HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

LIFTRONIC PTY LIMITED APPELLANT

AND

EROL UNVER RESPONDENT

Liftronic Pty Limited v Unver [2001] HCA 24
3 May 2001
S102/2000

ORDER

1. *Appeal allowed.*

2. *Set aside the Orders of the Court of Appeal of the Supreme Court of New South Wales made on 7 February 2000.*

3. *Remit the matter to the Court of Appeal for determination, in accordance with the reasons for judgment in this Court, of the nett amount for which judgment should be entered, and of the question of costs in that Court.*

4. *Respondent to pay the costs of the appeal to this Court.*

On appeal from the Supreme Court of New South Wales

Representation:

B M J Toomey QC with P J Mooney for the appellant (instructed by Vandervords)

B J Gross QC with H N Kelly and S Thode for the respondent (instructed by Gibsons)

CATCHWORDS

Liftronic Pty Limited v Unver

Negligence – Contributory negligence – Apportionment of responsibility – Whether Court of Appeal erred in setting aside jury's apportionment of responsibility – Whether jury's apportionment reasonable.

Employer and employee – Negligence – Contributory negligence – Employer's duty to provide safe system and place of work – Conduct amounting to contributory negligence by employee – Respective roles of jury giving verdict at trial and appellate court deciding appeal against jury's apportionment.

Practice and procedure – When parties bound by conduct of case.

Law Reform (Miscellaneous Provisions) Act 1965 (NSW), s 10(1).

1 GLEESON CJ. The issue in this appeal is whether the Court of Appeal of New South Wales erred in setting aside, as perverse, a jury's apportionment of responsibility between plaintiff and defendant in a case where there was an admittedly justifiable finding of contributory negligence.

2 In *Podrebersek v Australian Iron and Steel Pty Ltd*, this Court said[1]:

> "A finding on a question of apportionment is a finding upon a 'question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds' … Such a finding, if made by a judge, is not lightly reviewed. The task of an appellant is even more difficult when the apportionment has been made by a jury."

3 I agree with McHugh J that, having regard to the manner in which the case was conducted and left to the jury at trial, it is not possible to say that it was unreasonable for the jury to place the responsibility on the plaintiff to the extent found, and to make the apportionment that they made.

4 I agree that the appeal should be allowed and the proceedings remitted to the Court of Appeal as proposed by Gummow and Callinan JJ.

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1 (1985) 59 ALJR 492 at 493-494; 59 ALR 529 at 532 per Gibbs CJ, Mason, Wilson, Brennan and Deane JJ.

5 McHUGH J. The issue in this appeal is whether the Court of Appeal of New South Wales (Mason P and Brownie AJA, Meagher JA dissenting) erred in setting aside a jury's finding that the plaintiff was 60 percent responsible for the damage that he suffered as the result of his and his employer's negligence. The majority held that 20 percent was "as high a percentage as might reasonably have been found". In my opinion, the Court of Appeal erred in setting aside the jury's finding. On the way that the case was conducted – and the law seems to have been misunderstood and misapplied by all parties at the trial – the jury's finding of 60 percent responsibility was reasonable.

The plaintiff's case

6 On Monday 20 February 1995, the plaintiff sustained injury to his back in the course of his employment with the defendant. The plaintiff was a lift mechanic. He had been "doing this job for 17 years" although he had been employed by the defendant only since October 1994. He was injured while working with another employee installing rails in an elevator shaft at the Sydney Eye Hospital. According to the plaintiff, their job was to lift steel rails, each 5 metres in length and weighing approximately 111.5 kilograms, from the floor onto a shelf and clean and paint them. When a rail had been cleaned and painted, they had to lift it "and put it aside somewhere else". Painting and cleaning a rail took about 15 to 20 minutes.

7 The plaintiff testified that this work had commenced on the previous Thursday when a charge hand had directed him to clean and paint the rails. He said that he was given no instructions as to how to carry out the job. Nor was he given any hooks or other equipment to assist in lifting the rails. He denied that he was told to keep his back straight when lifting and to bend from his knees.

8 The plaintiff said that, at about 8.30am on the Monday morning, "I was again bending down and I tried to lift the railing. When I was doing that I felt a burning sensation." He said that he "bent down, picked it up, tried to lift, then I felt that burning sensation".

9 Mr Colin Simpson, a consulting engineer, testified that authorities such as the National Health and Medical Research Council recommended that a person should not be asked to lift more than 39 kilograms. He said that on each lift the plaintiff and his fellow employee would be lifting about 55 kilograms each. Mr Simpson said that the 39 kilograms maximum weight assumes "ideal conditions on a once per eight hour basis and assumes that whoever does it, bends their knees, keeps a straight back, there is no twisting or any of those contortions that are known to be potentially dangerous". In his opinion, "in this instance the weight is well and truly over that and there has to be a real risk of injury and specifically a back injury". If the plaintiff had to lift the rails manually onto the scaffolding, the maximum weight that ought to have been lifted was 35 kilograms and that weight assumed that the worker "has been

trained in lifting". Mr Simpson said that there were hundreds of mechanical lifting devices available to lift the rails and that, if manual labour had to be used, then eight people using hooks should have been used to lift each rail.

10 On the plaintiff's case, therefore, the defendant had no system, gave its employees no instructions, and required them to lift weights that exposed them to a risk of injury that could have been avoided by using reasonably practicable alternatives. If the jury had accepted the case for the plaintiff, they could not reasonably have found him guilty of contributory negligence.

11 The learned trial judge gave the jury a number of questions that they had to answer. The first question was, "Has the plaintiff proved he suffered injury as a result of the defendant's negligence?" In directing the jury on this question, his Honour said:

> "In this case, the plaintiff's case in negligence is a fairly simple one. He says that to require or permit him to try to lift this rail … in the way in which he did, exposed him to an unnecessary risk of injury and it was a foreseeable risk … So he says the defendant was in breach of its duty to provide a safe system of work. The system that should have been employed the plaintiff says, was to use either a mechanical lifting device, a small crane of some sort, or alternatively, to use eight men, two on each of four tongs as a team, possibly with an extra man supervising."

12 Later the judge said:

> "It was said to you by [counsel for the plaintiff] and you might think with perhaps some justification, that [counsel for the defendant] did not spend a lot of time submitting to you that the defendant was not negligent."

13 His Honour also said:

> "The other part of the first question is whether the plaintiff suffered injury and as I understand the submissions and the approach of the defendant in this case, [counsel for the defendant] does not submit to you that the plaintiff was not injured. So again, it is entirely a matter for you to decide, but I suggest to you that you would have little difficulty in coming to the view on the evidence that the plaintiff in fact suffered injury as a result of his lifting this rail on the morning of 20 February 1995."

14 The latter direction gave the jury no assistance on the issue of causation. It treated the first question as dealing with the issues of negligence and injury and assumed that, if negligence and injury were found, the first question must be answered in favour of the plaintiff. It omitted any discussion of the term "resulted" in question 1. In so far as the direction dealt with the plaintiff's case

based on his evidence, it was harmless enough. But, as will appear, if the jury accepted the defendant's evidence, the direction was likely to mislead the jury on the issue of causation.

The defendant's case

15 Mr Shane Dawes, an apprentice fitter and machiner who was working with the plaintiff at the time of the injury, gave a very different version of the employer's system and the circumstances leading to the plaintiff's injury. He said that the rails had come in bundles of ten, strapped together. Troy Carson, the charge hand, had told them to split the bundles, move the rails onto timbers and paint them. The timbers were two to three inches above the ground. Mr Carson had given each of them a lifting hook which went through a hole at each end of the rail and had instructed them how to carry out the work. Mr Dawes said that "[w]e were shown how to lift and where to do the work, we were shown pretty much how to do it." He said that on one occasion Mr Carson had told the plaintiff that he was "lifting incorrectly, bend your knees and don't bend your back".

16 Mr Dawes said that on the Monday morning the plaintiff "said he was fed up with bending over and painting the rails and he wanted to lift it up to a better height that he didn't have to bend over". The plaintiff then got a scaffold frame that was about two feet high. He told Mr Dawes "we were going to be picking them up and putting them up on there so there was no more bending involved in painting". Mr Dawes said they "had to physically manhandle the rails to pick them up to put them on the scaffold". Asked the difference between using the hooks system and the method devised by the plaintiff, Mr Dawes said:

> "[U]sing the hooks it's very easy work. It's not very hard at all because you're keeping your body straight but actually bending over and picking up rails is a very hard job."

17 Asked how long they had been using the "new system" before the plaintiff complained about back pain, Mr Dawes said, "Not very long at all, probably about five or ten minutes."

Alternative cases for the plaintiff

18 The evidence of Mr Dawes, if accepted, rejected the whole basis of the plaintiff's case. But it also allowed the plaintiff to run two alternative cases, if he had wanted to do so. The first alternative was that the defendant's system required the plaintiff and Mr Dawes to crouch or bend while they were cleaning and painting the rails and that it was reasonably foreseeable that the plaintiff might abandon the system and adopt the system that he did. If the jury found that what the plaintiff had done was a reasonably foreseeable consequence of the defendant's system, they could also have found that the provision of lifting

equipment and a sufficiently high platform would have avoided the injury and the risk of it occurring. But the plaintiff did not put this alternative case as a head of negligence.

19 In determining what was a reasonable apportionment of responsibility for the damage suffered by the plaintiff, it would be erroneous, therefore, to act on the basis that the defendant should have foreseen that the plaintiff would abandon its system and introduce his own. That was never the plaintiff's case at the trial. As will appear, the majority of the Court of Appeal held that it was reasonably foreseeable that the plaintiff would in fact do that. In doing so, the majority erred. By doing so, they attributed to the defendant a degree of fault that was not litigated at the trial and which, if it had been litigated, could reasonably have been found in favour of the defendant.

