CONTRIBUTORY NEGLIGENCE
INTOXICATION AND MOTOR VEHICLES

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INTRODUCTION

1. This CPD focuses on the topic of Contributory Negligence; specifically, the circumstances in which the intoxication of a driver, passenger or some other person who is involved in a transport accident can lead to a finding of contributory negligence.

***Joslyn v Berryman & Anor* [2003] HCA 34**

2. This matter was heard by the High Court of Australia on appeal from the Supreme Court of New South Wales.

3. At first instance, the Plaintiff, Allan Berryman, sought damages for personal injuries arising from a motor vehicle accident. At the time of the accident, he was a passenger in a car being driven by Sally Joslyn on a road in respect of which the Wentworth Shire Council was the responsible road authority. Both individuals were inebriated and the vehicle was defective.

4. The evidence was that, on the night prior to the accident, Mr Berryman and Mr Joslyn had both attended a party in Dareton, New South Wales, and consumed large quantities of alcohol over a period of time that spanned into the early hours of the following day. Neither of them slept for long.

5. On the morning of the accident, Mr Berryman drove a relatively short distance to Mildura, with Ms Joslyn as his passenger, to have breakfast. They then drove back to Dareton. Mr Berryman was initially at the wheel of the vehicle on that leg of the journey.

6. During the trip, Ms Joslyn noticed that Mr Berryman was dozing off. They exchanged words on the matter and then swapped seats. They set off again with Ms Joslyn as the driver. Some distance down the road, Ms Joslyn did not see a curve in the road and lost control of the vehicle. The vehicle left the road and overturned, causing Mr Berryman to suffer serious injuries.

7. The District Court of New South Wales, at first instance, found that Ms Joslyn had driven negligently and that the Council was negligent in not erecting a sign that adequately warned of the danger of a curve in the road where the accident occurred. The apportionment of damages between the two was 90/10 respectively. The Court then reduced Mr Berryman's damages by 25% on the basis of contributory negligence in allowing Ms Joslyn to drive in an inebriated state.

8. Mr Berryman appealed to the Court of Appeal of New South Wales, and Ms Joslyn and the Council cross-appealed, seeking a higher reduction for contributory negligence. The Court of Appeal held that Mr Berryman was not guilty of contributory negligence. Of particular importance to the issues in this case, and the principles more broadly, Meagher JA made the following comments:

> *'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), 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%.'

9. The matter was then appealed to the High Court of Australia. It must be noted at this juncture that the issues of contributory negligence were considered in the context of a statutory regime specific to New South Wales (and not dissimilar to regimes that exist in other States other than Victoria). Specifically, there was consideration of section 74(2) of the *Motor Accidents Act 1988* (NSW), which 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.

10. Section 74(6) of that Act also stipulates 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'*. The Act does not otherwise affect the common law rules of contributory negligence. Thus, the rationale of the Court, to the extent that it was not specific to those provisions, is broadly applicable.

11. There was also extensive discussion in the various judgments of the history of the principle of contributory negligence. Most notably, contributory negligence was traditionally a full defence to an action for negligence, until apportionment legislation was enacted[1].

12. McHugh J set out the well-established principle that *'[a]t 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'*[2].

13. His Honour also confirmed the test is an objective one, with the exception that in considering whether a child is guilty of contributory negligence, the standard of care is tailored to the age

[1] In Victoria, the relevant provision is section 26(1) of the *Wrongs Act 1958* (Vic).
[2] *Joslyn v Berryman & Anor* [2003] HCA 34 at [16]; *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.

of the child[3]. Beyond that exception, *'…the plaintiff is held to the standard of care expected of an ordinary person engaging in conduct that caused the plaintiff's injury or damage'* and His Honour saw no reason to depart from that principle in the case of a passenger accepting a lift from an intoxicated driver[4].

14. With respect to what a Plaintiff knew, or ought to have known, His Honour stated:

> *'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. The relevant facts and circumstances include those which a reasonable person could have known by observation, inquiry or otherwise.'*[5]

15. In line with that notion, His Honour went on to say as follows:

> *'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.'*[6]

16. By way of illustration, His Honour stated that *'[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'*[7]. Quoting what was

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[3] *Joslyn v Berryman & Anor* [2003] HCA 34 at [32]; *McHale v Watson* (1966) 115 CLR 199; *Lynch v Nurdin* (1841) 1 QB 29.
[4] *Joslyn v Berryman & Anor* [2003] HCA 34 at [35]
[5] Ibid at [37].
[6] Ibid at [38].
[7] Ibid at [39].

said in *Glasgow Corporation v Muir*[8], *'[c]ontributory negligence is independent of "the idiosyncrasies of the particular person whose conduct is in question"'*[9].

17. McHugh J then went on to discuss what Mr Berryman perceived, or should have perceived, when he became a passenger in the vehicle. Ms Joslyn had lost her driver's licence, the speedometer was broken, the vehicle had a tendency to roll over and Ms Joslyn had no experience driving it, and Ms Joslyn had been drinking for the same period of time as Mr Berryman. Taking into account the amount of alcohol Ms Joslyn had consumed, the time that had elapsed since she stopped drinking and her lack of sleep, she was probably unfit to drive.

