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Insurance

Recent Trends in Contributory Negligence Cases

by Daniel Best, Partner

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Apportionment of liability for contributory negligence is by no means an exact science and is variable upon the discrete facts of each matter.

Five recent cases have provided guidance as to how Australian courts are inclined to approach the topic of in the contexts of public liability and motor vehicle accidents. In particular, they highlight the need to examine the knowledge, awareness and state of mind of each party at the time of the occurrence and what circumstantial evidence may potentially be available to prove it.

Dangerous Recreational Activities

The Northern Territory Court of Appeal has shed light on what apportionment of contributory negligence is appropriate in respect of injuries incurred in the course of recreational activities. It specifically highlights the need for those in care and control of public areas to display adequate signage to warn of risks and discourage dangerous recreational activities and for tour guides to chose suitable activities for their patrons and to warn against engaging in dangerous activities.

In Brief

§ Recent court decisions on contributory negligence involving intoxification, dangerous recreational activities and motor vehicles.

By Daniel Best, Partner

Preti v Sahara Tours Pty Ltd & Anor [2008] NTCA 2

The facts of this case surround the death of Mauro Santo Preti, a Swiss tourist who dived into a waterhole, fatally striking his head on a submerged obstacle.

The deceased had been travelling with Sahara Tours Pty Ltd ("Sahara") the first respondent, through Central Australia. On 18 January 1999 the tour ventured to a large waterhole west of Alice Springs for the purpose of using a rope swing. Here the travel guide instructed them on how to use the rope swing. The deceased and others in the group then proceeded to use the rope several times to swing out from either the bank or an elevated tree stump to enter the water.

The incident occurred while the deceased was standing on a ledge on the bank, watching another male, Fabrice, attempt to swing from the tree stump. Fabrice lost his balance and swung sideways away from the tree colliding with the deceased and in turn causing him to lose balance. The deceased turned to his right and dived into the water, striking his head on a submerged obstacle and dying instantly.

Proceedings were instituted against both Sahara and the Parks and Wildlife Commission ("the Commission") who had care, control and management of the area.

The trial judge determined that both Sahara and the Commission breached their respective duties of care, owed to the deceased. Sahara should have warned the members of the tour group not to use the rope swing or at the very least the dangers of submerged rocks or other obstacles under the water, and alerted them to the danger of swinging on the rope when there was someone standing on the bank or the ledge. The Commission should have either maintained their normal practice (which was to remove any rope swings that were set up in the area) or provided some sort of warning sign to dissuade tourists from engaging in the activity.

The trial judge also awarded a 50% reduction in damages for contributory negligence on the part of the deceased.

On appeal, Mildren, Thomas & Riley JJ in their joint judgement addressed the appropriate test for determining whether the deceased was in fact contributorily negligent and if so what apportionment should be made for it.

In doing this the court particularly relied upon the process of arriving at a just and equitable apportionment provided in *Pennington v Norris (1956) 96 CLR 10 at 16* which requires a comparison of the culpability of each party (culpability being the degree of departure from the standard of care of a reasonable man). It also cited *Podrebersek v Australian Iron & Steel Pty Ltd (1985) 59 ALJR 492 at 494* holding that

"*the whole conduct of each party in relation to the circumstances of the accident must be subject to examination*."

The court considered that a significant factor in determining any negligence on the part of the deceased was evidence of his knowledge of the dangers of his actions. He was aware of the risk of diving head first into the waterhole, as he might strike his head on submerged obstacles, because he was previously warned by the tour guide at other similar waterholes of such risks. He was aware of the actual submerged rocks adjacent to where he stood when struck by

Fabrice, as he had climbed over them when exiting the water previously. The court also found evidence that the deceased knew of the risk of slipping off the tree trunk from where Fabrice was endeavouring to swing and therefore the danger of standing in the location that he did.

Although all of the risks and dangers known to the deceased were commonly known to the tour guide (and thus Sahara), the court ultimately concluded that the combined fault of the respondents significantly outweighed that of the deceased.

Liability was therefore reapportioned 80% to Sahara and the Commission and only 20% to the plaintiff.

Intoxication

Jones v Dapto Leagues Club Ltd [2008] NSWCA 32

Most states have civil liability legislation that presumes a level of contributory negligence where the injury is likely to have occurred even if the person was not intoxicated, but not where the intoxication in no way contributed to the injury. The following case appears to suggest that this presumption will not be established where there is no evidence led of the plaintiff's actual level of intoxication and the action causing injury is not proved to be deliberate.

