

NEW SOUTH WALES BAR ASSOCIATION: COMMON LAW CONFERENCE

Saturday, 11 March 2017

PERSONAL INJURY – CONTRIBUTORY NEGLIGENCE

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It is sometimes said that we live in an age of statutes. If that is so, we also live in an age of law reform. Perhaps surprisingly, the process of law reform itself is sometimes in need of reform. Thus, after completing a review of the history which led to the UK *Law Reform (Contributory Negligence) Act 1945*, Professor Paul Mitchell noted that the Law Revision Committee report which led to the legislation did not itself produce draft legislation.¹ Professor Mitchell concluded:

“Within each of the official stages of law reform was a small group of individuals, representing a small minority of those entitled to contribute, whose ideas and influence carried weight. Furthermore, each stage of the process was not of equal importance: the parliamentary stage, which we might expect to be crucial, was, in fact, a sterile formality; key individuals made sure that it stayed that way. Being a consultant to the parliamentary draftsman, by contrast, was an apparently marginal role that, in fact, was just about the most powerful position in the process. The theory of how law reform should occur bore no relation to what actually happened.”

If the process of reform was complex, the outcome was, nevertheless, never in doubt. The Chair of the Committee was Lord Wright, whose judgment in *McLean v Bell*² affirmed the opinion of the Privy Council in a leading case on contributory negligence as a complete defence to a claim in negligence, *British Columbia Electric Railway Co Ltd v Loach*.³ Nor were the members recruited for the purpose of the inquiry lightweights: three were academics, including Stallybrass (Oxford), Winfield (Cambridge) and Professor A L Goodhart. Part of the pressure for reform derived from the experience that English judges had been acquiring in dealing with apportionment of liability for loss in maritime cases, following the enactment of the *Maritime Conventions Act 1911* (UK). That Act had introduced into English law the

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¹ Paul Mitchell, *A History of Tort Law 1900-1950* (Cambridge University Press, 2015), at 327.

² (1932) 147 LT 262.

³ [1916] 1 AC 719.

Brussels Convention on the Law of the Sea, which in turn reflected civil law principles of apportionment.

The suggestion that the Law Revision Committee examine the question of contributory negligence came from Lord Wright himself.⁴ This suggestion, which was made in April 1937 and was approved almost immediately, led to a report released in 1939. The timing was inauspicious and the war undoubtedly contributed to the six year delay between publication of the report and the resultant legislation.

In Australia, reform seeped across the continent from west to east. Western Australian acted first, in 1947;⁵ South Australia followed suit in 1951.⁶ Tasmania and the Northern Territory also enacted similar reforms, with the east coast catching up somewhat later.⁷

No law reform commission worth its salt would, these days, provide a report without draft legislation giving effect to its recommendations. That is not because parliamentary counsel are not up to the task of translating general policy directions into legislation, but because the act of drafting is likely to reveal ambiguities and vagueness in the policy conclusions. By the time New South Wales came on board in 1965, one might have expected that some of the infelicities in the original drafting would have been ironed out. However, at least for a while, things arguably went backwards. Even the subject matter of the legislation was concealed with the anodyne title, *Law Reform (Miscellaneous Provisions) Act 1965* (NSW). I hope I may be forgiven for continuing the well-understood, if somewhat parochial, approach of referring to “the 1965 Act”.

Various infelicities in the drafting have been remedied over the years; however, to keep us on our toes, more amendments have been made which reveal some combination of fuzzy thinking and deliberate obscurity. Let me justify those comments.

⁴ Mitchell at 303, fn 1.

⁵ *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA), s 4(1).

⁶ *Wrongs Act Amendment Act 1951* (SA), s 4, adding s 27a to the *Wrongs Act 1936* (SA).

⁷ Peter Handford, “Intention, negligence and some statutory conundrums” (2010) 18 *Tort L Rev* 140 at 150, fn 80.

Responsibility for a basic element of confusion must lie with the courts. The term “contributory negligence” is a double misnomer. In legal parlance, “negligence” refers to a breach of duty of care owed by one person to another. An injured plaintiff does not have his or her damages reduced because of some breach of duty to another. Further, it is at best unclear to what the plaintiff’s negligence contributes: does it contribute to the events which caused the injury, or to the severity of the injury, or possibly to neither? These questions are still not adequately answered by the statutory reforms.