18. His Honour concluded that *'[u]pon 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…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'*[10]. His Honour concluded that the Trial Judge was correct in finding Mr Berryman guilty of contributory negligence, and stated that the matter should be remitted to the Court of Appeal.

19. Gummow and Callinan JJ provided a joint judgment. Noting the comments of Meagher JA, extracted above, Their Honours expressed their disagreement and stated:

> *'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.'*[11]

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[8] [1943] AC 448 at 457.
[9] *Joslyn v Berryman & Anor* [2003] HCA 34 at [39].
[10] Ibid at [41].
[11] Ibid at [73].

20. Like McHugh J, Their Honours essentially preferred the view that all relevant circumstances should be considered, not simply whether Ms Joslyn exhibited signs of intoxication at the time when she commenced driving. Regard should have been had to the evens in which Mr Berryman and Ms Joslyn had participated over the preceding 36 hours.

21. To that end, Their Honours noted that both individuals were undoubtedly intoxicated and, whilst there was evidence that Ms Joslyn was not manifesting obvious sings of intoxication not long after the accident, it seemed highly unlikely that the signs would not have been there to be seen by those able to see them[12]. Accordingly, Their Honours allowed the appeal against the findings of the Court of Appeal, and stated that the matter should be remitted to the Court of Appeal.

22. Kirby J agreed from a factual point of view that *'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'*[13]. Further, His Honour was of the view that Mr Berryman would have objectively known that he, and probably Ms Joslyn, were still affected by alcohol.

23. Applying similar reasoning to the other Justices, Kirby J stated that *'[t]he 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'*[14]. His Honour noted, by way of example, that if a passenger accepted an invitation to travel from a driver without knowledge of their insobriety, the initial appearances of the driver could be a very important consideration.

24. However, in the circumstances of this case, Ms Joslyn's *'…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'*[15].

[12] Ibid at [75-6].
[13] Ibid at [89].
[14] Ibid at [144].
[15] Ibid at [145].

25. In concluding that the appeal should be allowed, and agreeing with the proposed orders of the majority, Kirby J stated:

> *'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.'*[16]

26. However, His Honour added that *'I do not say that Mr Berryman's "share in the responsibility for the damage" was as large as that of Ms Joslyn'*[17]. To that end, His Honour quoted an extract of his judgment from the matter of *Williams v Government Insurance Office*[18] in which he expressed the view that the primary responsibility for the plaintiff's damage rested on the driver.

27. Hayne J delivered a short judgment in which His Honour agreed that the appeal should be allowed and concluded that the Trial Judge did not err in assessing the level of contributory negligence at 25%.

***Transport Accident Commission v Estate of Ewer* [2009] VSC 488**

28. The subject matter of this case arose out of a transport accident. The driver of a vehicle, Hayden Ewer (deceased), had allegedly driven his vehicle in a negligent manner and caused an accident, resulting in personal injuries to his passenger, Simon Bayne. The Transport Accident Commission (**'TAC'**) paid benefits to Mr Bayne and, because the vehicle was registered in South Australia, TAC then made an application against Mr Ewer's estate for indemnity in relation to the compensation paid pursuant to section 104 of the *Transport Accident Act 1986* (Vic).

29. Prior to the accident, Mr Ewer and Mr Bayne were friends and were well known to each other. There was evidence that they socialised regularly, and that their social interactions often involved the consumption of alcohol, at times in large quantities.

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[16] Ibid at [147].
[17] Ibid.
[18] (NSW) (1995) 21 MVR 148 at 158.

30. On the evening of the accident, prior to its occurrence, the two men were separated for a period of time. Mr Ewer participated in an evening of bowls at the local bowls club for a number of hours, and there was evidence that he consumed a number of beers (though the evidence as to how many was conflicting). Meanwhile, Mr Bayne socialised with another friend at a local pub. The friend gave evidence that Mr Bayne consumed at least seven pots of beer and maybe in the vicinity of 10.

31. Later in the evening, Mr Bayne joined Mr Ewer at the bowls club. The two men then drove to a number of locations; first to change a flat tyre, then to purchase a slab of Bourbon and Cola, then back to the bowls club, before heading towards Mr Ewer's home. On the way, they stopped at another property, where a witness observed Mr Ewers drinking from a can. He also saw Mr Bayne retrieve two cans of drink from the back of the vehicle. When the two men left the property, the witness observed that Mr Ewers was driving.

32. As Mr Ewers died in the accident, and Mr Bayne sustained head injuries which rendered him unable to recall the accident, no direct evidence was led as to how it occurred. Expert evidence was led to the effect that the driver of the vehicle lost control, and the vehicle rolled over up to two and a half times, landing on its roof.