20 The second alternative case that Mr Dawes's evidence allowed the plaintiff to put to the jury was that the defendant had failed to enforce its own system. On the evidence of Mr Dawes, it was unlikely that the plaintiff could have succeeded on this alternative case. On that evidence, there could not have been more than one previous lift under the "new system". In effect, the jury would have been asked to find that the defendant should have continually supervised a mechanic of 17 years' experience to ensure that he did not abandon its system – after using it for two days – and substitute a system of his own. Moreover, given how quickly the injury occurred under the "new system", the plaintiff would have had a difficult problem on the issue of causation. To succeed on that issue, the jury would have had to find that constant supervision would have avoided his injury. Nevertheless, despite these difficulties, the learned trial judge left a version of this alternative case, although his charge hardly directed the jury to the issues that were involved in it. He merely said, "The plaintiff also says that it is part of the employer's duty to supervise and ensure that any system of work that is put in place is carried out by the employees." He said no more on the issue.

The directions of the trial judge

21 After the jury had retired to consider its verdict, they asked for further directions on question 1. Given the evidence of Mr Dawes and that of Mr Simpson and the compressed nature of the directions, that was hardly surprising. On this occasion, the learned trial judge used Mr Dawes's evidence and the evidence of Mr Simpson to make another case of negligence against the defendant. He said:

> "The way in which the plaintiff puts his case here is that he was required by whatever means, to lift a weight that was excessive. That is his case. He says it does not matter really whether you find that the hooks were available or not, because in any event the weight that was to be lifted when distributed between the two men who were to do the lift, was still

> excessive, and for that the plaintiff relies upon the evidence of Mr Simpson."

22 Later, his Honour said:

> "But you might think, having heard the evidence and particularly that of Mr Simpson, which is not contradicted, and you will recall that [counsel for the defendant] did not attempt in any way to cross-examine him so as to get him to retract what he said about safe lifting weights, so you can take it that the defendant accepts that what Mr Simpson said for that purpose can be accepted by you. You might think that you will have not a great deal of difficulty in answering question one 'yes'."

23 The learned trial judge erred in giving these directions. It did matter whether the hooks were available or not, and the issues of negligence and causation that were involved were much more complex than these directions assumed. The issue of actionable negligence did not turn on whether the defendant's system was negligent in some abstract sense, divorced from the facts of the case as found by the jury. In so far as the plaintiff relied on an unsafe system of work, he had to prove not merely that the defendant's system was negligent but that that system had caused his injury. The issue of causation was an easy one for the plaintiff on his evidence. It was a complex and difficult one, as was the issue of negligence, if the jury accepted Mr Dawes's evidence.

24 It is true that, on the unchallenged evidence of Mr Simpson, the defendant's system required the plaintiff to lift a weight that was at least 16 kilograms greater than the National Health and Medical Research Council standard. On that basis it was open to the jury to find that the defendant's system was defective. But they would not have been acting unreasonably if they had found that the defendant was not negligent in using its system. It was open to the jury to find that, despite Mr Simpson's evidence, only a small risk was involved in using, every 15 or 20 minutes, the hooks and a straight back to twice carry a rail two or three metres and lift it up and down two or three inches. It was open to the jury to find that the risk was so small that it was not unreasonable for the defendant not to use a small crane or a team of eight men to lift each rail. This was particularly so, since the work was not being done on the defendant's premises and would have required the expense and inconvenience of getting the crane to the Hospital. The jury might also have been sceptical as to whether the National Health and Medical Research Council standards were fully applicable in respect of a lift of two or three inches using hooks and a straight back. Mr Simpson's evidence had been based on the assumption that the plaintiff had to lift the rails manually onto a platform two feet high. When counsel for the plaintiff asked him about lifting the rail onto beams two or three inches above the ground, his evidence was far from clear and seemed to have assumed that manual lifting without hooks was involved. Asked "would you still subscribe that those

two alternative methods [ie lifting equipment and eight men with tongs] would be much preferable?" he answered, "Most certainly."

25 The judge's directions to the jury did not address any of the considerations that pointed against negligence. His Honour and counsel seemed to have proceeded on the erroneous assumption that, if there was a reasonably foreseeable risk of injury to the plaintiff that could have been avoided by using mechanical means, the defendant was necessarily negligent. But the issue in negligence is always whether reasonable care required the elimination of the risk having regard to the consequences of the risk, the probability of its occurrence and the cost, expense and inconvenience of eliminating it. In *Wyong Shire Council v Shirt*[2], Mason J pointed out:

> "The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position."

26 Assuming that the defendant was negligent in using its system, however, his Honour's directions overlook the fact that *the plaintiff was not using the defendant's system when he was injured*. He was using his own system, if the jury accepted the evidence of Mr Dawes. The "new system" involved the manual handling of the rails and bending of the back while picking up the rails. Whatever the faults the defendant's system had, it required the use of hooks, and their use avoided the necessity for bending the back while lifting. In addition, under the "new system" the height of the lift increased from two to three inches to two feet. According to the evidence of Mr Simpson, lowering the rail from the height of the platform to the floor involved a greater risk than lifting it to that height. The consequence of that was that the plaintiff was exposed to a higher risk of injury than that involved in the defendant's system and for a longer period. A causal connection between the defendant's system and the plaintiff's injury could exist only if the jury found that it was reasonably foreseeable that the plaintiff might abandon the defendant's system and adopt the kind of system that he did. But that case was never put.

27 The above directions of the learned trial judge concerning the defendant's negligence were erroneous. At all events, they did not deal with the complex issues that arose if the plaintiff's evidence was rejected. However, neither counsel objected to the judge's summing up. And the issue of apportionment

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2 (1980) 146 CLR 40 at 47-48.

must be examined with that in mind. But the course of the trial and the summing up create difficulties because issues of responsibility in apportionment are closely tied with the issue of causation in negligence and with the issue of lack of care contributing to harm in contributory negligence[3].

Apportioning responsibility

28 Section 10(1) of the *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW) then required the jury, if it found contributory negligence, to reduce the damages to "such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage"[4]. That required the jury to compare the culpability of the plaintiff and defendant in the sense of the "degree of departure from the standard of care of the reasonable man[5]".

29 In determining whether the jury's apportionment in the present case was unreasonable, one principle is basic. The issue must be examined on the basis that, so far as it was reasonably possible to do so, the jury found the least degree of fault on the part of the defendant and the maximum degree of fault on the part of the plaintiff. The apportionment must also be examined on the basis that the jury took that view of the evidence, favourable to the defendant, which is most consistent with their apportionment.

30 In *Zoukra v Lowenstern*[6], a case which this Court and others have cited with approval[7], the Full Court of the Supreme Court of Victoria said:

> " ... it is not known what view the jury took. The appeal must therefore proceed upon the basis that the jury took the most favourable view to the

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3 *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALJR 492 at 494; 59 ALR 529 at 532-533; see also *Wynbergen v Hoyts Corporation Pty Ltd* (1997) 72 ALJR 65 at 68; 149 ALR 25 at 29.

4 The *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW) has since been amended. See *Law Reform (Miscellaneous Provisions) Amendment Act* 2000 (NSW) (Act No 111 of 2000).

5 *Pennington v Norris* (1956) 96 CLR 10 at 16.

6 [1958] VR 594 at 595.

7 *Podrebersek v Australian Iron and Steel* (1985) 59 ALJR 492; 59 ALR 529; *Kulczycki v Metalex Pty Ltd* [1995] 2 VR 377 at 383; *Coleman v Latrobe University* (unreported, Court of Appeal of Victoria, 8 September 1995); *Butler v Rick Cuneen Logging Pty Ltd* [1997] 2 VR 99 at 104; *Moundalek v Woolworths Limited* (unreported, Court of Appeal of New South Wales, 22 October 1997).

> respondent which a reasonable jury could take upon the evidence. This court is not at liberty to form its own view upon the facts and substitute it for the view which might reasonably have been taken by the jury in respondent's favour. So far as the findings of negligence against each party are concerned, this depends upon the view taken by the jury as to the failure of each party to observe the required standard of care. This is essentially a jury question, and it is only where the court is able to say that on no possible view of the facts could negligence be found against a party by a reasonable jury that a finding on this issue will be interfered with upon appeal."

31 Given the jury's finding on contributory negligence, it is clear that they rejected the plaintiff's primary case on negligence. He was not left to design his own system, as he maintained. So either the jury found that the defendant was negligent in not enforcing its system or that it was negligent simply because it did not provide lifting equipment. The strength of the trial judge's directions in his summing up and in his re-direction indicates that the jury probably found that the defendant was negligent because, although it provided hooks and instructed the plaintiff not to bend his back and to bend his knees, its system exposed the plaintiff to the risk of injury because lifting equipment was not provided.

32 On the other hand, the finding of contributory negligence must be assessed on the basis that the plaintiff had abandoned the defendant's system, had invented his own system and, in defiance of express instructions, bent his back to lift the rail onto the platform.

33 Upon these findings, it was open to the jury to find that it was just and equitable to reduce the plaintiff's damages by 60 percent. The jurors were entitled to take the view that, although the provision of lifting equipment and a higher platform would have eliminated the risk of injury and the plaintiff would not have suffered injury, the injury would not have occurred even if he had continued to use the defendant's system. That is, although the jury had found that the defendant was negligent in not using a mobile crane or similar device, the defendant's system while containing a theoretical risk of injury would probably not have caused the plaintiff's injury if he had followed the system. Giving powerful support to that conclusion was the fact that the plaintiff and Mr Dawes had used the system for two days without mishap. Yet it took only five or ten minutes for the "new system" to cause injury to the plaintiff. Moreover, Mr Dawes said that using the hooks was very easy work, that it was "not very hard at all because you're keeping your body straight". In contrast to the defendant's system, however, "actually bending over and picking up rails is a very hard job".

