"*Contributory Negligence – Alcohol and Heavy Lifting*"
Diana Manova, Foley's List

An Overview of the Case Law of Contributory Negligence in the context of work-related injuries
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> "*A worker will be guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable and prudent man, he would expose himself to risk of injury. But his conduct must be judged in the context of a finding that the employer has failed to use reasonable care to provide a safe system of work, thereby exposing him to unnecessary risks. The question will be whether, in the circumstances and under the conditions in which he was required to work, the conduct of the worker amounted to mere inadvertence, inattention or misjudgment, or to negligence rendering him responsible in part for the damage*[1];

That's the common law principle in a nutshell.

While these principles apply across a wide range of personal injuries and civil actions, this paper will concentrate on injuries arising out of or in the course of employment.

Negligence is a failure by a defendant to exercise reasonable care, which failure is a cause of damage or injury to another, judged by reference to the foreseeability and probability of harm arising from the failure, in circumstances where the defendant operated under a legal duty to avoid such risks.

Contributory negligence only falls to be considered after a finding has been made that the defendant has been guilty of negligence which has been a cause of the plaintiff's injury. Like the defendant's negligence, the plaintiff's contributory negligence will only be operative if, it too has been a cause of the plaintiff's injury.

Plaintiffs however are not considered to owe a "duty" to themselves in the same sense that a defendant owes a duty – their obligations arise only in a context – where the plaintiff seeks to recover damages for injuries that another has caused in breach of the law. These are defined by the Common Law and by statute.

In injuries arising out of or in the course of employment, a finding of contributory negligence establishes a **partial defence**[2] to a plaintiff's claim. It does not defeat the claim entirely. Juries in Victoria are directed that if they find contributory negligence against the plaintiff, his/her damages would be reduced, to the extent of his or her responsibility for the injury, that extent being expressed as a percentage.[3]

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[1] *Podrebersek v Australian Iron and Steel Pty Ltd* [1985] HCA 34 (1985) 59 ALJR 492 , at 493-494

[2] Contrast the position under the Wrongs Act 1958 – amendments in 2003 included s 63 – pursuant to which the court may determine the extent of reduction by up to 100% if it thinks it just and equitable to do so

[3] See Judicial College of Victoria Civil Juries Charge Book at 2.1.8.1

The starting point – the employer's negligence

The employer's duty to provide a safe system of work, a safe plant and equipment and a safe workplace continue to be refined and made more onerous with advancements in technology and increase in working and living standards. That duty is inextricably linked to the employer's power to prescribe, warn, command and enforce obedience to a system of work.

The nature of the work and the circumstances and conditions in which it is being performed are primary considerations. The employer's duty is defined in light of the risks to safety associated with those circumstances and conditions. The employer must also take into account the possibility of inadvertence, thoughtlessness, misjudgment or even carelessness[4], on the part of his or her employee and even third parties - and guard against that also[5].

A number of relevant considerations can be said to arise from the case law. These are:

1) What is the employer's system of work – did it contain an inherent risk of injury, what did the employer do to minimise the risk;

2) Was the worker engaged in repetitive tasks such that the likelihood of inadvertence or misjudgment was high;

3) Did the worker fail to seek assistance in circumstances where the employer's system of work required it;

4) Did the worker fail to obey the employer's directions or instructions?

The System of Work

Davies v Adelaide Chemical and Fertilizer Co Ltd [1946] HCA 47 (Latham CJ, Dixon and McTiernan JJ)

In this case, a worker injured his right arm when he reached under a slowly moving belt to grease a roller. The employer's system of work required the worker to grease the rollers. The worker adopted a practice of greasing the rollers while the conveyor belt was moving – an activity which had some risk attached to it, but was not highly dangerous. The employer had not expressly prohibited this and the evidence of the worker was that the employer was aware of the practice and had not told him to do things differently. He said if had he been told to stop the machine, he would have done so.

The court held that:

[4] Taylor J in *Smith v Broken Hill Pty Ltd (1957) 97 CLR 337 (at 343)* cited with approval by the majority in *McLean v Tedman and Another (1984) 155 CLR 306*

[5] *McLean v Tedman and Another (1984) 155 CLR 306*

- conduct which can be said to fall short of the standard of care a worker has to exercise for themselves is not contributory negligence **if it is an accepted practice by employer;**

- the evidence did not support a finding of contributory negligence because the worker **was not acting contrary to any rule, instruction, advice or practice given or established by the employer**. He had in fact been performing his duties in a manner which had been approved by factory management and treated by them as though it was part of his usual work.

Were the worker's duties repetitive, increasing the likelihood of inadvertence or misjudgment?