33. There was a dispute as to who was actually driving the vehicle at the time of the accident and, following analysis of all of the evidence leading up to the accident, Robson J concluded it was Mr Ewer. Beyond that, negligence was not in issue as Mr Ewer's estate had conceded that, if Mr Ewer was found to be the driver, he was negligent because his ability to drive was adversely affected by the consumption of alcohol.

34. On the question of contributory negligence, Robson J quoted the definition of contributory negligence set out by McHugh J in *Joslyn v Berryman* (supra at paragraph 12). His Honour also expanded on that by saying that *'[t]he term contributory negligence is slightly misleading as it does not require that the plaintiff contribute to the accident which caused his injury, rather it means nothing more than "he was guilty of some want of common caution by which he would have avoided the injury"'*[19]. In addition, His Honour made note that apportionment

[19] *Transport Accident Commission v Estate of Ewer* [2009] VSC 488 at 105, quoting *The Insurance Commissioner v Joyce* (1948) 77 CLR 39 at 54 per Dixon J.

of damages is now dictated by section 26 of the *Wrongs Act 1958* (Vic), and that the standard of care for contributory negligence is set out in section 62 of that Act[20].

35. Robson J also cited and applied the rationale of McHugh J set out above, in relation to the objective standard of care assessed by reference to the thought processes and actions of the reasonable person in the position of the Plaintiff[21] (supra at paragraphs 13 and 14).

36. Accordingly, Robson J concluded that *'…for the purposes of determining whether Mr Bayne was contributorily negligent, he is treated as knowing those matters a reasonable person in the position of Mr Bayne ought to have known including those facts or matters which he could have ascertained by the exercise of reasonable care'*[22].

37. Despite the amount of alcohol Mr Ewer was found to have consumed, a number of witnesses gave evidence to the effect that they did not notice signs that he was adversely affected by alcohol. However, following cross-examination, His Honour was unable to place much weight on that evidence.

38. His Honour found that Mr Ewer and Mr Bayne were part of a culture of drinking, such that it played a significant role in their social lives. There was evidence about previous occasions on which the two men drank together and had, on occasions, driven on roads whilst significantly affected by alcohol. His Honour noted that Mr Bayne knew Mr Ewer was a heavy social drinker and was sure that the latter would have had a few drinks at the bowling club.

39. Taking all relevant factors into account, His Honour came to a conclusion as to what a reasonable person in the position of Mr Bayne would have known:

> *'Such a person would have known that Mr Ewer enjoyed a drink and often drunk to excess. Such as person would have known that despite drinking, Mr Ewer was prepared to drive around paddocks and back roads to go spotlighting when affected by alcohol. Such a person knew that Mr Ewer had purchased a slab of mixed spirits. Such a person knew*

[20] *Transport Accident Commission v Estate of Ewer* [2009] VSC 488 at [106-7].
[21] Ibid at [109].
[22] Ibid at [111].

that Mr Ewer had consumed at least one of those cans whilst driving back to Bringalbert.

Such a person would have thought it likely that Mr Ewer had been drinking at the bowls club. Such a person would have appreciated that Mr Ewer's driving ability may have been adversely affected by alcohol, even though he was not staggering about or vomiting. Such a person would have realised that a night out with mates at the bowling club probably included the consumption of alcohol.'[23]

40. With all of that in mind, His Honour concluded that:

'[i]n my opinion, a reasonable person in Mr Bayne's position, exercising reasonable care for their own safety, would have made inquiries of Mr Ewer as to how much, if any, he had to drink. I find that if such a question had been asked, as it should have been, it would have been apparent to a reasonable person in Mr Bayne's position that Mr Ewer was not in a proper state to drive the utility and that Mr Bayne would be taking a risk in permitting Mr Ewer to drive his utility and riding as a passenger in the utility.'[24]

41. Accordingly, His Honour found Mr Bayne guilty of contributory negligence. As to the extent of that contribution, His Honour stated that *'…in exercising my discretion I should take into account the degree of culpability of both parties and the relative importance of the acts of the parties in causing the damage'*[25]. He ultimately concluded that damages should be reduced by 10%.

[23] Ibid at [126].
[24] Ibid at [128].
[25] Ibid at [132].

***Allen v Chadwick* [2015] HCA 47**

42. This matter was heard by the High Court of Australia on appeal from the Full Court of the Supreme Court of South Australia.

43. Danielle Chadwick, the Plaintiff at first instance, claimed damages for personal injuries she allegedly suffered whilst a passenger in a vehicle being driven by Alex Allen.

44. The evidence was that, on 10 March 2007, Ms Chadwick, her daughter and Mr Allen travelled to Yorke Peninsula in NSW for a weekend away. Along the way, they rendezvoused with another man, Mr Martlew, and his daughters, and the group completed the journey together in Mr Martlew's station wagon.

45. Throughout the day, Mr Allen and Mr Martlew consumed alcohol. Ms Chadwick did not drink as she was pregnant. Some time after their arrival at Port Victoria, Ms Chadwick readied the children for bed while Mr Allen and Mr Martlew continued to drink at the local pub. Once the children were asleep, Ms Chadwick joined the men at the pub.