The source of the need for statutory reform also lies with the courts. It was the courts which invented the defence of “contributory negligence” as an answer to a claim for damages resulting from the defendant’s negligence. The resultant opportunities for injustice were neither unpredictable, nor rare. Inevitably, there were attempts to ameliorate the results in particular cases by artificial manipulation of questions of causation and the construction of the “last opportunity” doctrine.⁸ That was followed by ambivalence as to the operation of the doctrine and even as to its existence.⁹

As we know, the reform introduced in New South Wales by the 1965 Act abolished the unqualified common law defence and allowed for the reduction of the claimant’s damages “to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage”.¹⁰ This language still appears, although it contains an important element of ambiguity. What precisely was to be measured, and against what standard?

The legislative reforms

Before turning to that question, there was an underlying uncertainty as to the scope of operation of the amending legislation. In its original form, both s 10 of the 1965 Act and its UK progenitor identified the area of operation as being “[w]here any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons...”. It is, to say the least, unfortunate drafting to use the

⁸ *Davies v Mann* (1842) 10 M&W 546.

⁹ See Mitchell at 306-309.

¹⁰ 1965 Act, s 10(1).

word “fault” in one clause with two different points of reference. That infelicity was only exacerbated by the definition in s 9:

“‘[f]ault’ means negligence, or any other act or omission which gives rise to a liability in tort or would, apart from this Part, give rise to the defence of contributory negligence....”

Although not without some judicial vacillation, this definition was understood to involve two separate elements separated by the disjunctive “or” (actually the third use of this word); the first limb referred to the conduct of the tortfeasor, while the second referred to the conduct of the person who had suffered harm. The difficulties with this language have been ameliorated by subsequent amendments to the 1965 Act. Thus, in its present form, the operative provision, s 9, reads as follows:

9 Apportionment of liability in cases of contributory negligence

- (1) If a person (the **claimant**) suffers damage as the result partly of the claimant’s failure to take reasonable care (**contributory negligence**) and partly of the wrong of any other person:
 - (a) a claim in respect of the damage is not defeated by reason of the contributory negligence of the claimant, and
 - (b) the damages recoverable in respect of the wrong are to be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage.
- (2) Subsection (1) does not operate to defeat any defence arising under a contract.
- (3) If any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of subsection (1) is not to exceed the maximum limit so applicable.

As can be seen, the term “fault” has been removed, so that the reference to the injured party’s conduct is identified by reference to “the claimant’s failure to take reasonable care” and the tortfeasor’s conduct as “the wrong of any other person”. The definition of fault has been removed (from what is now s 8) to be replaced by a definition of “wrong” as meaning any act or omission that:

- “(a) gives rise to a liability in tort in respect of which a defence of contributory negligence is available at common law, or

- (b) amounts to a breach of a contractual duty of care that is concurrent and co-extensive with a duty of care in tort.”

Paragraph (b) of the definition was introduced to overcome a limitation identified in *Astley v Austrust Ltd*.¹¹ It may be noted that no analogous defence applies to a claim founded on breach of fiduciary duty.¹²

The effect of the first limb of the definition of “wrong”, par (a), and the first operative provision in s 9(1), is to abolish the defence of contributory negligence as it applied under the common law. The second limb of the operative provision allows (and requires) that the damages which thus become payable, be reduced. The natural reading of the two limbs is to render them coextensive. At least in theory, that gave rise to a question as to whether the scope of “contributory negligence” was to be equated with an objective test of unreasonable conduct on the part of the injured party or whether it operated in the more limited circumstances in which the common law provided a complete defence, applying the last opportunity doctrine. In other words, if the last opportunity doctrine had not gone, there would now be fewer cases in which the claimant who would formerly have got nothing, would get reduced damages. There would then be cases where the careless claimant would have recovered in full under the common law and would therefore not have his or her damages reduced following the statutory amendments.

Indeed, there was (and seems to remain in the UK) an expansionist, rather than a restrictive construction of the provision, the gist of which is to consider whether under the common law, there were torts other than negligence in respect of which contributory negligence might be a defence.

Broadly speaking, neither of these issues remains alive in this jurisdiction, except in uncontroversial circumstances. Thus, in *State of New South Wales v Riley*,¹³ Hodgson JA (Sheller JA and Nicholas J agreeing) thought that the defence might be available for trespass to the person where the injury suffered was not intentionally inflicted.¹⁴ In that case, the claimant sought damages for false imprisonment in the course of which his wrist was accidentally fractured. Hodgson JA concluded that

¹¹ (1999) 197 CLR 1; [1999] HCA 6.

