system of work involved in Mr Liddiard's tasks as a general hand was a system for which Bostik had ultimate responsibility. This is so, notwithstanding that it is likely that in an immediate sense it was Brolton that adopted Dow Corning's system of work. Mr Pearce's position was that he left such matters to Mr Lynch, " *because he was looking after the outside of the gardens* ". That did not mean, however, that Bostik was entitled to do nothing. There is a difficulty, in any event, with this evidence. Mr Pearce did not say that that was a communicated arrangement with Mr Lynch. Nor did Bostik cross-examine Mr Lynch on the basis that that was the arrangement between Brolton and Bostik. 110 Bostik did not establish that Brolton in fact was in charge of the outdoor area. Mr Pearce's evidence did not establish that was the case and the fact that Bostik required a general hand would make this unlikely. Whilst it is likely that Brolton merely adopted the system that was in place under Dow Corning, Bostik's overall responsibility for the premises and for safety systems for the work that was required to be carried out on the premises was such that I do not consider that there was any error in his Honour's assessment of contribution.

Perkins v Redmond Company Pty Ltd (13 July 2007) (Rein SC DCJ)
Skulander v Willoughby City Council (18 May 2007) (Mason P; Beazley JA; Basten JA)
Fantis v Abi-Mosleh (29 March 2007) (Bleby, Gray and Layton JJ)
Roth v RTA (09 March 2007) (Hall J at 1)
Evans v Lindsay (11 December 2006) (Beazley JA; Ipp JA; Bryson JA)

82. *Podrebersek* has been consistently applied: see *Joslyn v Berryman* (2003) 214 CLR 552; [2003] HCA 34 at [157] per Hayne J ; *Liftronic Pty Limited v Unver* (2001) 75 ALJR 867; [2001] HCA 24 per Gleeson CJ.

Shellharbour City Council v Rigby (27 November 2006) (Beazley JA; Ipp JA; Basten JA)
Avram v Gusakoski (06 February 2006) (Malcolm CJ, Pullin JA, Murray AJA)

30 Although an appeal court will intervene to correct a trial Judge's assessment of the extent of contributory negligence where necessary (see ***Czatyrko v Edith Cowan University*** (2005) 214 ALR 349), it is still true that on appeal the appeal court is only justified in interfering if it is satisfied that the apportionment at trial is plainly wrong. In a passage from ***Podrebersek v Australian Iron & Steel Pty Ltd*** (1985) 59 ALJR 492, cited by Hayne J in ***Joslyn*** at [157] , 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,

(Page 10)

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."

Wills v Bell (14 November 2003) (Hayne and Heydon JJ)

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.

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[155] *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492; 59 ALR 529 ; *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301; *Wynbergen v Hoyts Corporation Pty Ltd* (1997) 72 ALJR 65; 149 ALR 25; *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867; 179 ALR 321.

[156] (1985) 59 ALJR 492 at 493494; 59 ALR 529 at 532.

[157] [1943] AC 197 at 201.

[158] [1958] VR 594 .

[159] (1985) 59 ALJR 492 at 494; 59 ALR 529 at 532533 .

[160] (1956) 96 CLR 10 at 16.

[161] [1953] AC 663 at 682.

[162] [1958] Tas SR 36 at 4249 .

[163] [1976] VR 208 at 219.

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158. **Following paragraph cited by:**

Wellington Shire Council v Steedman (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

[7] *Liftronic Pty. Ltd. v. Unver* (2001) 75 ALJR 867, at 885, per Kirby, J.; *Joslyn v. Berryman* , at [158] , per Hayne , J.

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* .

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[164] (2001) 75 ALJR 867 at 885 [90]; 179 ALR 321 at 345.

[165] *Sungravure Pty Ltd v Meani* (1964) 110 CLR 24 at 37 per Windeyer J; *Easson v London and North Eastern Railway Co* [1944] KB 421 at 426.

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159. I would, therefore, order, in each appeal:

1. Appeal allowed with costs.

2. Set aside par 2 of the orders of the Court of Appeal of New South Wales made on 11 April 2001 and in its place order that the appeal in *Allan Troy Berryman v Sally Inch Joslyn & Anor* be dismissed with costs.

Cited by:

Knowles v Interprac Financial Planning Pty Ltd [2025] QSC 78 -
VWA v Seventy First Trading Pty Ltd [2025] VCC 342 -
VWA v Seventy First Trading Pty Ltd [2025] VCC 342 -

Carleton v National Spiritual Assembly of the Baha'is of Australia [2025] TASSC 11 (12 March 2025) (Pearce J)

51 The findings I have made mean that the defendant's claim of contributory negligence must also fail. A finding of contributory negligence is a finding that a person contributed to his or her own injury by failing to take reasonable care for his or her own safety. The *Wrongs Act* 1959, s 4(1) , provides that the damages recoverable by a person injured partly as a result of his or her own wrongful act "shall be reduced to such extent up to 100% as the court thinks just and equitable, having regard to the claimant's share in the responsibility for the damage." The test for contributory negligence is an objective one, to be determined having regard to all of the circumstances of the case: *Joslyn v Berryman* [2003] HCA 34, 214 CLR 552 . The *Civil Liability Act* , s 23 , provides:

> "**23 Standard of contributory negligence**
>
> (1) The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent for the purpose of apportioning liability under section 4 of the *Wrongs Act* 1954 .
>
> (2) For the purpose of apportioning liability under section 4 of the *Wrongs Act*
>
> 1954 –
>
> (a) the standard of care required of the person who suffered harm is that required of a reasonable person in the position of that person; and
>
> (b) the matter is to be determined on the basis of what that person knew or ought to have known at the time."

14 No 11/2025

Touch for Health Pty Ltd as Trustee for Knight Superannuation Fund v Property Mentors Australia Pty Ltd (No 3) [2024] FCA 1381 -
Content removed [2024] NSWSC 1495 (27 November 2024) (Walton J)

320. The first defendant's submissions with respect to contributory negligence were as follows:

> "65. In the event it is liable, SDN raise a defence of contributory negligence. The question is whether, in the circumstances giving rise to the accident, the plaintiff failed to exercise reasonable standard of care for his own safety: *T and X Company Pty Ltd v Chivas* [2014] NSWCA 235, [4]. This involves an objective test based on the facts and circumstances of the case, including what the plaintiff knew or ought to have known at the time: CLA s 5R(2)(b) ; *Joslyn v Berryman* (2003) 214 CLR 552, [16] ; *Origin Energy LPG Pty Ltd v Bestcare Foods Ltd* [2012] NSWCA 407, [217] .
>
> 66. Applying those principles, it was the plaintiff alone that created the risk by spilling the noodle. She alone failed to observe the spill and clean it up in accordance with the work procedures.

67. The "court may determine a reduction of 100% if the court thinks it just and equitable to do so": s 5S of the CLA ."

Baxter v AAI Limited t/as GIO [2024] NSWPIC 643 -
Gilmour v Blue Care [2024] QDC 189 -
Gilmour v Blue Care [2024] QDC 189 -
Inkamala v An Assessor under s 24 of the Victims of Crime Act [2022] NTCAT 20 -
Manhattan Homes Pty Limited v Burnett [2024] NSWCA 219 -
Shearman v Dosen Holdings [2024] ACTMC 4 -
Finniss v State of New South Wales [2023] NSWCA 292 -
Finniss v State of New South Wales [2023] NSWCA 292 -
Finniss v State of New South Wales [2023] NSWCA 292 -
Chamberlain v Scentre Shopping Centre Management (WA) Pty Ltd [2023] WADC 145 -
Chamberlain v Scentre Shopping Centre Management (WA) Pty Ltd [2023] WADC 145 -
Cassidy v Metro Trains Melbourne Pty Ltd [2023] VCC 1866 (18 October 2023) (Fraatz J)

124 Mrs Cassidy is guilty of contributory negligence if Metro Trains can show that she failed to take reasonable care for her own safety, and this failure to take reasonable care results, in part, to her injury. [88] Like negligence, the test is an objective one, [89] disregarding any idiosyncrasies of Mrs Cassidy in question. The surrounding factual context must be considered in determining what is reasonable in the circumstances.

via

[89] *Joslyn v Berryman; Wentworth Shire Council v Berryman* (2003) 214 CLR 552, [32] (per McHugh J)

Gulati v Insurance Australia Limited t/as NRMA Insurance [2023] NSWPIC 549 -
Sivonen v Smith [2023] NSWSC 984 (29 September 2023) (Harrison AsJ)

157. The question is whether, in the circumstances giving rise to the accident, the plaintiff failed to exercise reasonable care for his own safety: *T and X Company Pty Ltd v Chivas* [2014] NSWCA 235 at [4] . This involves an objective test based on the facts and circumstances of the case, including what the plaintiff knew or ought to have known at the time: CLA s 5R(2)(b) ; *Joslyn v Berryman* (2003) 214 CLR 552 at 558-559 per McHugh J ; *Origin Energy LPG Pty Ltd v Bestcare Foods Ltd* [2012] NSWCA 407 at [217] per Hoeben JA (Macfarlan and Ward JJA agreeing).

Ali Khan Babayi v Eden Park Fruits Pty Ltd [2023] NSWSC 473 (05 May 2023) (Harrison AsJ)

289. The question is whether, in the circumstances giving rise to the accident, the plaintiff failed to exercise reasonable care for his own safety: *T and X Company Pty Ltd v Chivas* [2014] NSWCA 235, [4]. This involves an objective test based on the facts and circumstances of the case, including what the plaintiff knew or ought to have known at the time: CLA s 5R(2)(b) ; *Joslyn v Berryman* (2003) 214 CLR 552, 558-559 [16] (McHugh J); *Origin Energy LPG Pty Ltd v Bestcare Foods Ltd* [2012] NSWCA 407, [217] .

Taaga v Cic Allianz Insurance Limited [2023] NSWPIC 49 -
Shuk v Allianz Australia Insurance Limited [2022] NSWPIC 764 -
Fayad v Insurance Australia Limited t/as NRMA Insurance [2022] NSWPIC 763 -
Banmala v AAI Limited t/as GIO [2022] NSWPIC 762 -
Miric v Allianz Australia Insurance Limited [2022] NSWPIC 753 -

Smythe v Cic Allianz Insurance Limited [2022] NSWPIC 758 -
Insurance Australia Limited t/as NRMA Insurance v Dobner [2022] NSWPIC 502 -
Insurance Australia Limited t/as NRMA Insurance v Dobner [2022] NSWPIC 502 -
McGrath v Insurance Australia Limited t/as NRMA Insurance [2022] NSWPIC 492 -
Osman By His Tutor Osman v Clement [2022] NSWDC 385 -
Whitby v Insurance Australia Limited t/as NRMA [2022] NSWPIC 437 (18 July 2022)

5. In its submissions the insurer accepts that contributory negligence would be less than 61% if the claimant had not authorised the use of her own vehicle and given the keys to her sister, Leanne. However, the circumstance in the claim is that the owner of the vehicle authorised the use of her vehicle in circumstances where she was aware that her cousin had taken ICE and given the same to her. The insurer claims that the claimant administered the drugs to her cousin, the insured driver. The insurer relies on the authority in *Joslyn v Berryman* [2003] HCA 34; 214 CLR 552 (*Joslyn*) where cases such as these rises to a standard where there is no duty.

Evidence before me

Whitby v Insurance Australia Limited t/as NRMA [2022] NSWPIC 437 (18 July 2022)

47. The approach in *Podrebersek* therefore remains relevant, notwithstanding the changed legislative landscape: see *Joslyn* per Hayne J [157] and *Mackenzie* per Giles JA at [62] . Section 3.38 of the MAI Act does not purport to impinge on the obligation to have regard to the injured person's share in the responsibility for the damage; it should not be read as an exception to s 9(1) *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) to which it is made subject by s 3.38 of the MAI Act.

Whitby v Insurance Australia Limited t/as NRMA [2022] NSWPIC 437 -
Whitby v Insurance Australia Limited t/as NRMA [2022] NSWPIC 437 -
Whitby v Insurance Australia Limited t/as NRMA [2022] NSWPIC 437 -
Whitby v Insurance Australia Limited t/as NRMA [2022] NSWPIC 437 -
Whitby v Insurance Australia Limited t/as NRMA [2022] NSWPIC 437 -
Whitby v Insurance Australia Limited t/as NRMA [2022] NSWPIC 437 -
Whitby v Insurance Australia Limited t/as NRMA [2022] NSWPIC 437 -
Muscat v Allianz Australia Insurance Limited [2022] NSWPIC 337 (29 June 2022) (Maurice Castagnet)

48. McColl JA set out the proper approach to assessment of contributory negligence in *Pollard v Baulderstone Hornibrook Engineering Pty Ltd* [2008] NSWCA 99 at [13]-[14] :

> "At common law, a plaintiff is guilty of contributory negligence when the plaintiff exposes himself or herself to a risk of injury which might reasonably have been foreseen and avoided and suffers an injury within the class of risk to which he or she was exposed: *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552 (at [16]) per McHugh J. As the primary judge recognised, the issue of contributory negligence was governed by s 5R of the *Civil Liability Act* ...
>
> The words 'reasonable person in the position of that person' in s 5R are equivalent to the words 'a reasonable person in the plaintiff's position': *Waverley Council v Ferreira* [2005] NSWCA 418; (2005) Aust Torts Reports 81-818 (at [87]); *Carey v Lake Macquarie City Council* [2007] NSWCA 4 (at [10]). Section 5R reflects 'the expectation that, in general, people will take as much care for themselves as they expect others to take for them': *Consolidated Broken Hill Ltd v Edwards* [2005] NSWCA 380; (2005) Aust Torts Reports 81-815 (at [70]) per Ipp JA (Giles JA and Hunt AJA agreeing)."

Shakhesi v QBE Insurance (Australia) Limited [2022] NSWPIC 362 -

Pietrobelli v Jewell Family Nominees Pty Ltd [2022] NSWSC 660 -
Hooper v Citywide Service Solutions [2022] VSC 239 -
Woods v Murray River Council [2022] NSWDC 120 -
Woods v Murray River Council [2022] NSWDC 120 -
Raad v Cossey [2022] NSWDC 59 -
Raad v Cossey [2022] NSWDC 59 -
Raad v Cossey [2022] NSWDC 59 -
Raad v Cossey [2022] NSWDC 59 -
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Raad v Cossey [2022] NSWDC 59 -
Raad v Cossey [2022] NSWDC 59 -
Stav Investments Pty Ltd v Taylor [2022] NSWSC 208 (09 March 2022) (Ward CJ in Eq)

543. Turning then to the claim in contributory negligence, I am not persuaded that this has been established. A finding of contributory negligence turns on an examination of the factual circumstances in order to determine whether the plaintiffs contributed to their own loss by failing to take reasonable care of their person, property or economic circumstances (see *Astley v Austrust Ltd* (1999) 197 CLR 1; [1999] HCA 6 at [30] per Gleeson CJ, McHugh, Gummow and Hayne JJ). Contributory negligence is to be determined objectively: a plaintiff will be guilty of contributory negligence where they expose themselves to a risk which might reasonably have been foreseen and avoided, and suffer damage within the class of risk to which they exposed themselves (*Joslyn v Berryman* (2003) 214 CLR 552; [2003] HCA 34 at [16] and [32] per McHugh J).

Port Sorell Bowls Club Inc v Dann [2022] TASFC 2 -
Biggs v O'Connor [2021] VSC 826 (13 December 2021) (Keogh J)

33. Consumption of alcohol may impair the capacity of a driver to exercise care for the safety of others. There may be circumstances in which a passenger's knowledge of the driver's incapacity means that no duty of care is owed, or that there is a defence of voluntary assumption of risk. [2] The defendant bears the onus of negativing the existence of a duty, or establishing a defence of voluntary assumption of risk. [3]

via

[2] *Gala v Preston* (1991) 172 CLR 243, 253–254 ('*Gala*'); *Joslyn v Berryman* (2003) 214 CLR 552, 560 [20] ; *Imbree v McNeilly* (2008) 236 CLR 510, 527.

Inthaphala v Insurance Australia Limited t/as NRMA Insurance [2021] NSWPIC 541 (29 November 2021)

160. Ms Allen said that the claimant's contributory negligence should be at least 50% and said this case was on all fours with *Joslyn v Berryman* [54] which resulted in a finding of 60% contributory negligence.

Inthaphala v Insurance Australia Limited t/as NRMA Insurance [2021] NSWPIC 541 (29 November 2021)

162. The case of *Joslyn v Berryman* is not, in my view, 'on all fours' with this case. While both driver and passenger in that case were affected by alcohol, the vehicle was defective and the plaintiff had taken over the driving and was a less experienced driver than her passenger.