34 In cross-examination, Mr Simpson agreed that providing a hook so that the worker can stand close to upright places little stress on the lumbar spine and is "a very satisfactory way … of reducing the risk of injury to the lower back".

He also agreed in a series of questions that, if the plaintiff did not have to bend or arch his back in any way when using the hooks, there would have been "far less strain on his lower back" with "far less risk of injury to lower back". Mr Simpson was asked:

> "Q. And it's really, I mean the real thrust of your criticism of the work system, is it not, *is the requiring of him to have to bend down with his hands and pick up a rail off the ground*, that's a real critical aspect of the physical work he was required to perform?
>
> A. That and the ultimate weight." (emphasis added)

35 Mr Simpson's evidence in chief was primarily based on the assumption that the system employed by the defendant was that described in the plaintiff's evidence. He agreed in cross-examination that the system that Mr Dawes described carried with it far less risk of injury than what he had been "initially asked to assume" based on the plaintiff's account.

36 The jury was therefore entitled to conclude that, although the defendant's system involved a risk of injury that could have been eliminated with a different system and that the plaintiff would not have been injured under such a system, the probability of injury under the defendant's system was small, much smaller than under the "new system". Moreover, defective though the defendant's system was, it was improbable that the plaintiff would have sustained his injury if he had continued to use it. Indeed, if the jury had been properly directed on the issues of reasonable response and causation in accordance with *Shirt*[8] and many other cases, it may not have found any negligence, once it rejected the plaintiff's evidence. But, however that may be, the jury was entitled to conclude that the plaintiff's lack of care for his own safety bore a greater share of the responsibility for his damage than the defendant's breach of duty in using the hooks system. While the defendant's negligence exposed the plaintiff to a risk of injury, that risk had never eventuated. In contrast, the plaintiff's "new system" not only exposed him and Mr Dawes to a greater risk of injury than the defendant's system but the risk quickly translated to injury. Most importantly, the defendant had specifically warned the plaintiff against doing the very thing that caused his injury. In these circumstances, it is impossible to conclude that the jury acted unreasonably in finding that it was just and equitable to reduce the damages recoverable by the plaintiff in respect of his injury by 60 percent. The jury was entitled to conclude that in the circumstances of the case the plaintiff's conduct in using a system that required the bending of his back – although he had been specifically warned against it when he had done it previously – was a greater departure from the standard of care for his safety than the defendant's departure from the standard of care required of an employer.

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8 (1980) 146 CLR 40 at 47-48.

37 The plaintiff sought to rely on the case of *Bankstown Foundry Pty Ltd v Braistina*[9]. Apart from the fact that it is a lifting case, the present case has nothing in common with *Braistina*. *Braistina* was a case where the injury occurred on the defendant's premises and where a hoist was available for the lifting, if needed. Two issues arose in *Braistina.* First, whether the defendant was negligent. Second, whether the majority judges in the Court of Appeal – who included myself – had erred in describing the content of the employer's duty. This Court unanimously held that the defendant was negligent in requiring the employee to lift pipes without directing him that this should be done only by using a hoist. The Court upheld the trial judge's finding that lifting and twisting were involved in the system and that it carried an inherent risk of injury. On that finding, the Court held that the trial judge was also correct in finding that the plaintiff should have been directed to use the hoist as the exclusive method of lifting the pipes. The Court also criticised the majority judges in the Court of Appeal saying that a trial judge should not approach the issue of negligence on the basis of some perceived principle that there was a heavy obligation on the part of the employer to protect the worker. Nor should the judge approach that issue on the basis that the standard of care for an employer "had moved close to the border of strict liability[10]".

38 *Braistina* has nothing to say concerning apportionment or contributory negligence. It emphasises that the employer's duty is to take reasonable care for the safety of its employees and that what is reasonable is a question of fact to be judged according to the standards of the time. Juries, with their knowledge of the working conditions in their communities, are probably in a better position than judges to determine whether an employer has breached the duty of reasonable care that it owes to an employee and whether an employee has taken reasonable care for his or her safety. At all events, there is no ground for supposing that judges – including appellate judges – are in a better position to decide these matters than juries are.

The reasons of the Court of Appeal

39 In the Court of Appeal, Brownie AJA, giving the leading judgment for the majority judges, said "the assessment by the jury that the plaintiff should bear 60 per cent of the loss seems to me to have been perverse". The majority allowed the appeal and substituted "an assessment of 20 per cent". In concluding that the assessment of 60 percent was perverse, the majority took into account against the

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9 (1986) 160 CLR 301.

10 *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 307 and 313-314.

employer two factors upon which there was no express or implicit finding by the jury and upon which the plaintiff did not rely at the trial. Those factors were:

- "If the system of work provided involved employees working in conditions of discomfort, *it was plainly foreseeable that they might take steps to ameliorate those conditions*, whilst otherwise working in accordance with the system." (emphasis added)

- "The jury's verdict means that in doing that, the [plaintiff] failed to take sufficient care for his own safety, in relation to the lifting of the rails on to (and off) the scaffold frame, and doing that manually rather than with the lifting hooks. *In my view this was something the [defendant] ought to have foreseen and guarded against* …" (emphasis added)

40 On the evidence, as I have indicated, it would have been open to the plaintiff to make a case that the defendant should reasonably have foreseen these matters and that, given the available alternatives, its conduct was negligent in not reducing or eliminating the risks that arose from them. But they formed no part of the plaintiff's case against the defendant, no part of the finding of negligence against the defendant, no part of the relevant "fault" that is the basis of the s 10 assessment. Moreover, if these matters had been left to the jury, the jury could reasonably have found for the defendant on each of them. Because that is so, the Court of Appeal erred in apportioning responsibility on a theory of the plaintiff's case and the defendant's fault that had never been litigated by the parties. It substituted its view of the facts, based on its view of the transcript and without reference to the respective cases of the parties at the trial.

41 Indeed, their Honours went so far as to say "in any event what the [plaintiff] did was inadvertent on his part. That is, so far as the evidence shows, the [plaintiff] did not foresee or even turn his mind to the possibility that the modified system he adopted carried a risk of injury." This statement overlooked that the plaintiff defied the instruction not to bend his back although he had been warned against it when the charge hand saw him doing it. The statement also overlooked that the plaintiff abandoned lifting the rails by hooks – a method that kept his back straight. Instead, he introduced a "new system" involving manual lifting and lowering of the rails for two feet rather than two or three inches. Without hooks, the bending of his back while lifting and lowering was inevitable. Indeed he was "again bending down" when he tried to lift the rail and was injured even though he had been specifically warned against bending his back when he had done so while lifting the rail only two or three inches.

42 It follows that the Court of Appeal erred in setting aside the jury's apportionment of the damages.

The conduct of the case

43 In the present case, the trial judge put to the jury that counsel for the defendant had submitted that the reduction of the plaintiff's damages, by reason of his contributory negligence, should "be of the order of 75%". His Honour also put to the jury that counsel for the plaintiff had submitted that the jury should assess the reduction "as being much less of the order, possibly of 5 to 10%". Neither counsel objected to these directions. Thus, the parties conducted the case on the basis that, if contributory negligence was found, the jury could reduce the damages by a percentage of between 5 and 75 percent.

44 It is an elementary rule of law that a party is bound by the conduct of his or her case[11]. As six Justices of this Court said in *University of Wollongong v Metwally (No 2)*[12]:

> "Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so."

45 If there was no more to the case, the failure of counsel for the plaintiff to object to the 75 percent direction would itself have been sufficient to require the Court of Appeal to refuse to set aside the finding of 60 percent reduction of damages for contributory negligence. However, the defendant appears not to have relied on this ground in resisting the plaintiff's appeal in the Court of Appeal and did not rely on it in this Court. Despite the defendant's failure to rely on it, I mention it because it seems to me wrong in principle that a party can acquiesce in a jury making a particular finding and then appeal against a finding of the jury that is consistent with the party's acquiescence.

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11 *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 483; 60 ALR 68 at 71; *Coulton v Holcombe* (1986) 162 CLR 1 at 8-9.

12 (1985) 59 ALJR 481 at 483; 60 ALR 68 at 71.

Order

46 The appeal must be allowed. I agree with Gummow and Callinan JJ that the proceedings should be remitted to the Court of Appeal to determine the nett amount for which judgment should be entered and to deal with the question of costs in that Court.

47 GUMMOW AND CALLINAN JJ. This appeal raises no new point of principle but requires the intervention of this Court to correct an impermissible interference by the Court of Appeal of New South Wales with an entirely reasonable apportionment of fault by a properly instructed jury after an unexceptionable trial.

Case history

48 The respondent and an apprentice, Mr Dawes, were instructed by a foreman on behalf of the appellant, their employer, to clean and paint some steel rails each weighing approximately 111 kilograms. The respondent was then thirty-two years old, with some experience in the work that he was instructed to do.

49 The work involved moving each rail, one at a time, from a bundle of rails and placing it on to two pieces of wood which were set up on the floor about two metres away so that it could be cleaned and painted. Lifting hooks were available to assist in the lifting and placement of each rail.

50 The respondent was given explicit instructions to keep his back straight and to bend his knees in any attempt to move or adjust the position of a rail. On 20 February 1995, whilst carrying out his work, the respondent told Mr Dawes that he was "fed up" with the method which they had been instructed to adopt. He decided to look for some means by which the rail could be raised above the floor to such a height as would enable it to be cleaned and painted by him in an upright position.

51 He found a scaffold frame about two feet high and placed it in a position in which it could be used to support a rail. He and Mr Dawes manually, rather than using the lifting hooks provided, lifted the next rail on to the scaffold frame. Within about five to ten minutes after adopting this new procedure, the respondent complained of pain and discomfort in his back. He was subsequently found to have injured his back.