¹² *Pilmer v Duke Group Ltd (In liq)* (2001) 207 CLR 165; [2001] HCA 31.

¹³ (2003) 57 NSWLR 496; [2003] NSWCA 208.

¹⁴ *Riley* at [105]-[107].

compensation for such an injury could be obtained in a claim for false imprisonment, but that being an indirect and unintended consequence of the trespass, contributory negligence was available at common law.¹⁵

Finally, before returning to the critical question identified above as to the nature of the assessment to be made of the conduct of the injured party, I should refer to provisions dealing with contributory negligence in the areas of industrial and motor vehicle accidents.

Each of the *Workers Compensation Act 1987* (NSW),¹⁶ the *Motor Accidents Act 1988* (NSW)¹⁷ and the *Motor Accidents Compensation Act 1999* (NSW)¹⁸ have provisions which commence:

“The common law and enacted law as to contributory negligence apply to [an award of damages in respect of a motor accident], except as provided by this section.”

The *Workers Compensation Act*, but not the motor accident Acts, then expressly refers to the 1965 Act.

There are two comments to be made about these provisions. First, the reference to the common law as to contributory negligence is obscure: precisely what role could the common law play since 1965? Secondly, at least in respect of the motor accident Acts, a finding of contributory negligence became obligatory in a case of failure to wear a seat belt or protective helmet as required by law, and where the injured party had been convicted of a blood alcohol offence. Of particular interest is the provision which requires a finding of contributory negligence by a “voluntary passenger in or on a motor vehicle” who should have known that the driver’s ability to drive the motor vehicle was impaired by alcohol or some other drug.¹⁹ Such a finding could be resisted only if the injured person “could not reasonably be expected to have declined to become a passenger”.

¹⁵ See also the discussion in *Elite Protective Personnel Pty Ltd v Salmon* [2007] NSWCA 322 at [126].

¹⁶ Section 151N.

¹⁷ Section 74.

¹⁸ Section 138.

¹⁹ *Motor Accidents Compensation Act*, s 138(2)(b).

The basis on which damages are to be reduced gives rise to two broad issues. The first is whether the assessment of the injured person's "share in the responsibility for the damage" extends to moral blameworthiness or direct causal effects and, secondly, whether there are degrees of causal responsibility.

*Pennington v Norris*²⁰ dealt with an early case under the Tasmanian legislation of 1954.²¹ The High Court side-stepped a technical approach to what would have constituted a defence under the common law and said:²²

"What has to be done is to arrive at a 'just and equitable' apportionment as between the plaintiff and the defendant of the 'responsibility' for the damage. It seems clear that this must of necessity involve a comparison of culpability. By 'culpability' we do not mean moral blameworthiness but degree of departure from the standard of care of the reasonable man."

In other words, the Court asked itself whether a reasonable person in his situation would have put himself at risk in the way that Mr Pennington did, even though he did not endanger anybody else.²³ The lack of care was a failure of the plaintiff to keep a proper look out for approaching vehicles when crossing a street on foot.

The next question is whether that approach has been affected by the final provision to which I will make reference, namely s 5R of the *Civil Liability Act 2002* (NSW). As you will be aware, that section states:

5R Standard of contributory negligence

- (1) The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.
- (2) For that purpose:
 - (a) the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person, and
 - (b) the matter is to be determined on the basis of what that person knew or ought to have known at the time.

²⁰ (1956) 96 CLR 10 (Dixon CJ, Webb, Fullagar and Kitto JJ).

²¹ *Tortfeasors and Contributory Negligence Act 1954* (Tas).

²² *Pennington* at 16.

²³ *Pennington* at 16.

Applying the current legislation

The principles to which reference is made in s 5R(1) are presumably the principles set out in s 5B and s 5C. But to take the facts of *Pennington v Norris*, how does one apply those principles to the driver of the motor vehicle and the pedestrian? The Ipp Report²⁴ stated:

“There is a perception (which may reflect the reality) that many lower courts are more indulgent to plaintiffs than to defendants. In some cases judges have expressly applied a lower standard of care for contributory negligence. This may result, for example, in motorists being required to keep a better lookout than pedestrians. In the Panel’s view, this approach should not be supported.”