Inthaphala v Insurance Australia Limited t/as NRMA Insurance [2021] NSWPIC 541 -
Wassell v Ken Carr Bobcat & Tipper Hire Pty Ltd [2021] NSWSC 1415 -
Al-Kes-Butrus v NRMA [2021] NSWPIC 510 -
Cutting Edge Services Pty Ltd v Raymond and Therese Penfold; Raymond and Therese Penfold v The Hollard Insurance Company Pty Ltd [2021] NSWSC 1322 -
McDonald v National Express Group Australia (Bayside Trains) Pty Ltd (ACN 087 425 287) [2021] VCC 926 -
McDonald v National Express Group Australia (Bayside Trains) Pty Ltd (ACN 087 425 287) [2021] VCC 926 -
ABZ v AAI Limited t/as AAMI [2021] NSWPIC 246 -
Turner v Carrington Ginning Pty Limited [2021] NSWSC 445 (30 April 2021) (Cavanagh J)

103. In *Pollard v Baulderstone Hornibrook Engineering Pty Ltd* ,[4] McColl JA set out the proper approach to the assessment of contributory negligence in a case such as this:

> "[13] At common law, a plaintiff is guilty of contributory negligence when the plaintiff exposes himself or herself to a risk of injury which might reasonably have been foreseen and avoided and suffers an injury within the class of risk to which he or she was exposed: *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552 (at [16]) per McHugh J. As the primary judge recognised, the issue of contributory negligence was governed by s 5R of the *Civil Liability Act* which provides:
>
> > (1) The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.
> >
> > (2) For that purpose:
> >
> > > (a) The standard of care required of the person who suffered harm is that of a reasonable person in the position of that person, and
> > >
> > > (b) The matter is to be determined on the basis of what that person knew or ought to have known at the time.
>
> [14] The words 'reasonable person in the position of that person' in s 5R are equivalent to the words 'a reasonable person in the plaintiff's position': *Waverley Council v Ferreira* [2005] NSWCA 418; (2005) Aust Torts Reports ¶81-818 (at [87]); *Care y v Lake Macquarie City Council* [2007] NSWCA 4 (at [10]). Section 5R reflects 'the expectation that, in general, people will take as much care for themselves as they expect others to take for them': *Consolidated Broken Hill Ltd v Edwards* [2005] NSWCA 380; (2005) Aust Torts Reports ¶81-815 (at [70]) per Ipp JA (Giles JA and Hunt AJA agreeing)."

City Pacific Ltd (in liq) v CBRE (V) Pty Ltd [2021] NSWSC 456 -
Mount Arthur Coal Pty Ltd v Duffin [2021] NSWCA 49 -
Gregory Spencer Ward trading as Ward's Stock Transport v Watson [2021] WASCA 44 -
Benning v Richardson [2021] ACTSC 34 -
Kelly v Thorn; Monteleone v Thorn (No 8) [2021] NSWSC 118 -
Wreford v Lyle [No 3] [2021] WASCA 20 (11 February 2021) (Quinlan CJ; Murphy and Pritchard JJA)

103. The last opportunity rule was a common law doctrine developed by judges to weaken the harshness of the common law rule that contributory negligence was a complete defence. [101] At common law, a plaintiff 'was entitled to recover, despite his or her own negligence, if the defendant had the last opportunity of avoiding the accident but failed to do so due to negligence'. [102] The rule was, in effect, an 'all or nothing' exception to the 'all or nothing'

common law defence of contributory negligence. For this reason, both the common law defence, and the 'last opportunity' exception, came in for much criticism for the unfair and unreasonable results that they produced.[103]

via

[101] ***Joslyn v Berryman*** [2003] HCA 34; (2003) 214 CLR 552 [18] (McHugh J).

Wreford v Lyle [No 3] [2021] WASCA 20 -
Wreford v Lyle [No 3] [2021] WASCA 20 -
AAI Limited t/as Suncorp Insurance v Lifetime Care and Support Authority of New South Wales [2021] NSWSC 64 -
Hubbard v CPB Contractors Pty Limited (No 2) [2020] NSWSC 1922 -
Smith v Coles Supermarkets Australia Pty Ltd t/as Coles Distribution Centre; Ready Workforce (A Division of Chandler Macleod) Pty Ltd v Coles Supermarkets Australia Pty Ltd [2020] NSWCA 206 -
Sloan v Service Stream Limited [2020] SADC 98 (28 July 2020) (Schammer J)

Holyoak v Ivanoff (1995) 183 LSJS 21; *Bowden v Colbey* [2005] SASC 387; *Fox v Wood (1981)* 148 CLR 438; *Wyong Shire Council v Shirt* (1980) 146 CLR 40; *Clare & Gilbert Valleys Council v Kruse* [2019] SASCFC 106; *Podrebersek v Australian Iron & Steel Pty Ltd* [1985] HCA 34; *Joslyn v Berryman* (2003) 214 CLR 552 ; *Consolidated Broken Hill Ltd v Edwards* [2005] NSWCA 380; *Pennington v Norris* (1956) 96 CLR 10; *Marc h v E & MH Stramare Pty Ltd* (1991) 171 CLR 506; *Wallace v Kam* [2013] HCA 19; *Purkess v Crittenden* (19 65) 114 CLR 164; *Ridolfi v Hammond* [2012] NSWCA 3; *Eicas v Dawson* [2016] SASCFC 124; *Calvaresi & Rota Forma Pty Ltd v Lawson & Lawson* (1995) 184 LSJS 147; *Wheeler v Page & Harris* (1982) 31 SASR 1, considered.

Sloan v Service Stream Limited [2020] SADC 98 -
Sloan v Service Stream Limited [2020] SADC 98 -
El Hallak v Sydney Trains [2020] NSWDC 374 -
Ajia v TJ & RF Fordham Pty Ltd trading as TRN Group [2020] NSWDC 371 (20 July 2020) (Scotting DCJ)

In determining if a person is guilty of contributory negligence it is necessary to have regard to their personal responsibility for his or her own safety: *Consolidated Broken Hill Ltd v Edwards* [2005] NSWCA 380 at [67]-[68] . Contributory negligence is determined objectively from the facts and circumstances of a case, which includes what the injured person knew or ought to have known at the time: *Joslyn v Berryman* (2003) 214 CLR 552 at [16] .

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 -
PC Case Gear Pty Ltd v Instrat Insurance Brokers Pty Ltd (in liq) [2020] FCA 137 (19 February 2020) (Anderson J)

194. In *Astley* , the majority stated that, "[a]t common law, contributory negligence consisted in the failure of a plaintiff to take reasonable care for the protection of his or her person or property": ibid at [21] per Gleeson CJ, McHugh, Gummow and Hayne JJ. This overarching principle continues despite statutory modification: see s 62(1) of the *Victorian Wrongs Act* . The conduct of the plaintiff will be judged on an objective basis: ibid, s 62(2) . The onus is on the defendant to prove that the plaintiff's negligence contributed to the plaintiff's loss: *Anderson v Eric Radio & TV Pty Ltd* [1965] HCA 61; 114 CLR 20 (***Anderson***) at 43 per Windeyer J; *Joslyn v Berryman* [2003] HCA 34; 214 CLR 552 at [18] per McHugh J . It should also be recalled that causation is central to the defence of contributory negligence: *Ackland v Commonwealth of Australia* [2007] NSWCA 250; (2007) Aust Torts Reports 81-916 at [138] per Ipp JA, citing *Caswel l v Powell Duffryn Associated Collieries Limited* [1940] AC 152 at 165 per Lord Atkin. That is, for an award of damages to be reduced on the basis of the plaintiff's negligence, that negligence must be a *cause* of the plaintiff's relevant loss.

PCCG's failure to inform Instrat of risk

Badger v John Kagelaris Pty Ltd [2019] NSWSC 1792 -
Badger v John Kagelaris Pty Ltd [2019] NSWSC 1792 -
Shaikh v Risk [2019] NSWDC 557 -
Rodd v Hall [2019] NSWSC 1304 -
Makaroff v Nepean Blue Mountains Local Health District [2019] NSWSC 715 -
Dempsey v Am Controls Pty Ltd; Am Controls Pty Ltd v Atlas Metal Processors Pty Ltd; Atlas Metal Processors Pty Ltd v Am Controls Pty Ltd [2019] NSWSC 698 -
Mathews v Schuler [2019] NSWDC 203 -
Bucic v Arnej Pty Ltd [2019] VSC 330 -
Mackey v Hunter Valley Gardens Pty Ltd [2019] NSWDC 150 -
State of New South Wales v Charter Hall Retail Management Limited (formerly Macquarie Countrywide Management Limited) [2019] NSWDC 95 -
Thompson v J-Corp Pty Ltd [2018] WADC 164 -
Thompson v J-Corp Pty Ltd [2018] WADC 164 -
Australian Securities and Investments Commission v State One Stockbroking Limited [2018] FCA 1830 -
A Fife and Co Pty Ltd v Pane [2018] NSWDC 332 -
Ryan Wealth Holdings Pty Ltd v Baumgartner [2018] NSWSC 1502 -
Coles Supermarkets Australia Pty Ltd v Bridge [2018] NSWCA 183 (17 August 2018) (Leeming and Payne JJA, Emmett AJA)

29. The question is whether the plaintiff has taken that degree of care for his or her own safety that an ordinary reasonable person would take: *Joslyn v Berryman* (2003) 214 CLR 552; [2003] HCA 34 at [34] , [38] and [70] .

Avopiling Pty Ltd v Bosevski [2018] NSWCA 146 (27 July 2018) (McColl, Payne and White JJA)

Joslyn v Berryman (2003) 214 CLR 552; [2003] HCA 34 ; *Ghunaim v Bart* [2004] NSWCA 28, applied.

Avopiling Pty Ltd v Bosevski [2018] NSWCA 146 -
Avopiling Pty Ltd v Bosevski [2018] NSWCA 146 -
Avopiling Pty Ltd v Bosevski [2018] NSWCA 146 -
Matte v Delandro (No 3) [2018] NSWDC 235 -
Cam & Bear Pty Ltd v McGoldrick [2018] NSWCA 110 -
Pocock v Citi-Steel Pty Ltd [2018] QDC 81 -
Pocock v Citi-Steel Pty Ltd [2018] QDC 81 -
Hyjer v Lopes [2018] NSWDC 8 (31 January 2018) (Dicker SC DCJ)

182. In *Calcagno v Dent* [2015] NSWDC 308 Mahony DCJ stated the following general principles in relation to contributory negligence under the Act and ss 5R and 5S of the CLA :

> [87] Contributory negligence in relation to a motor accident is to be determined by application of both s 138 of the Motor (Accidents Compensation) Act 1999 ("MACA") and ss 5R and 5S of the CLA .
>
> [88] Section 138 of the MACA provides relevantly as follows:
>
> > "**Contributory negligence — generally**
> >
> > (1) The common law and enacted law as to contributory negligence apply to an award of damages in respect of a motor accident, except as provided by this section.
> >
> > ...

(3) The damages recoverable in respect of the motor accident are to be reduced by such percentage as the court thinks just and equitable in the circumstances of the case.

(4) The court must state its reasons for determining the particular percentage."

[89] Division 8 of the CLA is headed "Contributory negligence". It provides:

"**Standard of contributory negligence**

5R (1) The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.

(2) For that purpose;

(a) The standard of care required of the person who suffered harm is that of a reasonable person in the position of that person, and

(b) The matter is to be determined on the basis of what that person knew or ought to have known at the time.

5S Contributory negligence can defeat claim

In determining the extent of the reduction in damages by reason of contributory negligence, a court may determine a reduction of 100 per cent if the court thinks it is just and equitable to do so, with the result that the claim for damages is defeated."

[90] In *Gordon v Truong* [2014] NSWCA 97, Basten JA (Macfarlan JA agreeing), set out the principles applicable in determining contributory negligence by application of s 138 of the MACA and ss 5R and 5S of the CLA as follows:

"15 The principles applicable in determining whether a person has been negligent include the "General principles" set out in s 5B . Applying these principles as required by the statute is not without its difficulties. Where the plaintiff and defendant are both drivers in control of similar vehicles, questions of negligence and contributory negligence can readily be assessed according to the same broad standards. However, where the plaintiff is a pedestrian and the defendant a driver of a vehicle, the negligence of the defendant is to be assessed against the risk of harm to the plaintiff, while the contributory negligence of the plaintiff is, generally, to be assessed against a risk of harm to him — or herself. (It is possible that the carelessness of a pedestrian may create a risk of harm to other drivers, for example, if a car is forced to swerve to avoid a pedestrian, but that is not this case). The harm which the motor vehicle is likely cause to the pedestrian is, on one view, precisely the same harm which should have been foreseeable to the pedestrian. However, the precautions which each should reasonably take will be different in kind.

16 The purpose of s 5R may be gleaned from the recommendations in the *Review of the Law of Negligence: Final Report* (September 2002) which are, in this case, reflected in the statute. At par 8.7, the Report stated:

Should the law allow people to take less care for their own safety than it requires others to take for their safety? ... Another way of putting this question is to ask whether the standard of care applicable to victims of the negligent conduct of others should be different from

> that applicable to the negligent person merely because they are victims?

17 The Report then stated at par 8.11:

> Leading text book writers have asserted that in practice, the standard of care applied to contributory negligence is lower than that applied to negligence despite the fact that, in theory, the standard should be the same. There is a perception (which may reflect the reality) that many lower courts are more indulgent to plaintiffs than to defendant. In some cases judges have expressly applied a lower standard of care for contributory negligence. This may result, for example, in motorists being required to keep a better lookout than pedestrians. In the Panel's view, this approach should not be supported.

18 The penultimate sentence was supported by reference to three judgments in the High Court and two in the South Australian Supreme Court. The comments of Murphy J in *Watt v Bretag* (1982) 56 ALJR 760at 762–763, are in point. Referring to the South Australian equivalent of the 1965 Act, s 9(1)(b), Murphy J stated:

> The speed and size and weight of the vehicles in contributing to the severity of the damage should be taken into account, not merely those factors which contributed to the collision ... For example, where the collision is between a semi-trailer or other juggernaut vehicle and a pedal bicycle, even if the driver and the plaintiff rider each made an equal contribution to causing the collision, it would generally be just and equitable to reduce the plaintiff's damages not by half, but by much less. Similarly, excessive speed may greatly increase the damage, even though the fault of the other driver was the major cause of the collision."

[91] The correct application of these principles was further explained in *Davis v Swift* [2014] NSWCA 458 by Meagher JA (with whom Leeming JA agreed) as follows:

> "23 Section 138(1) of the MAC Act provides that the 'common law and enacted law as to contributory negligence' apply to an award of damages in respect of a motor accident, except as provided by that section. The enacted law relevantly is the Law Reform (Miscellaneous Provisions) Act 1965 (NSW (LR Act), s 9 and the Civil Liability Act 2002 (NSW) (CL Act), ss 5R and 5S . Sections 138(2) and (3) vary the enacted law; the former by requiring findings of contributory negligence to be made in particular cases; and the latter by describing in more general terms the matters to which regard may be had when apportioning responsibility.
>
> 24 The starting point is s 9(1) which provides that if the claimant 'suffers damage as the result partly of the claimant's failure to take reasonable care (contributory negligence) and partly of the wrong of any other person' the damages recoverable in respect of the wrong 'are to 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'. That description of contributory negligence reflects the common law position that the claimant's lack of care must contribute to the occurrence of the injury or the nature or extent of it: *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601at 611 in a passage cited with approval by the majority in *Astley v Austrust Ltd* [1999] HCA 6; 197 CLR 1 at [21] .

25 The approach to the reduction of damages in accordance with the language of s 9(1) was described in *Podrebersek v Australian Iron & Steel Pty Limited* [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. 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.

26 Section 138(3) is in different terms to s 9(1) and the other State provisions based on s 1(1) of the Law Reform (Contributory Negligence) Act 1945 (UK). Whereas those provisions require the Court when assessing what is 'just and equitable' to have regard 'to the claimant's share in the responsibility for the damage', s 138(3) provi des:

> (3) The damages recoverable in respect of the motor accident are to be reduced by such percentage as the court thinks just and equitable in the circumstances of the case.

27 Section 74(3) of the Motor Accidents Act 1988 (NSW) is in the same terms. In *Nicholson v Nicholson* (1994) 35 NSWLR 308 at 333–334, Mahoney JA suggested a reason for the use of the broader language. The concept of contributory negligence involves the plaintiff's lack of care contributing to the damage. However, the effect of s 74(2) which is in similar terms to s 138(2) , is to require a finding of contributory negligence in cases where the act or omission may not have caused or contributed to the damage claimed. Relevantly in that case, s 74(2)(c) required a finding of contributory negligence 'where the injured person ... was ... not wearing a seat belt as required' by law. That being the position, the broader language may have been used to allow the Court in such cases to recognise that it would be unjust and inequitable, where there was no such causation or contribution, to reduce the damages otherwise recoverable. The remaining members of the Court, Kirby P with Meagher JA agreeing, also held that the finding of contributory negligence required by s 74(2)(c) did not constrain the inquiry as to what was 'just and equitable' or prevent consideration of all of the circumstances, including whether the absence of a seat belt contributed to the damage claimed.