52 Mr Dawes gave evidence at the trial about the nature of the work he and the respondent were doing at the time:

> "Q. And you were there and you were doing this, did you experience it – your own experience, the use of the hooks and moving them over onto the timber, as you experienced it, how difficult was that for you?
>
> A. Using the hooks it's very easy work. It's not very hard at all because you're keeping your body straight but actually bending over and picking up rails is a very hard job."

In the District Court of New South Wales

53 The respondent claimed damages for negligence on the part of the appellant for personal injuries to his back in the District Court of New South Wales. The case was tried by Dodd DCJ with a jury.

54 The jury brought in a verdict for the respondent but found that his damages should be reduced by 60% by reason of his own negligence. In doing so they must have preferred the evidence of Mr Dawes to that of the respondent because Mr Dawes said that explicit directions as to the method of work to be adopted had been given by the foreman on behalf of the appellant, whilst the respondent denied that he had been given any relevant instructions at all. Judgment was accordingly entered for the respondent for damages reduced by 60%.

In the Court of Appeal of New South Wales

55 The respondent appealed to the Court of Appeal of New South Wales[13]. The grounds of appeal included that the trial judge should not have allowed the issue of contributory negligence to go to the jury, and that the finding of contributory negligence to the extent of 60% was perverse.

56 On 29 July 1999 the Court of Appeal, (Brownie AJA with whom Mason P agreed; Meagher JA dissenting) held the jury's assessment of 60% to be perverse and substituted a finding of contributory negligence of 20% in reduction of the respondent's damages. Meagher JA gave a short judgment as follows[14]:

> "In this matter I disagree with Brownie AJA. The matter seems to me to be entirely covered by the High Court decision in *Podrebersek v Australian Iron & Steel Pty Limited*[15].
>
> As Brownie AJA concedes, there was ample material for the jury to find contributory negligence. Indeed, he himself would put it at 20%. The appellant invented a new and dangerous system of doing his job, that new system made the use of lifting hooks (invented for his safety) impossible, and he bent his back although forbidden to do so. These are

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13 *Unver v Liftronic Pty Ltd* [1999] NSWCA 275.

14 *Unver v Liftronic Pty Ltd* [1999] NSWCA 275 at [2]-[4].

15 (1985) 59 ALJR 492; 59 ALR 529.

> obvious acts of contributory negligence, and of some magnitude. I cannot see how the jury's apportionment of 60% is in any way more perverse than the judge's apportionment of 90% in *Podrebersek v Australian Iron & Steel Pty Limited* … nor indeed of Brownie AJA's apportionment of 20% in this case.
>
> I would dismiss the appeal with costs."

The appeal to this Court

57 The only ground of appeal in this Court is that the Court of Appeal erred in substituting an assessment of 20% for contributory negligence for that of 60% by the jury.

58 In this case a properly instructed jury did exactly what the apportionment legislation required them to do, to apportion negligence between the parties on a just and equitable basis[16]. It was not for the Court of Appeal to substitute its own opinion for that of the jury. Nor was it for the Court of Appeal to do so on the basis upon which the majority did, a basis neither pleaded, litigated, nor the subject of a ground of appeal. That basis was that the appellant failed to foresee, or even to turn its mind to the possibility that the respondent might disobey his instructions and modify the system of work to a method carrying a risk of injury.

59 The instructions given to the respondent were given for the precise reason that their implementation would eliminate, or greatly reduce the risk of injury. The jury's verdict was, if anything, generous to the respondent in the circumstances of his flagrant disregard of the instructions which were given to him for his own protection. The conclusion of Meagher JA that the appeal should have been dismissed is, with one qualification, correct. No attention was paid to it in argument in this Court, but there was apparently a concession by the appellant in the Court of Appeal, that in entering judgment the trial judge did not make proper allowance for the deduction to be made from the damages in respect of workers' compensation received by the respondent. That matter leaves questions of the net amount for which judgment should be entered and of costs for the Court of Appeal still to determine.

60 The apportionment of fault however was very much a matter for determination by the jury whose collective knowledge and experience of the workplace were unlikely to be inferior to those of judges. The different view of the majority of the Court of Appeal from the jury's view is probably indicative of too ready a judicial inclination to absolve people in the workplace from the duty

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16 *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW) s 10(1).

that they have to look out for their own safety which will often depend more, or as much, upon their own prudence and compliance with directions, as upon any measures that a careful employer may introduce and seek to maintain. A jury is uniquely well qualified to decide, to use the language of Mason, Wilson and Dawson JJ in *Braistina*[17] "[w]hat is considered to be reasonable in the circumstances of the case [according to] *current community standards*."

61 We would allow the appeal with costs and order that the matter be remitted to the Court of Appeal to be dealt with in accordance with these reasons.

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17 *Bankstown Foundry Proprietary Limited v Braistina* (1986) 160 CLR 301 at 309. See also at 307-308 (emphasis added).

62 KIRBY J. This appeal[18] follows a jury verdict in an action in which an injured worker sued his employer for damages. The claim was framed in negligence at common law. The employer contested liability. It pleaded contributory negligence. The jury found for the worker but upheld the defence of contributory negligence. They apportioned the worker's responsibility at 60%[19].

63 The worker appealed against the judgment that followed the jury's verdict. By majority, the Supreme Court of New South Wales (Court of Appeal) upheld the worker's appeal[20]. It set aside the jury's apportionment. It substituted its own apportionment that the worker was 20% responsible for the damage which he had suffered. From this judgment, the employer, by special leave, appeals to this Court.

The principles governing the Court of Appeal

64 Before stating the facts in more detail, it is useful to collect a number of legal principles which affect the proper approach to the appeal. I hesitate to call these principles trite[21]. However, unless they are remembered, it is easy to fall into error:

1. The jury is the "constitutional tribunal" of fact-finding[22]. Partly for reasons of legal history, and partly for pragmatic reasons upholding the finality of jury verdicts, there is a general bias of appellate courts against disturbing such verdicts.

2. Where a trial is conducted before a jury in a civil action, there is an important distinction between the respective functions of the judge and the jury[23]. Following the creation of appellate courts, this distinction has been

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18 From a judgment of the Supreme Court of New South Wales (Court of Appeal): *Unver v Liftronic Pty Ltd* [1999] NSWCA 275.

19 Applying the *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW), s 10(1).

20 Brownie AJA, Mason P concurring; Meagher JA dissenting.

21 cf Haigh, "'It is trite and ancient law': The High Court and the use of the obvious", (2000) 28 *Federal Law Review* 87.

22 *David Syme & Co v Canavan* (1918) 25 CLR 234 at 240; *Hocking v Bell* (1945) 71 CLR 430 at 440; cf *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 287 [53].

23 As explained in *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 288-291 [55]-[60].

observed in appeals against judgments based on jury verdicts. Appellate judges are not authorised to disturb such judgments simply because they disagree with the verdict or regard the evidence called at the trial as preponderating against the verdict[24]. Absent any misdirection or misreception of evidence, or disobedience to a judicial direction on the law that might invalidate the verdict, the appellate court must assume that the jury acted lawfully and properly in reaching their verdict[25]. It must do so unless the verdict betokens "a conclusion which is against the evidence in the sense that the evidence in its totality preponderates so strongly against the conclusion favoured by the jury that it can be said that the verdict is such as reasonable jurors could not reach"[26]. This stringent test has been expressed in various ways[27]. It may be called the rule of restraint.

3. Where a jury verdict necessarily involves elements of discretion, assessment or evaluation, an appellant, challenging the judgment based on it, faces a specially difficult task[28]. This is true of challenges to jury verdicts of general damages[29] as it is to those which apportion responsibility for contributory negligence. Where a judge is the trier of fact, reasons must ordinarily be provided to explain a judgment[30]. Such reasons may reveal error, inviting appellate correction. However, because

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24 *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 289-290 [58].

25 *Progress and Properties Ltd v Craft* (1976) 135 CLR 651 at 672.

26 *Calin v Greater Union Organisation Pty Ltd* (1991) 173 CLR 33 at 41 (emphasis omitted).

27 For example in *Hocking v Bell* (1945) 71 CLR 430 at 487, Starke J said "the verdict is not disturbed unless the jury, viewing the whole evidence reasonably, could not properly find it". In *Precision Plastics Pty Ltd v Demir* (1975) 132 CLR 362 at 369, Gibbs J described the circumstances of intervention in an award of damages as occurring only when they were "so excessive or so inadequate that no jury could reasonably have awarded them, or ... [were] out of all proportion to the circumstances of the case".

28 *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALJR 492 at 493-494 ("*Podrebersek*"); 59 ALR 529 at 532.

29 *Precision Plastics Pty Ltd v Demir* (1975) 132 CLR 362.

30 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 666.

a jury gives no reasons, an attempt to meet the stringent standard, and to overcome the rule of restraint, necessarily faces formidable obstacles[31].

4. A particular reason why jury verdicts in cases involving apportionment of responsibility are not usually disturbed by appellate courts is that the applicable legal criterion is expressed in extremely broad terms. In the language of s 10(1) of the *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW), applicable to this case[32], the decision-maker, judge or jury, must perform the apportionment according to "such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage"[33]. Obviously, this formulation affords the decision-maker a very wide discretion. The repository of the power provided by Parliament is the primary decision-maker, not the appellate court. The latter only secures powers of disturbance if the initial exercise of power has not conformed to law but has miscarried. It is of the nature of the power conferred on the primary decision-maker that it presents "a question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds."[34]

5. Where a party appeals against a judgment giving effect to a jury's verdict, including one upon a question of apportionment for contributory negligence, there are certain settled principles controlling the approach which the appellate court must take[35]. Thus, the appellate court must

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31 *Podrebersek* (1985) 59 ALJR 492 at 494; 59 ALR 529 at 532; *Zoukra v Lowenstern* [1958] VR 594; *Valkanis v Cox* (1988) 7 MVR 513.

