HIGH COURT OF AUSTRALIA

McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

Matter No S122/2002

SALLY INCH JOSLYN — APPELLANT

AND

ALLAN TROY BERRYMAN & ANOR — RESPONDENTS

Matter Nos S125/2002 and S126/2002

WENTWORTH SHIRE COUNCIL — APPELLANT

AND

ALLAN TROY BERRYMAN & ANOR — RESPONDENTS

Joslyn v Berryman
Wentworth Shire Council v Berryman
[2003] HCA 34
18 June 2003
S122/2002, S125/2002 and S126/2002

ORDER

In each matter:

1. *Appeal allowed.*

2. *Set aside paragraphs 1, 2 and 3 of the order of the Court of Appeal of New South Wales made on 11 April 2001.*

3. *Remit matter to the Court of Appeal of New South Wales for determination of the issues not so far dealt with and the cross-appeal regarding the assessment of the contributory negligence of the first respondent.*

4. *First respondent to pay the costs of the appeal to this Court.*

On appeal from the Supreme Court of New South Wales

Representation:

Matter No S122/2002

D F Jackson QC with G I Charteris for the appellant (instructed by McMahons National Lawyers)

M L Williams SC with P R McGuire for the first respondent (instructed by Carroll & O'Dea)

P R Garling SC with J M Morris for the second respondent (instructed by Phillips Fox)

Matter Nos S125/2002 and S126/2002

P R Garling SC with J M Morris for the appellant (instructed by Phillips Fox)

M L Williams SC with P R McGuire for the first respondent (instructed by Carroll & O'Dea)

D F Jackson QC with G I Charteris for the second respondent (instructed by McMahons National Lawyers)

CATCHWORDS

Joslyn v Berryman
Wentworth Shire Council v Berryman

Negligence – Contributory negligence – Passenger in defective vehicle with intoxicated and inexperienced driver – Whether reasonable person would have foreseen a risk of serious injury – Facts and circumstances relevant to contributory negligence.

Negligence – Contributory negligence – *Motor Accidents Act* 1988 (NSW), s 74(2) – Whether passenger was "aware or ought to have been aware" that driver's ability was affected by alcohol – Objective or subjective test – Facts and circumstances to be taken into account.

Negligence – Contributory negligence – *Motor Accidents Act* 1988 (NSW), s 74(6) – Whether passenger a "voluntary passenger".

Appeal – Contributory negligence – Application of apportionment legislation – Factual considerations – Utility of earlier judicial decisions – Whether relevant to disclose common approaches at trial and on appeal – Whether relevant to disclose purpose of statutory amendments obliging finding of contributory negligence in specified circumstances.

Words and phrases – "aware or ought to have been aware", "just and equitable in the circumstances of the case", "responsibility for the damage", "voluntary passenger".

Law Reform (Miscellaneous Provisions) Act 1965 (NSW), s 10.
Motor Accidents Act 1988 (NSW), s 74.

1 McHUGH J. When Sally Inch Joslyn noticed that the first respondent, Allan Troy Berryman, was falling asleep at the wheel of the vehicle in which they were travelling, she insisted that she drive the vehicle. Shortly after Ms Joslyn commenced to drive, the vehicle overturned causing injury to Mr Berryman. The accident occurred at about 8.45am. The driving capacity of both parties was affected by their intoxication. They had been drinking at a party until about 4.00am. The vehicle also had a propensity to roll over, and its speedometer was broken. Section 74(2) of the *Motor Accidents Act* 1988 (NSW) requires a finding of contributory negligence if an injured person was a voluntary passenger in a motor vehicle and "was aware, or ought to have been aware" that the driver's ability to drive was impaired by alcohol. Section 74(6) of the Act declares that a person "shall not be regarded as a voluntary passenger ... if, in the circumstances of the case, the person could not reasonably be expected to have declined to become a passenger in or on the vehicle." However, s 74 does not otherwise affect the common law rules of contributory negligence.

2 The issues in these appeals are:

- whether Mr Berryman was guilty of contributory negligence at common law;
- whether, within the meaning of s 74(6), Mr Berryman was a "voluntary passenger" in the vehicle;
- whether, in determining for the purposes of s 74(2) that a passenger was or ought to have been aware that the driver's ability was impaired by alcohol, regard can be had to facts and circumstances occurring before the passenger entered the vehicle;
- whether Mr Berryman was aware, or ought to have been aware, that Ms Joslyn was incapacitated by reason of her intoxication.

3 In my opinion, Mr Berryman was guilty of contributory negligence at common law and by reason of the direction in s 74 independently of the common law. He was guilty of contributory negligence at common law because a reasonable person in his position would have known that Ms Joslyn was affected by alcohol by reason of her drinking during the previous 12 hours, that the vehicle was defective and that, by becoming a passenger, he was exposing himself to the risk of injury. He was guilty of contributory negligence by reason of the direction in s 74 because he was a voluntary passenger and ought to have been aware that Ms Joslyn's ability to drive was impaired by alcohol.

Statement of the case

4 Allan Troy Berryman suffered severe injuries when a utility motor vehicle in which he was a passenger, but which he owned, left the road and overturned on a country road in New South Wales. He sued the driver, Sally Inch Joslyn,

and the Wentworth Shire Council for damages in the District Court of New South Wales, claiming that Ms Joslyn had driven negligently and that the Council was negligent in failing to provide proper warning signs[1]. The action was heard by Boyd-Boland ADCJ. His Honour found Ms Joslyn guilty of negligence. He also found that the Council was guilty of negligence in not erecting a sign that adequately warned of the danger of the curve where the accident occurred. He held Ms Joslyn 90% and the Council 10% responsible for the accident. However, his Honour reduced the damages by 25% because of the contributory negligence of Mr Berryman in allowing Ms Joslyn to drive when he ought to have been aware that she was unfit to drive.

5 Mr Berryman appealed to the Court of Appeal of New South Wales contending that the trial judge erred in finding that he was guilty of contributory negligence. Alternatively, he contended that the trial judge should have found a smaller percentage of contributory negligence. Ms Joslyn and the Council cross-appealed against the percentage of contributory negligence attributed to Mr Berryman. They contended that the trial judge should have made a finding of up to 80% contributory negligence. The Court of Appeal (Priestley JA, Meagher JA and Ipp AJA) allowed Mr Berryman's appeal, holding that he was not guilty of contributory negligence[2].

6 This Court gave special leave to Ms Joslyn and the Council to appeal against the judgment of the Court of Appeal.

The material facts

7 The accident occurred at about 8.45am on a Sunday. Shortly before the accident Mr Berryman had been driving the vehicle. Ms Joslyn noticed that he was dozing off. She must have remonstrated with him for doing so because he said to her, "well, you drive the car then." She then took over the driving. Ms Joslyn did not have a driver's licence, having lost her licence after being convicted for driving while under the influence of intoxicating liquor. Mr Berryman knew that she had lost her licence and, according to Ms Joslyn, she had told him that she had not driven for over three years. However, the Court of Appeal appears to have accepted that he was unaware that she had not driven for three years.

8 After driving about one kilometre, Ms Joslyn lost control of the vehicle while driving around a sharp corner. The vehicle overturned. As a result,

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1 *Berryman v Joslyn* unreported, District Court of New South Wales, 5 November 1999.

2 *Berryman v Joslyn* (2001) 33 MVR 441.

Mr Berryman suffered serious injuries. The vehicle had a propensity to roll – having overturned on two previous occasions. Ms Joslyn did not know what speed she was travelling when the accident occurred because the speedometer of the vehicle did not work. The trial judge found that it was broken.

9 On the previous night, Mr Berryman had gone to a party at a property near Dareton, a town in south-western New South Wales. He arrived at the party at about 9.00pm. With a short interruption, he drank alcohol until about 4.00am, when he went to sleep on the front seat of his utility. He had no further alcohol that morning. A sample of blood taken on the Sunday morning indicated that at about 8.45am he probably had a blood alcohol level of .19g/100ml. Ms Joslyn had also been a guest at the party. During the evening, she also consumed a large amount of alcohol. At about 4.30am, she was seen to be "quite drunk and staggering about". Eventually, she went to sleep on the ground beside Mr Berryman's vehicle.

10 Later that Sunday morning, Ms Joslyn and Mr Berryman decided to drive to Mildura to have breakfast, a journey that took about 20 minutes. She had had no more than three hours sleep (and may have had only two hours sleep) before embarking on the journey which resulted in Mr Berryman's injuries. She had no further alcohol that morning. A sample of blood taken from her indicated that at about 8.45am she probably had a blood alcohol level of .138g/100ml. After Ms Joslyn and Mr Berryman had eaten, they commenced to drive back to Dareton. Mr Berryman drove until shortly before the accident.

11 Upon these facts, Boyd-Boland ADCJ said that, having decided to stay overnight, Mr Berryman "should have contemplated his vehicle might be driven by [Ms] Joslyn". His Honour also said that Mr Berryman had had no regard to the consequences of his own alcohol consumption, and that he had allowed Ms Joslyn to drive despite his knowledge of her alcohol consumption. His Honour found that, at the time Mr Berryman allowed Ms Joslyn to drive, he was capable of taking her condition into account. His Honour also said that Mr Berryman "ought also to have realised the lack of experience and qualifications of [Ms] Joslyn particularly given his knowledge of the propensity of his vehicle to roll over."

12 The Court of Appeal held that the relevant facts were confined to those that Mr Berryman observed, or ought to have observed, when Ms Joslyn took over the driving. Meagher JA said "one must view matters as they stood at the time of handing over control of the car, (not as they were in the previous 24 hours), a task which his Honour did not really undertake."[3] Meagher JA went on to say "there is no evidence that either [Mr Berryman or Ms Joslyn] were

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3 (2001) 33 MVR 441 at 446 [21].

drunk at the time, and certainly no evidence that at the time Mr Berryman had any reason to think that [Ms] Joslyn was affected by intoxication."[4]

Section 74

13 Section 74(2) directed the trial judge to find Mr Berryman guilty of contributory negligence if he "was aware, or ought to have been aware" that Ms Joslyn's ability to drive the utility "was impaired as a consequence of the consumption of alcohol". Neither in the Court of Appeal nor at the trial was any issue raised as to whether s 74 applied to the facts of the case. Nor was any issue raised as to whether Mr Berryman was "a voluntary passenger in or on a motor vehicle" within the meaning of s 74(6) of the Act. However, upon the facts of the case, these issues are squarely raised. Even if Mr Berryman was not guilty of contributory negligence at common law, s 74 might require a finding that he be deemed guilty of contributory negligence. Accordingly, this Court cannot avoid dealing with the issue, an issue that is squarely raised by the law that governs the case[5].

14 Apparently treating the case as one turning on common law principles, the Court of Appeal held that Mr Berryman was not guilty of contributory negligence. As I have indicated, the learned judges did so because they thought that Mr Berryman was not aware that Ms Joslyn's ability to drive the vehicle was impaired at the time that he became a passenger. They evidently took the view that, at least in a case like the present, the contributory negligence of a plaintiff has to be evaluated by reference to what the plaintiff knew or could have observed when he or she became a passenger. As will appear, I do not think that the common law test is so limited. But s 74(2) directs the court to determine whether the passenger ought to have been aware of the driver's impairment. This introduces an objective test. So the fact that Mr Berryman was unaware of Ms Joslyn's impaired ability to drive, does not necessarily prevent a finding that he was guilty of contributory negligence under s 74. However, it is convenient to deal first with the issue of contributory negligence at common law.

The common law rules of contributory negligence

15 The Court of Appeal erred in confining the facts and circumstances relevant to contributory negligence to those observed or observable by Mr Berryman when he became a passenger. Although judges and juries have often taken a benign view of conduct alleged to constitute contributory

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4 (2001) 33 MVR 441 at 446 [21].

5 *Attorney-General (NSW); Ex rel McKellar v The Commonwealth* (1977) 139 CLR 527 at 559-560.

negligence and some decisions concerned with intoxication support the reasoning of the Court of Appeal, the basic principles of the law relating to contributory negligence show that the relevant facts and circumstances were not as confined as that Court held.

16 At common law, a plaintiff is guilty of contributory negligence when the plaintiff exposes himself or herself to a risk of injury which might reasonably have been foreseen and avoided and suffers an injury within the class of risk to which the plaintiff was exposed[6]. In principle, any fact or circumstance is relevant in determining contributory negligence if it proves, or assists in proving, a reasonably foreseeable risk of injury to the plaintiff in engaging in the conduct that gave rise to the injury suffered. For historical reasons associated with the consequences of a finding of contributory negligence, judges and juries in earlier times took a lenient view of what facts constituted contributory negligence. And some modern cases concerned with passengers accepting a lift from intoxicated drivers have also taken a lenient view of the passengers' conduct. But in principle, any fact or circumstance which a reasonable person would know or ought to know and which tends to suggest a foreseeable risk of injury in accepting a lift from an intoxicated driver, is relevant in determining whether the passenger was guilty of contributory negligence in accepting the lift.

17 Until the middle of the 20th century, the contributory negligence of a plaintiff was a defence to an action for negligence, even if the negligence of the defendant far outweighed the contributory negligence of the plaintiff. No one with experience of common law jury trials could fail to believe that juries often – perhaps usually – avoided the harshness of the rule by taking a benign view of the plaintiff's conduct. On some occasions, juries even appeared to compromise by reducing the plaintiff's damages to accord roughly with his or her responsibility for the damage suffered.

18 Eventually, judges also came to dislike the harshness of the contributory negligence rule. They weakened it by holding that the onus was on the defendant to prove contributory negligence, even though historically contributory negligence was said[7] to negative the causal connection between the defendant's negligence and the plaintiff's damage. If that was so, the onus should have been on the plaintiff to negative the plea. The common law judges further weakened the harshness of the rule by inventing the "last opportunity" rule[8]. In

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6 *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601 at 611; *Jones v Livox Quarries Ltd* [1952] 2 QB 608 at 615; *Froom v Butcher* [1976] QB 286 at 291.

7 *Butterfield v Forrester* (1809) 11 East 60 [103 ER 926].

8 See *Alford v Magee* (1952) 85 CLR 437 for a discussion of this rule.

employment cases, they went so far as to effectively obliterate the efficacy of the rule. They did so by holding that regard had to be had "to the long hours and the fatigue, to the slackening of attention which naturally comes from constant repetition of the same operation, to the noise and confusion in which the man works, to his pre-occupation in what he is actually doing at the cost perhaps of some inattention to his own safety."[9] For a time, this Court even held[10] that contributory negligence was not a defence to an action for breach of statutory duty. Ultimately, however, it felt compelled[11] to follow a House of Lords decision[12] to the opposite effect.