McLean v Tedman & Another [1984) 56 ALR 359
(Gibbs CJ, Mason, Wilson Brennan and Dawson JJ)

In this case, a garbage worker was injured when crossing the road while chasing a garbage truck on a garbage round. It was a requirement of the worker's job to run across the road and keep up with the truck – therefore reasonably foreseeable that while carrying "*a humper*" he might be at risk of being hit by cars travelling on the road when he ran up from behind the truck or towards it.

The evidence established that the employer was:

- either well aware of the practice of running across the road or ought to have been well aware;

- aware that the plaintiff was new to the particular route and ought to have been aware that he might have been preoccupied with learning the work or some aspect of it;

The majority held that the conduct did not amount to contributory negligence. The employer **should have taken all of the circumstances into account** in devising a safer system of work. Risk of injury was not only foreseeable but **easily preventable** by having the truck drive on one side of the road first then on the other, obviating the need for the workers to cross the road.

It is interesting to note the dissenting judgement and compare the findings to that of the majority. This highlights the difficulties practitioners still face when assessing the merits of their client's case.

Gibbs CJ considered that the injured worker had contributed to his own injury for the following reasons:

- It was his first day on that route so he had to take more care – the majority held that the employer had to take this possibility into account;

- He was carrying a humper on his right shoulder and this impeded his vision so there was even more reason to take care when he crossed the road, the

majority considered the employer also had to factor this possibility into devising a safe system of work;

- The task was not a repetitive one – the only thing he had to concentrate on was crossing the road safely, the majority considered that this need to cross the road was something which could easily have been obviated by simply having the truck drive first on one side of the road then the other thus removing the possibility of the type of momentary inattention which contributed to the accident.

- His failure to look for approaching traffic was incompatible with the conduct of a prudent and reasonable man. The majority considered that the employer was bound to consider the risk of momentary inattention which was in fact not incompatible with the conduct of a prudent and reasonable man[6]

The Commissioner of Railways v Ruprecht (1979) 142 CLR 563

A railways worker was hit by a moving wagon when he stepped out in front of it without looking. He wasn't expecting it to come along the line and didn't look because he was too absorbed in his duties. The majority of the High Court concluded there was no contributory negligence.

As the court found in McLean, it was necessary to look at the entirety of the circumstances in which the worker was doing his work and in which he was injured.

The court said:

- In considering the question of liability of the injured worker, regard must be had to the entirety of the circumstances in which the worker is performing his duties,

- *"inattention borne of familiarity and repetition, and the man's preoccupation with the matter in hand*" should be considered in the context of deciding "*whether any of these things caused some temporary inadvertence to danger, some lapse of attention, some taking of risk, or other departure from the highest degree of circumspection, excusable in the circumstances because not incompatible with the conduct of a prudent and reasonable man*[7]"

*Czatyrko v Edith Cowan University (2005) 79 ALJR 839 (*Gleeson CJ, McHugh, Hayne, Callinan and Heydon JJ)

The worker was injured when he stepped backwards while stacking boxes on the back of a truck fitted with a lifting platform. A co-worker had lowered the platform and had not informed the worker. The worker did not look to make sure the platform was there and was injured when he stepped off it and fell one meter to the ground.

[6] (1984) 56 ALR 359 at 366

[7] Gibbs J in *The Commissioner for Railways v Ruprech*t (1979) CLR 563 citing *Sungravure Pty Ltd v Meani* (1964) 110 CLR 24 at 37

The evidence established that the worker had not disobeyed any direction, or warning from the employer, in fact no instructions of any kind had been provided by the employer with regards to using the platform.

The Court said that:

- cases involving repetitive work, provide fertile ground for inadvertence;
- the circumstances of this case were exactly the kind of situation which an employer must guard against as "*it was not a remote risk that the (worker) might step back without looking behind him. His actions were neither* ***deliberate****, intentional nor in disregard of a direction or order from the (employer)*"[8].

In all three cases, the worker failed to look out – which was a fairly simple thing to do and in the circumstances failure to do it carried great risk. In all three cases, the work might have been repetitive but the individual task which led to the injury was not quite so easily described. Each task involved an individual momentary decision and a deliberate act by the workers – stepping out or stepping back without looking.

The Court in all three cases applied a lower standard of care for contributory negligence than the standard required of the employer in the negligence case. It is interesting to consider whether this is in line with community standards and expectations. Are we living in a society in which there is an expectation that individuals will take as much care for their own safety as they expect others to take on their behalf? Or is our system one which accords a much more onerous obligation on one category of persons (like employers) to look out for the safety of another category of person (workers).