32 By virtue of *Workers Compensation Act* 1987 (NSW), s 151N. Section 10 of the *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW) has been replaced by the *Law Reform (Miscellaneous Provisions) Amendment Act* 2000 (NSW), s 9.

33 *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW), s 10(1). Similar provisions appear in the law of other States: *Wrongs Act* 1958 (Vic), s 26(1); *Wrongs Act* 1936 (SA), s 27A(3); *Law Reform (Tortfeasors Contribution, Contributory Negligence, and Division of Chattels) Act* 1952 (Qld), s 10(1); *Tortfeasors and Contributory Negligence Act* 1954 (Tas), s 4(1); *Law Reform (Miscellaneous Provisions) Act* 1956 (NT), s 16(1); *Law Reform (Miscellaneous Provisions) Act* 1955 (ACT), s 15(1). The *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act* 1947 (WA), s 4(1) is in slightly different form.

34 *British Fame (Owners) v Macgregor (Owners)* [1943] AC 197 at 201 applied in *Podrebersek* (1985) 59 ALJR 492 at 494; 59 ALR 529 at 532.

35 *Progress and Properties Ltd v Craft* (1976) 135 CLR 651.

assume that the jury took the reasonable view of the evidence most favourable to the party defending the verdict[36]. In determining the inferences to be derived from that verdict, an appellate court will pay regard to the way in which the parties presented their respective cases at trial. Where there is some evidence reasonably consistent with the verdict, although much that is not, it will be assumed that the jury preferred the evidence consistent with the verdict to that which was not. Similarly, where the verdict upholds a claim or defence that was propounded at trial, it will be assumed that the jury accepted the case presented and rejected the contrary case.

6. Parties are bound on appeal by the way in which their cases are litigated at trial[37]. However, the way a case is litigated is not discerned by simply looking at the pleadings or even the way counsel for a party opened or presented it or the judge expressed it in the judge's charge to the jury or in judicial reasons. Once a trial commences, it assumes its own dynamic. Within broadly stated pleadings, parties will often be permitted to lead evidence that shifts somewhat the postulated case from that expressed by the lawyers who plead and present it towards that which emerges from the actual evidence of the witnesses to the occurrences out of which the case arises.

The principles governing the High Court

65 In addition to the foregoing principles, it is necessary for this Court to remind itself of the rules that govern its appellate authority to disturb a judgment entered in such a case:

1. Because this Court is discharging the constitutional function of deciding an appeal, relevantly from a Supreme Court of a State, the focus of its attention must be on whether error has been shown on the face of the judgment or in the reasons that support that judgment. Without a finding of error, this Court is not entitled to merely re-exercise the powers that belonged to the Court of Appeal.

2. The Court of Appeal had undoubted jurisdiction and power, in this case, to hear the appeal from the judgment of the District Court based on the jury's

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36 *Hydro Electric Commission v Kemp* [1966] Tas SR (NC) 29.

37 *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 483; 60 ALR 68 at 71.

verdict[38]. Once its jurisdiction was engaged, it had a duty to determine the appeal in accordance with law. The rule of restraint does not, and could not, amount to an absolute rule forbidding the discharge of appellate functions or requiring that such functions always be exercised in one way. Because of the nature of the appeal to the Court of Appeal, that Court's functions necessarily involved a decision that required, on its part, judgment, evaluation and the weighing of competing arguments. So long as the Court of Appeal has shown itself aware of, and has applied, the correct principles, this Court may not disturb the outcome simply because its members would have reached a different result. "We must decide whether they were in error in being so satisfied. In reaching our conclusion we should ... give due weight to the views of ... the Court of Appeal ... [W]e should not proceed as though we were sitting in their places and they had never spoken."[39] To demand restraint in the disturbance of jury verdicts, but to exhibit none in the disturbance of the Court of Appeal's judgments, would be to misapply this Court's powers and to mistake its responsibilities. It would also be to exhibit selectivity in the application of a basic rule governing appellate intervention.[40]

3. Where, viewed in the totality of the evidence, it appears that a jury's verdict (or a judge's decision) in a matter of apportionment is unreasonable in the applicable sense[41], this Court has occasionally stepped in, although an intermediate court had declined to do so. Such was the case in *Wynbergen v Hoyts Corporation Pty Ltd*[42], where inconsistent answers to certain questions by a jury were held to require correction. So it was, earlier, in *Pennington v Norris*[43] where this Court altered an apportionment of contributory negligence in a motor vehicle case, reducing that of 50%, fixed by the primary judge, to one of 20%, as seemed proper to this Court. In each of these cases, this Court was unanimous. In each, it acknowledged the rule of restraint. But restraint

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38 *District Court Act* 1973 (NSW), s 127; *Supreme Court Act* 1970 (NSW), ss 48(1)(a)(iv), 75A(2).

39 *Precision Plastics Pty Ltd v Demir* (1975) 132 CLR 362 at 370.

40 cf, by analogy, *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 74 ALJR 1348 at 1368 [86]; 174 ALR 585 at 611 where the need for this Court to avoid "double standards" was referred to.

41 *Podrebersek* (1985) 59 ALJR 492 at 494; 59 ALR 529 at 532.

42 (1997) 72 ALJR 65 at 70; 149 ALR 25 at 31.

43 (1956) 96 CLR 10 at 17.

must be distinguished from paralysed inertia or repudiation of jurisdiction. The fact that this Court has repeatedly come to a conclusion that intervention is required, notwithstanding the rule of restraint, should prevent any unthinking application of that rule. The provision of appeal carries with it the obligation on the part of the appellate court, within its jurisdiction and powers, to perform its functions in accordance with law. Necessarily, this involves the possibility that, in the particular case, those with the appellate responsibility may conclude that the proper discharge of that responsibility requires an order upholding the appeal. The mere fact that this case was one of apportionment does not eliminate that responsibility.

4. Once the Court of Appeal decided that the jury's apportionment was unreasonable in the applicable sense, it was authorised by law[44] to set aside the judgment giving effect to that apportionment. It might then have ordered a retrial of the question of apportionment before a second jury. Alternatively, where the parties consented or where it was appropriate to avoid a multiplicity of trials, that Court was entitled to substitute its own "verdict"[45]. There was no contest that, in this case, substitution of a different apportionment was within the Court of Appeal's powers. There was no challenge to the decision that a second jury trial should be avoided by the Court of Appeal making its own orders. In making such orders, the Court of Appeal would not be bound by the suggestions which were put to the jury by counsel for the parties, recorded in the primary judge's charge to the jury[46]. However, the Court of Appeal's apportionment would have had to take into account (a) the case for the worker on negligence viewed in its entirety (which, it must be inferred from the verdict in his favour, the jury accepted); (b) the view of the evidence relevant to contributory negligence accepted by the Court of Appeal itself; and (c) the applicable principles of law governing employer liability and contributory negligence. Inevitably, an appellate court would be more knowledgeable than a jury concerning the law governing an employer's liability to its workers and about conduct that may amount to contributory negligence on the part of a worker. There is no point complaining (as the employer did) about the appellate court's substitution of its own decision for that of the jury, unless that complaint is based on a ground of appeal objecting to the

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44 *Supreme Court Act* 1970 (NSW), ss 105, 106.

45 *Supreme Court Act* 1970 (NSW), s 107(c)(ii). See also s 107(c)(iii).

46 Counsel for the worker urged no more than 5 to 10%. Counsel for the employer urged 75%: Charge to the jury of Dodd DCJ, District Court of New South Wales, 14 October 1998 at 14.

> Court of Appeal's failure to order a second jury trial. There is no such ground of appeal. Once the Court of Appeal found that it was authorised to intervene, and that it should substitute an apportionment for contributory negligence according to its own opinion, it was bound to exercise its own powers. Necessarily, when the Court of Appeal proceeded to act in this way it was entitled to take into account the applicable law of employer liability and contributory negligence. That knowledge would necessarily contribute to an appellate court's view of what was "just and equitable" in the particular case.

66 In approaching the single ground of appeal that the appellant argued before this Court, it is essential, in my view, to have regard to all of the foregoing principles. Mechanical application of the rule of restraint expressed in this Court's decision in *Podrebersek*[47] (and elsewhere) is no substitute for legal analysis. The rule of restraint is one principle. But it is only one. And it is not, nor could it be, an absolute and unyielding rule.

The facts

67 It is now necessary to state in more detail the facts relevant to the issue before this Court. The main facts were undisputed. The jury's verdict was that Liftronic Pty Ltd (the appellant) was liable in negligence to its worker, Mr Erol Unver (the respondent) and that his damages should be reduced by 60% having regard to the respondent's responsibility for his own injury.

68 The respondent was injured on 20 February 1995 in the course of his employment with the appellant. He had been working for the appellant for four months. He was an experienced worker. For many years he had worked as a lift engineer and lift mechanic. At the time of the respondent's injuries, the appellant was a contractor for the installation of a new lift in a Sydney hospital. The installation required the positioning of a number of steel rails in the lift shaft, against which the new lift would ascend and descend. The rails were about 5 metres long. Each weighed 111.5 kilograms. They had been delivered to the ground floor of the construction site by crane. They had then been moved mechanically to the first floor of the building site in bundles of ten. They were there placed against a wall adjacent to the lift shaft, awaiting installation.

69 On the Thursday before his injury, the respondent was detailed to clean and paint the rails in preparation for their use. This obliged him to remove a rail from the stack and to put it onto supporting timber beams. So positioned each rail was elevated about 2 inches (approximately 5 cm) from the floor. This involved using lifting hooks (a type of fixed bar with a hook at one end) to move

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47 (1985) 59 ALJR 492; 59 ALR 529.

each rail manually a few metres from the stack, cleaning and painting it and then using the hooks to remove the cleaned and painted rail. The rails were moved manually one at a time. The process of cleaning and painting each rail took between fifteen and twenty minutes. The respondent performed these tasks under the instruction of Mr Troy Carson, a charge hand or foreman who was his immediate superior. He was assigned one assistant. The lifting, cleaning and painting duties kept the respondent busy on the Thursday and Friday preceding his injury. On the day of the injury, a Monday, he was assisted by an apprentice, Mr Shane Dawes.