28 In a case that does not involve a finding of contributory negligence made under s 138(2) or deemed fault on the part of the owner or driver, an assessment of what is 'just and equitable in the circumstances of the case' will involve, as part of that evaluative process, a comparison of the kind described in Podrebersek. See the discussion per Giles JA in *Mackenzie v The Nominal Defendant* [2005] NSWCA 180 ; 43 MVR 315 at [54]–[63] . In *Joslyn v Berryman* [2003] HCA 34 ; 214 CLR 552 at [157] H ayne J considered s 74(3) to require the undertaking of such a comparison: cf Kirby J at [133]].

> 29 Section 5R of the CL Act, which by s 3B(2)(a) applies to motor accidents, provides that the principles applicable in determining whether a person has been negligent, which include those in s 5B , also apply in determining whether the person who has suffered harm has been contributorily negligent in failing to take precautions against the risk of harm which materialised and resulted in injury. As Basten JA observed in *Gordon v Truong* [2014] NSWCA 97; 66 MVR 241 at [15] , a case involving a collision between a pedestrian and a motor vehicle, the existence and extent of a claimant's contributory negligence is to be assessed by reference to the risk of harm which is the subject of his or her claim for damages, and the precautions that a reasonable person in the claimant's position would have taken against that risk. Se ction 5S provides that in apportioning responsibility a court may determine a reduction of 100 per cent in the claimant's damages by reason of contributory negligence."

[92] More recently, in *Grills v Leighton Contractors Pty Ltd* [2015] NSWCA 72, Beazley P (Barrett and Gleeson JJA agreeing) said as follows:

> "161 The effect of s 5R therefore is to require the court, in determining whether a person is contributorily negligent, to apply the provisions of s 5B and s 5C , being the statutory provisions applicable to determining breach. There may be a question whether any aspect of the common law continues to apply to the determination. However, that question does not need to be determined in this case.
>
> 162 As has been remarked in various cases in this Court, there is a conceptual difficulty in applying the general principles identified in ss 5B and 5C to the determination of contributory negligence: the question of breach is directed to whether a person has breached a duty owed to another person; contributory negligence, however, requires a determination whether a person has taken reasonable care for the person's own safety. Once this difference in the fact finding task is recognised, the manner of application of s 5B becomes apparent. Consideration is required to be given to the statutory prescriptions in s 5B . In doing so, it is to be borne in mind that s 5B(2) i s not limited to the factors identified in s 5B(2)(a) — (d) and that pursuant to s 5R(2) , the standard of care is that of a reasonable person in the position of the plaintiff and the matter is to be determined on the basis of what the person knew. Once a finding of contributory negligence has been made, the Motor Accidents Compensation Act, s 1 38(3) required the court to reduce the damages recoverable 'by such percentage as the court thinks just and equitable in the circumstances of the case.'"

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)

37. The reason why such a finding is not lightly reviewed was explained by Kirby J in *Joslyn v Berryman* ,[17] who identified three factors which justify restraint in disturbing decisions on, *i nter alia*, apportionment, namely: [18]

> (1) the issue of apportionment is essentially a factual question and therefore the primary judge will have relevant advantages over an appellate court that will often be critical for the determination of the issue; [19]
>
> (2) the apportionment legislation confers upon the court a power to apportion the recoverable damages "to such extent" as the court determines "having regard to" a consideration expressed in

very general language ("the extent of each contributory's responsibility for the harm") that evokes the exercise of a quasi-discretionary judgment upon which different minds may readily come to different conclusions; and

(3) the broad criteria by which such decisions are made at trial (including by reference to what the court thinks "fair and equitable" in the case) 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

[18] [2003] HCA 34 at [119] .

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 -
Nominal Defendant v Buck Cooper [2017] NSWCA 280 -
Nominal Defendant v Buck Cooper [2017] NSWCA 280 -
Simon Felice v St George Masonic Club [2017] NSWDC 276 -
Simon Felice v St George Masonic Club [2017] NSWDC 276 -
Paskins v Hail Creek Coal Pty Ltd [2017] QSC 190 -
Paskins v Hail Creek Coal Pty Ltd [2017] QSC 190 -
Paskins v Hail Creek Coal Pty Ltd [2017] QSC 190 -
Lee v Dow [2017] NSWDC 220 (17 August 2017) (Dicker SC DCJ)

132. At paragraphs 144-146 of *Stojan (No 9) Pty Ltd v Kenway* [2009] NSWCA 364 McColl JA (with whom Ipp and Basten JJA agreed) stated as follows:

> [144] Pursuant to s 5R of the Civil Liability Act the principles are applicable in determining whether a person has been negligent also applied in determining whether the plaintiff was guilty of contributory negligence in failing to take precautions against the risk of the harm which befell her. The standard of care required of the plaintiff was that of a reasonable person in her position, and the matter was to be determined on the basis of what she knew or ought to have known at the time: s 5R(2) .
>
> [145] Section 5R(1) reflects the "fundamental idea that people should take responsibility for their own lives and safety" and also the proposition expressed by Callinan and Heydon JJ in *Vairy* (at [220]) that "the duty that [an injured plaintiff] owes is not just to look out for himself, but not to act in a way which may put him at risk, in the knowledge that society may come under obligations of various kinds to him if the risk is realized": *Consolidated Broken Hill Ltd v Edwards* [2005] NSWCA 380; (2005) Aust Torts Reports 81-815 at [68]–[70]); per Ipp JA (Giles JA and Hunt AJA agreeing); see also *Gordon Martin Pty Ltd v State Rail Authority (NSW)* [2009] NSWCA 287 (at [39]–[41]) per Beazley JA (Giles and Ipp JJA agreeing).
>
> [146] The question whether a person has been guilty of contributory negligence is determined objectively. The Council and Stojan bore the burden of proving that the plaintiff had been guilty of contributory negligence: *Gordon Martin Pty Ltd v State Rail Authority (NSW)* (at [42]); *Joslyn v Berryman* [2003] HCA 34 ; (2003) 214 CLR 552

(at [16] , [18]) per McHugh J; *Flower v Ebbw Vale St, Iron and Coal Co Ltd* [1936] AC 206 (at 216); *Commissioner for Railways v Halley* (1978) 20 ALR 409 (at 419).

Libra Collaroy Pty Ltd v Bhide [2017] NSWCA 196 -
Love v North Goonyella Coal Mines Pty Ltd [2017] QSC 140 -
Love v North Goonyella Coal Mines Pty Ltd [2017] QSC 140 -
Love v North Goonyella Coal Mines Pty Ltd [2017] QSC 140 -
Rhonda Payne v Lee Ronald Witt [2017] NSWDC 78 -
Cooper v Nominal Defendant [2017] NSWDC 3 (20 January 2017) (Neilson DCJ)

211. After considering the facts of the case then before him, Basten JA continued:

> "... the appellant submitted that the very substantial apportionment (80%) which it proposed was supported by three authorities, in each of which contributory negligence was assessed at 80%. In the first, *Williams v Government Insurance Office (NSW)* (1995) 21 MVR 148, the plaintiff and another couple had been drinking for several hours at a club. They left the club in a car owned by the plaintiff. Rather than drive herself, she handed the keys to her friend, with whom she had been drinking, whom she knew to be affected by alcohol and to be a learner driver. Her friend's husband, who was also inebriated, sat beside the driver, whilst the plaintiff lay down on the back seat of the vehicle. The driver lost control and the plaintiff was severely injured. The trial judge assessed contributory negligence at 80%, a figure with which this Court declined to interfere. (Kirby P, in dissent, would have reduced the figure to 40%.) Cole JA (with whom Meagher JA agreed) stated at 163:
>
> > "Here, the appellant ought reasonably to have foreseen that to hand the keys of her car to an inexperienced, alcohol affected, unlicensed learner plate driver to be assisted by a person himself too affected by alcohol to drive was to act both unreasonably and without prudence. The appellant ought to have reasonably foreseen that so doing exposed her to risk of gross injury.
> >
> > The extent of risk of injury commences with driving with an L-plate driver. That risk may be regarded as modest because the learner driver is normally assisted by a competent licensed driver who can give her instruction sufficient to avoid or minimise the likelihood of accident and thus damage. The risk is increased to a very great extent if the person giving such assistance so as to minimise risk is himself so affected by alcohol as not to be able satisfactorily or effectively to perform that task. It is magnified to a much greater extent if the inexperienced driver is affected by alcohol. And is magnified a fourth time if the passenger who is accepting these risks then lies in the rear seat of the vehicle without a seatbelt."

44. The second case was *Mackenzie v Nominal Defendant* [2005] NSWCA 180; 43 MVR 315. This was also a case in which the owner of the vehicle (a motorcycle) travelled as a pillion passenger, having invited a friend who had no licence and was believed by the plaintiff to be "immature and irresponsible", to drive the motorcycle. The plaintiff said that he would not "in his right mind" have permitted him to drive the motorcycle: at [26] . The driver's blood alcohol level was estimated at 0.187% at the time of the accident. The plaintiff's blood alcohol level was estimated at 0.25%. The trial judge fixed the plaintiff's culpability at 100%. In considering whether this Court should interfere, Giles JA (with whom Stein AJA and Gzell J agreed) stated at [101]:

> "In reconsidering the reduction of the passenger's damages in *Berryma n v Joslyn* [[2003] HCA 34 ; 214 CLR 552] a reduction of 60% was found, and in *Williams v Government Insurance Office (NSW)* a reduction of 80% was upheld. The cases turn on their own facts. I have gone to a number of other cases of intoxicated passengers of intoxicated drivers, and the assessments vary widely. It is necessary to make an assessment on the facts of this case."

45. The Court found error in the process of assessment and concluded that a just and equitable reduction was 80%: at [112].

46. The third case relied upon was *Zanner v Zanner* [2010] NSWCA 343; 79 NSWLR 702. The plaintiff, the mother of an 11-year-old boy, permitted her son to drive the family car into the carport, whilst she was standing two metres in front of the vehicle. The boy's foot slipped from the brake to the accelerator causing the car to collide with the plaintiff. The trial judge had assessed the mother's contributory negligence at 50 %. The appellant submitted that the reduction should have been 100%. This Court intervened, fixing the reduction at 80%.

47. There are a number of issues raised by the reliance placed on these cases. First, they are not "authorities" in the sense that they establish some legal principle: rather, each is an example of an assessment of responsibility based on particular facts. On the other hand, the wide variation in results noted by Giles JA may reveal an undesirable disparity in result between cases which are truly comparable. Kirby P in *Williams* was critical of "pious solecisms about the unique quality of the facts of each case", as a basis for not having regard to similar cases: at p 157.

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.

49. Thirdly, there is a superficial attraction in the submission made by senior counsel for the respondents Green and Golding that it cannot be just and equitable to attribute 80% of the blame for the accident to the injured passenger, when the primary causative event was the carelessness of the driver. However, the submission is attended by two separate difficulties. First, it elides causation and culpability. Culpability is the measure of departure from an appropriate standard of care and may be viewed separately from the causal link between carelessness and harm. Secondly, the comparison between the culpability of the driver and that of the injured plaintiff is problematic and highly fact-specific. For example, in *Zanner v Zanner* , the boy's mistake was to allow his foot to slip from the brake to the accelerator, an act of momentary inadvertence. His mother's error was to stand, unnecessarily, in the path of the vehicle whilst being driven by a young and inexperienced driver. In the present case, the respective failures of each plaintiff to avoid harm resulted from their willingness to travel in the car with a driver who was relatively inexperienced and intoxicated, and without seatbelts. The breach by the driver was not of a duty owed to himself, but of a duty of care owed to each of his passengers and, potentially, to other road users. An apportionment which is "just and equitable" requires the weighing of the culpability of each plaintiff as against that of the negligent driver and an assessment of the causative contribution of the lack of care of each. The range within which the resultant apportionment lies may, in a particular case, be quite broad.

50. The respondents noted that there were decisions in which similar conduct appeared to have given rise to findings of contributory negligence between 25% and 50%. In *Dennis v NRMA* [1997] NSWSC 570, James J assessed contributory negligence of 50% with respect to a claim by a plaintiff against his wife in circumstances where he knew she was driving while intoxicated and he, the

plaintiff, was not wearing a seatbelt. In *Nominal Defendant v Lane* [2004] NSWCA 405 the trial judge reduced the plaintiff's damages by 40%, in circumstances where both he and the driver were significantly affected by alcohol (their readings being between 0.144g/100ml and 0.175g/100ml) and he was not wearing a seatbelt (although the vehicle was only fitted with seatbelts inappropriately attached to the doors). This Court (Giles JA, with whom Ipp and Tobias JJA agreed) declined to intervene.

51. The third case from this State was *Dunnet v Brennan* [2000] NSWCA 211; 31 MVR 362. The plaintiff and two friends, all of whom were inebriated, stripped in order to expose their buttocks to people in the following vehicle, not an activity of high social value. They climbed out of the rear window and stood on the rear bumper bar, grasping the rear roof rack. The plaintiff then climbed onto the top of the vehicle, but was thrown off and injured when the vehicle turned a corner. His damages were reduced by 25%. Fitzgerald JA (with whom Priestley and Powell JJA agreed) noted that the reduction "might seem curious" taking into account the respondent's intoxicated state and "reckless folly": at [13] . Noting that other minds might consider a higher figure appropriate, the Court concluded that 25% was within the available range and therefore not a conclusion with which the Court was entitled to interfere: at [15].

52. As senior counsel for the respondents Green and Golding noted, neither these authorities nor those relied on by the appellant demonstrated any more than the availability of a wide range in broadly comparable circumstances.

53. If these cases were thought to be truly comparable, a range which extended from 25% to 80% is too broad to be acceptable. Even a range from 30% to 60%, which would allow the independent discretion of a trial judge to award half (or twice) what another judge would award, might appear to involve an element of arbitrariness or caprice.

54. However, the two groups of cases to which the Court was referred were not broadly comparable with the present case. As counsel for the respondents correctly noted, each of the cases relied upon by the appellant, where a reduction of 80% was upheld, involved a plaintiff who, either as the owner of the vehicle, or, as in *Zanner* , as the mother of a minor, was in a position, not merely to decide whether he or she should accept a particular risk, but to control the conduct of the intoxicated driver. Further, in each case the plaintiff not merely failed to control the driver, but actively invited the driver to drive. In the cases involving alcohol, the blood alcohol levels of the drivers were far higher than that of Mr Campbell. These comparative aspects of the conduct will readily justify an increase in apportionment for contributory negligence above the present range.

55. It is sufficient to say in the present cases, there was no reason demonstrated which took the conduct of the respective parties outside a range of 35%-40%. For these reasons, leave to appeal was granted, but the appeals dismissed."

Cooper v Nominal Defendant [2017] NSWDC 3 -
Cooper v Nominal Defendant [2017] NSWDC 3 -
Cooper v Nominal Defendant [2017] NSWDC 3 -
Cooper v Nominal Defendant [2017] NSWDC 3 -
VWA v Downer Utilities Australia Pty Ltd [2016] VSC 775 -
Spanjol v The Queen [2016] VSCA 317 -
Eicas v Dawson [2016] SASCFC 124 -
Eicas v Dawson [2016] SASCFC 124 -
Eicas v Dawson [2016] SASCFC 124 -
Eicas v Dawson [2016] SASCFC 124 -
Jarrett v Bugeja [2016] NSWDC 309 -
Peapell v The Smith's Snackfood Company Limited [2016] QDC 265 -
Townsend v O'Donnell [2016] NSWCA 288 -
Serrao (by his Tutor Serrao) v Cornelius (No.2) [2016] NSWCA 231 -
Serrao (by his Tutor Serrao) v Cornelius (No.2) [2016] NSWCA 231 -
Serrao (by his Tutor Serrao) v Cornelius (No.2) [2016] NSWCA 231 -

Alzawy v Coptic Orthodox Church Diocese of Sydney, St Mary and St Merkorious Church (No.2) [2016] NSWSC 1123 -
Hendricks v El Dik (No 4) [2016] ACTSC 160 -
Hendricks v El Dik (No 4) [2016] ACTSC 160 -
O'Connor v Insurance Commission of Western Australia [2016] WASCA 95 -
O'Connor v Insurance Commission of Western Australia [2016] WASCA 95 -
O'Connor v Insurance Commission of Western Australia [2016] WASCA 95 -
VWA v Probuild [2016] VSC 102 -
Calcagno v Dent [2015] NSWDC 308 -
Allen v Chadwick [2015] HCA 47 (09 December 2015) (French CJ, Kiefel, Bell, Keane and Gordon JJ)

52. Had the issue arisen under the common law unaffected by statute, a plaintiff's subjective mental or emotional state would have been irrelevant to the reasonable choice expected of him or her. In *Joslyn v Berryman* [33] , McHugh J, speaking of the position at common law, said:

> "a plaintiff cannot escape a finding of contributory negligence by pleading ignorance of facts that a reasonable person would have known or ascertained. A pedestrian or driver who enters a railway crossing in the face of an oncoming train cannot escape a finding of contributory negligence because he or she was not, but should have been, aware of the train. Nor does it make any difference that the pedestrian or driver had defective hearing or sight. Contributory negligence is independent of 'the idiosyncrasies of the particular person whose conduct is in question' [34] ."

via

[33] (2003) 214 CLR 552 at 567 [39] .