46. Between about 1:30am and 2:00am, the three decided to go for a drive, *'ostensibly'* (to quote the Trial Judge) to find cigarettes. Ms Chadwick gave evidence that she drove around for about 10 to 15 minutes, at one point leaving the township itself. She described the trip as chaotic, with very loud music playing and both men shouting directions at her.

47. At one point, Ms Chadwick stopped the car on the side of the road to urinate. Her observation was that the area was *'literally black'* and there was a light somewhere in the distance. In fact, she was only about 500 metres from the pub, but the Trial Judge accepted she was somewhat disorientated.

48. When Ms Chadwick returned to the car, Mr Allen was in the driver's seat. Ms Chadwick protested and told Mr Allen not to drive, but was met with a colourful response in the negative.

49. Ms Chadwick entered the car via the rear door and her evidence was that Mr Allen took off so fast that the door closed itself with force. She failed to put on her seatbelt. Mr Chadwick drove aggressively and erratically, eventually lost control of the car and collided with a small tree, causing Mr Chadwick to be ejected from the vehicle. She sustained acute spinal cord

injuries.

50. As with the matter of *Allen v Berryman*, this case was decided in the context of statutory provisions unique to the particular jurisdiction; namely the *Civil Liability Act 1936* (SA). Specifically, section 47(1) of the Act creates an irrebuttable presumption of contributory negligence in certain circumstances involving an intoxicated tortfeasor. Pursuant to section 47(2)(b), an exception applies where *'the injured person could not reasonably be expected to have avoided the risk'*. The Act also mandates specific percentage reductions of 25% or 50%, with the latter reduction applying in the case of motor vehicle accidents where the driver had a BAC of 0.15 or more.

51. At first instance, the Trial Judge held that Ms Chadwick ought to have been aware that Mr Allen was intoxicated when she decided to ride in the car. However, His Honour also accepted that Ms Chadwick could not reasonably have been expected to have avoided the risk. Accordingly, no reduction for contributory negligence was applied on the basis of Mr Chadwick electing to travel in the vehicle with an intoxicated driver. Though, as a side note, a compulsory reduction of 25% was applied pursuant to section 49(3) of the Act for failing to wear a seatbelt (a decision that was overturned on appeal to the Supreme Court, but restored by the High Court).

52. The Full Court of the Supreme Court of South Australia dismissed Mr Allen's appeal with respect to the section 47 issue on the basis that the Trial Judge was correct to conclude that Ms Chadwick could not reasonably have been expected to have avoided the risk.

53. On appeal to the High Court of Australia, a joint judgment was delivered by a bench of five Justices. In its discussion of the application of section 47, the Court noted as follows:

> *'The evaluation which s 47(2)(b) contemplates is an evaluation of relative risk in a given situation by the exercise of reasonable powers of observation and appreciation of one's environment, as well as the exercise of a reasonable choice between alternative courses of action. Inputs into the evaluation contemplated by s 47(2)(b) are those facts, as they may reasonably be perceived, which bear upon the reasonable assessment of the relative risks of alternative courses of action. Those*

facts may include matters of objective fact personal to the plaintiff as well as aspects of the external environment. But subjective characteristics of the plaintiff which might diminish his or her capacity to make a reasonable evaluation of relative risk in the light of those facts are immaterial to the evaluation which s 47(2)(b) contemplates. Those subjective characteristics might include impetuosity, drunkenness, hysteria, mental illness, personality disorders or, as Kourakis CJ said, "witlessness". For example, if a person suffering from a medical condition, and subject to episodic disabling symptoms, were to be confronted with the choice of an arduous trek out of a wilderness as the only alternative to accepting a lift with a drunk driver, that person might reasonably choose to accept the lift rather than be left at the risk of the occurrence of the episode in the wilderness where he or she would have no recourse to assistance; whereas a risk-laden decision by the same person to accept a lift with a drunk driver in a busy urban area would not be "reasonable" simply because it was made while the person was, because of stress associated with a particular episode, prevented from making a reasonable evaluation of the relative risks. That is to say, the circumstance that a person is incapable of making a reasonable decision at the relevant time has no bearing on the reasonableness or otherwise of the decision actually made'[26]

54. Considering the rationale in the matters discussed above, one might say those observations are apposite to describe the position at common law as well. Indeed, Their Honours quoted with approval similar comments made by McHugh J in *Joclyn v Berryman* (supra at paragraph[27].

55. It was submitted on Mr Allen's behalf that a reasonable person in Ms Chadwick's position would not have been disoriented and confused. However, the Court disagreed and stated that *'[o]nce it is accepted that, as the trial judge found, Ms Chadwick did not know where she*

[26] Allen v Chadwick [2015] HCA 47 at [51].
[27] Ibid at [52].

was, then the availability of a relatively low-risk alternative to travelling back to the hotel in a vehicle with Mr Allen was not reasonably apparent'[28].