In this case, the plaintiff, while drinking and playing pool at his local leagues club stuck his fingers into an empty light socket, believing that the power had been turned off. He subsequently suffered an electric shock, burns to his middle finger and a brief period of unconsciousness following the shock.

The trial judge held that the leagues club had been negligent but made a finding of 65% contributory negligence on the part of the plaintiff.

On appeal, the finding of contributory negligence was set aside on the basis that the findings of fact relied on by the trial judge were contradictory as to whether the plaintiff's action was deliberate or accidental.

The Court of Appeal observed that there was no evidence that led to the plaintiff deliberately stuck his fingers in the socket, despite the fact that he had earlier made joking remarks to that effect. It was also pointed out that although the plaintiff was aware that the lights had earlier been turned off by an employee of the club, no one including the plaintiff, appeared to be aware that the power had been switched back on.

The Court of Appeal also held that no contributory negligence could be made out under s50 of the *Civil Liability Act 2002* (NSW) which provides for such a finding where an injured party is affected by alcohol at the time of the incident. The Court of Appeal upheld the trial judge's findings that the plaintiff was not intoxicated to the extent that his capacity to exercise reasonable care and skill was impaired, as there was largely no evidence given as to the plaintiff's actual level of intoxication.

Motor Vehicle Accidents

The following case examines the appropriate level of objective and subjective evidence that should be considered when applying the test in Joslyn v Berryman (203) 214 CLR 552 to interpret s138(2)(b) Motor Accidents Compensation Act 1999 (NSW).

AAMI Limited v Hain [2008] NSWCA 46

The plaintiff in this case suffered serious injuries as a passenger in a motor vehicle when it left the road at high speed, collided with a tree and subsequently burst into flames. The driver (Wilson) was found to have a blood alcohol level of three times the legal limit.

Section 138(2)(b) of the *Motor Accidents Compensation Act 1999* (NSW) states that a finding of contributory negligence must be made where the injured person was a voluntary passenger in a motor vehicle and 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.

The trial judge found that on the balance of probabilities the plaintiff ought not to have been aware of Mr Wilson's alcohol induced impairment based on evidence that:

- the plaintiff had only personally observed Wilson consume 1 schooner and 1 middy of beer;
- he understood that Wilson had diabetes and that this prevented him from consuming much alcohol;
- he had never seen him adversely affected by alcohol;
- neither he nor other witnesses present observed anything abnormal about Wilson's behaviour on the night in question; and
- that the plaintiff was only 18 years old and had limited experience in such matters.

Accordingly, no finding of contributory negligence on the part of the plaintiff was made.

The defendant appealed this finding on the basis that the trial judge applied a subjective test rather than the objective test required by the High Court in *Joslyn v Berryman (203) 214 CLR 552*. It was asserted that more weight should be given to the objective medical evidence that Wilson was in fact three times the legal limit and expert evidence that such a level of intoxication would have resulted in obvious and recognisable symptoms.

The Court of Appeal held that *Joslyn's* interpretation of the legislation did not require a consideration merely of the objective evidence to the exclusion of observations and knowledge of the plaintiff. Trial judge was correct to consider evidence of the plaintiff and other witnesses as to the behaviour of Wilson when he arrived at the hotel, and the plaintiff's age and experience.

It was also concluded that the trial judge did in fact give sufficient weight to the objective expert and medical evidence despite not relying on it. Although it was accepted that the level of intoxication found in Wilson would cause most people to exhibit certain behavioural symptoms, the evidence conceded that this may not be the case in all instances and in any event, such

symptoms were not observed by the plaintiff and other witnesses.

Accordingly, the finding of no contributory negligence was upheld and the appeal dismissed.

The following recent decisions involving motor vehicle accidents indicate that the court is not only likely to find contributory damages where plaintiffs infringe road regulations but even where they fail to abide by suggested limits and use common sense in the circumstances. They also reinforce the test for apportioning contributory negligence and factors requiring consideration to determine the culpability of each party.

Gorman v Scofield [2008] WASCA 78

The plaintiff was riding a motorcycle when he collided with the rear of the defendant's vehicle. The defendant had pulled out onto a highway and driven across two southbound lanes with the intention of turning right to travel northbound. She stopped her vehicle when it was straddling the inner southbound lane and the median strip to check the northbound traffic before pulling out. She was struck on the rear right side by the plaintiff's motorcycle which was travelling between 90 and 100 kmph. The motorcycle broke into pieces on impact and the plaintiff and his pillion were thrown about 80 to 100 metres along the highway.