Allen v Chadwick [2015] HCA 47 -
Allen v Chadwick [2015] HCA 47 -
Neradovsky v Burnett [2015] NSWSC 1458 -
Catherine Robertson v Joshua Liebmann [2015] NSWDC 231 (01 October 2015) (Mahony SC DCJ)

39. The correct application of these principles was further explained in *Davis v Swift* [2014] NSWCA 458 by Meagher JA (with whom Leeming JA agreed) as follows:

> "23 Section 138(1) of the MAC Act provides that the 'common law and enacted law as to contributory negligence' apply to an award of damages in respect of a motor accident, except as provided by that section. The enacted law relevantly is the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW (LR Act), s 9 and the *Civil Liability Act 2002* (NSW) (CL Act), ss 5R and 5S . Sections 138(2) and (3) vary the enacted law; the former by requiring findings of contributory negligence to be made in particular cases; and the latter by describing in more general terms the matters to which regard may be had when apportioning responsibility.
>
> 24 The starting point is s 9(1) which provides that if the claimant 'suffers damage as the result partly of the claimant's failure to take reasonable care (contributory negligence) and partly of the wrong of any other person' the damages recoverable in respect of the wrong 'are to 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'. That description of contributory negligence reflects the common law position that the claimant's lack of care must contribute to the occurrence of the injury or the nature or extent of it: *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601 at 611 in a passage cited with approval by the majority in *Astley v Austrust Ltd* [1999] HCA 6; 197 CLR 1 at [21] .

25 The approach to the reduction of damages in accordance with the language of s 9 (1) was described in Podrebersek v Australian Iron & Steel Pty Limited [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, 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 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.

26 Section 138(3) is in different terms to s 9(1) and the other State provisions based on s 1(1) of the *Law Reform (Contributory Negligence) Act 1945* (UK). Whereas those provisions require the Court when assessing what is 'just and equitable' to have regard 'to the claimant's share in the responsibility for the damage', s 138(3) provides:

> (3) The damages recoverable in respect of the motor accident are to be reduced by such percentage as the court thinks just and equitable in the circumstances of the case.

27 Section 74(3) of the *Motor Accidents Act 1988* (NSW) is in the same terms. In *Nicholson v Nicholson* (1994) 35 NSWLR 308 at 333-334, Mahoney JA suggested a reason for the use of the broader language. The concept of contributory negligence involves the plaintiff's lack of care contributing to the damage. However, the effect of s 74(2) which is in similar terms to s 138(2) , is to require a finding of contributory negligence in cases where the act or omission may not have caused or contributed to the damage claimed. Relevantly in that case, s 74(2)(c) required a finding of contributory negligence 'where the injured person ... was ... not wearing a seat belt as required' by law. That being the position, the broader language may have been used to allow the Court in such cases to recognise that it would be unjust and inequitable, where there was no such causation or contribution, to reduce the damages otherwise recoverable. The remaining members of the Court, Kirby P with Meagher JA agreeing, also held that the finding of contributory negligence required by s 74(2)(c) did not constrain the inquiry as to what was 'just and equitable' or prevent consideration of all of the circumstances, including whether the absence of a seat belt contributed to the damage claimed.

28 In a case that does not involve a finding of contributory negligence made under s 138(2) or deemed fault on the part of the owner or driver, an assessment of what is 'just and equitable in the circumstances of the case' will involve, as part of that evaluative process, a comparison of the kind described in Podrebersek. See the discussion per Giles JA in Mackenzie v The Nominal Defendant [2005] NSWCA 180; 43 MVR 315 at [54] – [63] . In Joslyn v Berryman [2003] HCA 34 ; 214 CLR 552 at [157] Hayne J considered s 74(3) to require the undertaking of such a comparison: cf Kirby J at [133]].

29 Section 5R of the CL Act, which by s 3B(2)(a) applies to motor accidents, provides that the principles applicable in determining whether a person has been negligent, which include those in s 5B , also apply in determining whether the person who has suffered harm has been contributorily negligent in failing to take precautions against the risk of harm which materialised and resulted in injury. As Basten JA observed in *Gordon v Truong* [2014] NSWCA 97; 66 MVR 241 at [15] , a case involving a collision between a pedestrian and a motor vehicle, the existence and extent of a claimant's contributory negligence is to be assessed by reference to the risk of harm which is the subject of his or her claim for damages, and the precautions that a reasonable person in the claimant's position would have taken against that risk. Section 5S provides that in apportioning responsibility a court may determine a

reduction of 100 per cent in the claimant's damages by reason of contributory negligence."

Stuart Douglas Parker v Charles Youmaran [2015] NSWDC 199 -
Solomons v Pallier [2015] NSWCA 266 -
Joel Roche v Bill Kigetzis [2015] VSCA 207 (06 August 2015) (Osborn and Kyrou JJA and Garde AJA)

43. As Hayne J observed in *Joslyn v Berryman* ,[23] so much follows from the nature of the task that is undertaken in making such an apportionment. That task was described in *Podrebersek v Australian Iron and Steel Pty Ltd* 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. 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] (1985) 59 ALJR 492, 494 [10] (citations omitted); see also *Joslyn v Berryman* (2003) 214 CLR 552, 601 [157] (Hayne J); *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867, 868 [3] (Gleeson CJ), 872-3 [28] -[30] (McHugh J), 876-7 [58]-[59] (Gummow and Callinan JJ).

Joel Roche v Bill Kigetzis [2015] VSCA 207 -
Joel Roche v Bill Kigetzis [2015] VSCA 207 -
Joel Roche v Bill Kigetzis [2015] VSCA 207 -
Fabre v Lui [2015] NSWCA 157 -
Goldsmith by her tutor the New South Wales Trustee and Guardian v Bisset (No 3) [2015] NSWSC 634 (29 May 2015) (Campbell J)

132. I accept that the approach of Kitto J may accord with more modern authorities such as *Joslyn v Berryman* [2003] HCA 34; 214 CLR 552, a case concerned with contributory negligence under s 74 of the 1998 Act. McHugh J referred to Kitto J's judgment, with respect, with approbation: *Joslyn* at 565 [34] . His Honour referred, like Kitto J to *Lynch v Nurdin* (1841) 1 QB 29 as, in respect of children, fixing a standard as "that to be expected of an ordinary child of the same age" (565 [35]). McHugh J apparently regarded the case of children as an "exception to the general rule that the test for contributory negligence is an objective test": *Joslyn* 566 [36]. The other Justices deciding *Joslyn* did not advert to the special circumstances of the child. Their Honours did not refer to *McHale* .

Goldsmith by her tutor the New South Wales Trustee and Guardian v Bisset (No 3) [2015] NSWSC 634 -
Goldsmith by her tutor the New South Wales Trustee and Guardian v Bisset (No 3) [2015] NSWSC 634 -
Goldsmith by her tutor the New South Wales Trustee and Guardian v Bisset (No 3) [2015] NSWSC 634 -
Radojka Backo v Kris Akhurst [2015] NSWDC 85 -
Verryt v Schoupp [2015] NSWCA 128 (15 May 2015) (Meagher and Gleeson JJA, Sackville AJA)

20. The relevant statutory provisions are referred to in my judgment in *Davis v Swift* [2014] NSWCA 458 at [23] – [26], [28] – [29] :

[23] Section 138(1) of the MAC Act provides that the "common law and enacted law as to contributory negligence" apply to an award of damages in respect of a motor accident, except as provided by that section. The enacted law relevantly is the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) (LR Act), s 9 and the *Civil Liability Act 2002* (NSW) (CL Act), ss 5R and 5S . Sections 138(2) and (3) vary the enacted law; the former by requiring findings of contributory negligence to be made in particular cases; and the latter by describing in more general terms the matters to which regard may be had when apportioning responsibility.

[24] The starting point is s 9(1) which provides that if the claimant "suffers damage as the result partly of the claimant's failure to take reasonable care (contributory negligence) and partly of the wrong of any other person" the damages recoverable in respect of the wrong "are to 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". That description of contributory negligence reflects the common law position that the claimant's lack of care must contribute to the occurrence of the injury or the nature or extent of it: *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601 at 611 in a passage cited with approval by the majority in *Astley v Austrust Ltd* [1999] HCA 6; 197 CLR 1 at [21] .

[25] The approach to the reduction of damages in accordance with the language of s 9 (1) was described 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, 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 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.

[26] Section 138(3) is in different terms to s 9(1) and the other State provisions based on s 1(1) of the *Law Reform (Contributory Negligence) Act 1945* (UK). Whereas those provisions require the Court when assessing what is "just and equitable" to have regard "to the claimant's share in the responsibility for the damage", s 138(3) provides:

> (3) The damages recoverable in respect of the motor accident are to be reduced by such percentage as the court thinks just and equitable in the circumstances of the case.

...

[28] In a case that does not involve a finding of contributory negligence made under s 138(2) or deemed fault on the part of the owner or driver, an assessment of what is "just and equitable in the circumstances of the case" will involve, as part of that evaluative process, a comparison of the kind described in *Podrebersek* . See the discussion per Giles JA in *Mackenzie v The Nominal Defendant* [2005] NSWCA 180; 43 MVR 315 at [54] - [63] . In *Joslyn v Berryman* [2003] HCA 34; 214 CLR 552 at [157] Hayne J considered s 74(3) [of the *Motor Accidents Act 1988* (NSW) , which is in the same terms as s 138(3)] to require the undertaking of such a comparison: cf Kirby J at [133].

[29] Section 5R of the CL Act , which by s 3B(2)(a) applies to motor accidents, provides that the principles applicable in determining whether a person has been negligent, which include those in s 5B, also apply in determining whether the person who has suffered harm has been contributorily negligent in failing to take precautions against the risk of harm which materialised and resulted in injury. As Basten JA observed in *Gordon v Truong* [2014] NSWCA 97; 66 MVR 241 at [15] , a case involving a collision between a pedestrian and a motor vehicle, the existence and

extent of a claimant's contributory negligence is to be assessed by reference to the risk of harm which is the subject of his or her claim for damages, and the precautions that a reasonable person in the claimant's position would have taken against that risk. Section 5S provides that in apportioning responsibility a court may determine a reduction of 100 per cent in the claimant's damages by reason of contributory negligence.

Frontlink Pty Ltd v Commissioner of State Revenue (Review and Regulation) [2015] VCAT 741 -
Rachel Beyer v Lillian Jean Gehue [2015] NSWDC 62 -
Davis v Swift [2014] NSWCA 458 -
Kigetzis v Roche [2014] VSC 657 (19 December 2014) (Rush J)

7. Mr J. Ruskin QC, senior counsel for the defendant, submitted that care needed to be exercised in the manner in which previous cases are relied upon to support a breach of duty. I agree. Issues concerning breach of duty and contributory negligence are matters to be decided on the facts of this case, not by factually analogous cases. Each case will turn on its own particular facts. [8]

via

[8] See *Joslyn v Berryman* (2003) 214 CLR 552 at 602 , [158] (Hayne J) .

Allen v Chadwick [2014] SASCFC 100 -
Allen v Chadwick [2014] SASCFC 100 -
Rankilor v City of South Perth [No 2] [2014] WADC 125 (15 September 2014) (Bowden DCJ)
Joslyn v Berryman (2003) 214 CLR 552
Kuhl v Zurich Financial Services

Rankilor v City of South Perth [No 2] [2014] WADC 125 -
Rankilor v City of South Perth [No 2] [2014] WADC 125 -
T and X Company Pty Ltd v Chivas [2014] NSWCA 235 (22 July 2014) (Beazley P, Basten and Barrett JJA)

55. A second factor to be taken into account is the requirement in s 5R(2) that the standard of care required of the plaintiff is that of "a reasonable person in the position of" the plaintiff. In assessing the harm caused to the mother, the trial judge noted that the deceased was affected by Asperger's syndrome. This might have raised a question as to whether the deceased's ability to judge the behaviour of other road users was affected and, if so, whether that was a factor to be ignored in assessing contributory negligence. This in turn might have raised a question as to whether, although in assessing damages the tortfeasor must take the plaintiff with his or her personal frailties and idiosyncrasies, that is not so in the case of an assessment of contributory negligence. In *Joslyn* , McHugh J thought that statements of Stable J in *Daly v Liverpool Corporation* [1939] 2 All ER 142 at 143 and of Jordan CJ in *Cotton v Commissioner for Road Transport and Tramways* (1942) 43 SR(NSW) 66 at 69 that a person should not be held to a standard of which he or she was not capable were wrong because they contradicted the "objective test of contributory negligence": *Joslyn* at [34] and [39] . McHugh J noted an exception with respect to age in the case of a child: at [35].

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 -
T and X Company Pty Ltd v Chivas [2014] NSWCA 235 -
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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 -
Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139 (07 May 2014) (McColl, Basten and Emmett JJA)

88. Finally, although there have been statements in this Court to the effect that s 5R(2) reflects the principle stated by McHugh J in *Joslyn* , the correctness of that statement is not self-evident and the reasoning underlying it has never been fully exposed, no doubt because it has been accorded the status of received wisdom. However, McHugh J described the test of contributory negligence as "an objective one": *Joslyn* , at [32] . He described it as one which "eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question", quoting *Glasgow Corporation v Muir* [1943] AC 448 at 457 (Lord Macmillan). McHugh J noted exceptions in respect of children and possibly certain other "special and exceptional circumstances" (referring to *Cook*) at [30] and [32]. The standard identified in s 5R(2)(a) is at best a qualified objective test: it is not one that conforms to the language adopted by McHugh J in *Joslyn* .

Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139 (07 May 2014) (McColl, Basten and Emmett JJA)

49. Section 9 is also part of the enacted law as to contributory negligence captured by s 138(1) : *Nominal Defendant v Rooskov* [2012] NSWCA 43; (2012) 60 MVR 350 (at [117]) per Campbell JA (Young JA agreeing); see also *Joslyn v Berryman* (at [69]) per Gummow and Callinan JJ (referring to s 10(1) of the 1965 Act which, at the time applicable to the accident in that case, dealt with apportionment of liability in cases of contributory negligence.)

Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139 (07 May 2014) (McColl, Basten and Emmett JJA)

50. However there are differences between s 138(3) of the MAC Act and s 9(1)(b) of the 1965 Act. As Kirby J explained in *Joslyn v Berryman* (at [133]), albeit by reference to s 74(3) of the MAA (which as I have said is relevantly on all fours with s 138(3) of the MAC Act):

"Secondly, in s 74(3) of the Motor Accidents Act , Parliament has avoided the more complex statement of the criteria found in s 10(1) of the 1965 Act. There is no reference to the respective 'faults' of the persons involved. Nor is there a reference to the 'responsibility for the damage'. In s 74(3) provision is simply made for the reduction of the damages recoverable 'as the court thinks just and equitable in the circumstances of the case'. It is not entirely clear whether this more limited formula replaced the previous statement of the 'enacted law' set out in the 1965 Act. On the face of things, it appears to do so and thus leaves wholly at large the reduction for contributory negligence, made by reference to nothing more than what 'the court thinks just and equitable'"

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 -
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Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139 -
Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139 -
Waco Kwikform Ltd v Perigo and Workers Compensation Nominal Insurer [2014] NSWCA 140 -

Waco Kwikform Ltd v Perigo and Workers Compensation Nominal Insurer [2014] NSWCA 140 -
Grant v Roads and Traffic Authority of NSW [2014] NSWSC 379 -
Campton v Centennial Newstan Pty Ltd [No.2] [2014] NSWSC 177 -
Thillainath v Celli [2013] WADC 188 -
Thillainath v Celli [2013] WADC 188 -
Mikaera v Newman Transport Pty Ltd [2013] NSWCA 464 -
Egan v Mangarelli [2013] NSWCA 413 -
Motorcycling Events Group Australia Pty Ltd v Kelly [2013] NSWCA 361 -
Elliott v The State of South Australia [2013] SADC 140 -
Caruso v Black and White Distribution Pty Ltd [No 2] [2013] WADC 145 -
Simmons v Rockdale City Council [2013] NSWSC 1431 -
Simmons v Rockdale City Council [2013] NSWSC 1431 -
Caruso v Black and White Distribution Pty Ltd [No 2] [2013] WADC 145 -
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; Nominal Defendant v Golding; Nominal Defendant v Campbell; [2013] NSWCA 219 -
Aaron Lot Stafford v Andrew Carrigy-Ryan and QBE Insurance (Australia) Ltd (ACN 003 191 035) [2013] ACTSC 99 -
Aaron Lot Stafford v Andrew Carrigy-Ryan and QBE Insurance (Australia) Ltd (ACN 003 191 035) [2013] ACTSC 99 -
Aaron Lot Stafford v Andrew Carrigy-Ryan and QBE Insurance (Australia) Ltd (ACN 003 191 035) [2013] ACTSC 99 -
Davis v Swift [2013] NSWDC 99 (04 June 2013) (Gibson DCJ)

60. The relevant principles are explained by Tobias AJA in *Axiak v Ingram* , *supra*, at [83]-[87] as follows:

"[83] I would accept the respondent's submission that the exercise called for in *Prodreber sek* 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 is 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 *Prodrebersek.*

[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 Div 1 of Pt 1.2 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.