56. The Court accepted that it was not unreasonable for Ms Chadwick to have had no clear appreciation of her proximity to the township, given the length of time in the car and the confusing directions for 10 or 15 minutes. The Court also accepted that there was no reason why she should have attended closely to the course she was taking whilst driving under direction[29].

57. Relevantly, it was noted that *'[a] person with the limited factual information available to Ms Chadwick might reasonably have formed the same appreciation of the situation. A person does not make an unreasonable choice because he or she acts upon imperfect knowledge if perfect knowledge is not reasonably available'*[30].

58. Ultimately, the relevant factors in the evaluation of the risk included that Ms Chadwick was a young woman who was pregnant (and therefore more vulnerable to more serious consequences of an assault), she was in dark and unfamiliar territory in the early hours of the morning, and she was an uncertain distance from the township. Furthermore, the substantial risk of riding in the vehicle could reasonably be regarded as lessened to relatively acceptable levels by the absence of other vehicles at that time. On a reasonable evaluation of the risks, the Court concluded that Ms Chadwick could not have been expected to have avoided the risk of travelling with Mr Allen[31].

***MacKenzie v The Nominal Defendant* [2005] NSWCA 180**

59. At first instance, this matter was heard by the District Court of New South Wales. Mr Peter Mackenzie sought damages for personal injuries resulting from a motor vehicle accident, whilst he was travelling as a pillion passenger on a motorcycle being ridden by Mr Aaron Brown. However, the positions of the two men on the motorcycle was in dispute, as were a number of other facts.

60. There was evidence that, on Saturday 16 December and Sunday 17 December 2000, the

[28] Ibid at [57].
[29] Ibid at [58].
[30] Ibid at [59].
[31] Ibid at [61].

two men spend a considerable amount of time drinking alcohol. Mr Mackenzie gave evidence that, at one point, they were drinking about four to five stubbies per hour. His last memory of the relevant events was that he was still drinking some time on the Sunday morning, following which his next recollection was of being in intensive care.

61. Mr Brown's gave evidence about the events closer to the motorcycle accident. His evidence was that, on the Sunday, the men walked to Mr Mackenzie's house with their arms around each other. They then went to the shed to look at Mr Mackenzie's Harley Davidson, soon after which Mr Mackenzie asked if he wanted a ride. According to Mr Brown, the two men pushed the motorcycle out of the shed, put on a few items of protective gear, and then mounted the motorcycle, with Mr Mackenzie in front and Mr Brown as the pillion passenger. Not long after that, the motorcycle ran off the road.

62. Taking into account the totality of the evidence, the Trial Judge did not accept Mr Brown's evidence that Mr Mackenzie was the rider, and concluded that Mr Brown was in front with Mr Mackenzie as pillion passenger. However, the Judge did accept some of his evidence, including that the two men agreed to go for a ride, that Mr Mackenzie retrieved the keys and some items of safety gear, and that he unlocked the back gate to access the adjacent laneway.

63. There was expert evidence to the effect that Mr Brown's BAC at the time of the accident was estimated to be within the range of 0.182 and 0.192. Though no blood was taken from Mr Mackenzie, an expert estimated his BAC was about 0.25. Another expert estimated it to be 0.187.

64. Again, it must be noted that this decision was made in the context of the New South Wales statutory scheme. The Trial Judge found that Mr Brown rode the motorcycle negligently. But also said that *'…it was the plaintiff who let him drive it and who rode on it as a pillion passenger in circumstances where he then knew –*

    i. *Brown did not have a licence to drive a motor cycle…*

    ii. *Brown had never before driven a Harley Davidson motor cycle…*

    iii. *Brown was well intoxicated by alcohol.*

iv. *Brown was a person whom he regarded as immature and irresponsible.*

v. *Brown was a person who, 'in his right mind' he would never allow to drive his Harley Davidson motor cycle.'*[32]

65. His Honour also noted that:

> *'[t]he plaintiff was actually at his home. He had control over the motor cycle. He had control over, and brought from his house, the key to the locked padlock on the back gate through which the cycle had to pass in order to reach the roadway. He had possession of, and brought from his house, the riding boots, the joggers and the helmets which he distributed between Aaron Brown and himself. He yielded the motor cycle up to Brown, unlocked the padlock to the back gate and assisted Brown to wheel the bike out of the back gate. He then allowed Brown to sit in the driver's seat whilst he sat on the pillion seat and allowed the motor cycle to be driven off on to the public road.'*[33]

66. In those circumstances, the Trial Judge found that Mr Mackenzie was guilty of contributory negligence[34]. In determining what was a just and equitable reduction in damages, His Honour cited comments by McHugh J in *Joslyn v Berryman & Anor*, and stated that *'[i]t follows that even if the plaintiff was so intoxicated that he did not appreciate the dangers of being a pillion passenger on a motorcycle driven by Aaron Brown, he is still guilty of contributory negligence because a reasonable person in the position of the plaintiff would know or ought to have known at the time that Brown was highly intoxicated and inexperienced in driving such a motorcycle'*[35].