70 According to Mr Dawes' evidence (which the jury must be assumed to have accepted), the respondent at some time during the morning said that he was "fed up" with the constant bending and wanted to lift the rails to a better height. He "went across and got a scaffold frame which is about a couple of foot [sic] off the ground". He "told me [that] we were going to be picking them up and putting them up on [the scaffold frame] so there [would be] no more bending involved in painting".

71 Obviously, the system of work devised by Mr Carson subjected the respondent and his co-worker to manipulating and carrying the rails, although they were of very great weight. It was common ground that no mechanical device was provided for this purpose. Mr Dawes, who was called by the appellant, agreed that it was easier to paint the rails when they were in the slightly elevated position on top of the scaffold frame. However, he said "it wasn't easy when you were lifting them though". He stated that using the hooks provided by the employer was "very easy work" and that doing so kept the user's body straight. But he continued that "actually bending over and picking up rails is a very hard job". He had heard Mr Carson on one occasion tell the respondent "[y]ou are lifting incorrectly, bend your knees and don't bend your back".

72 The respondent, in his case, called a consulting mechanical engineer (Mr Colin Simpson) who had extensive experience in the manual handling of heavy objects in industry. The appellant did not call expert evidence. Mr Simpson's testimony was therefore uncontradicted. It is appropriate to assume that the jury, acting reasonably, accepted at least the main parts of Mr Simpson's evidence. No other view would appear consistent with the jury's verdict in favour of the respondent on the contested issue of negligence.

73 Mr Simpson stated that, for practical purposes, the respondent and his assistant, in lifting each rail, were each subjected to lifting 55 kilograms. That figure assumed that the weight of each rail was evenly distributed at all times. Commonsense suggests that this might not necessarily be so. Mr Simpson deposed that, according to standards or guidelines currently recommended in industry in Australia, the "absolute maximum" for safe lifting for any one person was 39 kilograms "under ideal conditions". Such conditions involved the assumption that the person engaged in the task "bends their knees, keeps a

straight back, [and] there is no twisting or [other potentially dangerous] contortions". Subjecting a human being to such weights should be confined to "a once per eight hour basis". Accordingly, the system of work devised by the appellant for the respondent with one assistant was, according to Mr Simpson, "well and truly over [the absolute maximum] and there has to be a real risk of injury and specifically a back injury".

74 The work on each rail involved its initial removal from the stack, lifting it onto a support, cleaning and painting it and then removing it from the support and placing it elsewhere. These tasks occupied a period of fifteen minutes or longer with each rail. In Mr Simpson's view, the series of manoeuvres took the weight of the rail over the amount to which the respondent's back should safely be subjected "as far as industry is concerned". Such safe weight was "something of the order of 35 kilograms". This amounted to a discounted absolute maximum weight. It was an estimate put forward upon the assumption that the person involved had been trained in lifting. Alternative methods for performing such work would have involved using more than two workers or providing a mechanical alternative which would certainly have been preferable. Mr Simpson stated that there were hundreds of variations of overhead lifting devices. These ranged from block and tackle gear to electrically or pneumatically operated chain blocks and mobile cranes. The latter were commonly found throughout industry and used for the kinds of task to which the respondent was assigned by the appellant. Such devices did not have to be fixtures of the building site in question. Some of them were capable of moving in and out of a building site. Presumably they could be hired. A view that, to impose the obligation of hiring or supplying a mechanical crane to assist the workers, including the respondent, in the manoeuvres described would be unduly expensive or inconvenient[48] betokens, in my opinion, a bygone attitude to the imposition of unreasonable weight-bearing tasks on Australian workers. Such a view is not, in my opinion, an attitude that should be attributed to the jury in the present case, reasonably evaluating the evidence at trial.

75 Mr Simpson agreed that the use of a lifting hook by a worker, standing close to the rail, subjected the worker's lumbar spine to little stress and was a satisfactory way of reducing risk of back injury. Use of that method alone would certainly have obviated bending and crouching whilst positioning the rail for cleaning and painting, and thus impose far less risk of injury to the lower back. Nevertheless, the ultimate weight of the object was still unarguably (according to Mr Simpson) "very significant". Even in an ideal lifting situation, the actual weight to be borne was "approaching double the maximum recommended".

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48 cf reasons of McHugh J at [24].

76 In relation to the respondent's initiative to lift the rail onto a slightly elevated platform, Mr Simpson stated that the system of work instituted by the appellant would have involved the respondent in cleaning and painting the rails whilst continuously bending over them, virtually at floor level. This had the potential "for it to be very fatiguing of back muscles and causing backache and secondly, the positioning of the rail on the floor must be carried out by some means and if that's done manually down [on] the floor level then the risk, in my view, is even greater than it would be [on] the ... scaffold". In Mr Simpson's view, there was no practical difference in the strain to the lumbar spine involved in lifting the rail onto the timber beams and lifting it a greater height onto the scaffold. Even if the rails had been lifted by the respondent onto the timber beams (just off the floor surface) he would have had to manoeuvre them by turning them for the purpose of cleaning and painting them. This would have had him in a position of constant crouching or bending at an acute angle for most of his working day. Such posture would be interrupted only by the actions necessary to remove and replace a completed rail. Viewed in this way, according to Mr Simpson, the entire activity to which the respondent was assigned had a potential for back injury.

The issues litigated at trial

77 With respect, it is not correct to suggest that the practical necessity for the respondent to seek out a reasonable system of work of his own devising was not litigated at the trial[49]. The pleadings included a general assertion that the appellant had "[f]ailed to devise, install and maintain a safe system for the lifting of steel rail" and had failed "to provide adequate assistance … in the performance of [the respondent's] duties, in particular, the provision of a hoist or other such lifting device". Those allegations had to be understood in the conditions of work in which the respondent found himself and which were proved in evidence. Relevantly, those conditions were not disputed. The work involved the respondent being required to paint the rails, close to the floor surface, in a position of constant bending or crouching. Trained athletes can maintain that posture for long periods. The average worker — even an average lawyer, I suggest — cannot. Bending and crouching for lengthy periods is extremely taxing. In default of a better system being provided by an employer, it would naturally and reasonably cause a reasonable worker to endeavour to find a better way to perform his or her duties for the employer.

78 That this was an aspect of the respondent's case at trial is clear from his own evidence. More importantly, perhaps, for present purposes, it was clearly understood as such by the appellant. Its counsel, in cross-examination, put directly to the respondent the explanation of what he had done:

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49 Reasons of McHugh J at [5], [18]-[20] and [40].

> "Q. And you said … that you were tired of bending over and painting the rails whilst they were on the ground and that you went away and got the scaffold frame … ?
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> A. … [It] is virtually impossible to paint or clean those beams in those positions.
>
> Q. Mr Unver … it was your idea to use that scaffold?
>
> A. What was the other way of doing it?"

79 The expert, Mr Simpson, in answer to a question about the safety of the system of cleaning and painting devised by the appellant, specifically deposed to its potential to cause muscle fatigue and backache. In the appellant's case, the apprentice, Mr Dawes, affirmed how the respondent's search for a reasonable system of work had come about. Speaking of the respondent, he stated:

> "A. He said he was fed up with bending over and painting the rails and he wanted to lift it [sic] up to a better height [so] that he didn't have to bend over".

80 To suggest that the respondent's case before the jury did not include an assertion that the respondent was effectively constrained to devise a better system of work because of the failure of the employer to provide him with a mobile mechanical device and obliged him to work over long periods in an awkward, fatiguing, crouched or bended position, is not compatible with the transcript of the trial. The jury found negligence in the employer. That finding must be accepted as the premise from which the apportionment for contributory negligence is approached. The judge, in his directions to the jury, did not endorse the respective propositions advanced by counsel for the parties[50]. He did no more than to remind the jury of what counsel had said. What the jury then did may have involved a compromise between the submissions of the parties. But what the jury, acting reasonably, had to consider, on the basis of their finding of negligence, was the respective responsibility of the employer and the employee for the state of affairs that brought about the respondent's injury. Incontestably, that included not just the complaints about lifting and carrying the rails but about bending and crouching and the failure of the employer to provide an appropriate mechanical device for the entire activity. The prolonged bending and crouching were certainly part of the respondent's case as litigated.

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50 cf reasons of McHugh J at [43].

Contributory negligence and contemporary employment obligations

81 In considering the extent to which it was reasonably open to a jury in the present case to conclude as it did on the apportionment for contributory negligence, the Court of Appeal, for its part, was entitled to take into account the principles established by this Court governing the liability of employers for employees in work situations such as present in this case. The Court of Appeal was also entitled to test the verdict against the law that determines what constitutes contributory negligence on the part of a worker and what does not. Keeping such considerations in mind was important, not only for establishing the liability of the employer to the worker in negligence. It was also relevant in evaluating the extent to which it is just and equitable, where the primary liability was found, to hold that the worker shared in the responsibility for the damage and should thus have the verdict reduced proportionately.