[87] In my view one obtains some guidance as to the appropriate approach from what was said by McHugh J in *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552 at [34] where his Honour referred to

the established rule that "[i]n theory, a plaintiff is required to conform to the same standard of care as a defendant, with due allowance for the fact that here the enquiry is directed to what is reasonable for his own safety rather than the safety of others". No one would now suggest that the standard of care expected of a defendant is that which the defendant "is in fact capable of". To introduce such a standard into the law of contributory negligence would not only contradict the objective test of contributory negligence, it would impose on tribunals of fact the almost insuperable task of determining what standard of care the plaintiff was "in fact capable of"."

MZZBR v Minister for Immigration [2013] FCCA 244 -
Robbins v Skouboudis and Suncorp Metway Insurance Limited [2013] QSC 101 -
Robbins v Skouboudis and Suncorp Metway Insurance Limited [2013] QSC 101 -
Robbins v Skouboudis and Suncorp Metway Insurance Limited [2013] QSC 101 -
Robbins v Skouboudis and Suncorp Metway Insurance Limited [2013] QSC 101 -
Robbins v Skouboudis and Suncorp Metway Insurance Limited [2013] QSC 101 -
Robbins v Skouboudis and Suncorp Metway Insurance Limited [2013] QSC 101 -
Howarth v Rail Corporation New South Wales (No 1) [2013] NSWSC 220 -
Town of Port Hedland v Hodder (No 2) [2012] WASCA 212 (26 October 2012) (Martin CJ, McLure P, Murphy JA)

253. It is significant that the paragraphs in the judgment of McHugh J in ***Joslyn v Berryman*** upon which Meagher JA (Tobias AJA agreeing) relied, are those paragraphs in which his Honour refers to ***Daly v Liverpool Corporation*** and ***Cotton v Commissioner for Road Transport*** . Those cases, of course, support the proposition that physical defect and infirmity is taken into account when assessing contributory negligence. No reference is made by Meagher JA to that portion of the reasons of McHugh J which is disparaging of the observations made by Jordan CJ in ***Cotton*** .

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

331. The common law standard involves a consideration of matters of which the person was aware or ought to have been aware: ***Joslyn v Berryman*** [2003] HCA 34; (2003) 214 CLR 552 [16], [70].

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

344. ***Daly*** was a decision referred to by Bell J (as her Honour then was) in ***Russell v Rail Infrastructure Corporation*** [2007] NSWSC 402, where the plaintiff had a mild intellectual disability. Her Honour [96], held that it was appropriate in considering whether the plaintiff in that case failed to take reasonable care for her own safety, to apply the standard of a reasonable adult having a mild degree of intellectual handicap. Her Honour relied on, inter alia, the reasoning of the High Court in ***Cook v Cook*** (1986) 162 CLR 376, which has since been overruled by ***Imbree v McNeilly*** . Her Honour also referred to the 9th edition of Fleming, *The Law of Torts*, (1998) 321, which stated that the fact that the plaintiff was a child, 'or [a person] *su bject to some mental or physical disability* may have a bearing on the standard of care demanded from either party'. These italicised words do not appear in the equivalent passage

in par 12.170 of the current 10th edition of that textbook. There is, in the current edition, a reference to ***Russell v Rail Infrastructure*** as a footnote to par 12.160. Paragraph 12.160 reads:

> In principle, the issue of whether the plaintiff is guilty of contributory negligence is resolved by the same rules that determine whether the defendant is negligent. Thus, like defendants, plaintiffs are held to an objective standard of care (*Civil Liability Act 2002* (NSW), s 5R(2) ; *Civil Liability Act 2003* (Qld), s 23 ; *Civil Liability Act 1936* (SA), s 44(1) ; *Civil Liability Act 2002* (WA), s 5K ; *Civil Liability Act 2002* (Tas), s 23 ; *Wrongs Act 1958* (Vic), s 62I These provisions, which reflect recommendation 30 of the *Review of the Law of Negligence* (2002), were discussed in ***Consolidated Broken Hill v Edwards*** (2005) Aust Torts Reps 81815, [2005] NSWCA 380 at 68,01968,020 [68][70] ; ***Waverley Council v Ferreira*** (2005) Aust Torts Reps 81818; [2005] NSWCA 418 at 68,08368,084 [84][87] ; ***Pollard v Baulderstone Hornibrook Engineering Pty Ltd*** [2008] 172 IR 453; [2008] NSWCA 99 at 458459 [13][14] ; ***Stojan (No 9) Pty Ltd v Kenway*** (2009) Aust Torts Reps 82043; [2009] NSWCA 364 at [144][145]). It follows that the fact that the plaintiff did not appreciate a reasonably foreseeable risk of injury created by the defendant's negligence will not preclude a finding of contributory negligence (***Joslyn v Berryman*** (2003) 214 CLR 552; [2003] HCA 34 at 558 [14] , 566567 [38][39] ; ***Hussey v Twomey*** [2009] 3 IR 293; [2009] IESC 1 at 305306 [30]). It is *also irrelevant that the plaintiff was incapable of taking as much care of himself as the reasonable plaintiff would have exercised owing to, for instance, a deficit of intellect* (Cf ***Russell v Rail Infrastructure Corp*** [2007] NSWSC 402 at [80][98]) or memory or a physical disability (***Joslyn v Berryman*** (2003) 214 CLR 552; [2003] HCA 34 at 564565 [32][34]). (emphasis added)

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

290. McHugh J's judgment in ***Joslyn*** is referred to without reservation in ***Imbree*** at [10], [79], [107] . The exception of children from the standard of the ordinary reasonable person first occurred in the context of a defence of contributory negligence against a child plaintiff. It was against that background that the High Court in ***McHale v Watson*** extended the exception to child defendants: ***McHale v Watson*** (205, 215, 229). That is a reflection of the fact that consistency requires that the same standard apply to both negligence and contributory negligence.

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

344. ***Daly*** was a decision referred to by Bell J (as her Honour then was) in ***Russell v Rail Infrastructure Corporation*** [2007] NSWSC 402, where the plaintiff had a mild intellectual disability. Her Honour [96], held that it was appropriate in considering whether the plaintiff in that case failed to take reasonable care for her own safety, to apply the standard of a reasonable adult having a mild degree of intellectual handicap. Her Honour relied on, inter alia, the reasoning of the High Court in ***Cook v Cook*** (1986) 162 CLR 376, which has since been overruled by ***Imbree v McNeilly*** . Her Honour also referred to the 9th edition of Fleming, *The Law of Torts*, (1998) 321, which stated that the fact that the plaintiff was a child, 'or [a person] *subject to some mental or physical disability* may have a bearing on the standard of care demanded from either party'. These italicised words do not appear in the equivalent passage in par 12.170 of the current 10th edition of that textbook. There is, in the current edition, a reference to ***Russell v Rail Infrastructure*** as a footnote to par 12.160. Paragraph 12.160 reads:

> In principle, the issue of whether the plaintiff is guilty of contributory negligence is resolved by the same rules that determine whether the defendant is negligent. Thus, like defendants, plaintiffs are held to an objective standard of care (*Civil Liability Act 2002* (NSW), s 5R(2) ; *Civil Liability Act 2003* (Qld), s 23 ; *Civil Liability Act 1936* (SA), s 44(1) ; *Civil Liability Act 2002* (WA), s 5K ; *Civil Liability Act 2002* (Tas), s 23 ; *Wrongs Act 1958* (Vic), s 62I These provisions, which reflect recommendation 30 of the *Review of the Law of Negligence* (2002), were discussed in ***Consolidated Broken Hill v Edwards*** (2005) Aust Torts Reps 81815, [2005] NSWCA 380 at 68,01968,020 [68][70] ; ***Waverley Council v Ferreira*** (2005) Aust Torts Reps 81818; [2005] NSWCA 418 at 68,08368,084 [84][87] ; ***Pollard v Baulderstone Hornibrook Engineering Pty Ltd*** [2008] 172 IR 453; [2008] NSWCA 99 at 458459 [13][14] ; ***Stojan (No 9) Pty Ltd v Kenway*** (2009) Aust Torts Reps 82043; [2009] NSWCA 364 at [144][145]). It follows that the fact that the plaintiff did not appreciate a reasonably foreseeable risk of injury created by the defendant's negligence will not preclude a finding of contributory negligence (***Joslyn v Berryman*** (2003) 214 CLR 552; [2003] HCA 34 at 558 [14], 566567 [38][39] ; ***Hussey v Twomey*** [2009] 3 IR 293; [2009] IESC 1 at 305306 [30]). It is *also irrelevant that the*

plaintiff was incapable of taking as much care of himself as the reasonable plaintiff would have exercised owing to, for instance, a deficit of intellect (Cf *Russell v Rail Infrastructure Corp* [2007] NSWSC 402 at [80][98]) or memory or a physical disability (*Joslyn v Berryman* (2003) 214 CLR 552; [2003] HCA 34 at 564565 [32][34]). (emphasis added)

Town of Port Hedland v Hodder (No 2) [2012] WASCA 212 -
Town of Port Hedland v Hodder (No 2) [2012] WASCA 212 -
Town of Port Hedland v Hodder (No 2) [2012] WASCA 212 -
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Town of Port Hedland v Hodder (No 2) [2012] WASCA 212 -
Town of Port Hedland v Hodder (No 2) [2012] WASCA 212 -
Town of Port Hedland v Hodder (No 2) [2012] WASCA 212 -
Town of Port Hedland v Hodder (No 2) [2012] WASCA 212 -
Town of Port Hedland v Hodder (No 2) [2012] WASCA 212 -
Town of Port Hedland v Hodder (No 2) [2012] WASCA 212 -
Town of Port Hedland v Hodder (No 2) [2012] WASCA 212 -
AMA v State of Victoria [2012] VCC 1453 -
AMA v State of Victoria [2012] VCC 1453 -
Axiak v Ingram [2012] NSWCA 311 -
O'Neill v Liddle [2012] NSWCA 267 -
Chadwick v Allen [2012] SADC 105 -
Chadwick v Allen [2012] SADC 105 -
Chadwick v Allen [2012] SADC 105 -
Chadwick v Allen [2012] SADC 105 -
Chadwick v Allen [2012] SADC 105 -
Chadwick v Allen [2012] SADC 105 -
Chadwick v Allen [2012] SADC 105 -
Chadwick v Allen [2012] SADC 105 -
Indigo Mist Pty Ltd v Palmer [2012] NSWCA 196 -
Egan v Mangarelli [2012] NSWSC 867 -
Pettigrew v Wentworth Shire Council [2012] NSWSC 624 (12 June 2012) (Hoeben JA)

126. I am satisfied that the plaintiff has established causation and therefore negligence against the defendant. There remains the question of contributory negligence. The test for contributory negligence is an objective one (*Joslyn v Berryman* [2003] HCA 34, 214 CLR 552). For the reasons already indicated, I am not prepared to find that the plaintiff failed to exercise reasonable care for his safety by not complying with the traffic advisory sign. Whether he failed to keep a proper lookout in the circumstances is not so clear.

Smith v Zhang [2012] NSWCA 142 (18 May 2012) (Macfarlan and Meagher JJA, Tobias AJA)

21. Because the task of apportioning responsibility involves the weighing of a number of considerations and the making of judgments about which minds might reasonably differ, it is well established that appellate courts should not interfere in the absence of some error of principle or of fact or where the apportionment is plainly wrong: *British Fame (Owners) v Macgregor (Owners)* [1943] AC 197 at 201 ; *Pennington v Norris* at 15-16 ; *Podrebersek v Australian Iron & Steel Pty Ltd* [1985] HCA 34; (1985) 59 ALJR 492 at 494 ; *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552 at [84] , [157] ; *Anikin v Sierra* at [50] ; *Nominal Defendant v Rooskov* [2012] NSWCA 43 at [122]-[123], [163] .

Smith v Zhang [2012] NSWCA 142 (18 May 2012) (Macfarlan and Meagher JJA, Tobias AJA)

32. The respondent's failure to see the appellant at the earlier point in time did not make the accident inevitable. Indeed, it remained the position that the accident would not have happened if the appellant had exercised the standard of care required of a reasonable person in her position. The appellant chose to cross the road at a point where there was no pedestrian crossing. At that point and immediately before she stepped onto the roadway it was likely that she could not be seen from a vehicle travelling down the roadway because of her stooped posture and the existence of the low concrete wall. The appellant then stepped onto the roadway in front of an oncoming vehicle either without looking for oncoming traffic or appreciating that she may not be able to see any oncoming traffic. Taking into account the fact that she was old and slow and suffered from these disabilities, her "reasonable best" still required that she stop before stepping onto the roadway so as to give a visual warning of her presence once she was in the line of sight of oncoming vehicles: cf *Joslyn v Berryman* at [32] .

Smith v Zhang [2012] NSWCA 142 -
Smith v Zhang [2012] NSWCA 142 -
Smith v Zhang [2012] NSWCA 142 -
Mitchell Green v The Nominal Defendant Twilia Rose Campbell v The Nominal Defendant James Golding v The Nominal Defendant [2012] NSWDC 37 (18 April 2012) (Judge M Sidis)

18. In *Joslyn* Justice McHugh said:

The plea of no breach of duty - perhaps even a plea of no duty in **an extreme case** - is still open in the case of a passenger who accepts a lift with a driver known to the passenger to be seriously intoxicated. (at p. 563 [29])

(emphasis added)

Mitchell Green v The Nominal Defendant Twilia Rose Campbell v The Nominal Defendant James Golding v The Nominal Defendant [2012] NSWDC 37 -
Mitchell Green v The Nominal Defendant Twilia Rose Campbell v The Nominal Defendant James Golding v The Nominal Defendant [2012] NSWDC 37 -
Nominal Defendant v Meakes [2012] NSWCA 66 (04 April 2012) (McColl and Basten JJA, Sackville AJA)

80. The test of contributory negligence is objective: the question is whether the plaintiff has taken that degree of care for his or her own safety that an ordinary reasonable person would take: *Joslyn v Berryman* [2003] HCA 34; 214 CLR 552, at 564-566 [32] , [34] , [38] , per McHugh J ; CL Act, s 5R(2) . Once contributory negligence is found, the apportionment as between a plaintiff and 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."

Podrebersek v Australian Iron & Steel Pty Ltd [1985] HCA 34; 59 ALR 529, at 532-535, *per curiam*.

Nominal Defendant v Meakes [2012] NSWCA 66 -
Campbell v Woollard [2012] WADC 48 -
Campbell v Woollard [2012] WADC 48 -
Nominal Defendant v Rooskov [2012] NSWCA 43 (20 March 2012)

123. The Court of Appeal decision in ***Sierra v Anikin*** was reversed by the High Court after the decision in ***Manly Council v Byrne*** was given (***Anikin v Sierra*** [2004] HCA 64; (2004) 79 ALJR

452), but the High Court accepted that a trial judge's decision concerning apportionment for contributory negligence was *"not lightly reviewed"* : ibid at [50], citing ***Podrebersek, Liftronic Pty Ltd v Unver*** (2001) 179 ALR 321 at 322 [2]; 75 ALJR 867 at 868 ; and ***Joslyn v Berryman*** (2003) 214 CLR 552 at 578-9 [84] , 601-2 [157] .

Wrong Apportionment for Failure to Wear a Helmet?

Nominal Defendant v Rooskov [2012] NSWCA 43 -
Nicol v Whiteoak (No 2) [2011] NSWSC 1486 -
Nicol v Whiteoak (No 2) [2011] NSWSC 1486 -
Tarres v Rozelle Carriers Pty Ltd [2011] NSWSC 1410 -
Hodder by his next friend Elaine Georgina Hodder v Town of Port Hedland [2011] WADC 145 -
Hodder by his next friend Elaine Georgina Hodder v Town of Port Hedland [2011] WADC 145 -
Hodder by his next friend Elaine Georgina Hodder v Town of Port Hedland [2011] WADC 145 -
Smith v Brambles Australia Ltd [2011] NSWSC 963 -
Hughes v Tucaby Engineering Pty Ltd [2011] QSC 256 -
BestCare Foods Ltd v Origin Energy LPG Ltd (formerly Boral Gas (NSW) Pty Ltd) [2011] NSWSC 908 -
Harmer v Hare [2011] NSWCA 229 -
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.

French v QBE Insurance (Australia) Limited [2011] QSC 105 (13 May 2011) (Fryberg J)

174. In the paragraph cited from *Astley* , the High Court was discussing factors to be taken into account in determining whether a plaintiff had suffered damage as the result partly of his own fault. By reason of the definition of the fault, that required a determination of whether the plaintiff was guilty of negligence which would have given rise to a defence of contributory negligence at common law. "At common law", wrote McHugh J in *Joslyn v Berryman* :

> "A plaintiff is guilty of contributory negligence when the plaintiff *exposes himself or herself to a risk of injury* which might reasonably have been foreseen and avoided and suffers an injury within the class of risk to which the plaintiff was exposed. In principle, any fact or circumstance is relevant in determining contributory negligence if it proves, or assists in proving, a reasonably foreseeable risk of injury to the plaintiff in engaging in the conduct that gave rise to the injury suffered." [111]

That was written in a case involving an intoxicated plaintiff.