67. Of particular importance, His Honour said, *'[u]nder these circumstances a reasonable person in the position of the plaintiff knew, or at least ought to have known, that Brown was so incapable of handling the vehicle that it was inevitable that an accident would occur'*[36]. His

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[32] *MacKenzie v The Nominal Defendant* [2005] NSWCA 180 at [64].
[33] Ibid at [74].
[34] Ibid at [65].
[35] Ibid at [69].
[36] Ibid at [74].

Honour used the word *'inevitable'* quite deliberately, noting that in most cases in which a Plaintiff became the passenger of a vehicle driven by an intoxicated person, the prospect of an accident were *'possible'* or *'probable'*, and it would be just and equitable for damages to be reduced by a percentage in the range of 25% to 80%[37]. However, in these circumstances, His Honour found it just and equitable to reduce the Plaintiff's damages by 100%[38]. Mr Mackenzie appealed to the Supreme Court of New South Wales Court of Appeal.

68. One ground of appeal was that, whilst an objective test is applied when finding contributory negligence, the next stage of determining what percentage reduction is just and equitable requires the application of a subjective test. In that sense, it was submitted that the Trial Judge erred[39].

69. However, the Court of Appeal disagreed with a sharp line distinction between an objective test and a subjective test and stated that *'[i]n determining contributory negligence there must be regard to the circumstances of the plaintiff whose conduct is in question, because the ordinary reasonable man is engaged in the person's conduct'*[40]. Furthermore, the Trial Judge did not err because:

> *'[h]e did not attribute to the appellant, when the appellant allowed Mr Brown to ride the motor cycle with himself as pillion passenger, the reasonable man's capacity to understand what he was doing. The judge found that, despite his intoxication, the appellant had that capacity. He did not attribute to the appellant the reasonable man's knowledge of the matters in his [judgment at] [168], including Mr Brown's intoxication. He found that, despite his intoxication, the appellant had that knowledge. Only in his [judgment at] [169] did the judge refer to what a reasonable person in the position of the appellant ought to have known, namely, that Mr Brown was so incapable of riding the motor cycle that it was inevitable*

[37] Ibid.
[38] Ibid.
[39] Ibid at [87].
[40] Ibid at [88].

that the accident would occur...The reasonable man's knowledge attributed to the appellant was knowledge of a conclusion, from the appellant's knowledge of Mr Brown's inability safely to ride the motor cycle.'[41]

70. Mr Mackenzie also submitted on appeal that the Trial Judge failed to take into account Mr Brown's role in the accident, that is, that Mr Brown was unlicensed, inexperienced, intoxicated and had agitated for a ride. The Court of Appeal did not accept that, given the finding of negligence. Furthermore, Their Honours noted that the Trial Judge had found this to be a worst case situation in respect of Mr Mackenzie's conduct[42].

71. Finally, it was submitted that the Trial Judge's assessment was plainly unjust and unreasonable. The Court of Appeal did not agree, stating that *'[i]f the intoxicated appellant, knowing despite his intoxication that Mr Brown was unlicensed, inexperienced and wholly unfit to be allowed to ride the motor cycle, and was severely intoxicated, invited Mr Brown to ride the motor cycle and joined him as pillion passenger, the judge's determination was open to him'*[43].

72. The only occasion for questioning the Trial Judge was that he did not take into account that Mr Mackenzie was so affected by his intoxication so as to be impulsive and without full consideration of what might occur[44].

73. Their Honours noted the rational of Kirby P in *Talbot-Butt v Holloway*[45], in respect of an intoxicated pedestrian who was injured when she ran across the road in front of a car, that it could not be said that the pedestrian *'deliberately courted danger'* because in her state of insobriety her objectively unsafe conduct was not *'a deliberate act of negligence on her part'*[46]. Clarke JA also noted that *'[a]lthough both an intoxicated person who acted carelessly and a person embarking on a deliberate act of negligence would properly be seen to have departed from the objective standard of care that does not mean that they both had failed to*

[41] Ibid at [90].
[42] Ibid at [95].
[43] Ibid at [99].
[44] Ibid at [102].
[45] (1990) 12 MVR 70.
[46] Ibid at [74].

comply with that standard to the same extent or that the causative potency, of the failure was the same in each case'[47].

74. Thus, the Court of Appeal considered Mr Mackenzie's conduct to be that of *'…a man who, in his intoxicated condition, acted impulsively and without full consideration of what might occur'*[48].

75. However, Their Honours noted that:

> *'[i]n many cases, a Plaintiff's intoxication will not ameliorate their culpability or the causal potence of their contributory negligence. The further enquiry must be into the circumstances in which the plaintiff became intoxicated. A plaintiff who goes on a drinking spree with the driver, contemplating from the beginning that he will be a passenger in a vehicle driven by the driver, will only add to his departure from the standard of care of the reasonable man. A plaintiff who becomes intoxicated when being the passenger of an intoxicated driver is not in contemplation can say that his departure from the standard of care of the reasonable man is not complete, and perhaps that his conduct was less important in causing the damage'*[49].