19 In the case of a passenger who accepted a lift from an intoxicated driver, Australian courts showed a marked reluctance to use contributory negligence as the ground upon which the law might or ought to deny a right of action to the passenger. But this reluctance does not seem to have been the product of any sympathy for the passenger. Australian courts recognised that contributory negligence was an appropriate and available category for characterising the passenger's conduct. But generally they preferred to hold either that the driver had not breached any duty of care owed to the passenger or, more often, that the passenger had voluntarily accepted the risk of suffering the relevant harm. Perhaps the Australian courts thought that, if contributory negligence was the ground for denying liability, juries would take a benign view of the conduct of unmeritorious passengers and hold that the passenger's conduct in accepting a lift with an intoxicated driver was not unreasonable.

20 Preferring no breach of duty as the mechanism for determining liability enabled the courts to control the issue – whether there was any evidence of breach of duty being a question for the judge and not for the jury. Moreover, the passenger had the onus of proving breach. The other preferred alternative was to characterise the conduct of the passenger as the voluntary assumption of the risk of harm (*volenti non fit injuria*). That was a jury issue. It therefore gave the court less control of the issue, and the onus was on the defendant to establish the defence. But the defence of *volenti non fit injuria* meant that the plaintiff would invariably fail once it was established that he or she knew of the driver's intoxication. In that respect, it had considerable advantages over contributory negligence in controlling the claims of the passenger who, together with the driver, had embarked on a drinking spree and then accepted a lift from the driver.

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9 *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at 178-179.

10 *Bourke v Butterfield & Lewis Ltd* (1926) 38 CLR 354.

11 *Piro v W Foster & Co Ltd* (1943) 68 CLR 313.

12 *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152.

21 The reluctance of Australian courts to use contributory negligence as the ground of disentitlement was surprising having regard to the comments of the editor of the *Law Quarterly Review* concerning such cases and the United States jurisprudence. In *Dann v Hamilton*[13], Asquith J had held that the defence of *volenti non fit injuria* did not apply to a passenger who knowingly accepted a lift from an intoxicated driver. In *Dann*, the driver "was under the influence of drink to such an extent as substantially to increase the chances of a collision arising from his negligence"[14]. Despite this finding, Asquith J rejected the plea of *volenti*. His Lordship appears to have taken it for granted that the driver owed a duty of care and that it had been breached. Curiously, contributory negligence was not pleaded as a defence. *Dann* was powerfully criticised[15] by Dr A L Goodhart, the editor of the *Law Quarterly Review*, who argued "that judgment should have been entered for the defendant on the ground that the plaintiff was guilty of contributory negligence." Neither Asquith J nor Dr Goodhart appeared to think that no breach of duty was the appropriate ground for denying liability. United States jurisprudence also held that a passenger, like the plaintiff in *Dann*, was disentitled to sue because his or her conduct constituted contributory negligence[16].

22 Some years before *Dann* was decided, the issue arose for decision in the Full Court of the Supreme Court of New South Wales. In *Finnie v Carroll*[17], the Full Court held that the trial judge had erred in refusing to direct the jury that the plaintiff could not recover if the jurors concluded that the driver's intoxication caused the collision and the plaintiff knew of that condition[18]. Gordon J, who gave the judgment of the Court, said[19] that the defendant's immunity did not arise from the application of the maxim *volenti non fit injuria*. It arose "because there was no breach of any duty A owed to B to protect him from that danger of which he was fully aware when he accepted the invitation." As in *Dann*, the issue of contributory negligence appears to have been regarded as irrelevant.

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13 [1939] 1 KB 509.

14 [1939] 1 KB 509 at 515.

15 "Contributory Negligence and Volenti Non Fit Iniuria", (1939) 55 *Law Quarterly Review* 184 at 185.

16 *Restatement of the Law of Torts*, vol 2 (1934), §466.

17 (1927) 27 SR (NSW) 495.

18 (1927) 27 SR (NSW) 495 at 498.

19 (1927) 27 SR (NSW) 495 at 499.

23 Another 20 years elapsed before the issue came before this Court for the first time in *The Insurance Commissioner v Joyce*[20] (Latham CJ, Rich and Dixon JJ). Latham CJ and Dixon J both held that the passenger's entitlement to sue could be defeated on any one of three grounds: no breach of duty, *volenti non fit injuria* and contributory negligence. Latham CJ held that the passenger's claim failed because of contributory negligence and the voluntary acceptance of an obvious risk[21]. Rich J held that the plea of *volenti non fit injuria* had been made out[22]. Dixon J preferred to decide the case on the basis that a passenger who "knowingly accepts the voluntary services of a driver affected by drink ... cannot complain of improper driving caused by his condition, because it involves no breach of duty."[23]

24 However, Latham CJ and Dixon J disagreed as to the conditions that gave rise to the various defences. Latham CJ said[24] that, if the passenger was sober enough to know and understand the danger of driving with the defendant in a drunken condition, he was guilty of contributory negligence and had also voluntarily assumed an obvious risk. But his Honour also said that, if the passenger was not sober enough to know and understand the danger, he had disabled himself from avoiding the consequences of the negligent driving and was guilty of contributory negligence. In contrast, Dixon J said[25] that "for the plaintiff, who was not driving the car, to drink until he was too stupid to observe the defendant's condition can hardly be considered contributory negligence of which the accident was a reasonable or natural consequence." His Honour also held[26] that the pleas of no breach of duty and *volenti non fit injuria* both required "some degree of actual knowledge on the part of the passenger of the alcoholic conditions he is accepting." Dixon J would have dismissed the defendant's appeal on the ground that the defendant had not established any of the three grounds of disentitlement. On this issue, Dixon J was clearly right and Latham CJ and Rich J wrong. Both Latham CJ and Rich J overlooked that the onus was on the defendant to prove the defences of *volenti* and contributory negligence and that on the evidence it was not possible to say whether those defences were made out. But as I later indicate, I disagree with the analysis by

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20 (1948) 77 CLR 39.

21 (1948) 77 CLR 39 at 48.

22 (1948) 77 CLR 39 at 49.

23 (1948) 77 CLR 39 at 57.

24 (1948) 77 CLR 39 at 47.

25 (1948) 77 CLR 39 at 60.

26 (1948) 77 CLR 39 at 57.

Dixon J of the defence of contributory negligence in the case of an intoxicated passenger.

25 The issue of the appropriate ground of disentitlement again came before the Court in *Roggenkamp v Bennett*[27] where the trial judge had held that the plaintiff, having accepted a lift with an intoxicated driver, had failed to establish a breach of the duty owed to him. Like the trial judge, Webb J held that the defendant had not breached the duty of care that he owed to the passenger. However, McTiernan and Williams JJ dismissed the plaintiff's appeal on the ground that the defence of *volenti non fit injuria* had been established.

26 In *Jansons v The Public Curator of Queensland*[28], Lucas J also held that the plaintiff's claim failed because the defendant had proved that the plaintiff had voluntarily assumed the risk of injury as the result of the driver's intoxication. And in *Jeffries v Fisher*[29], the Full Court of the Supreme Court of Western Australia upheld the trial judge's finding that the plaintiff had voluntarily assumed the risk of suffering the harm sustained. But these four cases were the high water mark of the defence of *volenti* in cases where the driver was intoxicated. Since then the defence has failed in numerous cases – invariably on the ground that the passenger failed to appreciate the risk of harm or did not intend to take the risk[30].

27 It is difficult to escape the conclusion that the introduction of apportionment legislation has influenced the courts in characterising the conduct of the passenger as contributory negligence, rather than as a voluntary assumption of risk or as a determinant of the standard of care owed by the driver to the passenger. Apportionment legislation enables the court to apportion responsibility for the plaintiff's damages according to the respective responsibility of the plaintiff and the defendant for that damage[31]. Since the

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27 (1950) 80 CLR 292.

28 [1968] Qd R 40.

29 [1985] WAR 250.

30 See, for example, *Duncan v Bell and State Government Insurance Office (Queensland)* [1967] Qd R 425; *Dodd v McGlashan* [1967] ALR 433; *O'Shea v The Permanent Trustee Company of New South Wales Ltd* [1971] Qd R 1; *Sloan v Kirby and Redman* (1979) 20 SASR 263; *Banovic v Perkovic* (1982) 30 SASR 34.

31 *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act* 1947 (WA), s 4(1); *Wrongs Act* 1954 (Tas), s 4(1); *Law Reform (Miscellaneous Provisions) Act* 1956 (NT), s 16(1); *Wrongs Act* 1958 (Vic), s 26(1); *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW), s 9(1); *Law Reform Act* 1995 (Q),

(Footnote continues on next page)

introduction of apportionment legislation, contributory negligence has been the preferred characterisation of the conduct of the plaintiff who accepts a lift from a driver known to be intoxicated.

28 In New South Wales[32] and in South Australia[33], the legislature has even intervened to abolish the defence of *volenti non fit injuria* in motor accident cases. Instead, legislation[34] makes knowledge of the driver's intoxication a matter of contributory negligence and apportionment. But the defence of *volenti* is still available – at least theoretically – in other States and Territories.

29 What then of the issue of no breach of duty in cases where the passenger knows that the driver's ability is impaired by alcohol and suffers injury as the result of that impairment? Has it survived the judicial and legislative demise of the doctrine of *volenti*? While the reasoning of this Court in *Cook v Cook*[35] and *Gala v Preston*[36] stands, the answer must be: "Yes". The plea of no breach of duty – perhaps even a plea of no duty in an extreme case – is still open in the case of a passenger who accepts a lift with a driver known to the passenger to be seriously intoxicated. In *Cook* and *Gala*, this Court applied the now rejected doctrine of proximity to hold that in exceptional cases the content of the duty of care owed by a driver to a passenger varies in proportion to the passenger's knowledge of the driver's capacity to drive. In *Cook*, the Court held[37] that, where the passenger has invited an inexperienced and unlicensed driver to drive, the standard of care "is that which is reasonably to be expected of an unqualified and inexperienced driver in the circumstances in which [the driver] is placed." In so holding, the majority judgment relied on the no breach of duty statements contained in the judgments of Latham CJ and Dixon J in *Joyce* and the judgment of Webb J in *Roggenkamp*. In *Gala*, Mason CJ, Deane and Gaudron JJ and I held that no relevant duty of care was owed by a driver to a passenger in respect

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s 10(1); *Law Reform (Contributory Negligence and Apportionment of Liability) Act* 2001 (SA), s 7; *Civil Law (Wrongs) Act* 2002 (ACT), s 41.

32 *Motor Accidents Act* 1988 (NSW), s 76.

33 *Wrongs Act* 1936 (SA), s 24K(6).

34 *Wrongs Act* 1936 (SA), s 24K(1); *Motor Accidents Act* 1988 (NSW), s 74.

35 (1986) 162 CLR 376.

36 (1991) 172 CLR 243.

37 (1986) 162 CLR 376 at 384.

of the driving of a stolen car in circumstances where both parties had consumed large quantities of alcohol. We said[38]:

> "[E]ach of the parties to the enterprise must be taken to have appreciated that he would be encountering serious risks in travelling in the stolen vehicle when it was being driven by persons who had been drinking heavily and when it could well be the subject of a report to the police leading possibly to their pursuit and/or their arrest. In the special and exceptional circumstances that prevailed, the participants could not have had any reasonable basis for expecting that a driver of the vehicle would drive it according to ordinary standards of competence and care."

30 Now that this Court has rejected the doctrine of proximity, it may be that it would no longer follow the reasoning in *Cook* and *Gala*. Moreover, the notion of a standard of care that fluctuates with the sobriety of the driver is one that tribunals of fact must have great difficulty in applying. While *Cook* and *Gala* stand, however, they are authorities for the proposition that, in special and exceptional circumstances, it would be unreasonable to fix the standard of care owed by the driver by reference to the ordinary standard of care owed by a driver to a passenger[39]. In some cases, knowledge by a passenger that the driver's ability to drive is impaired by alcohol may transform the relationship between them into such a category.

31 It is unnecessary in this case to say any more about the authority of *Cook* and *Gala*. Neither in this Court nor in the courts below has Ms Joslyn suggested that she did not breach the duty of care owed to Mr Berryman.

Intoxication and contributory negligence

32 The test of contributory negligence is an objective one. Contributory negligence, like negligence, "eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question."[40] One exception to that rule is that, in considering whether a child is guilty of contributory negligence, the standard of care is tailored to the age of the child[41]. It may be the law that, in the case of an aged plaintiff, the standard of care is also

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38 (1991) 172 CLR 243 at 254.

39 *Gala v Preston* (1991) 172 CLR 243 at 253.

40 *Glasgow Corporation v Muir* [1943] AC 448 at 457.

41 *McHale v Watson* (1966) 115 CLR 199.

tailored to the age of the plaintiff. In *Daly v Liverpool Corporation*[42], Stable J thought so, saying:

> "I cannot believe that the law is quite so absurd as to say that, if a pedestrian happens to be old and slow and a little stupid, and does not possess the skill of the hypothetical pedestrian, he or she can only walk about his or her native country at his or her own risk. One must take people as one finds them. There is no hypothetical standard of care. We must all do our reasonable best when we are walking about."

33 This statement suggests that the physical and mental deficits of each plaintiff must be taken into account in determining whether that person was guilty of contributory negligence. Support for such a proposition can be found in the judgment of Jordan CJ in *Cotton v Commissioner for Road Transport and Tramways*[43] where his Honour said:

> "It is conceived that contributory negligence in the sense in which it is now being considered occurs only when a person fails to take all such reasonable care as he is in fact capable of. I am not aware of any case in which a person has been held to be guilty of contributory negligence through the application of some arbitrary general standard, notwithstanding that he had been as careful as he could."

34 In *McHale v Watson*[44], Kitto J held, correctly in my opinion, that this statement of Jordan CJ does not represent the law. Kitto J said[45] that "[i]n so far as his Honour's observations suggest a subjective standard for contributory negligence they ought not, I think, to be accepted." The statement of Jordan CJ, like that of Stable J in *Daly*, is inconsistent with the established rule that "[i]n theory, a plaintiff is required to conform to the same standard of care as a defendant, with due allowance for the fact that here the enquiry is directed to what is reasonable for his own safety rather than the safety of others."[46] No one would now suggest that the standard of care expected of a defendant is that which the defendant "is in fact capable of." To introduce such a standard into the law of contributory negligence would not only contradict the objective test of contributory negligence, it would impose on tribunals of fact the almost

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42 [1939] 2 All ER 142 at 143.