French v QBE Insurance (Australia) Limited [2011] QSC 105 -
French v QBE Insurance (Australia) Limited [2011] QSC 105 -
French v QBE Insurance (Australia) Limited [2011] QSC 105 -
French v QBE Insurance (Australia) Limited [2011] QSC 105 -
French v QBE Insurance (Australia) Limited [2011] QSC 105 -
French v QBE Insurance (Australia) Limited [2011] QSC 105 -
Fugro Spatial Solutions Pty Ltd v Cifuentes [2011] WASCA 102 (20 April 2011) (Martin CJ; McLure P; Mazza J)

Joslyn v Berryman (2003) 214 CLR 552

Fugro Spatial Solutions Pty Ltd v Cifuentes [2011] WASCA 102 -
Miller v Miller [2011] HCA 9 -
Malek Shahi v Granger [2011] SADC 18 -
Malek Shahi v Granger [2011] SADC 18 -
Warner (By Her Next Friend Airs) v Kernke [2010] SADC 170 -
Warner (By Her Next Friend Airs) v Kernke [2010] SADC 170 -
Warner (By Her Next Friend Airs) v Kernke [2010] SADC 170 -
Warner (By Her Next Friend Airs) v Kernke [2010] SADC 170 -
Zanner v Zanner [2010] NSWCA 343 -
Zanner v Zanner [2010] NSWCA 343 -
Laresu Pty Ltd v Clark [2010] NSWCA 180 -
Laresu Pty Ltd v Clark [2010] NSWCA 180 -
Freudenstein v Marhop Pty Ltd [2010] NSWSC 724 -
Freudenstein v Marhop Pty Ltd [2010] NSWSC 724 -
Freudenstein v Marhop Pty Ltd [2010] NSWSC 724 -
Freudenstein v Marhop Pty Ltd [2010] NSWSC 724 -
Council of the City of Greater Taree v Wells [2010] NSWCA 147 -
Spoilt Pty Ltd v Ticking Pty Ltd [2010] QDC 259 -
Peterson v South Eastern Sydney Illawarra Area Health Service & Elliott [2010] NSWDC 114 -
Peterson v South Eastern Sydney Illawarra Area Health Service & Elliott [2010] NSWDC 114 -
Starick v Starick & Edwards, Starick v Edwards [2010] SADC 79 -
Starick v Starick & Edwards, Starick v Edwards [2010] SADC 79 -
Starick v Starick & Edwards, Starick v Edwards [2010] SADC 79 -
Sijuk v Ilvariy Pty Limited, trading as, Craftsman Homes [2010] NSWSC 354 -
O'Hagan v Body Corporate 189855 [2010] NZCA 65 -
O'Hagan v Body Corporate 189855 [2010] NZCA 65 -

O'Hagan v Body Corporate 189855 [2010] NZCA 65 -
Magog (No 15) Pty Ltd v The Body Corporate for the Moroccan [2010] QDC 70 -
Hodge v CSR Limited [2010] NSWSC 27 -
Hodge v CSR Limited [2010] NSWSC 27 -
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 (12 November 2009) (Ipp, McColl and Basten JJA)

146. The question whether a person has been guilty of contributory negligence is determined objectively. The Council and Stojan bore the burden of proving that the plaintiff had been guilty of contributory negligence: *Gordon Martin Pty Ltd v State Rail Authority of New South Wales & Anor* (at [42]); *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552 (at [16] , [18]) per McHugh J; *Flower v Ebbw Vale Street, Iron and Coal Co Ltd* [1936] AC 206 (at 216); *Commissioner for Railways v Halley* (1978) 20 ALR 409 (at 419).

Penrose v Nominal Defendant [2009] NSWSC 1187 -
Penrose v Nominal Defendant [2009] NSWSC 1187 -
Penrose v Nominal Defendant [2009] NSWSC 1187 -
Stojan (No 9) Pty Ltd v Kenway [2009] NSWCA 364 -
Miller v Miller [2009] WASCA 199 -
Miller v Miller [2009] WASCA 199 -
TAC v Estate of Ewer [2009] VSC 488 (28 October 2009) (Robson J)

110. What ought a reasonable person in the position of Mr Bayne have known at the time? As indicated above, McHugh J in *Joslyn v Berryman [45]* said that the matters that the passenger ought to have known included facts known by "observation, inquiry or otherwise." [46] McHugh expressed the facts that could have been ascertained by inquiry in several ways. He included "those facts and circumstances that the plaintiff could have discovered by the exercise of reasonable care" [47] and "the relevant facts and circumstances included those which a reasonable person would have ascertained." [48] He said, "The relevant conduct is accepting a lift from a person whose driving capacity is known, or could reasonably be found, to be impaired by reason of intoxication." [49] Finally, he said:

> In other areas of contributory negligence, a plaintiff cannot escape a finding of contributory negligence by pleading ignorance of facts that a reasonable person would have known or ascertained. [50]

via

[46] Ibid at [37] .

TAC v Estate of Ewer [2009] VSC 488 (28 October 2009) (Robson J)
Joslyn v Berryman (2003) 214 CLR 552
Nance v British Columbia Electric Railway Co Ltd

TAC v Estate of Ewer [2009] VSC 488 (28 October 2009) (Robson J)

140. Kirby J referred with approval to this decision in *Joslyn v Berryman.* [64]

TAC v Estate of Ewer [2009] VSC 488 -
TAC v Estate of Ewer [2009] VSC 488 -
TAC v Estate of Ewer [2009] VSC 488 -
TAC v Estate of Ewer [2009] VSC 488 -
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TAC v Estate of Ewer [2009] VSC 488 -
TAC v Estate of Ewer [2009] VSC 488 -
TAC v Estate of Ewer [2009] VSC 488 -
Farrell v Farrell [2009] NSWSC 1122 -
Farrell v Farrell [2009] NSWSC 1122 -
Farrell v Farrell [2009] NSWSC 1122 -
Farrell v Farrell [2009] NSWSC 1122 -
Acir v Frosster Pty Ltd [2009] VSC 454 -
Gordon Martin Pty Ltd v State Rail Authority of New South Wales & Anor [2009] NSWCA 287 -
Gordon Martin Pty Ltd v State Rail Authority of New South Wales & Anor [2009] NSWCA 287 -
Gordon Martin Pty Ltd v State Rail Authority of New South Wales & Anor [2009] NSWCA 287 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Willersdorf-Greene and Commissioner of Taxation [2009] AATA 649 (28 August 2009) (Deputy S A Forgie P)

Joselyn v Berryman (2003) 214 CLR 552 ; 77 ALJR 1233; 198 ALR 137

Willersdorf-Greene and Commissioner of Taxation [2009] AATA 649 -
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)
Joslyn v Berryman [2003] HCA 34 ; (2003) 214 CLR 552
Liftronic Pty Ltd v Unver

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)

54 In *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552 McHugh J explained, at [16] , 558 that:

> "... at common law, a plaintiff is guilty of contributory negligence when the plaintiff exposes himself or herself to a risk of injury which might reasonably have been foreseen and avoided and suffers an injury within the class of risk to which the plaintiff was exposed."

His Honour added:

> "In principle, any fact or circumstance is relevant in determining contributory negligence if it proves, or assists in proving, a reasonably foreseeable risk of injury to the plaintiff in engaging in the conduct that gave rise to the injury suffered."

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 -
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 -
Liverpool City Council v Estephan [2009] NSWCA 161 -
Liverpool City Council v Estephan [2009] NSWCA 161 -
Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167 (26 June 2009) (Beazley JA at 1; Ipp JA at 113; Basten JA at 128)
105 In *Liftronic Pty Limited v Unver* [2001] HCA 24; (2001) 75 ALJR 867 Gleeson CJ at [2] cited with approval the passage in *Podrebersek* to which I have just referred. Kirby J pointed out, at [90] , that

the questions of contributory negligence and apportionment are always questions of fact. Although *Liftronic* involved an apportionment by a jury, the principles stated in *Podrebersek* were confirmed. 106 The principle has been consistently applied. As Hayne J observed in *Joslyn v Berryman* (2003) 214 CLR 552; [2003] HCA 34 at [157] , " *[f]indings about apportionment of responsibility are not lightly to be disturbed* ". His Honour then set out the above passage from *Podrebersek* . 107 For my part, I do not see any appellable error in his Honour's assessment of the respective contributions for which Bostik and Brolton were liable as between themselves. There was sense in his Honour's initial assessment of matters that pointed to equal contribution, although I would not have labelled the relationship between the two as a joint venture. The question for his Honour's consideration was, having regard to the respective relationship of each of Bostik and Brolton to Mr Liddiard and the responsibilities that were inherent in those relationships, what proportion of liability should each bear. 108 There were factors that pointed to an assessment that their relative contributions to Mr Liddiard's injury were equal. In particular, although Brolton had provided Mr Liddiard's services to Bostik, Brolton was his employer and was on site at all times. Although it had provided Mr Liddiard's services to Bostik, it was fully aware of the tasks that Mr Liddiard was undertaking and the manner in which he undertook those tasks. In particular, he was fully aware of the system in place for the collection of the rubbish bins. Mr Liddiard looked to Mr Lynch for employment-related matters, as instanced by his evidence that if he needed help with any matter in the course of his employment, he would approach Mr Lynch. 109 For its part, Bostik was responsible for the premises as I have discussed above, and it had engaged Mr Liddiard's services, through Brolton, to keep those premises in a clean condition. In my opinion, for the reasons I have already given, the system of work involved in Mr Liddiard's tasks as a general hand was a system for which Bostik had ultimate responsibility. This is so, notwithstanding that it is likely that in an immediate sense it was Brolton that adopted Dow Corning's system of work. Mr Pearce's position was that he left such matters to Mr Lynch, " *because he was looking after the outside of the gardens* ". That did not mean, however, that Bostik was entitled to do nothing. There is a difficulty, in any event, with this evidence. Mr Pearce did not say that that was a communicated arrangement with Mr Lynch. Nor did Bostik cross-examine Mr Lynch on the basis that that was the arrangement between Brolton and Bostik. 110 Bostik did not establish that Brolton in fact was in charge of the outdoor area. Mr Pearce's evidence did not establish that was the case and the fact that Bostik required a general hand would make this unlikely. Whilst it is likely that Brolton merely adopted the system that was in place under Dow Corning, Bostik's overall responsibility for the premises and for safety systems for the work that was required to be carried out on the premises was such that I do not consider that there was any error in his Honour's assessment of contribution.

Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167 (26 June 2009) (Beazley JA at 1; Ipp JA at 113; Basten JA at 128)

Joslyn v Berryman [2003] HCA 34 ; (2003) 214 CLR 552

Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167 -
Jones v Heaphy [2009] NSWDC 3 -
Jones v Heaphy [2009] NSWDC 3 -
Jones v Heaphy [2009] NSWDC 3 -
Jones v Heaphy [2009] NSWDC 3 -
Jones v Heaphy [2009] NSWDC 3 -
Iannello v BAE Automation and Electrical Services Pty Ltd [2008] VSC 544 -
Alam v Rail Corporation New South Wales [2008] NSWDC 265 -
Alam v Rail Corporation New South Wales [2008] NSWDC 265 -
Young v CAACI [2008] NTSC 47 -
Tarabay v Leite [2008] NSWCA 259 -
Tarabay v Leite [2008] NSWCA 259 -
Tarabay v Leite [2008] NSWCA 259 -
Marlow v Walsh [2008] TASSC 58 -
Peak v Dunleavy [2008] NSWDC 232 -
The State of South Australia v Ellis [2008] WASCA 200 (26 September 2008) (Martin CJ; Steytler P; McLure JA)

488. There is no dispute that the test for contributory negligence is objective. In ***Joslyn v Berryman*** [2003] HCA 34; (2003) 214 CLR 552 [32], McHugh J said (quoting Lord Macmillan in ***Glasgow Corporation v Muir*** [1943] AC 448, 457) that contributory negligence, like negligence, 'eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question'. That does not mean that all subjective factors must be ignored. For example, in considering whether a child is guilty of contributory negligence, the standard of care is tailored to the age of the child: ***McHale v Watson*** (1966) 115 CLR 199 (and see, as regards an aged plaintiff, ***Daly v Liverpool Corporation*** [1939] 2 All ER 142, 143 and, generally in this respect, ***Joslyn*** [32] (McHugh J)). Also, the question is what would have constituted the exercise of reasonable care by the plaintiff in the circumstances in which he found himself: ***Chandley v Roberts*** [2005] VSCA 273 [24] (Maxwell P, Nettle JA & Habersberger AJA concurring); ***Monie v Commonwealth of Australia*** [2007] NSWCA 230 [101] (Campbell JA, Mason P & Beazley JA concurring).

The State of South Australia v Ellis [2008] WASCA 200 -
The State of South Australia v Ellis [2008] WASCA 200 -
Hoad v Peel Valley Exporters Pty Ltd [2008] NSWSC 981 -
Imbree v McNeilly [2008] HCA 40 -
Imbree v McNeilly [2008] HCA 40 -
Imbree v McNeilly [2008] HCA 40 -
Imbree v McNeilly [2008] HCA 40 -
Imbree v McNeilly [2008] HCA 40 -
Imbree v McNeilly [2008] HCA 40 -
Tolhurst v Cleary Bros (Bombo) Pty Ltd [2008] NSWCA 181 (12 August 2008) (Beazley JA ; Giles JA ; Tobias JA)

91 Section 5R of the *Civil Liability Act* provides that the principles applicable in determining whether a person has been negligent also apply in determining contributory negligence. The standard of care is that of the hypothetical reasonable person, an objective test which at common law could be tailored to the age of a child but generally did not take account of the physical and mental deficits of the plaintiff (*Joslyn v Berryman* at [32]-[35] per McHugh J). But as s 5R(2) says, the standard of care is that of a reasonable person "in the position of that person", that is, a reasonable person in the plaintiff's position: *Waverley Council v Ferreira* [2005] NSWCA 418; (2005) Aust Torts Reps 81-818 at [87] ; *Pollard v Baulderstone Hornibrook Engineering Pty Ltd* [2008] NSWCA 99 at [14] .

Tolhurst v Cleary Bros (Bombo) Pty Ltd [2008] NSWCA 181 (12 August 2008) (Beazley JA ; Giles JA ; Tobias JA)

90 Endeavour relied on the evidence earlier set out in relation to Mr Tolhurst's appreciation of the danger, for the proposition that Mr Tolhurst "was injured by a risk he deliberately created". Endeavour submitted that it was erroneous *as regards Endeavour* to reason that Mr Tolhurst was not contributorily negligent because he had no real choice but to follow the practice endorsed by his employer. There was error, it was said, because (a) the contributory negligence was to be found in Mr Tolhurst's conduct, not that of Cleary; (b) the test for contributory negligence was objective, found in Mr Tolhurst's exposure of himself to risk which might reasonably have been foreseen and avoided and consequential suffering of loss (citing s 5R of the *Civil Liability Act* 2005 and *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552 at [16] per McHugh J); and (c) in bringing in Mr Tolhurst's employment situation the trial illicitly applied a subjective test. It was said that even if that could be done as between Mr Tolhurst and Cleary, it could not apply to Endeavour's liability "otherwise is to impose some new variety of vicarious liability on Endeavour Coal". In Endeavour's submission, there was contributory negligence whereby Mr Tolhurst's damages should be reduced by 100 per cent (as permitted by s 5S of the *Civil Liability Act*).

Tolhurst v Cleary Bros (Bombo) Pty Ltd [2008] NSWCA 181 -
AAMI Limited v Hain [2008] HCATrans 272 (01 August 2008) (Gummow and Heydon JJ)

Your Honours, that reference to "subjective attitudes of the particular plaintiff" is apposite here, as is the identification of the particular error. May I say, with respect, one of the particular errors in *Joslyn* which is highlighted by reference to the idea that the Court of Appeal in that case determined the question of contributory negligence by reference to what was observable by people of the condition of the driver at or about the time of the collision and, of course, in *Joslyn* it did not make any difference that other people who came upon the scene of the accident soon thereafter, people who were themselves sober and who were independent of the circumstances, thought that the driver, Ms Joslyn, in that case did not exhibit any signs of intoxication. In our submission, the Court of Appeal fell into an identical error in this case by the

AAMI Limited v Hain [2008] HCATrans 272 -
AAMI Limited v Hain [2008] HCATrans 272 -
AAMI Limited v Hain [2008] HCATrans 272 -
AAMI Limited v Hain [2008] HCATrans 272 -
AAMI Limited v Hain [2008] HCATrans 272 -
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AAMI Limited v Hain [2008] HCATrans 272 -
AAMI Limited v Hain [2008] HCATrans 272 -
AAMI Limited v Hain [2008] HCATrans 272 -
ACQ Pty Ltd v Cook [2008] NSWCA 161 -
ACQ Pty Ltd v Cook [2008] NSWCA 161 -
Wheeler v Macdonald [2008] NSWSC 567 (12 June 2008) (Malpass AsJ)

57 The authorities establish that the test of contributory negligence is an objective one and the issue is whether an ordinary reasonable sober person would realise their risk of injury (*Joslyn v Berryman* (2003) 214 CLR 552 at 564 and 566 – 567).