At trial the plaintiff's damages were reduced by 50% for contributory negligence. The defendant appealed on basis that this was a manifestly inadequate assessment of the extent of the respondent's contribution.

The court of appeal referred to the test in *Wynbergen v Hoyts Corporation Pty Ltd (1997) 72 ALJR 65, 68,* which required a comparative examination of the whole conduct of each negligent party in relation to the circumstances. It was held that

"*the culpability of a plaintiff and defendant for the purposes of apportionment, requires a consideration of the relative importance of the conduct of each party in causing the damage.*"

The crucial findings at trial in relation to the plaintiff's quality of driving were that:

- he was travelling at excessive speed (90 – 100kmph in a 60kmph zone);
- having seen the defendant's vehicle enter the highway when he was about 200 meters away, the plaintiff would have had time to slow down and stop before the collision or at least reduce the impact if he had been travelling the speed limit;
- the defendant was less likely to see and take into account the plaintiff's motorcycle when driving onto the highway because he was a considerable distance from the collision;
- the plaintiff suffered greater injuries as a result of the speed at which he was travelling; and
- he was travelling with a pillion passenger.

The Court of Appeal concluded on the basis of these findings that the manner of the plaintiff's driving was properly characterised as reckless and with a blatant disregard for his own safety, that of his pillion and other road users. It was therefore determined that the plaintiff was more culpable than the defendant and his negligent conduct was more significant than hers in causing the damage.

Accordingly the trial judge's apportionment of 50% was set aside and substituted with an apportionment of 65% liability against the plaintiff and 35% of liability against the defendant.

Roads & Traffic Authority of New South Wales v Turner [2008] NSWCA 48

In this case, the plaintiff was driving his partner's vehicle in wet conditions on a tight uphill curve when it fishtailed, passing into oncoming traffic and colliding with another vehicle. The plaintiff suffered serious injuries and his partner, the owner of the vehicle was killed.

Proceedings were brought against the deceased's third party insurer and the RTA. The plaintiff's allegation against the deceased was that she had been negligent in failing to replace the rear bald tyres on the vehicle, while the RTA was sued for failing to adequately warn northbound drivers of the dangers of travelling around the corner at speed in wet weather and to maintain a road surface with sufficient friction.

The trial judge found in favour of the plaintiff against the RTA and made no finding of contributory negligence.

On appeal the court held there was contributory negligence on the part of the plaintiff based on excessive speed. Although the plaintiff was travelling at approximately 85kmph which was below the speed limit of 100kmph, it was well above the advisory speed of 65kmph which was displayed on a warning sign just before the corner.

The court held that slowing to the speed shown on the advisory speed sign was a precaution that a reasonable person would have taken, and there was evidence that:

- the plaintiff saw the advisory speed sign;
- he knew the sign indicated the maximum safe speed in good conditions;
- he was aware that the road was wet; and
- he was aware from other road signage that he was approaching a tight curve.

As a result the court imposed a reduction of damages for contributory negligence against the defendant of 20%.

Summary

As can be seen from the aforementioned cases, apportionment is determined

through a detailed analysis of the culpability of each party. The actual and constructive knowledge of both plaintiff and defendant in relation to the risk will be highly material to such an analysis. It must therefore be the subject of comprehensive examination by a practitioner so that all relevant pieces of evidence may be identified and brought to the court's attention.

Surprisingly it appears that in public liability cases, even where the plaintiff's conduct clearly defies commonsense, a finding of contributory negligence will not necessarily be made if the defendant's negligence created the opportunity for the plaintiff's conduct. This provides warning to occupiers to be vigilant in minimising and creating awareness of risks.

In contrast, commonsense appears to be highly material in determining contributory negligence on the part of a plaintiff in a motor vehicle accident. This tends to demonstrate that a higher onus is placed upon those operating motor vehicles, to mind their own safety.

Australian Civil Liability Guide

The 2007 *Australian Civil Liability Guide* is a publication produced by Carter Newell addressing legislative and case law developments relevant to civil liability throughout Australian since the reform process in 2002. Designed as a quick reference tool, the 2007 Australian Civil Liability Guide is currently available.

To obtain a copy of the Guide, please contact Jaqueline Stephan on jstephan@carternewell.com or by telephone on 07 3000 8335.

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