76. Weighing the factors, the Court of Appeal noted that the two men were drinking at a location that was walking distance from Mr Mackenzie's house, and the drinking was done without any driving in contemplation. However, Mr Mackenzie allowed himself to get into a thoroughly intoxicated condition which, on any consideration before he did so, would have been seen as inimical to any rational and well thought out decision[50]. Thus, *'[d]eliberate drinking to the point of severe intoxication exposed him to act impulsively and without full consideration of what might occur…'*[51].

77. The Court of Appeal did not consider that justice and equity called for a significant move in

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[47] Ibid at [77].
[48] *MacKenzie v The Nominal Defendant* [2005] NSWCA 180 at [108].
[49] Ibid at [110].
[50] Ibid at [111].
[51] Ibid.

Mr Mackenzie's favour, given that acting irrationally was to be expected when he began and maintained his drinking. It was concluded that a just and equitable reduction in all the circumstances was 80%[52].

Nominal Defendant v Green; Nominal Defendant v Golding; Nominal Defendant v Campbell; [2013] NSWCA 219

78. This matter involved a claim in negligence by several passengers who suffered personal injuries whilst they were passengers in a vehicle. The Defendant was the driver of the vehicle.

79. At the time of the accident, there were eight people travelling in a Toyota station wagon, two of whom (Messrs Golding and Green) were in the rear luggage compartment. They had all spent the evening together at a pub in Tingha, New South Wales, and consumed alcohol. There was evidence that, prior to the leaving Tingha, there was some discussion as to who should drive.

80. On the relevant journey from Tingha to Inverell in the station wagon, all the passenger seats were occupied, with one person sitting on the lap of another in one of the back seats. Ms Campbell was occupying one of the rear seats. Mr Golding and Mr Green were lying down in the luggage compartment. Of note, the three Plaintiffs were the only ones not wearing seatbelts.

81. The path being taken by the vehicle was some 25km long, and part of it was on a dirt road. Along the way, the vehicle struck and killed a kangaroo. They placed the kangaroo on the roof of the car. On the outskirts of Inverell, Mr Campbell lost control of the car, it slid off the road for 80 metres, at an estimated speed of between 100 and 150km per hour, and struck a power pole. All three Plaintiff's were ejected from the vehicle.

82. At first instance, in the District Court of New South Wales, the Trial Judge found the driver to have been negligent, and all three Plaintiffs to have been contributorily negligent. The damages payable to Mr Golding and Mr Green were reduced by 40% and the damages payable to Ms Campbell were reduced by 35%.

[52] Ibid at [112].

83. As with the other matters heard in New South Wales, questions of contributory negligence were considered in the context of the statutory regime particular to that jurisdiction.

84. In identifying the basis for the reduction of 35% against Ms Campbell, the Trial Judge identified the following elements:

    - *'that Ms Campbell was aware that –*
        - *Samuel Campbell [the driver] was unlicensed and "was therefore an inexperienced driver";*
        - *the car was not registered, and*
        - *Mr Campbell's ability to drive the car was impaired as a consequence of his consumption of alcohol;*
    - *that Ms Campbell did not –*
        - *warn her brother against driving after consuming alcohol;*
        - *ask him to slow down, or*
        - *asked to be allowed to exit the vehicle during the course of the journey; and*
    - *that she failed to wear a seatbelt.'*[53]

85. The Trial Judge found that Ms Campbell knew or ought to have known that the driver's capacity to drive was impaired by his consumption of alcohol and found that she was ejected from the car because she was not wearing a seatbelt[54].

86. In respect of Mr Golding and Mr Green, The Trial Judge made the same finding, that is that each of them knew or ought to have known that the driver's capacity to drive was impaired by his consumption of alcohol[55].

87. The Nominal Defendant appealed to the Court of Appeal of New South Wales. The leading judgement was handed down by Basten JA, with whom McColl JA and Sackville AJA agreed.

[53] Nominal Defendant v Green; Nominal Defendant v Golding; Nominal Defendant v Campbell; [2013] NSWCA 219 at [19]
[54] Ibid at [21].
[55] Ibid at [26].

88. After discussing the factual matrix and the applicable statutory framework, Basten JA quoted an extract from the matter of *Podrebersek v Australian Iron and Steel Pty Ltd*[56], 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.'*

89. The Nominal Defendant made reference to a number of cases with factual matrices of varying similarity to matter at hand. However, Basten JA commented that:

> *'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.'*[57]

90. His Honour also noted that an appellate court should be reluctant to interfere with a Trial Judge's findings as to contributory negligence on the basis that reasonable minds may differ as to where within a reasonable range the appropriate result is to be found[58].