43 (1942) 43 SR (NSW) 66 at 69.

44 (1966) 115 CLR 199.

45 (1966) 115 CLR 199 at 214-215.

46 Fleming, *The Law of Torts*, 9th ed (1998) at 318.

insuperable task of determining what standard of care the plaintiff was "in fact capable of."

35 Ever since *Lynch v Nurdin*[47], common law courts have accepted that, in determining whether a child is guilty of contributory negligence, the relevant standard of care is that to be expected of an ordinary child of the same age. But otherwise the plaintiff is held to the standard of care expected of an ordinary reasonable person engaging in the conduct that caused the plaintiff's injury or damage. No exception should or could in principle be made in the case of the passenger accepting a lift from an intoxicated driver.

36 It is true that the reasoning in some decisions[48] concerned with a passenger accepting a lift with an intoxicated driver appears to suggest that this class of case, like those concerned with children, is another exception to the general rule that the test for contributory negligence is an objective test. But, in principle, intoxicated drivers cannot be an exception to the general rule. Cases like *Banovic v Perkovic*[49], *Nominal Defendant v Saunders*[50] and *McPherson v Whitfield*[51] cannot be followed in so far as they hold or suggest that a passenger is guilty of contributory negligence in accepting a lift from an intoxicated driver only if the passenger knew, or was aware of signs indicating, that the driver was intoxicated. In my view, the law on this subject was correctly stated by Cooper J in *Morton v Knight*[52] and by Clarke JA in *McGuire v Government Insurance Office (NSW)*[53].

37 The issue in a case like the present is not whether the passenger ought reasonably to have known of the driver's intoxication from the facts and circumstances *known to the passenger*. The relevant facts and circumstances include those which a reasonable person could have known by observation, inquiry or otherwise. In cases of contributory negligence outside the field of intoxicated passengers and drivers, the courts take into account as a matter of

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47 (1841) 1 QB 29 [113 ER 1041].

48 *Banovic v Perkovic* (1982) 30 SASR 34 at 36-37; *Nominal Defendant v Saunders* (1988) 8 MVR 209 at 215; *McPherson v Whitfield* [1996] 1 Qd R 474.

49 (1982) 30 SASR 34.

50 (1988) 8 MVR 209.

51 [1996] 1 Qd R 474.

52 [1990] 2 Qd R 419.

53 (1990) 11 MVR 385 at 388.

course those facts and circumstances that the plaintiff could have discovered by the exercise of reasonable care[54]. In *Morton*, Cooper J relied, correctly in my opinion, on the reasoning in the judgments of this Court in *O'Neill v Chisholm*[55] and held that the relevant facts and circumstances included those which a reasonable person would have ascertained. The test applied by all members of the Court in *O'Neill*, including Walsh and Gibbs JJ who found no contributory negligence, was whether the passenger ought to have realised that alcohol had impaired the driver's capacity to drive.

38 Hence, the issue is not whether a reasonable person in the intoxicated passenger's condition – if there could be such a person – would realise the risk of injury in accepting the lift. It is whether an ordinary reasonable person – a sober person – would have foreseen that accepting a lift from the intoxicated driver was exposing him or her to a risk of injury by reason of the driver's intoxication. If a reasonable person would know that he or she was exposed to a risk of injury in accepting a lift from an intoxicated driver, an intoxicated passenger who is sober enough to enter the car voluntarily is guilty of contributory negligence. The relevant conduct is accepting a lift from a person whose driving capacity is known, or could reasonably be found, to be impaired by reason of intoxication.

39 In other areas of contributory negligence, a plaintiff cannot escape a finding of contributory negligence by pleading ignorance of facts that a reasonable person would have known or ascertained. A pedestrian or driver who enters a railway crossing in the face of an oncoming train cannot escape a finding of contributory negligence because he or she was not, but should have been, aware of the train. Nor does it make any difference that the pedestrian or driver had defective hearing or sight. Contributory negligence is independent of "the idiosyncrasies of the particular person whose conduct is in question."[56] Similarly, the fact that the passenger's intoxicated condition prevents him or her from perceiving the risks attendant on driving with an intoxicated driver does not absolve the passenger from complying with the standard of care required of an ordinary reasonable person. If an intoxicated pedestrian falls down a manhole that a sober person would have seen and avoided, it seems impossible to hold that the pedestrian was not guilty of contributory negligence because the pedestrian's condition prevented him or her from seeing the danger. At all events, it seems

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54 See, for example, *O'Connor v South Australia* (1976) 14 SASR 187; *Preston Erections Pty Ltd v Rheem Australia Ltd* (1978) 52 ALJR 523; 21 ALR 379; *Purcell v Watson* (1979) 26 ALR 235; *AWA Ltd v Daniels (t/as Deloitte Haskins & Sells)* (1992) 7 ACSR 759.

55 (1972) 47 ALJR 1.

56 *Glasgow Corporation v Muir* [1943] AC 448 at 457.

impossible to so hold without introducing a subjective standard into this area of law. And I can see no reason in principle or policy for distinguishing between the intoxicated pedestrian and the intoxicated passenger.

Mr Berryman was guilty of contributory negligence at common law

40 Once it is accepted that the relevant circumstances were not confined to what Mr Berryman perceived or should have perceived when he became a passenger in his vehicle, a finding of common law contributory negligence on his part is inevitable. The relevant facts which an ordinary reasonable person would know or would infer point overwhelmingly to Mr Berryman's lack of care for his safety in becoming a passenger. First, Ms Joslyn had lost her driver's licence and probably had not driven for some time. Second, she was insisting on driving a vehicle whose speedometer did not work and which had a tendency to roll over and she had had no experience of driving the vehicle. Third, Ms Joslyn had been drinking for about the same length of time as Mr Berryman who was unfit to drive. Fourth, the amount of alcohol consumed by Ms Joslyn, the time that had elapsed since she stopped drinking and her lack of sleep confirmed that she also was probably unfit to drive. Mr Berryman's inability to keep awake and his agreement to stop driving increased the probability that her drinking and lack of sleep made her unfit to drive.

41 Upon these facts, a reasonable person would have foreseen that, as a passenger in a car driven by Ms Joslyn, he or she was exposed to a risk of serious injury as the result of the defective nature of the vehicle, her drinking, her lack of sleep, her probable lack of recent driving experience and her lack of experience of driving this defective vehicle. Moreover, there was no reason why the hypothetical ordinary person, as the owner of the vehicle, could not have parked it by the side of the road until he or Ms Joslyn was capable of driving. In those circumstances, the learned trial judge was correct in finding Mr Berryman guilty of contributory negligence at common law.

Voluntary passenger

42 I now return to the issue whether Mr Berryman was guilty of contributory negligence under s 74 of the Act. That depends in the first place on whether Mr Berryman was a voluntary passenger in the motor vehicle. In my opinion, he was. Under s 74(6), he was a voluntary passenger unless he "could not reasonably be expected to have declined to become a passenger" in the vehicle. A number of factors indicate that it was reasonable for him to have declined to become a passenger in his own vehicle. First, he knew Ms Joslyn did not have a licence and that she had been drinking for about the same length of time as he had. Second, given his own blood alcohol level, his inability to keep awake and his agreement to stop driving, I infer that he knew that his capacity for driving was affected by the alcohol that he had consumed. Third, because that is so, he either knew or ought to have known that the driving ability of Ms Joslyn was also

likely to be affected by the liquor that she had consumed. Fourth, there was no reason why he could not have parked his vehicle by the side of the road until he or Ms Joslyn was capable of driving. In those circumstances, he has failed to establish that he could not reasonably be expected to have declined to become a passenger in his vehicle.

Contributory negligence under s 74 of the Act

43 Under s 74(2) of the Act, Mr Berryman was guilty of contributory negligence if he "was aware, or ought to have been aware" that the driver's ability to drive was impaired by alcohol. The question posed by s 74 is a narrower one than that posed by the common law. Under the common law, the defective nature of the vehicle and Ms Joslyn's lack of experience with that vehicle were factors that, combined with her alcohol consumption, made an overwhelming case of contributory negligence. In combination, they pointed to a reasonably foreseeable risk of injury to a person accepting a lift from her. The statutory test is not concerned with foreseeability of risk. It poses the simple question whether Mr Berryman knew or ought to have known that Ms Joslyn's driving ability was impaired by the alcohol that she had consumed.

44 The use of the term "ought" in s 74(2) suggests a test of objective reasonableness. Accordingly, the question posed by this limb of s 74(2) is, would a reasonable person have known that intoxication impaired Ms Joslyn's ability to drive? Section 74(2) is silent, however, as to the circumstances that the reasonable person may take into account in determining that question. Are they confined to the circumstances known to the passenger? Do they include circumstances that the passenger ought to have known? Are they confined to circumstances that exist at the time that the driver commences to drive the passenger?

45 Counsel for Mr Berryman contended that at common law – he did not deal with the question under s 74(2) – "a driver must be exhibiting obvious signs of intoxication before a finding of contributory negligence can be made in these circumstances." If that was so, the relevant circumstances under s 74 are confined to those that demonstrate "obvious signs of intoxication". But, as I have pointed out, at common law the circumstances were not so limited, and there is no reason to give the "ought to have known" limb of s 74(2) a more restricted scope than exists at common law.

46 The trial judge found that Ms Joslyn was not showing objective signs of intoxication shortly after the accident. He inferred that she was not showing these signs when she took over driving. Given this finding, it is difficult to conclude that Mr Berryman knew, when he became a passenger, that her driving ability was impaired. Indeed, his agreement to give up driving and to allow her to drive suggests that he thought that she was competent to drive. At all events, it suggests that he believed that she was in better condition than he was to drive.

But, accepting that he was not aware that her driving condition was impaired, he "ought to have been aware" that it was.

47 In determining whether he "ought to have been aware", the relevant facts and circumstances must include all those facts and circumstances occurring in the previous 12 hours of which he was, or ought to have been, aware. They included the fact that Ms Joslyn had been drinking heavily until at least 4.00am when Mr Berryman left the party. When he went to bed at about 4.00am, "the people who were still at the party were all staggering drunk". Those people included Ms Joslyn, although Mr Berryman said in evidence that he could not recall what condition she was in.

48 Given the fact that Ms Joslyn was certainly "staggering drunk" at 4.00am and the accident occurred about 8.45am, I think that Mr Berryman ought to have been aware that Ms Joslyn's driving ability was impaired. She must have been very intoxicated at 4.00am. At about 4.30am, she was seen to be "quite drunk and staggering about". A sample of blood taken from her indicated that at about 8.45am, she probably had a blood alcohol level of .138g/100ml. Mr Berryman was neither aware, nor ought he have been aware, of this fact. But that Ms Joslyn should have such a high reading, nearly five hours after Mr Berryman left the party, shows how intoxicated she must have been at 4.00am. A reasonable person in Mr Berryman's position would have been aware that she was probably still affected by alcohol when he became a passenger in the vehicle. Add to this, that Mr Berryman's driving ability was impaired by reason of the alcohol that he had consumed, and it is an almost necessary conclusion that he ought to have been aware of a similar impairment in Ms Joslyn's driving ability.

49 In my opinion, Mr Berryman was guilty of contributory negligence for the purposes of s 74 of the Act.

Order

50 The appeals of Ms Joslyn and the Council should be allowed with costs. The judgment of the Court of Appeal of the Supreme Court of New South Wales in each case should be set aside. The proceedings in each matter should be remitted to the Court of Appeal for the hearing and determination of each appeal and cross-appeal to that Court in accordance with the reasons of this Court.

51 GUMMOW AND CALLINAN JJ. This case is concerned with the application of s 74 of the *Motor Accidents Act* 1988 (NSW) ("the Act") to a case in which an intoxicated owner of a motor vehicle who relinquished its management to a similarly inebriated person suffered injuries as a result of the latter's negligent driving.

The facts

52 Mr Berryman who was then 22 years of age, drank sufficient alcohol in the company of Sally Inch Joslyn on Friday evening, 25 October 1996, to be so intoxicated as to feel "fairly crook" on the following morning. He worked during the day on Saturday, rested for a time, and then, at about 9pm went to a party at a property near Dareton in south-western New South Wales. With one interruption, at about 11.30pm, Mr Berryman spent his time at the party, until about 4am, drinking alcohol. By that hour he must have been, indeed he admitted that he was, and as the objective evidence of the amount of alcohol in his bloodstream some hours later established, beyond doubt, quite drunk. He went to sleep on the front seat of his utility motor vehicle. In his evidence he claimed to have no further recollection until he heard a scream, and realized that he was a passenger in his vehicle which was turning over.

53 Mr Berryman had been friendly with Ms Joslyn before the Friday night preceding the accident. He was aware that she had lost her driving licence on her conviction for driving a motor vehicle with a blood alcohol content of 0.15g/100ml.

54 Ms Joslyn said that she and Mr Berryman spent the Friday evening drinking together until after midnight at hotels in Wentworth. Afterwards they returned to Ms Joslyn's residence where they continued drinking.

55 Ms Joslyn took a bottle of whisky with her to the party on the following Saturday evening. She travelled as a passenger in a car with three other women. Ms Joslyn drank from the bottle at the party. Whether anyone else also did so she was unable to say. Again, as the objective evidence of alcohol in her blood showed, she too must have been seriously adversely affected by the consumption of it. The reading, some hours later, was in her case, 0.102g/100ml. Indeed Ms Joslyn was observed by others at the party to be "quite drunk and staggering about" at 4.30am.

56 Early in the morning of the Sunday Ms Joslyn had placed her swag on the ground beside Mr Berryman's vehicle and had gone to sleep. Ms Joslyn said she did not know where the keys to the vehicle were when she fell asleep but she knew she had them when she woke not long after daylight, having heard Mr Berryman moving about in his vehicle. No one else was up at that time. There was a discussion between her and Mr Berryman, to whom she gave the

keys to his vehicle which he drove, with Ms Joslyn as a passenger into Mildura, along the road upon which the vehicle was later to overturn. The journey took some 15 to 20 minutes. When they arrived at a McDonald's café, Mr Berryman entered, ordered food, paid, drove towards the river, stopped and ate the food. He did not drink alcohol in that time.