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

The worker, a truck driver was injured descending steps between the rear of the cabin of the truck and the front of the first trailer. He was in the process of hooking up lines between the truck and the trailer. The worker gave evidence that there were handholds in place but they weren't really able to be properly gripped. He let go thinking that his foot was securely on the step. The Court of Appeal unanimously held that this case was a classic case of mere misjudgment not amounting to contributory negligence and accordingly, the jury's finding could not stand. The court said:

- Where the work is repetitive and can become familiar, inattention by a worker is foreseeable – in this case, the worker climbed up and down those steps on many, many occasions during the course of his employment – the employer' s duty to provide a safe system of work included the duty to guard against the very type of inattention which caused the worker to fall[9];

[8] at 79 ALJR 839 [18]
[9] [2010] VSCA 201 at p 13 para 35

- the position and construction of the steps was considered patently deficient and the fact that an accident had not happened before was not relevant – it was bound to happen at some time[10].

Failure to ask for or wait for assistance

Kulczycki v Metalex Pty Ltd (1995) 2 VR 377 (Tadgell Nathan and Ashley JJ)

The worker had been assisted by a co-worker to remove a cylindrical component of a die cast machine in order that he may carry out a repair. The component weighed approximately 48-60 kilograms. Having carried out the repair, the worker waited for assistance to replace it in the machine. When assistance did not come, the worker attempted to carry out this task himself and became injured in the process[11]. The jury apportioned 75% contributory negligence to the worker.

Tadgell J held that the employer's duty to provide a safe system of work extends to taking reasonable care to guard against the employee's own foreseeable failure to take reasonable care for his own safety. However, a finding of contributory negligence was open because the duty does not absolve the worker from the consequences of a failure to take reasonable care and it was open to the jury to find that the worker **acted outside the parameters of the system of work** provided by the employer, this was especially so because the evidence established that the worker knew he was not required to expose himself to risk and had acted accordingly when he waited for assistance at the start of the task.

Two of the three judges (Tadgell and Nathan JJ) concluded that contributory negligence was open but disagreed on the issue of apportionment. Ashley J dissented, but ultimately Nathan J and Ashley J formed a majority in favour of ordering a re-trial on liability.

Fassbender v HW & MT Bohlmann (t/a Seymour Freight Lines and caravans) [2010] VSCA 204 (Warren CJ, Nettle JA and Emerton AJA)

The worker was a truck driver of a semi trailer picking up and delivering goods along the eastern seaboard. He suffered serious injury to his back while moving boxes in the back of the trailer. The jury found the defendant had been negligent but also found the plaintiff had been guilty of contributing to his injury and apportioned 70%.

The question whether contributory negligence was properly left to the jury was considered by the Court of Appeal.

The boxes were fund to be heavy. They had not been properly secured at the departure point. The truck had already been loaded when the boxes arrived and the worker did not have any straps, ties or other means with which to secure them. He considered it would add 20 minutes to unload enough of the truck to load the boxes securely and 20 more minutes to reload the contents of the truck together with the boxes and he was not prepared to do that.

[10] Ibid at para 36

[11] At trial the jury found the employer had been negligent and the worker contributorily negligent as to 75%

The worker had given evidence that he made a phone-call to his employer objecting to take the boxes and indicating he had no straps. His evidence was that the employer had told him not to rock the boat and just accept the extra boxes. Much turned on this conversation (about which there was no objective evidence) and the employer did not concede it had taken place. The court took the view that the finding of contributory negligence would not have been open if the jury accepted the conversation as having taken place.

In evidence, the worker agreed he could have asked the forklift drivers (whose responsibility it was to load the goods onto the truck) to reconfigure the entire load but he had not done so.

The boxes were loaded by the forklift drivers and the worker secured them as best he could with what he had – he did not start afresh with the load as he considered it would take too long. The employer's evidence was that anything the worker needed to secure the load would have been provided to him if he had asked, and indeed he had been provided by his employer with a mobile phone to be used in the event of any issues arising.

The worker gave evidence that he knew that **re-configuring the load and the trailer and ensuring it was secure was his responsibility under his employer's system of work**. The Court of Appeal said

> *In our view, the jury was entitled to find that the appellant had, and knew that he had, an obligation to load the trailer safely or to ensure that it was safely loaded. However, when he was asked to take the extra four boxes, he told the forklift drivers he did not want to take any responsibility for them. It was open to the jury to conclude that he did not fulfil his responsibility to ensure that the trailer was securely loaded*[12].

The worker drove the load to NSW accompanied by a friend who had come along for the ride. At about Euroa, he noticed that the boxes had shifted, he drove on to Wangaratta and parked the truck in his friend's warehouse. He went to check on the boxes and correct the load on his own. He moved one, and on moving the second, he suffered his back injury and had to be lowered from the truck by forklift.

The case for the employer was partly put on the basis that the worker had not asked for assistance and attempted to move the second box alone – being well aware how heavy they were after having moved the first box. The evidence established that the worker's friend was in the vicinity but he did not ask him for help until after the injury occurred.