To similar effect, the English text, *Winfield and Jolowicz on Tort*²⁵ states:

“The lack of care that will constitute contributory negligence varies with the circumstances of each case. Thus, the greater the risk of suffering damage the more likely it will be, all other things being equal, that the reasonable person in the claimant’s position would have taken precautions in respect of that risk. The reasonable person will often take into account the possibility that others around him will be careless and so the claimant who does not anticipate that the defendant might be negligent may be guilty of contributory negligence. However, the law does not require the claimant to proceed like a timorous fugitive constantly looking over his shoulder for threats from others.”

The purport of these statements is not entirely clear: on one reading, however, they may suggest that the conduct described is that which would be undertaken by the reasonable person. On that view, it sets a standard.

The difficulty in applying these principles may be illustrated by the following consideration. On the one hand, the extent of the duty imposed with respect to the conduct of others is limited by reference to what may be expected of them, acting as reasonable people. That is not to disregard the possibility of inadvertence, inattention or misjudgement on their part.²⁶ By parity of reasoning, the injured party would not suffer a reduction of damages because of his or her inattention or misjudgement falling short of a failure to take reasonable care.

²⁴ *Review of the Law of Negligence - Final Report* (Cth of Aust, 2002), at par 8.11.

²⁵ W E Peel and J Goudkamp (eds) (19th ed, Sweet & Maxwell, 2014) at 703, par 23-042 (citations omitted).

²⁶ *McLean v Tedman* (1984) 155 CLR 306 at 312.

For many years after the introduction of what has been described as “the apportionment legislation” there have been elements of uncertainty as to precisely what it required. The language of the 1965 Act and its UK predecessor did not speak in terms of apportionment of responsibility between plaintiff and defendant or defendants, in the sense of requiring a comparative exercise. The focus of the legislation was directed not to responsibility for the act causing harm, but rather to the damage suffered. The legislation did not identify how the injured party’s share of responsibility for the damage suffered should be measured.²⁷ On the other hand, the courts were untroubled by the specific terms of the statutory provisions, as was illustrated by the 1985 judgment in *Podrebersek* in which the High Court stated:²⁸

“The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man (*Pennington v Norris* ... at 16) and of the relative importance of the acts of the parties in causing the damage: *Stapley v Gypsum Mines Ltd* [1953] AC 663 at 682”

The greatest anxiety, at least in this jurisdiction, was created by the need to deal with cases involving multiple defendants.²⁹

What remains of significance are two practical problems and one matter of principle. At the broadest level, the practical problems can be summed up by asking how tough should the courts be on injured parties. More specifically, is it correct now to say, as the courts tended to do in the past, that a higher standard should be applied to the driver of a motor vehicle who hits a pedestrian than to the injured pedestrian because the driver “was in charge of a machine that was capable of doing great damage to any human being who got in its way”?³⁰

The amendments to s 9 of the 1965 Act clarified the underlying principle and the scope of the legislative scheme, without departing from the “just and equitable” reduction test. The variation sought to be made by s 5R of the *Civil Liability Act* did something more.

²⁷ See, eg, Ross Parsons, “Negligence, contributory negligence and the man who does not ride the bus to Clapham” (1957) 1 Melb UL Rev 163.

²⁸ *Podrebersek v Australian Iron and Steel Pty Ltd* [1985] HCA 34; 59 ALJR 492 at 494.

²⁹ See *Barisic v Devenport* [1978] 2 NSWLR 111.

³⁰ *Talbot-Butt v Holloway* (1990) 12 MVR 70 at 88 (Handley JA); see also *Pennington v Norris* at 16-17; *Stocks v Baldwin* (1996) 24 MVR 416 at 417-418 (Mahoney P); *Schieb v Abbott* (1998) 27 MVR 285 at 287-288 (Beazley JA).

The drafting of s 5R was unfortunate; although it addressed directly the topic dealt with in s 9 of the 1965 Act, it did not adopt either the original form or the more recent form of s 9. Section 5R sought to do two things. First, it sought to equate the principles that were to be applied in determining whether a defendant has been negligent with the principles to be applied to determining whether the injured party has been “contributorily negligent in failing to take precautions against the risk of [the harm he or she has suffered].” Secondly, it identified the “standard of care” required of the injured person as that of “a reasonable person in the position of that person” having the same knowledge or constructive knowledge as the injured person.