57 Ms Joslyn said Mr Berryman had commenced the drive back to Dareton, but, at some time after they entered Hollands Lake Road she noticed he was dozing off. She must have reproached him for doing so for he said, "Well, you drive the car then." He stopped the vehicle and exchanged places with Ms Joslyn. She then commenced to drive it and did so to the point of the accident.

58 Ms Joslyn had last driven a vehicle three years earlier. She had at some time previously told Mr Berryman of that. She did not see the curve until the last minute. "It was just there all of a sudden and it turned really sharply and the car wouldn't go round the bend."

59 By the time the vehicle entered the curve Ms Joslyn had been driving, she estimated, for a couple of minutes at most. She could not say at what speed she travelled as the speedometer of the vehicle was broken.

60 Describing the curve where the vehicle left the road and overturned, she said that it looked as if it were just a simple curve "and then it goes right back around sharply". That was something she realized when she was already in the curve. Mr Berryman suffered serious injuries in the accident.

The trial

61 Mr Berryman sued for damages in the District Court of New South Wales. The action was tried by C J Boyd-Boland ADCJ. His Honour made these rather generous findings in favour of Mr Berryman:

> "Having made the decision, along with others, before the party commenced, to stay overnight at the party, the Plaintiff should have had in contemplation that he might have to later become a passenger in his own motor vehicle because of the alcohol he anticipated consuming. Although I think he did not give the matter consideration, he should have contemplated his vehicle might be driven by Miss Joslyn who was his companion for the evening and ought to have considered the prospect of a journey such as that undertaken to Mildura. He did not do so. He had no regard to the consequences of his own alcohol consumption but more significantly, as it turned out, despite saying in evidence he would not have allowed Miss Joslyn to drive, because of his knowledge of her alcohol consumption, he did just that. It was obvious to him before he

went to sleep that Miss Joslyn would not be fit to drive on the following morning. I believe, at the time of change over of drivers, he did not consider that issue, but should have done so and was capable of so doing. The failure to take these matters to account was contributory negligence. The Plaintiff ought also to have realised the lack of experience and qualifications of Miss Joslyn particularly given his knowledge of the propensity of his vehicle to roll over.

My assessment of the degree of the Plaintiff's contributory negligence has been reduced from what it would otherwise be because I find ... at the time of the hand-over Miss Joslyn exhibited none of the obvious signs of intoxication which one would expect to be present. That, it seems to me, could have influenced the Plaintiff if he had properly put his mind to the issue of Miss Joslyn's capacity. It warrants a reduction in the assessment of his contributory negligence which, but for that factor, I would have fixed at $33^{1}/_{3}$%. The level of reduction would be the same against [Ms Joslyn and the Council] there being no real difference in their arguments and in the defences pleaded on this issue. I find it appropriate to reduce the Plaintiff's verdict by virtue of his contributory negligence by 25%. His verdict against [Ms Joslyn and the Council] will be reduced accordingly."

62 His Honour then turned to the case against the Wentworth Shire Council ("the Council")[57]:

"Having found, on a balance of probabilities, it was the Council who erected a sign which was inadequate and misleading, and failed to erect signs which were proper, given the nature of the curve, I find, in this instance, the Council carried out that work without due care and skill for the safety of the road users. The work which Council performed was not carried out in accordance with the standard at the time …

We are not concerned, as the [Council] argues, with standards for road construction, nor whether this road was constructed to contemporary standards. We are not dealing with some very minor back road but one in use to the extent of 200 vehicles per day ... We are dealing with the failure by Council to properly signpost and warn of the danger of a road with a compound curve ... and I find that the Council failed to do that and was thus guilty of misfeasance. The primary cause of this accident remains the conduct of [Ms Joslyn] whose approach to the curve was nothing less than reckless, for the reasons already stated. However I find

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57 The case was tried before this Court decided *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

> the [Council] to be liable to contribute an amount of 10% to the verdict of the Plaintiff and there will be a verdict in favour of the Plaintiff and [Ms Joslyn] accordingly."

63 The trial judge next rejected a defence of joint illegal enterprise, a matter which is not the subject of an appeal to this Court. Judgment was entered for Mr Berryman with costs against Ms Joslyn for the sum of $1,496,314.77 and against the Council for the sum of $750,000. His Honour further ordered that Ms Joslyn have credit in respect of the first judgment sum for any amount paid by Ms Joslyn pursuant to s 45 of the Act.

The appeal to the Court of Appeal

64 Mr Berryman appealed to the Court of Appeal of New South Wales on the ground that the trial judge should either have not found any contributory negligence on his part, or ought to have found it in a smaller percentage than he did. Ms Joslyn and the Council each cross-appealed against the percentage of contributory negligence attributed to Mr Berryman, the Council asserting that it should have been up to 80%, and Ms Joslyn against the apportionment of liability against her of 90%.

65 The Court of Appeal (Priestley JA, Meagher JA and Ipp AJA)[58] upheld Mr Berryman's appeal by holding that he was not guilty of any contributory negligence at all. The leading judgment was given by Meagher JA with whom the other members of the Court agreed.

66 In giving his judgment Meagher JA made no reference to the Act. His Honour's conclusions are to be found in the following passage[59]:

> "His Honour, as I have said, made a finding of 25% contributory negligence against the plaintiff. The only action of his which could possibly have amounted to contributory negligence was permitting Miss Joslyn to drive instead of him. In this regard, one must view matters as they stood at the time of handing over control of the car, (not as they were in the previous 24 hours), a task which his Honour did not really undertake. One must also, if one concludes that at the time of handing over Mr Berryman was too drunk to appreciate what was happening, a situation as to which there is no evidence in the present case, judge the question of contributory negligence on the hypothesis that the plaintiff did

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58 *Berryman v Joslyn* (2001) 33 MVR 441.

59 (2001) 33 MVR 441 at 446 [21].

> have sufficient foresight to make reasonable judgments. But, although at the time of the accident the blood alcohol levels of Miss Joslyn and Mr Berryman were estimated as being 0.138g/100ml and 0.19g/100ml respectively, there is no evidence that either of them were drunk at the time, and certainly no evidence that at the time Mr Berryman had any reason to think that Miss Joslyn was affected by intoxication. Indeed, quite to the contrary. Of the people who were present who gave evidence, all said that Miss Joslyn showed no signs of intoxication. His Honour so found. Despite, therefore, one's reluctance to overrule a trial judge's finding on apportionment (*Podrebersek v Australian Iron and Steel Pty Ltd*[60]), it seems quite impossible to justify his Honour's conclusion on contributory negligence. I would be in favour of reducing it from 25% to 0%."

67 The Court of Appeal entered judgment, of $1,995,086.36 and $750,000 against Ms Joslyn and the Council respectively. The Council's appeal against Ms Joslyn was dismissed with costs. The Court of Appeal held that the maintenance and control of the road resided in the Council: accordingly there was no basis for a review of the trial judge's finding of negligence against the Council for failing to erect adequate signage. The Council's defence of "joint illegal activity" asserted against Mr Berryman and Ms Joslyn was again rejected.

The appeal to this Court

68 The grants of special leave to Ms Joslyn and the Council to appeal to this Court were confined to the question whether the Court of Appeal was justified in holding that Mr Berryman was not guilty of contributory negligence.

69 In 1988 important changes were made to the law relating to contributory negligence in New South Wales by the enactment of the Act. Section 74 deals as follows with contributory negligence in respect of motor accidents. Sub-section (1) states:

> "The common law and enacted law as to contributory negligence apply to claims in respect of motor accidents, except as provided by this section."

The "enacted law" included at the time of trial s 10(1) of the *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW) which introduced the principle of apportionment. Sub-section (2) of s 74 requires that a finding of contributory negligence be made in the cases enumerated in pars (a)-(d) of that sub-section.

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60 (1985) 59 ALJR 492; 59 ALR 529.

Paragraphs (c) and (d) deal with failures to wear seat belts and protective helmets. Paragraph (a) requires a finding of contributory negligence:

> "where the injured person or deceased person has been convicted of an offence in relation to the motor accident under [specified road transport legislation] unless the plaintiff satisfies the court that the concentration of alcohol in the person's blood or the alcohol or other drug, as the case requires, involved in the commission of the offence did not contribute in any way to the accident".

It is par (b) which speaks to the facts of the present appeals by providing:

> "where:
>
> (i) the injured person (not being a minor) or the deceased person was, at the time of the motor accident, a voluntary passenger in or on a motor vehicle, and
>
> (ii) the driver's ability to drive the motor vehicle was impaired as a consequence of the consumption of alcohol or any other drug and the injured person or the deceased person was aware, or ought to have been aware, of the impairment".

This is to be read with s 74(6) which states:

> "A person shall not be regarded as a voluntary passenger in or on a motor vehicle for the purposes of subsection (2)(b) if, in the circumstances of the case, the person could not reasonably be expected to have declined to become a passenger in or on the vehicle."

Finally, s 74(8) provides:

> "This section does not exclude any other ground on which a finding of contributory negligence may be made."

70 The reference in s 74(2)(b) to the impairment by alcohol of the ability of the driver to drive as something of which the injured person "was aware, or ought to have been aware" reflects the common law requirement that the standard of care expected of the plaintiff be measured against that of a person of ordinary prudence and not merely by reference to subjective attitudes of the particular

plaintiff[61]. Suggestions to the contrary, apparently made by the Full Court of the Federal Court in *Nominal Defendant v Saunders*[62] were in error.

71 Section 76 abolished the defence of *volenti non fit injuria* except with respect to motor racing.

> "**76 Defence of voluntary assumption of risk**
>
> (1) Except as provided by subsection (2), the defence of volenti non fit injuria is not available in proceedings for damages arising from a motor accident but, where that defence would otherwise have been available, the amount of any damages shall be reduced to such extent as is just and equitable on the presumption that the injured person or deceased person was negligent in failing to take sufficient care for his or her own safety.
>
> (2) If a motor accident occurs while a motor vehicle is engaged in motor racing, the defence of volenti non fit injuria is available in proceedings for damages brought in respect of the death of or injury to:
>
> (a) the driver of the vehicle so engaged, or
>
> (b) a passenger in the vehicle so engaged, other than a passenger who is less than 18 years of age or who otherwise lacked capacity to consent to be a voluntary passenger.
>
> (3) For the purposes of subsection (2), a motor vehicle is engaged in motor racing if it is participating in an organised motor sports event or an activity that is an offence under [specified road transport legislation]."

72 That the defence of *volenti non fit injuria* was abolished is not without significance. Its abolition requires, as no doubt the legislature intended, that courts focus on the question whether there has been any, and if any, how much contributory negligence.

73 To decide the appeals without reference to the Act, in particular, the key provision, s 74, as the Court of Appeal did, necessarily involved an error of law

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61 *Sungravure Pty Ltd v Meani* (1964) 110 CLR 24 at 36-37; *Purcell v Watson* (1979) 26 ALR 235 (HC); *Astley v Austrust Ltd* (1999) 197 CLR 1 at 14 [30].

62 (1988) 8 MVR 209 at 215-216.

calling for the intervention of this Court. But that is not the only error of law. To have regard to the alleged absence of indicia of intoxication at the time of the relinquishment of the steering wheel by Mr Berryman to Ms Joslyn only, and as if it were conclusive of what the former knew or ought to have known of the latter's condition, was to substitute a subjective test of the reasonableness of Mr Berryman's conduct for the objective test that s 74(2)(b) of the Act requires and the common law, which posited the standards of a reasonable person, formerly required in New South Wales in motor vehicle accident cases.

74 In our opinion the Court of Appeal also manifestly erred in fact. This is therefore a case in which this Court should intervene to review the factual findings both at first instance and in the Court of Appeal.

75 Both Mr Berryman and Ms Joslyn were undoubtedly intoxicated from at least 4am on the day of the accident until, and after the accident. Despite that evidence was given that Ms Joslyn was not in fact manifesting obvious signs of intoxication not long after the accident, it seems to us to be highly unlikely that signs would not have been there to be seen by those able to see, or not otherwise distracted by more pressing concerns. However, in view of the clearly objective test posed by s 74(2)(b) of the Act, of what the injured person "ought" to have known, it is unnecessary to explore that matter any further.

76 Of what ought Mr Berryman have been aware? Clearly he ought to have been aware of all of the matters to which we referred in outlining the facts of this case, which include, as a matter of irresistible inference, that he must have set out to become, and did become intoxicated, in company with others of a similar mind and of whom Ms Joslyn was one. What a person ought to have known is not comprehended simply by what a person knew or observed at the moment before an accident, or at the moment at which that person became a passenger in a vehicle in the charge of, or driven by an intoxicated person. A person in the position of Mr Berryman ought to have known, and in fact would have known (if he had not precluded himself from knowing by his own conduct) that Ms Joslyn's capacity must have been impaired, and probably grossly so, by the amount of alcohol she had drunk, not only during the immediately preceding evening, but also on the night before that. Furthermore Mr Berryman either knew, or ought to have known that the effects of two consecutive evenings of immoderate consumption would have had a compounding effect of tiredness and reduced attentiveness upon both of them.

77 The Court of Appeal erred in failing to have regard to, and to apply s 74 of the Act. It further erred in looking to Ms Joslyn's condition as it momentarily appeared to others after the accident. The Court of Appeal should have had regard to the events in which the passenger and the driver had participated over the preceding 36 or so hours before the accident.

78 Factually the Court of Appeal erred in not finding that Mr Berryman's and Ms Joslyn's faculties, and accordingly their capacities to observe, react, assimilate, and deal with information and to drive a motor vehicle must have been seriously impaired by the consumption of alcohol.

79 The appeals to this Court by Ms Joslyn and the Council have been heard together. The appeals should be allowed with costs. Orders 1, 2 and 3 made by the Court of Appeal on 11 April 2001 should be set aside. Each matter should be remitted to the Court of Appeal to deal with the issues not so far dealt with as well as Ms Joslyn's appeal respecting the assessment of only 25% contributory negligence against Mr Berryman.

80 KIRBY J. These appeals come from a judgment of the New South Wales Court of Appeal[63]. They concern a defence of contributory negligence in personal injuries claims brought by the common first respondent (Mr Allan Berryman). He suffered very serious injuries as a result of a motor vehicle accident that happened on 27 October 1996. His injuries occurred when he was travelling as a passenger in his motor vehicle driven by the appellant in the first appeal (Ms Sally Joslyn). That vehicle overturned in the course of negotiating a bend in a road for which, it was found, there had been inadequate warning signage provided by the appellant in the other appeals, the Wentworth Shire Council ("the Council"). In her filed defence, Ms Joslyn admitted a breach of the duty of care that she owed to Mr Berryman.