82 Obviously, the jury could have accepted parts and rejected parts of the evidence given at the trial. However, in judging those parts which the jury should be taken to have accepted, it was clearly appropriate for the Court of Appeal to consider the case which the respondent had put to the jury about the appellant's negligence. At the trial (although not thereafter) the appellant contested any negligence on its part. The primary judge summed up the respondent's case on negligence in these words[51]:

> "The way in which the plaintiff puts his case here is that he was required by whatever means, to lift a weight that was excessive. That is his case. He says it does not matter really whether you find that the hooks were available or not, because in any event the weight that was to be lifted when distributed between the two men who were to do the lift, was still excessive, and for that the plaintiff relies upon the evidence of Mr Simpson ... [Y]ou will recall that [counsel for the appellant] did not attempt in any way to cross-examine [Mr Simpson] so as to get him to retract what he said about safe lifting weights, so you can take it that the defendant accepts that what Mr Simpson said for that purpose can be accepted by you. You might think that you will not have a great deal of difficulty in answering question one [negligence of the appellant] 'yes'. And that the real issue so far as liability is concerned in this case, in the way in which the case has been conducted ... is whether the plaintiff has not taken sufficient care for his own safety."

83 It is true that this direction represented a rather telescoped version of the respondent's case. So much is demonstrated by the extracts that I have quoted from the transcript. But a judge's charge to a jury responds to the way the judge

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51 Charge to the jury of Dodd DCJ, 15 October 1998 at 19-21.

perceives the final issues. It is a fair inference that the primary judge in this trial concluded that the appellant was not energetically pressing its formal defence that negligence on its part had not been proved. Quite often in cases such as this an employer will wish to terminate its workers' compensation liability by seeing a person such as the respondent recover a verdict – but a modest one. The primary judge appears to have inferred that this was the way that the appellant had conducted its case. This helps to explain his somewhat cursory treatment of the issue of negligence. It has loomed larger in this Court than in any earlier stage of the proceedings.

84 No complaint was made, either before the Court of Appeal or before this Court, about the primary judge's instruction to the jury concerning contributory negligence or apportionment. The instruction was accurate so far as it went. It reminded the jury that it was a "very relevant consideration" that it was the appellant, as employer, that provided the place of work and the system of work and the work which the respondent was being called upon to perform[52]. The charge also asked the jury to consider "the extent to which you find each of them to have departed from the standard of care of the reasonable *person* and the cause and effect of the conduct of each party in what occurred"[53].

85 The last-mentioned instruction to the jury carried some dangers for the respondent that were not explored in the Court of Appeal and not raised in this Court either by notice of contention or cross appeal. The respondent owed no relevant legal duty of care to his employer[54]. The appellant, on the other hand, as employer, bore a heavy responsibility to devise, institute and enforce a safe place of work, and safe system of work, so as to avoid exposing workers, such as the respondent, to unnecessary or unreasonable risks[55]. This was a duty personal to the employer. The ultimate legal responsibility for its fulfilment could not be delegated[56]. In this sense, explaining the standard of care expected of an employer in terms of the conduct of "the reasonable *person*" may have understated the very heavy duties that the law in Australia casts on an *employer*[57]. Such duties include affirmative attention to the issue of accident

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52 Charge to the jury of Dodd DCJ, 14 October 1998 at 13.

53 Charge to the jury of Dodd DCJ, 14 October 1998 at 13 (emphasis added).

54 *Pennington v Norris* (1956) 96 CLR 10 at 16.

55 *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18.

56 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 678; *McDermid v Nash Dredging & Reclamation Co Ltd* [1987] AC 906 at 918.

57 Views as to what is "just and equitable" can differ greatly: cf Balkin and Davis, *Law of Torts*, 2nd ed (1996) at 348, n 107 citing *Annual Survey of Australian Law*

(Footnote continues on next page)

prevention. So much was held by this Court in *McLean v Tedman*[58] and re-affirmed in *Bankstown Foundry Pty Ltd v Braistina*[59].

86 *Braistina* is not irrelevant to the issue in this appeal[60]. That case involved a worker, a metal machinist, who had suffered a serious back injury in the course of drilling holes in, and manually stacking, heavy metal pipes (each weighing 60 pounds or 132 kilograms). His injury was sustained while he was lifting one of the pipes in a manner which, the employer claimed, was contrary to the method it had instructed the worker to use. But in that case, unlike the present, a mechanical hoist was available for use by the worker but was not often called on by employees. The finding by a judge of contributory negligence, assessed in that case at 10%, was not even challenged. The duty of accident prevention was held to be "unquestionably one of the modern responsibilities of an employer"[61]. It was underlined by all members of this Court[62]. Indeed, all were at pains to point out that similar ideas had been expressed by members of this Court for some time[63]. The decision is pertinent to this appeal because, without having a clear idea of what the law requires of an employer, including in discharging its duty of accident prevention, it is impossible to begin a reasonable approach to the ascertainment of the "just and equitable" apportionment of the employer's "share in the responsibility for the damage"[64]. The higher the employer's legal duty the less it would be "just and equitable" to burden the employee for established breaches which the employer was bound to prevent.

(1982) at 249. It involves not only a comparison of culpability (that is the degree of departure from the standard of care of the reasonable person) but also a comparison of the relative importance of the acts of the parties in causing the damage: *Podrebersek* (1985) 59 ALJR 492 at 494; 59 ALR 529 at 532-533 citing *Stapley v Gypsum Mines Ltd* [1953] AC 663 at 682; *Smith v McIntyre* [1958] Tas SR 36 at 42-49; *Broadhurst v Millman* [1976] VR 208 at 219 and cases there cited. See also *Covacevich v Thomson* [1988] *Aust Torts Rep* ¶80-153 at 67,373.

58 (1984) 155 CLR 306 at 313.

59 (1986) 160 CLR 301 at 309 ("*Braistina*").

60 cf reasons of McHugh J at [38].

61 *Braistina* (1986) 160 CLR 301 at 309 citing *McLean v Tedman* (1984) 155 CLR 306 at 313.

62 *Braistina* (1986) 160 CLR 301 at 309, 314.

63 eg *Smith v The Broken Hill Pty Co Ltd* (1957) 97 CLR 337 at 342-343; *Da Costa v Cockburn Salvage & Trading Pty Ltd* (1970) 124 CLR 192 at 218.

64 *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW), s 10(1).

87 When regard is had to the decisions of this Court on the subject of contributory negligence in an employment context, it is indisputable that reasonable care by an employer in Australia today requires "allowance to be made (in relation, eg, to a safe system of work) not just for inadvertence, misjudgment or inattention but also for neglect, carelessness and sometimes even foolishness or misconduct on the part of employees – including skilled and/or experienced employees"[65]. Indeed, the cases that support these propositions suggest an increasingly "forgiving" attitude by the courts toward errant employees in their approach as to what constitutes contributory negligence and the related apportionment of responsibility[66].

88 Inattention born of familiarity with a repetitious task, absorption in work functions and mistakes caused by fatigue or severe discomfort may not even constitute contributory negligence at all. Still less would they ordinarily warrant a most substantial reduction in the damages to which the employee is otherwise entitled for the consequences of the employer's negligence[67]. The same is true if the employee lacks appreciation of the danger to which the place or system of work exposes the employee[68]. Employers, acting reasonably, must provide a safe system of work for the average worker and "not a system which is safe only for persons of superior skill whose attention never wanders"[69].

89 Another consideration, not irrelevant in determining the existence and extent of contributory negligence where an employee has departed from a system of work established by the employer, is whether this was done defiantly, obdurately or stupidly for some personal purpose of the worker's own. Or

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65 Creighton, Ford and Mitchell, *Labour Law*, 2nd ed (1993) at 1437, par 41.22 citing *McLean v Tedman* (1984) 155 CLR 306; *Braistina* (1986) 160 CLR 301; *Nicol v Allyacht Spars Pty Ltd* (1987) 163 CLR 611; *Bus v Sydney County Council* (1989) 167 CLR 78.

66 *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at 178-179 per Lord Wright; cf Creighton, Ford and Mitchell, *Labour Law*, 2nd ed (1993) at 1437, par 41.22; Fleming, *The Law of Torts*, 9th ed (1998) at 573; Balkin and Davis, *Law of Torts*, 2nd ed (1996) at 338-340, 347-348.

67 *Carlyle v Commissioner for Railways* (1954) 54 SR (NSW) 238 at 249; *Commissioner of Railways v Ruprecht* (1979) 142 CLR 563.

68 *Commissioner for Railways v Halley* (1978) 20 ALR 409.

69 *Sungravure Pty Ltd v Meani* (1964) 110 CLR 24 at 36; *McLean v Tedman* (1984) 155 CLR 306 at 312. See also *Ferraloro v Preston Timber Pty Ltd* (1982) 56 ALJR 872 at 873; 42 ALR 627 at 629.

whether it was done out of a misguided, but understandable, endeavour on the part of the worker to fulfil his or her employment duties in a reasonable way. The former category of case will indeed permit a conclusion that the employee has contributed, by his or her own negligence, to the damage suffered. It may then be perfectly "just and equitable" to reduce significantly the worker's recovery "having regard to the claimant's share in the responsibility for the damage". But, in the latter category of case, any such reduction, to be "just and equitable", will have to take into account the fact that the worker was exposed to the risk that caused the damage in the course of pursuing the employer's economic interests in which the risks of injury to workers are part of the employer's necessary costs[70].

The decision of the Court of Appeal

90 In the Court of Appeal, Meagher JA dissented. His Honour considered that the case was "entirely covered"[71] by the decision of this Court in *Podrebersek*. With every respect, contributory negligence, and apportionment, are always questions of fact[72]. The invocation of a decision of this Court, in an earlier case on different facts, could not relieve the Court of Appeal of the proper discharge of its functions by reference to the facts of this case.