The employer had given evidence to the jury that the system of work **did not require a worker to move heavy objects alone – this was prohibited**.

The Court of Appeal found that the jury may well have accepted this evidence and found that the worker had NOT been injured in the performance of his duties **in**

[12] [2010] VSCA 204 at para 25

accordance with his employer's system of work. They did not disturb the jury's finding of 70% contribution – on the evidence it was open to the jury to make such a finding.

Failure to comply with employer's direction/instruction

Smith v Gellibrand Support Services Inc [2013] VSCA 368 Osborn and Beach JJA

The worker was employed as a carer and disability support worker. She injured her back in an incident with a resident she was helping to the toilet. The resident was quite overweight and lent on the worker, hanging around her neck causing her to suffer back pain. At the time of the incident, she was undertaking light duties as a result of a previous back injury and had been performing light duties for about a year.

In evidence, the worker accepted that the task of toileting the resident was something she should not have been doing and it had been made clear to her by her employer in the course of her light duties program. However, she maintained that this was "*not the reali*ty" of the situation as she felt she had no choice. The jury found 70% contributory negligence on the part of the worker.

The Court said the following:

- The restricted duties program was designed to limit the prospect of the worker injuring herself again;
- She was aware she was not to perform toileting of residents;
- The jury's finding on apportionment was open and there was no basis for interfering with it.

*Aycicek v Flowline Industries Pty Ltd 2019 [VSCA] 37 (*Beach JA Kyrou JA and Emerton JA*)*

The worker was employed on an assembly line. He injured his back when he lifted a heavy crate which weighed 62 kilograms. The employer's written policy provided a general "*rule of thumb*" that workers should not lift weights greater than 20 kilograms unassisted. That rule of thumb was contained in the employer's induction documents, which the plaintiff had signed when he commenced his employment.

The evidence in the trial established that the worker's written and spoken English were not so good and although trolleys had been provided by the employer, the evidence was that they were all full and he did not have access to a trolley at the time of the incident.

The appeal considered an application to set aside the jury's verdict of contributory negligence apportioned to 38 per cent, on the grounds that the employer had tolerated one man lifting of these crates, that the system was inherently unsafe and the plaintiff was not aware of the weight of the crate.

In making a determination, the Court considered the following:

1. What was the employer's system of work applicable to the lifting of the crate?

2. Irrespective of the system of work, can the jury's finding of contributory negligence be supported on the basis that the worker knew or ought to have known that the crate was too heavy for him to lift without placing himself at an unreasonable risk of injury?

3. Had the worker been told that he should not lift more than 20kgs?

The Court found as follows:

1) The evidence of the worker that the employer had tolerated the one man lift of the heavy crates for at least a year without complaint and about the lack of trolleys was unchallenged by the employer. Taking the evidence at its highest, the jury were entitled to conclude that the worker knew the crate was heavy and perhaps even knew it was very heavy when he went to lift it from its position on top of one crate so as to put it down on the ground;

2) The jury could only have concluded that at the time he lifted the crate, the worker was merely doing the job he was required to do – a job he had done many times before in the same manner and using the same action he and other workers had used **without complaint by the employer**;

3) In personal injury in the course of employment, mere inadvertence, inattention or misjudgment does not amount to contributory negligence.

4) The jury's finding of contributory negligence in this case was set aside.

Concluding remarks

The cases and principles discussed here all relate to the duties of employers to provide a safe workplace for their workers. It is clear that those duties are more onerous than the duty of the worker to exercise care for his or her own safety at work. Historically courts have taken the view that the relationship between employer and employee is not equal and therefore the duties of each, can-not be judged by the same measure.

The situation is different, however in non employment instances. In 2003, following a review of the law of negligence[13], the Wrongs Act 1958 in Victoria (and other legislation around the Australia) underwent legislative amendment. Section 62 of the Wrongs Act provides that the **same principles** apply to determining negligence and contributory negligence, and the standard of care required of the person who suffered harm is that of a reasonable person, and the matter is to be determined on the basis of what that person knew or ought to have known. Further, section 63 provides that damages for negligence can be reduced by as much as 100% for contributory negligence, if in the opinion of the court it is just and equitable to do so, with the end result that the entire claim can be defeated.

[13] Review of the Law of Negligence" (The Ipp Report September 2002)

As we can see, this is not the case in the common law as it relates to injured workers. The amount of damages for negligence of an employer can only be reduced by contributory negligence, they can be entirely defeated. This reflects the view of courts of the unequal relationship between employers and their workers and the need for protection of the safety of workers who are there to advance the employer's business and profit margins for a wage – often for a minimum wage.

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