81 The primary judge (Boyd-Boland ADCJ), sitting without a jury in the District Court of New South Wales, found negligence on the part of Ms Joslyn. He also found negligence in the Council. The primary judge entered judgment against the appellants in favour of Mr Berryman in a sum totalling more than $2 million. He found that Ms Joslyn was liable to contribute 90% towards Mr Berryman's damages and the Council 10%. He upheld each appellant's defence of contributory negligence. Ordinarily, he said, he would have reduced Mr Berryman's damages by a third[64]. However, he ultimately found it appropriate to "reduce the … verdict by virtue of [Mr Berryman's] contributory negligence by 25%"[65].

82 On appeal to the Court of Appeal, the finding of the primary judge that the defence of contributory negligence had been established by the appellants was reversed[66]. Many other issues were canvassed. However, special leave to appeal to this Court was confined to "the contributory negligence issue". During argument before this Court that issue was further limited to whether an error had been made in the decision of the Court of Appeal that the defence of contributory negligence had not been established. Although there have been cases in which this Court has reassessed contributory negligence for itself[67], in the present appeals this Court made it plain that any reassessment would have to be performed by the Court of Appeal, a course necessitated by the issues on the record.

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63 *Berryman v Joslyn* (2001) 33 MVR 441.

64 *Berryman v Joslyn* unreported, District Court of New South Wales, 5 November 1999 ("reasons of the primary judge").

65 Reasons of the primary judge at 19.

66 Per Meagher JA; Priestley JA and Ipp AJA concurring.

67 eg *Pennington v Norris* (1956) 96 CLR 10 at 17.

83 In the Court of Appeal, Ms Joslyn and the Council had challenged the primary judge's assessment of contributory negligence. Ms Joslyn had urged that a much greater deduction (of up to 80%) was required. So far, her challenge to the *quantification* of the deduction for contributory negligence has not been answered. Nor has Mr Berryman had consideration of his alternative argument that, contributory negligence being assumed, the *apportionment* of 25% should be reduced. Those issues fell away when the Court of Appeal concluded that the evidence did not warrant the conclusion that contributory negligence had been established.

84 Because of the broadly expressed criteria for the adjustment of awards of damages for contributory negligence, it is comparatively rare for appellate courts to interfere in the assessment of a trial judge on that issue[68]. However, these appeals enlist this Court's attention because they concern an instance of alleged contributory negligence where the injured person was a passenger in a motor vehicle who was affected by the consumption of alcohol at the time of his journey[69]. The appeals present a question as to the approach that should be taken to the assessment of the deduction for contributory negligence where a person in a motor accident, not actually responsible for driving the vehicle causing the accident, is nonetheless said to be liable to lose part of the damages otherwise recoverable as the consequence of "fault" on that person's part. Specifically, a question is presented as to the relevance of the passenger's intoxication for the decisions made by that person where it appears that such intoxication may have diminished, or removed, the passenger's capacity to make rational and self-protective decisions regarding his or her safety. Of special relevance to the resolution of these questions in the present appeals is the application to one of them of legislation enacted to govern contributory negligence decisions in respect of motor accidents involving claims by passengers who are intoxicated when injured in such accidents.

The background facts

85 The factual background is described in the reasons of Gummow and Callinan JJ ("the joint reasons")[70]. If the lens of the facts is widened so as to take

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68 eg *A V Jennings Construction Pty Ltd v Maumill* (1956) 30 ALJR 100 at 101; *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492 at 494; 59 ALR 529 at 532; *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 311.

69 See *The Insurance Commissioner v Joyce* (1948) 77 CLR 39; *O'Neill v Chisholm* (1972) 47 ALJR 1.

70 Joint reasons at [52]-[60].

into account the entire course of the conduct of Mr Berryman and Ms Joslyn, from the moment they respectively arrived at the property of Mr and Mrs Crisp until the moment Mr Berryman was injured, a different response might follow from that which results from narrowing the lens to focus exclusively on the events immediately before the accident happened.

86 The broader focus might commence with the fact that on Friday 25 October 1996, two days before the accident, Mr Berryman and some friends commenced consuming alcoholic drinks and continued to do so until the Sunday morning, a few hours before Mr Berryman was injured. The occasion for this sustained course of alcohol consumption was the approaching 21st birthday of a friend, Mr Rowan Crisp[71]. It was for that purpose that Mr Berryman, Ms Joslyn and others had gathered at the Crisp home.

87 There is no doubt that, objectively, at the time of the accident, all of the named actors were affected by the alcohol they had consumed. Evidence, accepted by the primary judge, demonstrated this clearly. A sample of blood taken from Ms Joslyn at 11.00am on Sunday 27 October 1996, after the accident, showed a blood alcohol concentration of 0.102g/100mL. Recalculated to the probable level at approximately 8.45am, the time of impact, this, according to Professor Starmer, disclosed a blood alcohol level of 0.138g/100mL in Ms Joslyn's case[72]. In the case of Mr Berryman the respective levels were 0.16g/100mL at 10.35am, with an estimated level at the time of impact of 0.19g/100mL[73].

88 Both Mr Berryman and Ms Joslyn were found to have been seasoned drinkers[74]. This would have reduced somewhat the effect of alcohol consumption on their cognitive and motor capacities. However, the primary judge accepted the evidence of Professor Starmer that, at the time of the accident, the "crash-risk" had been increased in the case of Ms Joslyn "more than 20-fold", over and above that of a sober driver. Moreover, he accepted Professor Starmer's opinion that the "risk of a crash would have been even greater in [her] case because she had not driven for three years after she had lost her license for a drink driving offence"[75]. As well, because Ms Joslyn had slept for no more than three hours and possibly as little as two before setting out with Mr Berryman, the

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71 *Berryman* (2001) 33 MVR 441 at 444 [16].

72 Reasons of the primary judge at 13.

73 Reasons of the primary judge at 13-14.

74 Reasons of the primary judge at 14.

75 Reasons of the primary judge at 14.

primary judge also accepted Professor Starmer's opinion that the effect on her of alcohol consumption was likely to have been increased by the effects of hangover. She was impaired, fatigued, in control of a vehicle which the evidence showed was prone to roll over and which had a broken speedometer. She was also inexperienced in driving.

89 In the case of Mr Berryman, even greater physiological effects of alcohol intake were identified by the evidence. He had gone to sleep at about 4.00am on Sunday 27 October 1996 in a state of high intoxication. Before he did so, he had been mainly "talking with the boys" at the party but had also spent time talking in close proximity to Ms Joslyn. He agreed that at the time he went to bed at 4.00am "the people who were still at the party were all staggering drunk". One of those people was Ms Joslyn, although Mr Berryman qualified his recollection by saying that he could not recall her condition. Nevertheless, it appears incontrovertible that, over the lengthy period of Mr Berryman's consumption of alcohol, he would have been aware, in a general sense, that Ms Joslyn was also drinking heavily over the same time.

90 There followed intervals of sleep, longer (and commencing somewhat earlier) in the case of Mr Berryman. When, upon waking at about 7.00am Mr Berryman set out with Ms Joslyn for Mildura for breakfast, he would, objectively, have known that he, and probably Ms Joslyn, were still affected by the alcohol they had consumed. Mr Berryman agreed that he would not have willingly allowed her to drive his vehicle on the Sunday morning. He knew, from something told to him before the accident, that Ms Joslyn did not have a driver's licence. He was aware of the propensity of his vehicle to roll if approaching a corner too fast. He was also aware that alcohol consumption could adversely affect the ability of a driver to accomplish such manoeuvres. He knew that it was against the law to permit an unlicensed driver to drive a motor vehicle and that it was illegal to permit someone seriously affected by alcohol to do so. Answers affirming these points were given in evidence by Mr Berryman in the course of reconstructing events.

91 To the foregoing facts had to be added evidence from witnesses, accepted as reliable by the primary judge, concerning the appearance of Ms Joslyn when she was observed soon after the accident. Thus the primary judge accepted the testimony of Constable Favelle, Mr Smythe and Mr Walker and of Ms Deane that Ms Joslyn did not show signs of intoxication at the accident scene. This was despite "the presence of beer bottles and the upturned Esky, at the accident scene, [which] would have raised, in the minds of those attending … the question of the part consumption of alcohol played in the accident"[76]. It was the evidence of the witnesses that led his Honour to conclude that "at the time [Mr Berryman]

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76 Reasons of the primary judge at 15-16.

authorised Miss Joslyn to take over the driving of the vehicle it is unlikely she was exhibiting, to [him], obvious signs of intoxication"[77].

92 It was on the basis of these findings that Mr Berryman presented his challenge to the finding of contributory negligence to the Court of Appeal. According to Mr Berryman the "real cause" of the accident and of the damage he had suffered in consequence, was solely the actions of Ms Joslyn in commencing to drive the vehicle and in doing so in the manner that she did and with her knowledge of her lack of a driver's licence, want of recent driving experience and objective condition of intoxication. According to Mr Berryman, the damage he had suffered could not reasonably be attributed to any fault on his part in handing Ms Joslyn the keys of his car on the return journey from Mildura. He had done this after Ms Joslyn observed him falling asleep at the wheel and said something to him. Mr Berryman argued that, in such circumstances, Ms Joslyn had the responsibility to refuse to drive, to allow him to sleep it off or to wait for, or summon, help. It was his submission that the crucial time to judge the issue of contributory negligence was the moment when he handed her the keys. Objectively, in the state in which he was at that time, combining intoxication and fatigue, he was not in a position to make a rational decision appointing Ms Joslyn as his driver. To the extent that his previous consumption of alcohol was relevant, it had disabled him from making responsible choices. He was not, therefore, to be treated as at fault for the damage that had followed.

Findings at trial and on appeal

93 *Findings at trial*: The primary judge recognised that the resolution of the issue of contributory negligence depended, in part, upon the period of time to which regard was to be had in resolving the issues presented[78]. After referring to a number of cases in which like questions had arisen[79], he concluded that, in this case, he was required to open the lens of the facts and take the broader focus[80].

94 His Honour therefore addressed his attention to a period starting "well before [Mr Berryman] went to bed on Sunday morning" up to the time Ms Joslyn commenced to drive. He found that, objectively, Mr Berryman "ought to have recognised her capacity to drive was affected by her excess consumption of alcohol and the other factors referred to by Professor Starmer which included

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77 Reasons of the primary judge at 16.

78 Reasons of the primary judge at 16.

79 eg *Williams v Government Insurance Office (NSW)* (1995) 21 MVR 148; *McPherson v Whitfield* [1996] 1 Qd R 474.

80 Reasons of the primary judge at 18.

fatigue and lack of experience"[81]. Although he accepted that Mr Berryman did not actually give the matter consideration, he found that he should have contemplated the prospect of a journey such as was undertaken to Mildura and that, had he done so, it would have been obvious to him before he went to sleep, that Ms Joslyn would not be fit to drive his vehicle on the following morning. He went on[82]:

> "I believe, at the time of change over of drivers, he did not consider that issue, but should have done so and was capable of so doing. The failure to take these matters to account was contributory negligence. [Mr Berryman] ought also to have realised the lack of experience and qualifications of Miss Joslyn particularly given his knowledge of the propensity of his vehicle to roll over."

95 It was in these circumstances that the primary judge turned to the apportionment. He fixed the reduction for contributory negligence at 25% rather than a third because "at the time of the hand-over Miss Joslyn exhibited none of the obvious signs of intoxication which one would expect to be present".

96 *Findings on appeal*: The reasons of the Court of Appeal were given by Meagher JA. After reciting the long interval during which the main actors had been consuming alcohol, followed by the short intervals of sleep, the visit to Mildura and the changeover of driving on the return journey to the Crisps' home, Meagher JA went on[83]:

> "The only action of [Mr Berryman's] which could possibly have amounted to contributory negligence was permitting Miss Joslyn to drive instead of him. In this regard, one must view matters as they stood at the time of handing over control of the car, (not as they were in the previous 24 hours), a task which his Honour did not really undertake. One must also, if one concludes that at the time of handing over Mr Berryman was too drunk to appreciate what was happening, a situation as to which there is no evidence in the present case, judge the question of contributory negligence on the hypothesis that the plaintiff did have sufficient foresight to make reasonable judgments. But, although at the time of the accident the blood alcohol levels of Miss Joslyn and Mr Berryman were estimated as being 0.138 g/100 ml and 0.19 g/100 ml respectively, there is no evidence that either of them were drunk at the time, and certainly no evidence that at the time Mr Berryman had any reason to think that

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81 Reasons of the primary judge at 18-19.

82 Reasons of the primary judge at 19.

83 *Berryman* (2001) 33 MVR 441 at 446 [21].

> Miss Joslyn was affected by intoxication. Indeed, quite to the contrary. Of the people who were present who gave evidence, all said that Miss Joslyn showed no signs of intoxication. His Honour so found."

97 It was with these words (and a sideways glance at the rule of restraint in disturbing apportionments for contributory negligence[84]), that Meagher JA concluded that contributory negligence had not been proved. The defence should therefore have been dismissed. The apportionment was overruled. The cross-appeal seeking an increase in the apportionment was rejected.

The issues

98 The following issues arise for decision by this Court:

(1) Whether the Court of Appeal erred in disturbing the conclusion of the primary judge on contributory negligence given the advantages enjoyed by that judge and the rule of restraint established in regard to such factual decisions. (The rule of restraint issue);

(2) Whether the Court of Appeal erred in law in failing to base its decision on the contributory negligence issue upon the legislation governing that issue as it applied to each of the appeals before it. (The statutory provisions issue); and

(3) Whether the Court of Appeal otherwise erred in its determination of the facts upon the basis of which it concluded that contributory negligence had not been proved in the circumstances of the case. (The factual evaluation issue).

99 I will deal with each of these issues in turn. However, first, it is useful to say something about the approaches taken in earlier cases to problems of a similar kind.

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84 His Honour referred to *Podrebersek* (1985) 59 ALJR 492; 59 ALR 529. See *Berryman* (2001) 33 MVR 441 at 446 [21].