91. Submissions were made by Counsel for Mr Golding and Mr Green to the effect that it cannot be just an equitable to attribute most of the blame for an accident to a passenger if the primary causative effect was the carelessness of the driver.

92. However, Basten JA saw two difficulties with this submission:

> *'First, it elides causation and culpability. Culpability is the measure of departure from an appropriate standard of care and may be viewed*

[56] [1985] HCA 34.
[57] Nominal Defendant v Green; Nominal Defendant v Golding; Nominal Defendant v Campbell; [2013] NSWCA 219 at [47].
[58] Ibid at [48].

separately from the causal link between carelessness and harm.

Secondly, the comparison between culpability of the driver and that of the injured plaintiff is problematic and highly fact-specific.'[59]

93. His Honour went on to say that *'[a]n 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'*[60].

94. Accordingly, the appeals were dismissed.

***O'Connor v Insurance Commission of Western Australia* [2016] WASCA 95**

95. The Plaintiffs at first instance in this matter were the estate of a deceased pedestrian who was struck by a bus driven by the Defendant.

96. On the night of 22 March 2009, Mr O'Connor had been a guest at a wedding in Busselton, Western Australia. At about 1:30am, he was walking along a road, with his back against the direction of travel in that lane, wearing mostly black clothing. His BAC at the time was 0.127. A bus was driving along that lane with its headlights on full beam. The driver did not see the deceased in time and struck him.

97. At first instance, in the District Court of Western Australia, the Trial Judge found the driver to have been negligent, but reduced damages by two thirds on account of the contributory negligence of Mr O'Connor. Once again, the decision was made in the context of a statutory regime. But the considerations have a degree of universal application.

98. The Trial Judge found that the driver was driving in an appropriate and careful manner, but for the fact that he did not see Mr O'Connor in circumstances where he should have[61]. With respect to the issue of contributory negligence, Her Honour made, inter alia, the following findings:

    - Mr O'Connor would have known that he was wearing dark clothing, walking on a dark country road at night, unlit, with his back to oncoming traffic;

[59] Ibid at [49].
[60] Ibid.
[61] *O'Connor v Insurance Commission of Western Australia* [2016] WASCA 95 at [34-5].

- He did not take reasonable care for his own safety;
- His conduct was reckless;
- He should have been alerted to the approach of the bus by either the engine noise or the lights, even if he had his back to it.[62]

99. *'Her Honour characterised [the Defendant's] negligence as involving "a brief deficit of attention resulting in his failure to see the [Deceased] until after he struck him" [92]. By contrast, the Deceased was "engaged in ongoing conduct on the road that night, which was obviously dangerous to himself and other road users" [92]'*[63].

100. The Trial Judge concluded that Mr O'Connor was significantly more to blame than the driver for bringing about the circumstances in which the event occurred and failing to react to save himself[64]. In essence, this was the basis for the apportionment findings.

101. On appeal to the Court of Appeal of Western Australia, the leading judgment was handed down by Buss JA, with McLure P and Mazza JA agreeing.

102. Buss JA noted, with reference to a number of authorities, that *'[o]rdinarily, the driver of a motor vehicle has, as a matter of fact, a greater capacity to cause damage than a pedestrian'*[65]. But his Honour also noted that *'[a]n assessment of the culpability of a plaintiff and a defendant, for the purposes of apportionment, requires a consideration of the relative importance of the conduct of each party in causing the damage. The whole conduct of each negligent party in relation to the circumstances of the accident must be subjected to comparative examination'*[66].

103. Ultimately, His Honour was satisfied the Trial Judge did not make any material error. Firstly, there was no challenge to the findings of fact[67]. Secondly, the notion that apportionment between a driver and pedestrian will always be in favour of the pedestrian is misconceived[68]. Thirdly, the fact that Mr O'Connor's conduct did not endanger the driver or anyone else is

[62] Ibid at [41].
[63] Ibid at [44].
[64] Ibid at [46].
[65] Ibid at [62].
[66] Ibid at [61].
[67] Ibid at [81].
[68] Ibid at [82].

ordinarily a relevant factor, but the significance and weight will vary from case to case[69]. Finally, the apportionment was open to the Trial Judge when considering, inter alia, the following factors:

- The findings of fact were unchallenged;
- The conduct of Mr O'Connor was reckless;
- The driver's breach was a brief deficit of attention, in contrast to Mr O'Connor's ongoing conduct that was an obvious danger to himself and other road users;
- Mr O'Connor walked on the road when there was room to walk off the road;
- Mr O'Connor walked on the wrong side of the road with his back to traffic;
- Mr O'Connor wore black clothes.
- Mr O'Connor should have heard the bus and been aware of its headlights;
- There was a curve in the road at the point of collision;
- At night, with no moon or street lights, it should have been easier to hear the bus and see its headlights;
- A reasonable person in the position of the driver would not readily anticipate encountering a pedestrian who was walking on the road at that hour.

104. Accordingly, the appeal was dismissed.

[69] Ibid at [83].