Wheeler v Macdonald [2008] NSWSC 567 -
Wheeler v Macdonald [2008] NSWSC 567 -
Pollard v Baulderstone Hornibrook Engineering Pty Ltd [2008] NSWCA 99 -
Pollard v Baulderstone Hornibrook Engineering Pty Ltd [2008] NSWCA 99 -
Confidential v Commissioner of Taxation [2008] AATA 415 -
Roads and Traffic Authority v Royal [2008] HCA 19 (14 May 2008) (Gummow, Kirby, Hayne, Heydon and Kiefel JJ)

39. The spectacle of five Justices of this Court labouring over highway plans and photographs and sifting through four appeal books in relation to such a question would be bound to cause surprise. The record describes the 12 day trial of these proceedings in the District Court of New South Wales, and the two day hearing in the Court of Appeal. What is, and is not, for legal purposes, a material cause of a motor vehicle collision is a question of fact. Ordinarily, it gives rise to no principle of law, binding on lower courts and future parties [37] . On the face of things, it concerns only the immediate parties and the outcome of their dispute.

via

[37] cf *Joslyn v Berryman* (2003) 214 CLR 552 at 602 [158] per Hayne J; [2003] HCA 34 .

Roads and Traffic Authority v Royal [2008] HCA 19 -
Kain v Mobbs [2008] NSWSC 383 (29 April 2008) (Harrison J)

139 In the same case Kitto J, whose judgment was the only one that McHugh J made reference to in ***Joslyn*** , appeared to reject subjective considerations from the inquiry: see 214-215. Menzies J appears to have gone even further stating at 223-224 that:

"Where a question concerns the plaintiff's contributory negligence, the law permits a subjective test, and this is so not only in the case of children. Any person under a disability is only required to take such reasonable care for his own safety as his capabilities permit".

Owen J added at 229-230 that "it is plain that in dealing with the question of contributory negligence on the part of a child, its age is a relevant fact since the care expected of it is that reasonably to be expected of a child of similar age, intelligence and experience. That has been laid down again and again".

Kain v Mobbs [2008] NSWSC 383 -
Kain v Mobbs [2008] NSWSC 383 -
Kain v Mobbs [2008] NSWSC 383 -
Preti v Sahara Tours Pty Ltd [2008] NTCA 2 -
Preti v Sahara Tours Pty Ltd [2008] NTCA 2 -
MILLER v MILLER [2008] WADC 46 -
MILLER v MILLER [2008] WADC 46 -
MILLER v MILLER [2008] WADC 46 -
MILLER v MILLER [2008] WADC 46 -
AAMI Limited v Hain [2008] NSWCA 46 (01 April 2008) (Beazley JA at 1; Tobias JA at 2; McClellan CJ at CL at 3)

48 The present case is different from the circumstances in *McGuire v GIO* (1990) 11 MVR 385 where the judgment of this Court was approved by McHugh J in *Joslyn.* In that case the plaintiff was aware of the quantity of drinks which the defendant had consumed and the evidence was that the defendant was obviously intoxicated. In the present case the respondent was not aware of the defendant drinking alcohol, except in a modest amount, and Mr Wilson's behaviour was not such as to cause a reasonable person to be concerned about his ability to drive the vehicle.

AAMI Limited v Hain [2008] NSWCA 46 (01 April 2008) (Beazley JA at 1; Tobias JA at 2; McClellan CJ at CL at 3)

46 I have previously indicated that his Honour observed that the respondent saw Mr Wilson "through the eyes of an eighteen year old, having just finished his schooling months before". If by this remark his Honour was indicating that he was applying a standard of care applicable to an 18 year old, there may be an error (*Joslyn* [32]). However, to my mind the better view is that his Honour was indicating that the respondent did have a limited experience in such matters and accordingly his judgment, alone, may not be sufficient to justify the conclusion that the respondent was not negligent. His Honour follows his reference to the respondent's evidence with the statement that "other and more experienced individuals did not detect that Mr Wilson was adversely affected", a clear indication that he was applying the correct test.

AAMI Limited v Hain [2008] NSWCA 46 -
AAMI Limited v Hain [2008] NSWCA 46 -
AAMI Limited v Hain [2008] NSWCA 46 -
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AAMI Limited v Hain [2008] NSWCA 46 -
AAMI Limited v Hain [2008] NSWCA 46 -
AAMI Limited v Hain [2008] NSWCA 46 -
Kendrick v Bluescope Steel (AIS) Pty Ltd [2007] NSWSC 1288 -
Kendrick v Bluescope Steel (AIS) Pty Ltd [2007] NSWSC 1288 -
Livingstone v Mitchell [2007] NSWSC 1477 -
Livingstone v Mitchell [2007] NSWSC 1477 -

Elite Protective Personnel Pty Ltd v Salmon [2007] NSWCA 322 (14 November 2007) (Beazley JA; McColl JA ; Basten JA)
Joslyn v Berryman [2003] HCA 34 ; (2003) 214 CLR 552
Kalls Enterprises Pty Ltd (In LIquidation) & Ors v Baloglow & Anor (No 3)

Elite Protective Personnel Pty Ltd v Salmon [2007] NSWCA 322 (14 November 2007) (Beazley JA; McColl JA ; Basten JA)

31 A person is guilty of contributory negligence if he or she exposes him(her)self to a risk of injury which might reasonably have been foreseen and avoided: *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552 at [16] per McHugh J . The question whether a person has been guilty of contributory negligence is determined objectively. The appellants bore the burden of proving that the respondent had been guilty of contributory negligence: *Flower v Ebbw Vale Street, Iron and Coal Co Ltd* [1936] AC 206 at 216 ; *Commissioner for Railways v Halley* (1978) 20 ALR 409 at 419 ; *Joslyn v Berryman* at [18] per McHugh J.

Elite Protective Personnel Pty Ltd v Salmon [2007] NSWCA 322 -
PricewaterhouseCoopers Legal v Perpetual Trustees Victoria Limited & 3 Ors [2007] NSWCA 271 (08 October 2007) (Giles JA; Ipp JA; McClellan CJ at CL)
Joslyn v Berryman (2003) 214 CLR 552
May v Ceedive Pty Limited

PricewaterhouseCoopers Legal v Perpetual Trustees Victoria Limited & 3 Ors [2007] NSWCA 271 -
PricewaterhouseCoopers Legal v Perpetual Trustees Victoria Limited & 3 Ors [2007] NSWCA 271 -
Robens v Fernandez [2007] NSWSC 1013 -
Ackland v Commonwealth of Australia [2007] NSWCA 250 -
Ackland v Commonwealth of Australia [2007] NSWCA 250 -
Ackland v Commonwealth of Australia [2007] NSWCA 250 -
Ackland v Commonwealth of Australia [2007] NSWCA 250 -
Borovina v Commissioner for Fair Trading (GD) [2007] NSWADTAP 44 (27 August 2007) (O'Connor K - DCJ (President); Montgomery S - Judicial Member; Antonios Z - Non Judicial Member)
Re Minister for Immigration and Multicultural Affairs S20/2002 (2003) 198 ALR 159
SZAPC v Minister for Immigration and Multicultural and Indigenous Affairs

Perkins v Redmond Company Pty Ltd [2007] NSWDC 147 (13 July 2007) (Rein SC DCJ)
Joslyn v Berryman (2003) 214 CLR 552; 198 ALR 137; [2003] HCA 34
Kirby v Sanderson Motors Pty Ltd

Perkins v Redmond Company Pty Ltd [2007] NSWDC 147 -
Estephan v Lynsey Finch and Ors [2007] NSWDC 285 -
Estephan v Lynsey Finch and Ors [2007] NSWDC 285 -
Estephan v Lynsey Finch and Ors [2007] NSWDC 285 -
Westerway v Rex [2007] NSWDC 136 (04 July 2007) (Hungerford ADCJ)
Joslyn v Berryman (2003) 214 CLR 552
Knight v Maclean

Westerway v Rex [2007] NSWDC 136 -
McNeilly v Imbree [2007] NSWCA 156 -
McNeilly v Imbree [2007] NSWCA 156 -
Garde-Wilson v Legal Services Board [2007] VSC 225 -
Garde-Wilson v Legal Services Board [2007] VSC 225 -
Garde-Wilson v Legal Services Board [2007] VSC 225 -
Marlow v Walsh [2007] TASSC 32 -
Skulander v Willoughby City Council [2007] NSWCA 116 (18 May 2007) (Mason P; Beazley JA; Basten JA)
Joslyn v Berryman (2003) 214 CLR 552; [2003] HCA 34
Leichhardt Municipal Council v Montgomery

Skulander v Willoughby City Council [2007] NSWCA 116 -

Williams v Nominal Defendant and Rosekelly; Rosekelly v Nominal Defendant and Williams [2007] NSWDC 81 (04 May 2007) (Sidis DCJ)

150 It was pointed out that Justice McHugh stated in *Joslyn v Berryman* (2003) 214 CLR 552 at [29] that it was still open to a driver to defend a claim on the basis of no duty to a passenger who accepts a lift with a driver knowing that the driver is seriously intoxicated.

Williams v Nominal Defendant and Rosekelly; Rosekelly v Nominal Defendant and Williams [2007] NSWDC 81 -
Russell v Rail Infrastructure Corporation [2007] NSWSC 402 -
Russell v Rail Infrastructure Corporation [2007] NSWSC 402 -
Russell v Rail Infrastructure Corporation [2007] NSWSC 402 -
Russell v Rail Infrastructure Corporation [2007] NSWSC 402 -
Golden Eagle International Trading Pty Ltd v Zhang [2007] HCA 15 (19 April 2007) (Gummow, Kirby, Hayne, Callinan and Crennan JJ)

10. It is fundamental but appropriate to repeat here that (i) at common law, a plaintiff is guilty of contributory negligence when the plaintiff exposes himself or herself to a risk of injury which might reasonably have been foreseen and avoided and suffers an injury within that class of risk and (ii) if proved by the defendant, the contributory negligence of the plaintiff defeats the plaintiff's cause of action in negligence [9] .

via

[9] *Astley v Austrust Ltd* (1999) 197 CLR 1 at 11 [21] ; *Joslyn v Berryman* (2003) 214 CLR 552 at 558559 [16]-[18] .

Golden Eagle International Trading Pty Ltd v Zhang [2007] HCA 15 -
Golden Eagle International Trading Pty Ltd v Zhang [2007] HCA 15 -
Fantis v Abi-Mosleh [2007] SASC 110 (29 March 2007) (Bleby, Gray and Layton JJ)
Fox v Percy (2003) 214 CLR 118; *Brady v Girvan Bros Pty Ltd* (1998) 7 NSWLR 241; *Pennington v Norris* (1956) 96 CLR 10; *Joslyn v Berryman* (2003) 214 CLR 552 ; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109; *Littler v Liverpool Corporation* [1968] 2 All ER 343; *Brodie & Anor v Singleton Shire Council; Ghantous v Hawkesbury City Council* (2001) 206 CLR 512; *Neindorf v Junkovic* (2006) 222 ALR 631, considered.

Fantis v Abi-Mosleh [2007] SASC 110 -
A v New South Wales [2007] HCA 10 -
Roth v RTA [2007] NSWSC 128 -
Roth v RTA [2007] NSWSC 128 -
Evans v Lindsay [2006] NSWCA 354 (11 December 2006) (Beazley JA; Ipp JA; Bryson JA)

82. *Podrebersek* has been consistently applied: see *Joslyn v Berryman* (2003) 214 CLR 552; [2003] HCA 34 at [157] per Hayne J ; *Liftronic Pty Limited v Unver* (2001) 75 ALJR 867; [2001] HCA 24 per Gleeson CJ.

Vale v Eggins [2006] NSWCA 348 -
Evans v Lindsay [2006] NSWCA 354 -
Evans v Lindsay [2006] NSWCA 354 -
Vale v Eggins [2006] NSWCA 348 -
Vale v Eggins [2006] NSWCA 348 -
Ellis, Executor of the Estate of Paul Steven Cotton (Dec) v The State of South Australia [2006] WASC 270 -
Ellis, Executor of the Estate of Paul Steven Cotton (Dec) v The State of South Australia [2006] WASC 270 -
Shellharbour City Council v Rigby [2006] NSWCA 308 -

Shellharbour City Council v Rigby [2006] NSWCA 308 -
Watson v Grenfell [2006] WADC 176 -
Watson v Grenfell [2006] WADC 176 -
Wok v O'KEEFE [2006] WADC 159 -
Wok v O'KEEFE [2006] WADC 159 -
Wok v O'KEEFE [2006] WADC 159 -
Wok v O'KEEFE [2006] WADC 159 -
Flatman v Epps [2006] VSCA 183 -
Flatman v Epps [2006] VSCA 183 -
Central Bayside General Practice Association Ltd v Commissioner of State Revenue [2006] HCA 43 (31 August 2006) (Gleeson CJ; Kirby, Callinan, Heydon and Crennan JJ)

84. Time and time again, this Court has reinforced the foregoing instruction. It is self-evident, but apparently it needs to be restated. Where the law in issue is expressed in the form of an Act of an Australian legislature, it is in the words of that statute that the content of the legal obligation is to be found, not in judicial synonyms, restatements or approximations. Upon this matter, this Court has until now spoken with a single voice [64]. It should be consistent in applying the same rule to the present appeal. It is not implausible to do so. It is our legal duty.

via

[64] *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 526 [11], 545 [63] ; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 37-39 [11]-[15], 111-112 [249] ; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 266 [159], 269 [164] ; *Conway v The Queen* (2002) 209 CLR 203 at 227 [65] ; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 542-544 [143]-[148] ; *Western Australia v Ward* (2002) 213 CLR 1 at 60 [2], 66 [16], 69 [25], 249-250 [588] ; *Wilson v Anderson* (2002) 213 CLR 401 at 430 [47], 459-460 [144]-[146] ; *Joslyn v Berryman* (2003) 214 CLR 552 at 595-596 [137] ; *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317 at 359 [127] ; *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1 at 6-7 [7]-[9] ; *Alexander v Perpetual Trustees WA Ltd* (2004) 216 CLR 109 at 138 [87] ; *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 167-168 [90]-[94] ; *Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)* (2005) 220 CLR 592 at 649-650 [181] ; *R v Lavender* (2005) 222 CLR 67 at 101-102 [107] ; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 79 ALJR 1850 at 1856 [30]; 221 ALR 448 at 455 ; *Travel Compensation Fund v Tambree t/as R Tambree and Associates* (2005) 80 ALJR 183 at 195 [54]; 222 ALR 263 at 277 ; *Combet v Commonwealth* (2005) 80 ALJR 247 at 280 [135]; 221 ALR 621 at 660 ; *Neindorf v Junkovic* (2005) 80 ALJR 341 at 350-351 [42]; 222 ALR 631 at 641 ; *Weiss v The Queen* (2005) 80 ALJR 444 at 452 [31]; 223 ALR 662 at 671.

Reynolds v Thomson [2006] TASSC 57 -
Imbree v McNeilly [2006] NSWSC 680 -
Imbree v McNeilly [2006] NSWSC 680 -
Hathaway & Anor v Thorpe bht Kinghorn [2006] NSWCA 163 (30 June 2006) (Santow JA at 1; Ipp JA at 2; McColl JA at 3)

32. In *Anikin* the plaintiff was seriously injured when he was struck by a bus on a slightly downhill section of a four-lane roadway at a position where the streetlights nearest the point of impact were not illuminated. The plaintiff was dressed in dark clothing, except for a white strip on the toe of his shoes. The bus driver was driving at about 70 to 80 km per hour. The primary judge found the plaintiff to have been guilty of contributory negligence to the extent of 25 percent. The Court of Appeal (Santow JA dissenting) set aside the primary judge's finding that the bus driver was negligent. On the issue of contributory negligence the primary judge had accepted that the plaintiff had the capacity to see the approaching bus, to which the joint judgment added (at [53]) that his capacity "may have been greater than that of the bus driver who was approaching at a greater speed, an object which was both unexpected and less readily visible." Accepting (at [50]) that the primary judge's decision

was “not lightly reviewed” (*Podrebersek v Australian Iron and Steel Pty Ltd* [1985] HCA 34; (1985) 59 ALJR 492 at 494 ; *Liftronic Pty Ltd v Unver* [2001] HCA 24; (2001) 75 ALJR 867 at 868 ; *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552 (at [84] , [157]), the High Court was of the view that there was no basis for appellate intervention in the apportionment for contributory negligence.