Conflicting approaches to cases of intoxicated passengers

100 *Course of authority*: In *Liftronic Pty Ltd v Unver*[85], I pointed out that "contributory negligence, and apportionment, are always questions of fact"[86]. It is a mistake to endeavour to elevate into rules of law observations "however eloquent, uttered by judges, however eminent, about the facts of some other case"[87]. Nevertheless, as more decisions upon such questions fall to be made by judges rather than by juries as they once were, and as judicial reasons are examined on appeal, it is probably inevitable and in the interests of judicial consistency (which is a hallmark of justice[88]), that trial judges and appellate courts should look to the way earlier decision-makers have resolved like factual questions. Those decisions do not yield binding principles of law. However, they do provide some guidance as to the approach that has been taken to the solution of problems, the recurring features of which take on a monotonous similarity when different cases are compared.

101 When appeals such as the present ones reach this Court, it is also desirable for the Court to inform itself of the way in which the issues for decision are being approached by courts subject to its authority. This will help this Court to provide to judges, lawyers, insurance assessors and litigants appropriate guidance for the making of decisions with a measure of confidence that they will not be subject to correction for errors of law or of approach to commonly repeated facts.

102 Furthermore, an understanding of this decisional background is specially relevant in these appeals. It helps to explain the reasons for, and purposes of, the provisions of the enacted law that was adopted, in part at least, to overcome some of the approaches disclosed in the cases. These sometimes evidence the judicial reluctance to find contributory negligence against intoxicated drivers and passengers that ultimately provoked Parliament to enact the statutory law that is critical to the decision in at least one of these appeals.

103 The seeds of the controversy were first considered by this Court in *The Insurance Commissioner v Joyce*[89]. Like the present case, that was one in which,

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85 (2001) 75 ALJR 867 at 885 [90]; 179 ALR 321 at 345.

86 Citing *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.

87 *Sungravure Pty Ltd v Meani* (1964) 110 CLR 24 at 37 per Windeyer J.

88 cf *Lowe v The Queen* (1984) 154 CLR 606 at 610-611 per Mason J.

89 (1948) 77 CLR 39.

after a motor vehicle accident had occurred, objective evidence demonstrated that the driver had been affected by consumption of alcoholic liquor. The question arose as to whether the claim for damages of the passenger, who had been sitting beside the driver, was defeated in consequence. Attention was given to three legal bases on which such a case might fail[90]:

(1) that no duty of care was owed to a passenger where a driver was known to be intoxicated;

(2) that the defence provided by the voluntary assumption of risk applied in such circumstances; and

(3) that the defence of contributory negligence (which at common law was a complete answer to a plaintiff's claim) forbade recovery.

104 Differing views were expressed in *Joyce* concerning the preferable basis for resolving a challenge to such a plaintiff's entitlement to succeed. However, it was upon the issue of contributory negligence (which, at that time[91], was somewhat controversial in such cases in England[92]) that conflicting opinions were stated, reflections of which have been seen in Australian judicial approaches ever since. Thus, Latham CJ was prepared to regard the category of contributory negligence as apposite to the circumstances where both driver and passenger were intoxicated. However, he went on[93]:

> "If in the last stage of the journey the plaintiff was sober enough to know and understand the danger of driving with [the driver] in a drunken condition, he was guilty of contributory negligence, and he also voluntarily encountered an obvious risk and his action should fail.
>
> But if he was not sober enough to know and understand such a danger, then there is no reason to believe that his inability to appreciate the danger was other than self-induced. If he drank himself into a condition of stupidity or worse, he thereby disabled himself from avoiding

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90 *Joyce* (1948) 77 CLR 39 at 45-47 per Latham CJ, 56-59 per Dixon J; cf *Cook v Cook* (1986) 162 CLR 376 at 386 and Hogg, "Guest Passengers: A Drunk Driver's Defences", (1994) 2 *Torts Law Journal* 37.

91 Following *Dann v Hamilton* [1939] 1 KB 509.

92 See eg Goodhart, "Contributory Negligence and Volenti Non Fit Iniuria", (1939) 55 *Law Quarterly Review* 184 noted in *Joyce* (1948) 77 CLR 39 at 58 per Dixon J.

93 *Joyce* (1948) 77 CLR 39 at 47.

> the consequences of negligent driving by [the driver], and his action fails on the ground of contributory negligence."

105 It was this last approach to the consequence of self-induced defects of cognition and understanding, fatigue and incapacity that caused Dixon J, in his dissenting opinion, to express a contrary view[94]:

> "But for the plaintiff, who was not driving the car, to drink until he was too stupid to observe the defendant's condition can hardly be considered contributory negligence of which the accident was a reasonable or natural consequence."

106 Similar divisions of opinion, upon the same subject, have appeared in later decisions of this Court and other courts in somewhat similar factual circumstances. In *O'Neill v Chisholm*[95], this Court, by majority[96], restored the trial judge's decision to reduce a plaintiff's damages by a third on the basis that he had been lacking in care for his own safety in becoming a passenger in the defendant's vehicle, taking into account the defendant's then visible state of insobriety. Crucial to the approach of all members of the Court in *O'Neill* was an investigation of what the plaintiff passenger "knew or ought to have known" of the condition of the driver so far as his sobriety was concerned. It was only on the question of whether the objective evidence warranted a finding of contributory negligence that the judges differed.

107 In the Supreme Court of South Australia in *Banovic v Perkovic*[97], the trial judge had rejected the defence of contributory negligence on the ground that the driver had not demonstrated outward signs of intoxication. It was on that evidentiary footing that King CJ, in the Full Court, affirmed that there was "no basis for a finding of contributory negligence"[98]. Cox J agreed[99]. So did Walters J, with expressed reluctance in light of the objective blood alcohol

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94 *Joyce* (1948) 77 CLR 39 at 60.

95 (1972) 47 ALJR 1.

96 Barwick CJ, McTiernan and Stephen JJ; Walsh and Gibbs JJ dissenting.

97 (1982) 30 SASR 34. See also *Spicer v Coppins* (1991) 56 SASR 175 in which contributory negligence (which had been rejected at trial) was found on appeal by the majority: Legoe and Matheson JJ; Bollen J dissenting.

98 *Banovic* (1982) 30 SASR 34 at 38.

99 *Banovic* (1982) 30 SASR 34 at 42.

evidence[100]. The decision illustrates the importance commonly attached by trial courts in such circumstances, to the appearance of the driver at the time the journey is commenced and whether there are then observable signs of intoxication.

108 In *Morton v Knight*, in the Supreme Court of Queensland, Cooper J found that contributory negligence had been established in the case of an intoxicated passenger who accepted a lift home from a driver who was found to have been "observably drunk to a marked degree", when that condition was such as to have been obvious to a reasonable sober person[101]. Cooper J dismissed the argument that a passenger could rely on his or her own self-induced insobriety to sustain a conclusion of unawareness about the driver's condition. While his Honour found contributory negligence to be proved, he described the passenger's conduct as "passive", resulting from "placing himself in a position of danger within the car" and thus having no "causative potency" so far as the negligent conduct of the driver or the accident were concerned[102].

109 In 1990, the New South Wales Court of Appeal considered an appeal by a passenger against a 20% reduction of damages for contributory negligence following injuries sustained in a car accident on the basis of objective evidence, despite the passenger's denial of any awareness that the driver was seriously affected by alcohol at the time of the accident. Clarke JA held that the passenger "ought reasonably to have recognised" the driver's unfitness to drive, treating the passenger's own intoxication as no excuse[103].

110 In 1995 in the Queensland Court of Appeal, in *McPherson v Whitfield*, Macrossan CJ (with the concurrence of McPherson JA) drew a distinction between the case where the passenger knew, or ought reasonably to have known, that the driver would be in charge of a vehicle in which he or she might travel as a passenger and the case where such reliance on the driver was unforeseeable[104]. In his reasons in *McPherson*, Lee J, in considering the relevance of a passenger's state of intoxication and in support of the approach of King CJ in *Banovic* (and

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100 *Banovic* (1982) 30 SASR 34 at 38.

101 [1990] 2 Qd R 419 at 423.

102 *Morton* [1990] 2 Qd R 419 at 430, citing *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 KB 291 at 326.

103 *McGuire v Government Insurance Office (NSW)* (1990) 11 MVR 385 at 388.

104 [1996] 1 Qd R 474 at 478-479.

other decisions[105]), rejected the approach taken by Cooper J in *Morton*. He said[106]:

> "To say that a sober person in those circumstances would have detected the driver's condition is not to the point. It is the passenger's conduct which must be judged and unless the defendant can point to some specific causative act of contributory negligence on his part his allegations in that respect must fail."

111 In *Williams v Government Insurance Office (NSW)*[107] the New South Wales Court of Appeal dealt with a case in some ways similar to the present. There, the plaintiff and defendant had been drinking together for some time. They then travelled together in the plaintiff's vehicle. However, as the defendant's husband, who had been driving the vehicle, was falling asleep in consequence of his alcohol consumption, the defendant protested. The plaintiff handed the keys to the defendant and got in the back seat of the car to lie down. The defendant drove off and the accident occurred, injuring the plaintiff.

112 The trial judge in *Williams* found contributory negligence and reduced the plaintiff's damages by 80%. All members of the Court of Appeal upheld the conclusion that contributory negligence had been established[108]. In my reasons I suggested that the primary responsibility for the plaintiff's damage rested on the driver[109]:

> "The keys put [the driver] in a position of choice. Driving the vehicle assigned to her extremely heavy and obvious obligations. Handing her the keys did not exempt her thereafter from her own responsibility. It *permitted* her to drive the vehicle. It did not *oblige* her to drive."

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105 eg *Nominal Defendant v Saunders* (1988) 8 MVR 209 at 210, 214-215; *Spicer* (1991) 56 SASR 175 at 179-180, 182-184; *Owens v Brimmell* [1977] QB 859 at 866-867.

106 *McPherson* [1996] 1 Qd R 474 at 484.

107 (1995) 21 MVR 148.

108 *Williams* (1995) 21 MVR 148 at 158. Cole JA (with whom Meagher JA agreed) found no error in the apportionment. I would have reduced the apportionment to 40%.

109 *Williams* (1995) 21 MVR 148 at 158 (emphasis in original). In my reasons I referred to *Teubner v Humble* (1963) 108 CLR 491 at 504.

113 In *Nominal Defendant v Saunders*, the trial judge in the Supreme Court of the Australian Capital Territory found that the signs of the driver's intoxication "were there for the plaintiff to see but he was too drunk to see them"[110]. His Honour dismissed the defence of contributory negligence on the basis that the defendant carried the onus to prove contributory negligence and, because the passenger was not conscious of the intoxicated condition of the driver, had failed to do so. The Full Court of the Federal Court rejected the appeal against that dismissal, with reasoning similar to the decision of the Court of Appeal in the present case. In his reasons, Fox J observed[111]:

> "The mere fact that a driver is inebriated at the time of the accident does not establish the defence [of contributory negligence], nor does the mere fact that the passenger is in such a condition at that time do so. It is to be remembered too that the allegation of negligence will normally relate, not to the drunkenness, but to the manner of driving. The defence will be based on what the passenger knew as to the driver's condition or behaviour, or what he would have known had he at a relevant time been taking reasonable care for his own safety … Whether or not the danger should have been apprehended, and what should have been done about it are matters to be measured according to the test of the reasonable man."

114 Spender and Miles JJ in *Saunders* regarded it as critical to ascertain whether the evidence established that the passenger "knew that it was likely that he would be the passenger of [the driver]"[112]. Their Honours' reasoning, in rejecting contributory negligence, treated as determinative the onus resting on the defendant to establish the defence and the need for the defendant to prove that the journey with the intoxicated driver was reasonably foreseeable before the passenger became incapable of deciding whether or not to so proceed.

115 *Two emerging approaches*: Broadly speaking, therefore, two approaches have emerged in the decisions of Australian courts relevant to the defence of contributory negligence where that defence is raised against the claim of a passenger who agrees to travel with a driver who, after an accident, is shown objectively to have been intoxicated.

116 On the one hand there are cases (of which *Morton*[113] is the clearest instance) in which the approach taken by the judges invites consideration of the

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110 (1988) 8 MVR 209 at 213.

111 *Saunders* (1988) 8 MVR 209 at 209-210.

112 *Saunders* (1988) 8 MVR 209 at 216.

113 [1990] 2 Qd R 419.

entire context of the passenger's conduct, including its "causative potency", while rejecting any suggestion that a passenger's self-intoxication can be a complete answer to the defence of contributory negligence constituted by the passenger's entering the vehicle and proceeding on a journey when he or she ought to have known (but for such intoxication) that the driver was not in a condition to drive[114].

117 On the other hand are the cases which focus more particularly on the conduct immediately preceding the accident. They consider (including by reference to the passenger's own state of sobriety, capacity and appreciation) whether he or she was then, and could with reasonable foreseeability have anticipated being, in a position to decline the proffered opportunity to travel in the vehicle driven by an intoxicated driver. Illustrations of this approach include *Banovic*[115], *Saunders*[116] and *McPherson*[117].

118 Once judges replaced juries in cases of this kind and were obliged by law to give reasons for their decisions, it was inevitable that such reasons would expose, in common factual situations, differing judicial consideration of mixed questions of fact and law. This Court should not ignore the differences with the solecism that each case turns on its own facts. Of course it does. But where the facts are common, and frequently repeated, the emergence of substantially differing judicial approaches to their legal consequences demands elucidation and authoritative choice by this Court of the preferable opinion. Subject to what follows, the resolution of the issues raised by the present appeals affords the opportunity to clarify the general approach that the law requires.

The rule of restraint issue

119 The first issue to be decided concerns the rule of restraint[118]. Three factors reinforce the need for restraint in disturbance of decisions about contributory negligence and apportionment:

(1) The issue of contributory negligence is essentially a factual question, and therefore the primary judge (or jury) will have

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114 [1990] 2 Qd R 419 at 429.

115 (1982) 30 SASR 34.

116 (1988) 8 MVR 209.

117 [1996] 1 Qd R 474.

118 That rule is described by Barwick CJ in *O'Neill* (1972) 47 ALJR 1 at 3.

relevant advantages over an appellate court that will often be critical for the determination of the issue[119];

(2) The apportionment legislation conferred upon the decision-maker a power to reduce the recoverable damages "to such extent" as the court determines "having regard to" a consideration expressed in very general language ("the claimant's share in the responsibility for the damage") that evokes the exercise of a quasi-discretionary judgment[120] upon which different minds may readily come to different conclusions[121]; and

(3) The broad criteria by which such decisions are made at trial (including by reference to what "the court thinks just and equitable" in the case[122]) make it difficult, absent a demonstrated mistake of law or fact, to establish the kind of error that, alone, will authorise an appellate court to set aside the decision and any apportionment of the trial judge and to substitute a different decision or apportionment on appeal.