91 The second reason which Meagher JA assigned for his dissent was that he could not see how the jury's apportionment of 60% here was "in any way more perverse than the judges' apportionment of 90% in *Podrebersek* ... nor indeed of Brownie AJA's apportionment of 20% in this case"[73]. So far as the first stated apportionment (that in *Podrebersek*) is concerned, it is, again with respect, irrelevant. There are factual differences between the two cases. Appeals must be decided by reference to legal principle, not perceived factual similarities. So far as the second (the 20% favoured by the majority in the Court of Appeal) it is also irrelevant. Once the Court of Appeal concluded that it was entitled, and obliged, to set aside the jury's apportionment, it was required to order retrial of the issue or to determine its own apportionment. Complaining that it did so, after it had so decided, was therefore mistaken. Furthermore, referring to a criterion of "perversity" (as distinct from lack of reasonableness in the entirety of the

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70 Glass, McHugh and Douglas, *The Liability of Employers*, 2nd ed (1979) at 224, n 54.

71 [1999] NSWCA 275 at [2].

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

73 [1999] NSWCA 275 at [3].

evidence) was likely to mislead and to overstate the restraint upon appellate correction of a disclosed error[74].

92 The reasons for the majority in the Court of Appeal were given by Brownie AJA. His Honour (who is particularly experienced in this area of the law and practice) acknowledged that what the worker had done "constituted an unauthorised departure from the system [the employer] provided"[75]. However, he explained why, in his view, this departure was "plainly foreseeable" to the employer[76]. He did so in terms which I regard as entirely convincing. As I have demonstrated, his reasons addressed directly the aspect of the respondent's case which had been elicited in evidence[77]:

> "[The worker] change[d] the system so as to reduce the discomfort and inconvenience of working for hours (with interruptions when moving the rails) in a crouched, kneeling or similar position. The jury's verdict means that in doing that, the [worker] failed to take sufficient care for his own safety, in relation to the lifting of the rails on to (and off) the scaffold frame, and doing that manually rather than with the lifting hooks. In my view this was something the [employer] ought to have foreseen and guarded against, but in any event what the [worker] did was inadvertent on his part."

93 Brownie AJA referred specifically to *Podrebersek*[78]. He acknowledged the rule of restraint to be observed by an appellate court before disturbing an apportionment for contributory negligence. But he concluded that intervention was required in the present case. He proceeded to propose the substitution of an apportionment of 20%. He said that this was "as high a percentage as might reasonably have been found"[79]. It follows from what I have said that, once the

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74 *Calin v Greater Union Organisation Pty Ltd* (1991) 173 CLR 33 at 41; cf *Progress and Properties Ltd v Craft* (1976) 135 CLR 651 at 673 where the word was used by Jacobs J (with whom Stephen, Mason and Murphy JJ concurred). Note that the word "perverse" was also used by Brownie AJA: [1999] NSWCA 275 at [14]. It was used by me in the New South Wales Court of Appeal and corrected in *Calin v Greater Union Organisation Pty Ltd* (1991) 173 CLR 33 at 41.

75 [1999] NSWCA 275 at [14].

76 [1999] NSWCA 275 at [13].

77 [1999] NSWCA 275 at [14].

78 [1999] NSWCA 275 at [14].

79 [1999] NSWCA 275 at [14].

jury's verdict was found to have been unreasonable, and the decision was taken to substitute the Court of Appeal's own "verdict", the question was, properly, what (in that Court's view) the nature of the case required rather than what the jury or a judge might properly have found. But nothing turns on this.

Conclusion: The Court of Appeal was correct

94 The conclusion of the majority in the Court of Appeal was therefore open to that Court, exercising its jurisdiction and powers. There is no indication of an incorrect approach. The requirement to observe the rule of restraint in cases of apportionment, but especially in an apportionment by a jury, was not ignored. The applicable principles were clearly in the minds of the majority.

95 On the undisputed evidence adduced at the trial, the system of work in which the respondent was engaged by the appellant was unsafe, and seriously so. This was because of the sheer weight of the steel rails which the respondent and his co-worker were obliged to lift manually, work upon and then manually remove. The system was unsafe whichever method of work was used. Even if the respondent had adhered, without the slightest variation, to the method in which he was instructed by his superior, Mr Carson, he was still required to carry a weight repeatedly beyond what was reasonable. Moreover, he was obliged to spend most of his working day in a crouched and awkward position, painting and cleaning the rails that called forth his reasonable attempt to institute a better system of work. In default of a mechanical device, this led naturally to his attempt to elevate the rails in order to paint them.

96 The respondent did not act defiantly or disobediently, for some private object of his own. Such a characterisation of his conduct is, with all respect, unfair, even absurd. What he did was done in a reasonable pursuit of his employer's interests[80]. Moreover, it was only done because of the failure of the employer to devise, institute and enforce an appropriate and reasonable system of work in the first place. At most, the respondent's lifting of the rails involved momentary inattention to risks in his lumbar spine. The respondent had hardly received much support in that regard from his employer. The method of work instituted by the appellant was primitive. The instrument provided to the respondent and his assistant was akin to that used in the building of the pyramids. It was not part of a system appropriate to a contemporary Australian workplace.

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80 *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at 178-179 per Lord Wright, referring to the preoccupation of a worker "in what [he or she] is actually doing at the cost perhaps of some inattention to [his or her] own safety"; cf *Bassanese v Freightbases Pty Ltd* (1981) 26 SASR 508: *Knight v Robert Laurie Pty Ltd* [1961] WAR 129 at 133; Fleming, *The Law of Torts*, 9th ed (1998) at 572; Trindade and Cane, *The Law of Torts in Australia*, 3rd ed (1999) at 598-599.

Perfunctory instruction to the respondent to bend his knees when lifting could scarcely discharge the heavy legal responsibilities resting on the employer. The more serious the risks, the greater the need for effective prevention[81]. Those in doubt of these propositions should read again what this Court said in *Braistina*[82].

97 Against the background of the Court's repeated statements about employers' duties of care and of accident prevention, and the proper approach to finding and assessing contributory negligence in that context, it is little wonder that the majority of the Court of Appeal, viewing all of the facts of this case, came to the conclusion which they did. With all respect to those of a different view, and taking the evidence at trial as it stood most favourably to the appellant's case, the attribution to this worker of one and a half times the responsibility for his injury to his back and consequent damage as compared to that of the employer, strikes me as completely alien to the proper understanding of negligence and contributory negligence in the modern Australian employment setting. As Brennan and Deane JJ remarked at the close of their joint reasons in *Braistina*[83]:

> "Contemporary decisions about what constitutes reasonable care on the part of an employer towards an employee in the running of a modern factory are in sharp conflict with what would have been considered reasonable care in a nineteenth century workshop and, for that matter, reflect more demanding standards than those of twenty or thirty years ago. While it is true that that has, in part, been the consequence of the elucidation and development of legal principle, it has, to a greater extent, reflected the impact, upon decisions of fact, of increased appreciation of the likely causes of injury to the human body, of the more general availability of the means and methods of avoiding such injury and of the contemporary tendency to reject the discounting of any real risk of injury to an employee in the assessment of what is reasonable in the pursuit by an employer of pecuniary profit."

98 Where, considering an individual verdict (whether by a judge or a jury) an appellate court is convinced that the decision-maker has ignored or underestimated the foregoing considerations and so has erred, it is entitled to intervene. This is what the legal procedure of appeal is for. The appellate court may do so for error in finding that contributory negligence has been proved. It

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81 *Commissioner for Railways v Halley* (1978) 20 ALR 409; cf Trindade and Cane, *The Law of Torts in Australia*, 3rd ed (1999) at 599.

82 (1986) 160 CLR 301. See also *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 200 CLR 121 at 159-160 [101].

83 (1986) 160 CLR 301 at 314.

may do so for error in deciding upon an apportionment which is manifestly not just and reasonable having regard to a worker's responsibility for the damage. The latter is what the Court of Appeal concluded in this case.

99 It has also been suggested that this conclusion was not open to the Court of Appeal because the respondent did not plead, litigate or make the subject of a ground of appeal, the possibility that he might "disobey his instructions and modify the system of work to a method carrying a risk of injury"[84]. With all respect, this is incorrect. The District Court of New South Wales is not a court of strict pleading. The appellant pleaded contributory negligence and the respondent, at trial, disputed this. That defence, in law, opens to argument the possibility that the employer will nonetheless be totally or mainly liable to the worker in circumstances of momentary inadvertence. The case books are full of such instances. I have referred to some of them. Specific pleading of that detail was not required. The issue was sufficiently raised once contributory negligence was contested. It was most certainly raised when, contributory negligence being found, a decision had to be reached about the extent to which it was "just and equitable"[85] to hold the respondent worker, and not the appellant employer, liable for the consequent damage. If in every case where an employer with an obviously defective system of work, could escape or minimise liability to its workers in negligence by what the appellant did here, the law of employers' liability in Australia would be substantially rewritten. Perhaps that is what is intended. But if so, it should be stated clearly and decades of this Court's authorities should be expressly overruled.

100 Not only were the Court of Appeal majority entitled to act as they did, their decision was, in my opinion, fully justified and correct. The contrary decision can only be sustained on a hypothesis of employer duties, and employee obligations, which turns the clock back to the unlamented past. I will not join in a restoration of unreasonable burdens on workers where employers have exposed them to the kinds of risks that, in this case, had such a foreseeable consequence for injury to the respondent's lumbar spine.

Orders

101 In the Court of Appeal, the appellant conceded that the primary judge's order could not stand. Upon this basis, the respondent was entitled, at least, to orders allowing the appeal, modifying the orders entered at trial and providing for the costs of the appeal at least on that issue. The order proposed by Meagher JA, that the appeal simply be dismissed with costs, could therefore not

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84 Reasons of Gummow and Callinan JJ at [58].

85 *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW), s 10(1).

stand in this Court in light of the appellant's concession. With every respect, that order reinforces an impression that his Honour may not have addressed the detail of the issues in the case but simply responded to it in an automatic or reactive way. That way is not the way of the law. It involves an error that this Court should neither confirm nor repeat.

102 On the substantive issues argued in this Court, the appeal should be dismissed with costs.