Wealand v Insurance Commission of Western Australia [2006] WADC 88 -
C G Maloney Pty Ltd v Hutton-Potts [2006] NSWCA 136 (29 May 2006) (Santow JA; McColl JA; Bryson JA)

Joslyn v Berryman (2003) 214 CLR 552

C G Maloney Pty Ltd v Hutton-Potts [2006] NSWCA 136 -
Binks v North Sydney Council [2006] NSWSC 463 -
Binks v North Sydney Council [2006] NSWSC 463 -
Nominal Defendant v GLG Australia Pty Ltd [2006] HCA 11 -
Bennett v Manly Council and Sydney Water Corporation [2006] NSWSC 242 -
Bennett v Manly Council and Sydney Water Corporation [2006] NSWSC 242 -
Dos Santos v C Morris Painting & Decorating & Anor [2006] NSWCA 54 (24 March 2006)

66. The question whether a person has been guilty of contributory negligence is determined objectively; contributory negligence “eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question”; accordingly “any fact or circumstance is relevant in determining contributory negligence if it proves, or assists in proving, a reasonably foreseeable risk of injury to the plaintiff in engaging in the conduct that gave rise to the injury suffered”: *Joslyn v Berryman* , per McHugh J (at [16], [32]); see also at [70] per Gummow and Callinan JJ who observed that the “the standard of care expected of the plaintiff be measured against that of a person of ordinary prudence and not merely by reference to subjective attitudes of the particular plaintiff”. The fact that the question of contributory negligence is determined objectively means the Court is not confined to the facts and circumstances observed or observable by the plaintiff (*Joslyn v Berryman* at [15] - [16]); it does not, however, mean the plaintiff's perceptions of the circumstances of the accident are irrelevant. They form part of the factual matrix in which the issue of contributory negligence is determined.

Dos Santos v C Morris Painting & Decorating & Anor [2006] NSWCA 54 -
Dos Santos v C Morris Painting & Decorating & Anor [2006] NSWCA 54 -
Avram v Gusakoski [2006] WASCA 16 (06 February 2006) (Malcolm CJ, Pullin JA, Murray AJA)

30 Although an appeal court will intervene to correct a trial Judge's assessment of the extent of contributory negligence where necessary (see ***Czatyrko v Edith Cowan University*** (2005) 214 ALR 349) , it is still true that on appeal the appeal court is only justified in interfering if it is satisfied that the apportionment at trial is plainly wrong. In a passage from ***Podrebersek v Australian Iron & Steel Pty Ltd*** (1985) 59 ALJR 492, cited by Hayne J in ***Joslyn*** at [157] , 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,

(Page 10)

> 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."

Avram v Gusakoski [2006] WASCA 16 (06 February 2006) (Malcolm CJ, Pullin JA, Murray AJA)

28 This explains why it is possible for a defendant to fail on the no duty defence and the voluntary assumption of risk defence and yet succeed in establishing that there was contributory negligence on the part of the passenger. This result can be seen in many cases. See ***Joslyn v Berryman*** (*supra*) [26] and the cases cited at footnote 39.

Avram v Gusakoski [2006] WASCA 16 (06 February 2006) (Malcolm CJ, Pullin JA, Murray AJA)

5 It is clear that, in the absence of legislation, and in the type of circumstances described above, it is open to a defendant to plead that he owed no duty or did not breach his duty of care to the passenger, to plead voluntary assumption of risk or plead contributory negligence. The relevant authorities are set out in the judgments of McHugh and Kirby JJ

(Page 5)

in ***Joslyn v Berryman*** (2003) 214 CLR 552 . See in particular ***Insurance Commissioner v Joyce*** (1948) 77 CLR 39 and ***Roggenkamp v Bennett*** (1950) 80 CLR 292. As Sir Francis Burt said in ***Jeffries v Fisher*** [1985] WAR 250 at 252, the latter two authorities compel this Court to accept that no breach of duty and voluntary assumption of risk are defences open in these circumstances. Since then, ***Cook v Cook*** (1986) 162 CLR 376; ***Gala v Preston*** (1991) 172 CLR 243 and ***Joslyn's*** case have reconfirmed that the no breach of duty defence is available (or in an extreme case "no duty"; see ***Joslyn*** at [29]). I will refer to the no breach of duty and the no duty defence as the "no duty" defence. The matters to be considered in relation to each defence, and the onus of proof in each are discussed in ***Joslyn*** and ***Jeffries*** . The accident occurred before s 5L was inserted in the *Civil Liability Act 2002* .

Avram v Gusakoski [2006] WASCA 16 -
Avram v Gusakoski [2006] WASCA 16 -
Avram v Gusakoski [2006] WASCA 16 -
Avram v Gusakoski [2006] WASCA 16 -
Avram v Gusakoski [2006] WASCA 16 -
Avram v Gusakoski [2006] WASCA 16 -
Avram v Gusakoski [2006] WASCA 16 -
Avram v Gusakoski [2006] WASCA 16 -
Avram v Gusakoski [2006] WASCA 16 -
Alcorn v Insurance Commission of WA [2005] WADC 256 -
Alcorn v Insurance Commission of WA [2005] WADC 256 -
Woolworths (WA) Pty Ltd v Berkeley Challenge Pty Ltd [2004] WASCA 196 (S) -
Woolworths (WA) Pty Ltd v Berkeley Challenge Pty Ltd [2004] WASCA 196 (S) -
Ainger v Coffs Harbour City Council [2005] NSWCA 424 (05 December 2005)

80. Ipp JA also took the issue of obviousness of risk into account on the issue of contributory negligence, albeit in the context of s 5R of the *Civil Liability Act 2002* : in *Edwards* at [64] – [67] . A plaintiff is guilty of contributory negligence if he or she exposes him or herself to a risk of injury which might reasonably have been foreseen and avoided and suffered an injury within the class of risk to which he or she was exposed: *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552 at [16] per McHugh J . Obviousness of risk must go to this issue too. If it were determinative of liability in every case, then, as the Court observed in *Thompson* (at [37]) , "there would be little room for a doctrine of contributory negligence".

Ainger v Coffs Harbour City Council [2005] NSWCA 424 -
Chandley v Roberts [2005] VSCA 273 -
Chandley v Roberts [2005] VSCA 273 -
Chandley v Roberts [2005] VSCA 273 -
Smith v National Foods Milk Limited [2005] TASSC 109 -
Wynne v Pilbeam [2005] WASCA 200 -
Tobin v Worland [2005] HCATrans 665 -
Montfroy v Roads Corporation [2005] VSC 320 (24 August 2005) (Gillard J)

139. In *Joslyn v Berryman* , [58] McHugh J [59] discussed the common law rules of contributory negligence. As his Honour noted:[60]

> "The test of contributory negligence is an objective one. Contributory negligence, like negligence, 'eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question'."

Montfroy v Roads Corporation [2005] VSC 320 (24 August 2005) (Gillard J)

139. In *Joslyn v Berryman* , [58] McHugh J [59] discussed the common law rules of contributory negligence. As his Honour noted:[60]

> "The test of contributory negligence is an objective one. Contributory negligence, like negligence, 'eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question'."

via

[58] (2003) 214 CLR 552 .

Montfroy v Roads Corporation [2005] VSC 320 -
Herning v GWS Machinery Pty Ltd [2005] NSWCA 263 (15 August 2005) (Handley, Beazley and Basten JJA)
Joslyn v Berryman (2003) 214 CLR 552
Czatyrko v Edith Cowan University

Herning v GWS Machinery Pty Ltd [2005] NSWCA 263 -
Rabay v Bristow [2005] NSWCA 199 (15 June 2005) (Handley, McColl and Bryson JJA)
Joslyn v Berryman [2003] HCA 34 ; (2003) 214 CLR 552
Kurrie v Azouri

Rabay v Bristow [2005] NSWCA 199 -
Mackenzie v The Nominal Defendant [2005] NSWCA 180 (07 June 2005) (Giles JA, Stein AJA and Gzell J)

53 Section 5R did not diminish the authority of *Joslyn v Berryman* . Section 5S addressed in one respect the consequences of contributory negligence.

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 -
Singh v Harika [2005] NSWCA 157 (12 May 2005) (Hodgson and Bryson JJA, Campbell AJA)

6 In *Joslyn v. Berryman* & *Anor* (2003) 214 CLR 552 , to which the Trial Judge referred, McHugh J considered at 558 [16] judicial treatment of contributory negligence of passengers accepting lifts from intoxicated drivers:

> [16] At common law, a plaintiff is guilty of contributory negligence when the plaintiff exposes himself or herself to a risk of injury which might reasonably have been foreseen and avoided and suffers an injury within the class of risk to which the plaintiff was exposed [Nance v British Columbia Electric Railway Co Ltd [1951] AC 601 at 611 ; Jones v Livox Quarries Ltd [1952] 2 QB 608 at 615 ; Froom v Butcher [1976] QB 286 at 291.]. In principle, any fact or circumstance is relevant in determining contributory negligence if it proves, or assists in proving, a reasonably foreseeable risk of injury to the plaintiff in engaging in the conduct that gave rise to the injury suffered. For historical reasons associated with the consequences of a finding of contributory negligence, judges and juries in earlier times took a lenient view of what facts constituted contributory negligence. And some modern cases concerned with passengers accepting a lift from intoxicated drivers have also taken a lenient view of the passengers' conduct. But in principle, any fact or circumstance which a reasonable person would know or ought to know and which tends to suggest a foreseeable risk of injury in accepting a lift from an intoxicated driver, is relevant in determining whether the passenger was guilty of contributory negligence in accepting the lift.

McHugh J went on to consider whether the defence of *Volenti non fit injuria* , in which there is no duty of care, no breach of duty and no question of contributory negligence or apportionment, continues to be available; see pp563-564 [29-31]. No such defence was relied on in the present case.

Singh v Harika [2005] NSWCA 157 (12 May 2005) (Hodgson and Bryson JJA, Campbell AJA)
Joslyn v. Berryman & Anor (2003) 214 CLR 552
Norris v. Blake (by his Tutor Porter) [No. 2]

Singh v Harika [2005] NSWCA 157 -
Doubleday v Kelly [2005] NSWCA 151 -
Doubleday v Kelly [2005] NSWCA 151 -
Bark v Tylor [2005] WADC 59 -
Pack-Tainers Pty Ltd v Moore [2005] NSWCA 43 -
Pack-Tainers Pty Ltd v Moore [2005] NSWCA 43 -
Van Der Wegen v O'Callaghan [2005] WADC 26 -
Van Der Wegen v O'Callaghan [2005] WADC 26 -
Swain v Waverley Municipal Council [2005] HCA 4 -
Lingard v Dearnley [2004] WASCA 306 -
Lingard v Dearnley [2004] WASCA 306 -
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)
Joslyn v Berryman (2003) 214 CLR 552

Anikin v Sierra [2004] HCA 64 (09 December 2004) (Gleeson CJ,Gummow, Kirby, Hayne and Callinan JJ)

50. It is accepted that the decision of the trial judge is "not lightly reviewed". [57] Santow JA referred to the authorities for that proposition but did intervene with the result indicated above.

via

[57] *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492 at 494; 59 ALR 529 at 532-533 ; *Liftronic* (2001) 75 ALJR 867 at 868 [2]; 179 ALR 321 at 322 ; *Berryman* (2003) 214 CLR 552 at 578-579 [84] , 601-602 [157] .

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 -
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Liverpool City Council v Millett & Anor; Liverpool City Council v WadeLiverpool City Council v Millett & Anor [2004] NSWCA 340 -
Nominal Defendant v Lane [2004] NSWCA 405 -
Nominal Defendant v Lane [2004] NSWCA 405 -
Nominal Defendant v Lane [2004] NSWCA 405 -
Nominal Defendant v Lane [2004] NSWCA 405 -
Gusakoski v Avram [2004] WADC 205 -
Gusakoski v Avram [2004] WADC 205 -
Port Kembla Coal Terminal Ltd v Braverus Maritime Inc [2004] FCA 1211 -
Port Kembla Coal Terminal Ltd v Braverus Maritime Inc [2004] FCA 1211 -
Ballerini v Berrigan Shire Council [2004] VSC 321 -
Ballerini v Berrigan Shire Council [2004] VSC 321 -
Woolworths (WA) Pty Ltd v Berkeley Challenge Pty Ltd [2004] WASCA 196 -
Woolworths (WA) Pty Ltd v Berkeley Challenge Pty Ltd [2004] WASCA 196 -
Klein v Minister for Education [2004] WADC 153 -
Dunn v Star City Pty Limited [2004] NSWCA 223 (09 July 2004)

63. Normally, contributory negligence is defined as a failure on the part of a plaintiff to take reasonable care for his or her own safety which, if taken, would have avoided the accident. Recently, it was more accurately stated by McHugh J in *Joslyn v Berryman* (2003) 77 ALJR 1233 at 1236 [16] in these terms:

"In common law, a plaintiff is guilty of contributory negligence when the plaintiff exposes himself or herself to a risk of injury which might reasonably have been foreseen and avoided and suffers an injury within the class of risk to which the plaintiff was exposed."

Gormley v Forrestania Gold Nl [2004] WADC 132 -
Gormley v Forrestania Gold Nl [2004] WADC 132 -
Paul Jonathon Keith Wilkins v Council of the City of Broken Hill [2004] NSWSC 503 -
Paul Jonathon Keith Wilkins v Council of the City of Broken Hill [2004] NSWSC 503 -
Tombleson v Cafest Holdings Pty Ltd [2004] HCATrans 225 -

Manly Council v Byrne [2004] NSWCA 123 -
Manly Council v Byrne [2004] NSWCA 123 -
Insurance Commission of Western Australia v Container Handlers Pty Ltd [2004] HCA 24 -
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 -
Berryman v Joslyn; Wentworth Shire Council v Joslyn [2004] NSWCA 121 -
Tremeer v City of Stirling [2004] WADC 56 -
Uzabeaga v Town of Cottesloe [2004] WASCA 57 -
Uzabeaga v Town of Cottesloe [2004] WASCA 57 -
Lane v Jennis [2004] WADC 48 -
Ghunaim v Bart [2004] NSWCA 28 (24 February 2004) (Giles, Ipp and McColl JJA)

Joslyn v Berryman [2003] HCA 34 , (2003) 77 ALJR 1233
Kelly v Fletcher (WASC, unreported, 22 October 1997, BC9705411)

Ghunaim v Bart [2004] NSWCA 28 -
Ghunaim v Bart [2004] NSWCA 28 -
Ghunaim v Bart [2004] NSWCA 28 -
Ghunaim v Bart [2004] NSWCA 28 -
Ghunaim v Bart [2004] NSWCA 28 -
Marminta Pty Ltd v French [2003] QCA 541 -
Wills v Bell [2003] HCATrans 479 -
Wills v Bell [2003] HCATrans 479 -
Wills v Bell [2003] HCATrans 479 -
Wills v Bell [2003] HCATrans 479 -
Wills v Bell [2003] HCATrans 479 -
Wills v Bell [2003] HCATrans 479 -
Bernardus Hubertus Van Stokkum and the People Named in Schedule A v The Finance Brokers Supervisory Board [2003] WASC 204 (30 October 2003) (Master Sanderson)

Joslyn v Berryman (2003) 198 ALR 137

Hoyts Pty Ltd v Burns [2003] HCA 61 -
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

[7] *Liftronic Pty. Ltd. v. Unver* (2001) 75 ALJR 867, at 885, per Kirby, J.; *Joslyn v. Berryman* , at [158] , per Hayne , J.

Wellington Shire Council v Steedman [2003] VSCA 115 -
Suvaal v Cessnock City Council [2003] HCA 41 (06 August 2003) (Gleeson CJ,McHugh, Kirby, Callinan and Heydon JJ)

72. A trilogy of cases in this Court [56] and many decisions before [57] and since [58] have insisted that where the primary decision depends, to any significant extent, upon the assessment of the credibility of important evidence, the appellate court's entitlement to draw

contradictory inferences, make conflicting findings of fact and reach different assessments is constrained. This is not, as such, to curtail the discharge of the appellate court's statutory powers. It is simply to explain the ways in which such powers will be exercised, given a relevant differentiation in the significant data available to the appellate court when compared with that available to the primary decision-maker.

via

[58] eg *Fox v Percy* (2003) 77 ALJR 989 at 994-995 [26]-[31]; 197 ALR 201 at 208-210 ; *Shorey v PT Ltd* (2003) 77 ALJR 1104 at 1107 [16]; 197 ALR 410 at 413 ; *Joslyn v Berryman* (2003) 198 ALR 137 at 167-168 [119]-[120] .

Suvaal v Cessnock City Council [2003] HCA 41 -
Cattanach v Melchior [2003] HCA 38 -
South v James Loughran and Sons Pty Ltd [2003] TASSC 59 (04 July 2003) (Evans J)

74. Each defendant asserts that the plaintiff is guilty of contributory negligence. The plaintiff will be held responsible for contributory negligence if he has exposed himself to a risk of injury which might reasonably have been foreseen and avoided and the injury he has suffered is within the class of risk to which he was exposed: *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601 at 611 ; *Jones v Livox Quarries Ltd* [1952] 2 QB 608 at 615 ; *Froom v Butcher* [1976] QB 286 at 291. The test of contributory negligence is an objective one. The plaintiff is held to the standard of care expected of an ordinary reasonable person engaging in the conduct that caused the plaintiff's injury: *Joslyn v Berryman; Wentworth Shire Council v Berryman* [2003] HCA 34 , pars32, 35 and 70.