120 In *Liftronic*, also a contributory negligence appeal, Meagher JA, in the Court of Appeal, was insistent upon the rule of restraint[123]. His dissent in that respect was later upheld by a majority of this Court[124]. I disagreed, pointing out that restraint had to be distinguished "from paralysed inertia or repudiation of jurisdiction"[125]. I remain of the view that unthinking application of restraint can amount to a negation of the judicial duty. Once error is shown, whether of law or fact, the appellate court is authorised to alter any apportionment for contributory negligence made at trial which is shown to have been affected by such error.

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119 *O'Neill* (1972) 47 ALJR 1 at 3, 4, 6.

120 *Liftronic* (2001) 75 ALJR 867 at 878 [64.4]; 179 ALR 321 at 335.

121 *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; cf *Liftronic* (2001) 75 ALJR 867 at 878 [64.3]; 179 ALR 321 at 334-335.

122 Relevantly *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW), ss 10(1) and 10(2).

123 A point noted in *Liftronic* (2001) 75 ALJR 867 at 885 [90]; 179 ALR 321 at 345.

124 per Gleeson CJ, McHugh, Gummow and Callinan JJ; myself dissenting.

125 *Liftronic* (2001) 75 ALJR 867 at 879 [65.3]; 179 ALR 321 at 337.

121 Correctly, Ms Joslyn and the Council urged the advantages which the primary judge enjoyed in reaching his conclusion about contributory negligence and in evaluating all of the circumstances of the case. The trial lasted eleven days. The primary judge's opinion as to Mr Berryman's "share in the responsibility for the damage" depended upon his evaluation of the entirety of the evidence. This fact presented a sound reason for restraint. However, I am not convinced that the Court of Appeal overlooked this consideration. Reference was expressly made to the decision of this Court in *Podrebersek v Australian Iron & Steel Pty Ltd*[126] in which the rule of restraint is stated. The Court of Appeal accepted the necessity to demonstrate error. It follows that the complaint raised by the first issue fails.

The statutory provisions issue

122 *Differential statutory application*: Of greater concern is the omission of the Court of Appeal to refer to, and apply, new statutory provisions that had been enacted by the New South Wales Parliament to govern conclusions on the issue of contributory negligence where that defence was raised in the case of a motor accident.

123 So far as the given reasons of the Court of Appeal are concerned, no distinction was drawn between the general provisions of the enacted law amending the common law doctrine of contributory negligence[127] and the particular provisions enacted to govern contributory negligence in cases of motor accidents. It may be that the omission can be explained by the failure of the parties to direct the attention of that Court to the legislation. It may be that it was because the Court, from many like cases, was well familiar with the applicable law. However, with respect, the statute needed to be referred to, not least because of the different statutory regimes that applied respectively to the appeal and cross-appeal concerning Mr Berryman's claim against Ms Joslyn and the appeal concerning his claim against the Council. In the former, the relevant statutory regime was s 74 of the *Motor Accidents Act* 1988 (NSW). In the latter, the relevant regime was the *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW) ("the 1965 Act").

124 *The 1965 Law Reform Act*: The familiar language of the 1965 Act needs to be stated because it is mentioned in the particular case of contributory

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126 (1985) 59 ALJR 492 at 493-494; 59 ALR 529 at 532.

127 In the *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW), Pt 3. That Act was amended by the *Law Reform (Miscellaneous Provisions) Amendment Act* 2000 (NSW). These amendments were not in force at the date relevant to these proceedings.

negligence in respect of motor accidents, being part of the "enacted law" referred to in the provisions governing motor accidents[128]. At the applicable time, s 10 of the 1965 Act stated, relevantly:

> "10(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage …
>
> (2) Where damages are recoverable by any person by virtue of the foregoing subsection subject to such reduction as is therein mentioned, the court shall find and record the total damages which would have been recoverable if the claimant had not been at fault."

125 A number of comments may be made on these provisions. The primary object of the 1965 Act was to reverse the rule of the common law that forbade recovery if contributory negligence was shown on the part of the plaintiff in however small a degree. It is in the second part of s 10(1), in establishing the substituted rule, that the new approach is established.

126 Secondly, s 10(1) read with s 10(2) ("if the claimant had not been *at fault*") is not concerned, as such, with moral culpability[129]. Courts are not authorised under the 1965 Act to punish a claimant because he or she became intoxicated by consumption of alcoholic liquor or because courts regard that state as morally reprehensible. The focus of the sub-section is different, and more limited[130]. As in the application of any statutory provision, a court must give it effect in terms of its language and to achieve its expressed object.

127 Thirdly, s 10(1) does not address attention to the extent to which any act or omission on the part of the claimant caused the accident, as such. To approach the issue of contributory negligence in that way would be to misread the provision. The "responsibility" for which s 10(1) provides is that which is "just and equitable having regard to the claimant's share in the responsibility *for the damage*". Such "damage", as the opening words of s 10(1) make clear, is the damage which the person has suffered as a "result partly of his own fault and

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128 *Motor Accidents Act*, s 74(1). The terms of the section are set out in the joint reasons at [69].

129 *Pennington* (1956) 96 CLR 10 at 16.

130 *Talbot-Butt v Holloway* (1990) 12 MVR 70 at 74.

partly of the fault of any other person or persons". In judging the question of culpability, the decision-maker will have regard to the fact that the respective acts of a driver and a passenger will ordinarily have posed quite different dangers. Thus, "the defendant who was driving the [vehicle] … was in charge of a machine that was capable of doing great damage to any human being who got in its way"; on the other hand "the plaintiff's conduct posed no danger to anyone but" himself[131].

128 Fourthly, a clue is given to the operation of s 10 by the definition of "fault" in s 9 of the 1965 Act. This clarifies the object to which s 10(1) is directed. By that definition, relevantly, "fault" means "negligence, or other act or omission which gives rise to a liability in tort or would, apart from this Part, give rise to the defence of contributory negligence". In a motor vehicle accident in which a passenger alone was injured, it is difficult to see how surrendering the keys to a vehicle to a person who then assumed the responsibility of driving the vehicle would constitute the kind of negligence or act or omission giving rise to a liability in tort except in a temporal sense. However, the presence of that definition appears to postulate an application of s 10(1) that looks at "fault" in a broad, and not a narrow, way. Such an approach would also be in harmony with the language and apparent object of the sub-section. In particular, it is comparable with the statutory direction to resolve issues of "responsibility" by reference to what is "just and equitable". This is enacted law that contemplates bold strokes of judgment in the assignment of "responsibility". It recognises that a search for mathematical precision or an objective evaluation of culpability is illusory.

129 *The Motor Accidents Act*: Greater guidance is afforded where the defence of contributory negligence is to be decided in accordance with the *Motor Accidents Act*[132]. That Act was enacted by the New South Wales Parliament to introduce reform of the previous law designed to enhance recovery in the case of "motor accidents" but to ensure that damages were more affordable. It repealed the original legislation[133] and returned the law in that State to a "modified

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131 *Talbot-Butt* (1990) 12 MVR 70 at 88 per Handley JA referring to *Pennington* (1956) 96 CLR 10 at 16; *Karamalis v Commissioner of South Australian Railways* (1977) 15 ALR 629 at 635; *Cocks v Sheppard* (1979) 53 ALJR 591; 25 ALR 325. See also *Williams* (1995) 21 MVR 148 at 156.

132 Section 74 of the Act has been superseded by s 138 of the *Motor Accidents Compensation Act* 1999 (NSW).

133 *Transport Accidents Compensation Act* 1987 (NSW).

common law scheme for compensating motor accident victims"[134]. The concern that led to the provision regulating contributory negligence in connection with defined motor accidents was said to be that "a crisis point" had been reached in the award of damages in such cases[135]. It was for this reason that the provisions that became ss 74 and 76 were included in the *Motor Accidents Act*.

130 The Attorney-General, supporting in Parliament the introduction of those provisions, described the Bill as "another significant reform to common law rules, which should have a large impact by placing responsibility for safe conduct on all road users"[136]. By s 76 of the Act, the defence of voluntary assumption of risk (*volenti non fit injuria*) was abolished (save, later, in certain presently irrelevant cases of motor racing)[137]. Instead of considering cases to which that defence would otherwise have applied, an approach of apportionment was to be substituted. It was to be applied "on the presumption that the injured person … was negligent in failing to take sufficient care for his or her own safety". Thus, in proceedings for damages arising from a "motor accident" in New South Wales, one of the three legal categories mentioned in *Joyce* was abolished. Effectively, it was subsumed within contributory negligence as that defence had earlier been reformed by statute.

131 Of equal importance in the *Motor Accidents Act* were three changes introduced by s 74 of that Act. That section was enacted to supplement "[t]he common law and enacted law"[138]. First, s 74 obliges ("shall") a court to make a finding of contributory negligence in specified cases. Three of those cases are immaterial to the present appeals but indicate the *genus* with which Parliament was concerned: convictions of certain offences under traffic law; injuries to certain persons who were not wearing a seatbelt as required by law; and injuries to persons not wearing a protective helmet when required[139]. The category that is expressly relevant to the appeal of Ms Joslyn is stated in s 74(2)(b). That paragraph reads, relevantly:

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134 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 29 November 1988 at 3827 (Attorney-General Dowd).

135 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 29 November 1988 at 3832 (Attorney-General Dowd).

136 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 29 November 1988 at 3833 (Attorney-General Dowd).

137 The relevant provisions are set out in the joint reasons at [71].

138 *Motor Accidents Act*, s 74(1).

139 *Motor Accidents Act*, s 74(2)(a), (c), (d).

> "A finding of contributory negligence shall be made in the following cases:
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> …
>
> (b) where:
>
> (i) the injured person … was, at the time of the motor accident, a voluntary passenger in or on a motor vehicle, and
>
> (ii) the driver's ability to drive the motor vehicle was impaired as a consequence of the consumption of alcohol … and the injured person … was aware, or ought to have been aware, of the impairment".

132 The parliamentary instruction that a court "shall" make a finding of contributory negligence in the specified cases may not be ignored when it applies to the facts. It represents the expressed will of the legislature acting within its powers. Clearly enough, it was enacted to arrest, or correct, any disinclination that might exist on the part of the decision-maker to give effect to such a finding. Once the precondition in the identified categories is fulfilled, the duty of the decision-maker ("shall") is enlivened. The finding of contributory negligence must then be made.

133 Secondly, in s 74(3) of the *Motor Accidents Act*, Parliament has avoided the more complex statement of the criteria found in s 10(1) of the 1965 Act. There is no reference to the respective "faults" of the persons involved. Nor is there a reference to the "responsibility for the damage". In s 74(3) provision is simply made for the reduction of the damages recoverable "as the court thinks just and equitable in the circumstances of the case". It is not entirely clear whether this more limited formula replaced the previous statement of the "enacted law" set out in the 1965 Act. On the face of things, it appears to do so and thus leaves wholly at large the reduction for contributory negligence, made by reference to nothing more than what "the court thinks just and equitable". If this is the effect of s 74(3), as I think it is, it introduces into appellate review of decisions on apportionment for contributory negligence in cases of motor accidents an even greater obstacle to the demonstration of appealable error[140].

134 Thirdly, perhaps as a means of safeguarding parties against arbitrary determinations under s 74(3), provision is made by s 74(4) of the *Motor Accidents Act* for the court to state its reasons "for determining the particular percentage". Typically, statements of reasons enhance the availability of

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140 See also *Motor Accidents Act*, s 74(8).

appellate reconsideration where the reasons disclose that extraneous or irrelevant considerations have been given effect[141].

135 *An erroneous oversight*: Enough has been said of the provisions of the relevant statutes, which were differentially applicable to the claims of Mr Berryman against Ms Joslyn and the Council, to indicate why the failure of the Court of Appeal expressly to address attention to the statutory language constituted error. In particular, in the case of the judgment against Ms Joslyn, in respect of what was undoubtedly a "motor accident" within the *Motor Accidents Act*, if the applicable law was to be applied accurately, it was essential for the primary judge and the Court of Appeal to give explicit attention to the requirements of s 74 of that Act.

136 Prima facie, the requirement of s 74(2)(b) of the *Motor Accidents Act* was engaged. At the very least, even if, because of alcohol consumption, it could be said that "the driver's ability to drive the motor vehicle was impaired as a consequence of the consumption of alcohol" (as seems clearly to have been established in the case of Ms Joslyn) but that the "injured person" (Mr Berryman) was not in fact "aware" of that impairment at the relevant time of her driving the motor vehicle by reason of his own intoxication and fatigue, the question would remain, within s 74(2), whether Mr Berryman "ought to have been aware … of the impairment".

137 In this case, the issue of contributory negligence was not therefore to be decided by reference to general considerations affecting contributory negligence at common law, as modified by the apportionment statute. It was governed by "enacted law". The duty of the Court of Appeal was therefore to apply that enacted law. This is yet another instance in which applicable statute law has been overlooked in favour of judge-made law[142]. When a statute applies (as it did here) it is fundamental that it must be given effect according to its terms. There is nothing to suggest that any of the considerations of the relevant statutes were addressed by the Court of Appeal. Instead of attention being focussed on the meaning of s 74(2)(b)(ii) (as should have been the case) the appeals were

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141 cf *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 666; *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 388.

142 Some of the recent instances include *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 89 [46]; *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 545 [63]; *Allan v Transurban City Link Ltd* (2001) 208 CLR 167 at 184-185 [54]; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 111-112 [249] and *Conway v The Queen* (2002) 209 CLR 203 at 227 [65]; cf Hayne, "Letting Justice be Done Without the Heavens Falling", (2001) 27 *Monash University Law Review* 12 at 16.

determined without reference to the considerations that the governing sub-paragraph of statute law required.

138 Nor can this be regarded an immaterial error. The clear purpose of s 74(2) of the *Motor Accidents Act* was to address what must be taken to have been a determination on the part of the New South Wales Parliament that findings of contributory negligence *should* be made in certain identified cases and, by inference, that the disinclination of the courts to so find, evident in the cases to some of which I have referred, was to be corrected in furtherance of the solution to the "crisis point in the calculation of damages" mentioned by the Attorney-General and in pursuance of the "large impact" deemed desirable "by placing responsibility for safe conduct on all road users"[143].