The first change raises an issue as to whether the duty imposed on the injured claimant with respect to his or her own safety is to be equated with the duty of care the injured person might have owed to the defendant or to a third person. If that is correct, it appears that any leniency which has in the past been accorded to pedestrians, for example, may need to be rethought. Certainly the Final Report which gave rise to the amendments to the *Civil Liability Act* identified that as a purpose of the recommendation which became s 5R.

There is also a lack of clarity about the apparent qualification of the broad objective test of reasonable care, by reference to the actual knowledge, or that which the injured person ought to have known, as a factor relevant to determining “the standard of care”. It is the generality of the language which causes difficulty. If the drafter had in mind the circumstances of a passenger who knows or ought to know that the driver of the vehicle is intoxicated, that would be one thing; the language, however, is not so limited.

Why the drafter insisted on including this provision in the *Civil Liability Act*, rather than amending s 9(1) of the 1965 Act, is far from clear. (Unlike the motor accident legislation, the amendment was intended to operate generally with respect to negligence, at least in the usual case involving personal injury.) Had that course been taken, attention might have been paid to whether the amendment was intended to affect the precondition to a reduction of damages, namely a finding of “contributory negligence” or whether it was intended to apply both to that limb of s 9 and also the limb addressing the just and equitable reduction. It might be expected that the intention was to influence both limbs, as the discussion of “the standard of care” was

language used in *Podrebersek* in describing how a just and equitable reduction was to be achieved. It should follow that s 5R effects a variation of the just and equitable test contained in s 9 of the 1965 Act.

There remains the tension between applying a similar standard of care to the injured party and to the defendant, and the need to take account of their different circumstances. Understandably, the principles set out in s 5B of the *Civil Liability Act* are apt for determining the scope of the duty and the possibility of breach, but are awkward when sought to be applied to the carelessness of the injured party. The problem arises in large part because of the lack of precision in the drafting of the *Civil Liability Act*. To explain why that is a problem, it may be helpful to identify some classes of cases in which the principles must be applied.

First there are the “static duty” cases. Examples are those cases involving occupiers (state of premises) and road authorities (road design and signals). Secondly, there are the “system” cases, such as those involving the duty of an employer to provide a safe system of work and duties owed by independent contractors of a similar kind. These are not static duties, but involve operational activities. Thirdly, there are the motor vehicle cases. Although it is correct to say that the user of a motor vehicle owes a duty of care to all other road users, it may be helpful to distinguish between the duty owed to other drivers and the duty owed to more vulnerable road users, such as cyclists and pedestrians.

Taking the employment situation by way of example, it is difficult to find any useful work for s 5R to do. The approach to the standard of negligence adopted by Lord Wright in 1940 in *Caswell v Powell Duffryn Associated Collieries Ltd*³¹ has long been accepted in this country³² and there is no reason to suppose that the *Civil Liability Act* intended to derogate from the sound factual judgments involved.

“What is all-important is to adapt the standard of what is negligence to the facts, and to give due regard to the actual conditions under which men work in a factory or mine, to the long hours and the fatigue, to the slackening of attention which naturally comes from constant repetition of the same operation, to the noise and confusion in which the man works, to his pre-

³¹ [1940] AC 152 at 178-179.

³² Though not always its application: see, eg, *Sungrature Pty Ltd v Meani* (1964) 110 CLR 24 at 36-38 (Windeyer J, Kitto, Menzies and Owen JJ agreeing at 34).

occupation in what he is actually doing at the cost perhaps of some inattention to his own safety.”

Thus, the fact that employers should have regard to likely lapses of attention and misjudgements on the part of workers tends to heighten the standard required of the employer. The same factual circumstances will excuse a degree of carelessness on the part of the worker.

The second example, which has caused a level of disagreement within the Court of Appeal, is the approach to be taken to carelessness on the part of injured pedestrians and cyclists. There the argument for differential standards is, on one view, analogous to that of the standard setting with respect to the employer. However, the critical element justifying a differential approach lies not in the location of control as between the parties (vested in the employer), but in the fact that the driver is operating a potentially dangerous machine, capable of causing significant damage to a pedestrian in the case of an accident. Because the reverse is not true, or assumed not to be true, carelessness on the part of the pedestrian is readily excused and a high standard is imposed on the driver.

It is, however, possible to apply s 5R in a way which could cast doubt upon what has previously been the approach of the Australian courts to such cases. Thus, applying the principles set out in s 5B(2), relevant to the standard of care in negligence, it can readily be said that (a) the probability that harm would occur if the pedestrian fails to take care is high; (b) the likely seriousness of the harm is very high, and (c) the burden of taking precautions to avoid the risk of harm (that is, keeping a proper lookout) is insignificant. This reflects the approach taken in *Winfield and Jolowicz*, referred to earlier.

In policy terms, the fresh approach proposed by the *Civil Liability Act* is coherent and justifiable. First, it is not necessarily correct to say that the pedestrian is careless only as to his or her own safety; a reckless pedestrian can cause a collision between two vehicles or endanger the safety of other pedestrians.³³ Secondly, it is curious that, whilst the law displays little tolerance of drunk or drug-affected drivers, it is

³³ Although the facts were not so analysed by the High Court, *Manley v Alexander* [2005] HCA 79; 80 ALJR 413, provides a good example: the driver of the truck, focusing his attention on an apparently drunk pedestrian at the side of the road, failed to see the more severely drunk pedestrian lying in the middle of the road.

willing to impose the cost of injury to a drunk or drug-affected pedestrian on an unaffected driver. Thirdly, the very fact that a careless pedestrian is likely to suffer serious harm should weigh in favour of the pedestrian taking special care for his or her safety. Finally, the driver of a moving vehicle will need to focus primarily on the roadway ahead, rather than pedestrians coming from one side or the other. At best, the driver's attention will be divided: the attention of the pedestrian, assuming that he or she is not taking multiple risks at one time, need not be divided.

Negligence and disability

To describe the test of negligence as objective, while not inaccurate, may be to divert attention from the identification of relevant circumstances. It is really a means of identifying an approach to determining a standard of care which is divorced, at least to some extent, from individual characteristics or abilities. However, s 5R(2) of the *Civil Liability Act* requires some accommodation of those characteristics and abilities. Thus it is necessary to ask, what is encompassed by the phrase “a reasonable person in the position of [the person who suffered harm]”.

Similarly, it is necessary to ask what is encompassed within the reference to that which the injured person knew or ought to have known at the time. I raised this question in passing in *T and X Company Pty Ltd v Chivas*,³⁴ a case in which the injured pedestrian, who dashed across the road against a red light in front of a moving taxi, was afflicted by Asperger's syndrome. Such a condition may limit how an individual will “read” the behaviour of others and thus, arguably, what he or she knew or ought to have known. There would be an irony if the law were willing to overlook the carelessness of self-induced (that is, drug-related) disability but not the disabilities resulting from genetic causes.³⁵ In the case of an assessment of carelessness regarding one's own safety, the “just and equitable” approach required by s 9 may extend to an allowance for conduct affected by disability.

It is also true that people may misjudge the risks they face; an ageing person may misjudge the speed of an approaching vehicle and his or her ability to take rapid evasive action if required. In the emergency thus created, misjudgement may be

³⁴ [2014] NSWCA 235; 67 MVR 297.

³⁵ *Chivas* at [55].

exacerbated by indecision. How should that affect the assessment of responsibility for the injuries resulting from the collision?³⁶

Conclusion

No-one, I suspect, thinks we should repeal the 1965 Act and revert to the blunt instrument of the common law defence. Nevertheless, it is intriguing that, more than 50 years after it came into force in this State (longer elsewhere) its operation continues to be controversial. Perhaps that is just because the apportionment exercise required of the courts is readily open to divergent opinions.

Although the statement in *Pennington*³⁷ that “the Act intends to give a very wide discretion to the judge or jury entrusted with the original task of making the apportionment” is no doubt as correct today as it was in 1956, the consequential prognostication that “cases will be rare in which the apportionment made can be successfully challenged” has proved less durable.³⁸

Perhaps the appeal courts intervene too readily; but removing the exercise from juries, combined with the zeal of appellate intervention for inadequate reasons, has encouraged more litigation than seems desirable.

³⁶ *Gordon v Truong* [2014] NSWCA 97; 66 MVR 241.

³⁷ *Pennington* at 15-16.

³⁸ See also *Podrebersek*.