139 When, in that statutory context, it is asked whether Mr Berryman "was aware, or ought to have been aware" of the fact that Ms Joslyn's ability as a driver to drive the motor vehicle was "impaired as a consequence of the consumption of alcohol" a different answer might be given than if the issue was wholly at large or was to be determined solely by reference to the considerations of "responsibility for the damage" mentioned in the 1965 Act. In the *Motor Accidents Act*, once the conditions were fulfilled (including those stated in s 74(2)(b)) the requirement to make a finding of contributory negligence was obligatory.

140 Applying this statutory provision, contributory negligence was therefore complete in the present case. All that had to be shown was that Mr Berryman was "aware, or ought to have been aware" of Ms Joslyn's "impairment". This did not require demonstration by the appellants of the fact that he was aware or ought to have been aware of the precise degree of incapacity that existed or of total inability on the part of Ms Joslyn to drive the vehicle. According to the undisputed evidence, Mr Berryman was certainly aware that Ms Joslyn had been consuming alcoholic drinks for many hours. To his knowledge, she had only a short interval of sleep when they set out for Mildura. Mr Berryman was also aware of the particular propensities of his vehicle that were relevant to any other driver's ability to drive it. To the extent that, because of impairment of cognition and fatigue, Mr Berryman did not actually focus upon, and consider, the issue of Ms Joslyn's ability to drive the motor vehicle, the question remains whether he "ought to have been aware" of these considerations.

141 It could not be said that the possibility of a journey to Mildura for breakfast, of his falling asleep at the wheel and handing the ignition keys to Ms Joslyn was something unforeseeable to Mr Berryman when he proceeded

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143 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 29 November 1988 at 3832-3833 (Attorney-General Dowd).

upon his course of alcohol consumption on the evening and morning before his accident. Already, as the primary judge found, he had left the party by his vehicle at about 11.00 to 11.30pm "to secure cigarettes"[144]. His continued use of the vehicle, although he was increasingly affected by alcohol consumption, was thus readily foreseeable. It was far from unlikely that the hand-over to Ms Joslyn of the keys of the vehicle would occur and that she would then accept the implied invitation and continue the return journey which Mr Berryman felt incapable of completing. In the circumstances it cannot be said that he was other than "a voluntary passenger in … a motor vehicle" from the moment he exchanged his place at the wheel with Ms Joslyn.

142 *The oversight establishes error*: It follows that, to find that there was no contributory negligence at all on the part of Mr Berryman, and in particular to do so without reference to the applicable statute law, constituted legal error. That error requires that the appeals be upheld and that the appeals and cross-appeal to the Court of Appeal be redetermined by that Court. That must be done by reference to the statute law governing each appeal to that Court.

The factual evaluation issue

143 In the light of the foregoing conclusion, and the consequential need to return the proceedings to the Court of Appeal, it is strictly unnecessary to resolve all the other complaints made for Ms Joslyn (supported by the Council) in respect of the factual errors that were said to underpin the conclusion that was reached, reversing that of the primary judge. Although a different statutory regime governs the resolution of the defence of contributory negligence in the proceedings between Mr Berryman and the Council, there is no reason to think that the conclusion of the Court of Appeal was right in the Council's case, although wrong in the "motor accident" proceedings concerning Ms Joslyn.

144 The mere fact that, at the time Ms Joslyn took the keys and accepted Mr Berryman's express or implied invitation to drive his vehicle, she did not appear to be affected by alcohol intoxication is much less significant in this case than it might be in other factual circumstances. If, for example, a passenger, without knowledge of a driver's insobriety, accepted an invitation to travel in a vehicle, the initial appearances of the driver could be very important to the statutory question of what was "just and equitable in the circumstances of the case"[145]. Similarly, it could be important to what a court thinks is "just and

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144 Reasons of the primary judge at 12.

145 *Motor Accidents Act*, s 74(3).

equitable having regard to the claimant's share in the responsibility for the damage"[146].

145 Such considerations were scarcely determinative in Mr Berryman's case because, before he became seriously inebriated as he did, he was able to, and did, observe Ms Joslyn engaged in a similar pattern of extended consumption of alcohol. Although Mr Berryman went to sleep at 4.00am, and may not have seen Ms Joslyn, as described, "staggering drunk" at about that time, it cannot seriously be suggested that it was not open to the primary judge to infer that Mr Berryman was aware of her extensive drinking. Her deceptive appearance of sobriety at the time he offered her his keys and exchanged positions with her at the wheel, whilst not irrelevant, could not in the circumstances enjoy the factual significance which the Court of Appeal assigned to them[147]. Other witnesses who saw her after the accident might say that she showed no signs of intoxication. But Mr Berryman knew differently. This will commonly be the case where a driver and passenger have engaged, together or close by, in an extended bout of alcohol consumption over a continuous interval[148].

146 A second factual error lay in the Court of Appeal's conclusion that the only action on the part of Mr Berryman that could possibly have amounted to contributory negligence was permitting Ms Joslyn "to drive instead of him"[149]. With respect, this represented an undue narrowing of the questions to be resolved, whether under the legislation governing motor accidents or under the general legislation provided in the 1965 Act. Even if the particular requirements of the *Motor Accidents Act* were ignored, the 1965 Act looks at the issue of "responsibility" more globally. As a price for relieving a claimant from the total disqualification which the common law had previously provided in the case of contributory negligence, the 1965 Act authorises the court, deciding the claimant's entitlement of damages, to reduce any such damages that would otherwise be recoverable by reference to "his own [partial] fault". All that is provided by way of criteria is the definition of "fault"; the direction to the consideration of the "claimant's share in the responsibility for the damage"; and the authorisation to make the deduction "to such extent as the court thinks just and equitable".

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146 The 1965 Act, s 10(1).

147 *Berryman* (2001) 33 MVR 441 at 446 [21].

148 As in *Saunders* (1988) 8 MVR 209; *McGuire* (1990) 11 MVR 385; *Morton* [1990] 2 Qd R 419; *Williams* (1995) 21 MVR 148; *McPherson* [1996] 1 Qd R 474.

149 *Berryman* (2001) 33 MVR 441 at 446 [21].

147 Having regard to the matters which Mr Berryman knew when he made it possible for Ms Joslyn to drive his vehicle, it is impossible to say that the trial judge erred in determining that his conduct in setting out on the journey to Mildura and later enabling Ms Joslyn to drive part of the return, engaged s 10(1) of the 1965 Act in respect of his claim against the Council. To the extent that Mr Berryman disabled himself from making rational choices by drinking so much alcohol that he was greatly affected by it and seriously fatigued, it was open to the primary judge to conclude that it was "just and equitable" that his recovery should be reduced because he shared in the responsibility for the damage that followed. In short, Mr Berryman ought to have known that in setting out to Mildura what happened might occur, as it quickly did. In providing the keys and exchanging places with Ms Joslyn he made that possibility an actuality.

148 I do not say that Mr Berryman's "share in the responsibility for the damage" was as large as that of Ms Joslyn. My general view on such matters remains as I stated it in *Williams*[150]. The comparable roles of Ms Joslyn and Mr Berryman in the "causative potency" of the events leading to Mr Berryman's damage appear to me to be quite different[151].

Ascertaining the responsibility of an intoxicated passenger

149 That returns me to the earlier cases of intoxicated passengers. With respect, I differ from Hayne J[152] concerning the utility of considering the decisions in which factual issues of this kind have been decided. This is a staple diet of trial courts and intermediate courts throughout Australia. Two broad approaches can be seen in the cases. The analysis of the relevant provisions of the *Motor Accidents Act* and the 1965 Act assists in identifying the preferable one. It is the approach that gives effect to the purposes of the apportionment legislation that is to be favoured. This Court has a responsibility to make that clear. Of the judicial approaches discussed, the one that takes the broader focus of considering the entire course of conduct by the intoxicated passenger is preferable to that which narrows the lens to focus exclusively on the events immediately preceding the accident. This is the approach that the statutes in issue here, and both of them, require.

150 The Court of Appeal reached the finding of no contributory negligence on the part of Mr Berryman by adopting the narrower approach. That affirmed, in

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150 (1995) 21 MVR 148.

151 cf *Talbot-Butt* (1990) 12 MVR 70 at 88.

152 See reasons of Hayne J at [158].

effect, Mr Berryman's submission that at the time immediately before the accident, he was, as a result of alcohol consumption and fatigue, deprived of the ability to make rational choices and therefore could not be held to have been at fault in law for the damage that ensued. But the words of the statutory provisions and their objects invite consideration of all the relevant facts in a less restrictive allocation of responsibility for the damage. Section 10(1) of the 1965 Act looks at fault in a broad way and s 74(2) of the *Motor Accidents Act* confers a discretion on the judge to decide the issue of contributory negligence by reference to whether the passenger "ought to have been aware" of the driver's impairment, the exercise of which also requires a broad focus, by reference to the objective evidence as well as the question of foreseeability of risk to a passenger in a car driven by an intoxicated driver.

151 The parties will now have the opportunity to canvass their respective factual arguments on the challenges to the apportionment made by the primary judge – Mr Berryman asserting that such apportionment was appealably excessive and Ms Joslyn asserting that it was appealably inadequate. Each will advance their respective arguments, as will the Council, on the footing that the primary judge, who considered the broader factual context, was correct to find some contributory negligence on the part of Mr Berryman proved. Such contributory negligence was established, both under the *Motor Accidents Act* (in the claim against Ms Joslyn) and under the 1965 Act (in the claim against the Council).

Orders

152 Each appeal should therefore be allowed with costs. I agree in the orders proposed in the joint reasons.

153 HAYNE J. The facts and circumstances giving rise to these appeals are set out in the joint reasons of Gummow and Callinan JJ. I do not repeat them. I agree that each of the appeals to this Court should be allowed with costs. I do not agree, however, that the primary judge was shown to have erred in assessing the level of contributory negligence as he did. I would therefore restore the judgment of the primary judge.

154 As the reasons of the other members of the Court demonstrate, the evidence at trial warranted, indeed compelled, the conclusion that Mr Berryman was contributorily negligent. The primary judge found the ability of the driver of the vehicle at the time of the accident, Ms Joslyn, to drive the vehicle was impaired as a consequence of her consumption of alcohol. (He found as a fact that her blood alcohol level at the time of the accident was about 0.138 grams per 100 millilitres.)

155 On these findings of fact, s 74(2)(b) of the *Motor Accidents Act* 1988 (NSW) was engaged. Section 74(2) required the primary judge to make a finding of contributory negligence. The question was then what reduction in damages recoverable did the court think "just and equitable in the circumstances of the case"[153]. The primary judge gave careful attention to this question and concluded that a reduction of 25 per cent was appropriate.

156 There is no basis for concluding that the primary judge erred in making the factual findings which he did. The Court of Appeal did not expressly say that the primary judge had erred in this way. Rather, the Court of Appeal addressed a different question: one which it was said[154] the primary judge did not. The question which the Court of Appeal appears to have considered to be determinative was whether, at the time he handed control of the car to Ms Joslyn, Mr Berryman should have observed that she was affected by intoxication. That is a narrower and different question from the question presented by s 74(2)(b) of the Act. The relevant statutory question – ought the injured person to have been aware of the impairment of the driver's ability to drive as a consequence of the consumption of alcohol – invited attention to wider considerations. They included all matters reasonably bearing upon the injured person's knowledge of impairment, not just observations which it was open to the injured person to make at the time of handing over control of the vehicle or getting into the vehicle as a passenger. The primary judge considered these matters. The Court of Appeal did not.

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153 *Motor Accidents Act* 1988 (NSW), s 74(3).

154 *Berryman v Joslyn* (2001) 33 MVR 441 at 446 [21].

157 Findings about apportionment of responsibility are not lightly to be disturbed[155]. In *Podrebersek v Australian Iron & Steel Pty Ltd*[156], five members of the Court said:

> "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': *British Fame (Owners) v Macgregor (Owners)*[157]. 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: *Zoukra v Lowenstern*[158]."

So much follows from the nature of the task that is undertaken in making such an apportionment. As was said in *Podrebersek*[159]:

> "The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man (*Pennington v Norris*[160]) and of the relative importance of the acts of the parties in causing the damage: *Stapley v Gypsum Mines Ltd*[161]; *Smith v McIntyre*[162] and *Broadhurst v Millman*[163] and cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the accident which

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155 *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492; 59 ALR 529; *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301; *Wynbergen v Hoyts Corporation Pty Ltd* (1997) 72 ALJR 65; 149 ALR 25; *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867; 179 ALR 321.

156 (1985) 59 ALJR 492 at 493-494; 59 ALR 529 at 532.

157 [1943] AC 197 at 201.

158 [1958] VR 594.

159 (1985) 59 ALJR 492 at 494; 59 ALR 529 at 532-533.

160 (1956) 96 CLR 10 at 16.

161 [1953] AC 663 at 682.

162 [1958] Tas SR 36 at 42-49.

163 [1976] VR 208 at 219.

> must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance."

Section 74(3) of the *Motor Accidents Act* required the primary judge to undertake this process. No error is shown in his Honour's conclusion.

158 As Kirby J pointed out in *Liftronic Pty Ltd v Unver*[164], contributory negligence and apportionment are always questions of fact. It is, therefore, wrong to elevate what was said in past cases about the facts of those cases to any principle of law[165]. That is, it is wrong to attempt to deduce from what has been said in such cases, often decided in a different legal context from that provided in this case by the *Motor Accidents Act*, any general principles to be applied in cases where passengers suffer injury as a result of the negligence of a drunken driver. Each case turns on its own special facts. It is, therefore, neither necessary nor appropriate to review any of the regrettably large number of decisions, in Australia and elsewhere, in which factual issues of that kind have been decided. The applicable rule is that prescribed by the *Motor Accidents Act*. The manner of making the necessary apportionment is described in *Podrebersek*.

159 I would, therefore, order, in each appeal:

1. Appeal allowed with costs.

2. Set aside par 2 of the orders of the Court of Appeal of New South Wales made on 11 April 2001 and in its place order that the appeal in *Allan Troy Berryman v Sally Inch Joslyn & Anor* be dismissed with costs.

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164 (2001) 75 ALJR 867 at 885 [90]; 179 ALR 321 at 345.

165 *Sungravure Pty Ltd v Meani* (1964) 110 CLR 24 at 37 per Windeyer J; *Easson v London and North Eastern Railway Co* [1944] KB 421 at 426.