HIGH COURT OF AUSTRALIA

GUMMOW, KIRBY, HAYNE, CALLINAN AND CRENNAN JJ

GOLDEN EAGLE INTERNATIONAL TRADING PTY LTD & ANOR — APPELLANTS

AND

YU ZHANG BY HIS TUTOR THE PROTECTIVE COMMISSIONER & ANOR — RESPONDENTS

Golden Eagle International Trading Pty Ltd v Zhang [2007] HCA 15
19 April 2007
S355/2006

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the New South Wales Court of Appeal made on 22 February 2006, save as to costs.*

3. *The appellants to pay the costs of the first respondent in this Court.*

4. *Unless on or before 10 May 2007 the appellants and the first respondent prepare and file agreed draft consequential orders, the appellants to file and serve by 17 May 2007, and the first respondent to file and serve by 24 May 2007, submissions on consequential orders.*

On appeal from the Supreme Court of New South Wales

Representation

K P Rewell SC with E G Romaniuk for the appellants (instructed by Sparke Helmore)

A S Morrison SC with E G H Cox for the first respondent (instructed by Graham Jones Lawyers)

Submitting appearance for the second respondent

CATCHWORDS

Golden Eagle International Trading Pty Ltd v Zhang

Damages – s 45 of the *Motor Accidents Act* 1988 (NSW) obliged an insurer to make certain payments to or on behalf of the victim of a motor accident once the insurer admitted liability to the victim – Treatment of these payments in assessing damages – Whether these payments should be removed from the calculation before or after reducing on account of contributory negligence the amount of damages assessed – What onus of proof should apply to a dispute over such damages.

Damages – Assessment of life expectancy – Whether reference should be made to "projected" or "historical" life expectancy tables.

Words and phrases – "best evidence rule", "contributory negligence", "damages payable", "damages recoverable", "defence".

Law Reform (Miscellaneous Provisions) Act 1965 (NSW).
Motor Accidents Act 1988 (NSW), ss 2A, 45, 74.
Motor Accidents Amendment Act 1995 (NSW).
Workers' Compensation Act 1926 (NSW).

1 GUMMOW, CALLINAN AND CRENNAN JJ. The relevant facts are not in dispute and may be stated shortly. The first respondent was born in 1973 in China and settled in Australia in 1991. He suffered serious personal injuries in a motor vehicle accident in New South Wales on 24 December 1997. In the District Court of New South Wales (Balla DCJ, sitting without a jury), the first respondent, as plaintiff, sued the first and second appellants and recovered against them a judgment for damages. The appellants were the owner and driver respectively of the vehicle in which the first respondent had been a passenger. He had not been wearing a seat belt. The accident occurred in the course of the first respondent's employment by the first appellant.

2 The first respondent also brought action against the present second respondent, a firm of motor mechanics, but that action failed at trial and in the New South Wales Court of Appeal. Special leave was refused by this Court on that branch of the litigation. The second respondent entered a submitting appearance to the present appeal.

3 In the District Court, the first and second appellants admitted liability. The contested issues at trial, and subsequently on a partially successful appeal to the Court of Appeal, were concerned with the assessment of damages. The Court of Appeal (Ipp, McColl and Basten JJA)[1] entered judgment in the sum of $1,936,012 in place of the assessment at trial of $1,768,362.

The issues

4 In this Court, two issues remain. The first is whether the Court of Appeal erred in having regard, when assessing the life expectancy of the first respondent, to life expectancy tables that were "projected" rather than "historical". Upon that issue, we agree with what is said by Kirby and Hayne JJ and would add only this. Despite criticism of it[2], the "best evidence rule"[3] has not fallen completely into desuetude. Subject to the exigencies of litigation, the circumstances of the parties[4], and the other settled and statutory rules of evidence, it has vitality. An

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1 (2006) 45 MVR 365.

2 See *Wigmore on Evidence*, (1972), vol 4, §§1173-1175.

3 *Omychund v Barker* (1744) 1 Atk 21 at 49 per Lord Hardwicke LC [26 ER 15 at 33]: "The judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will admit."

4 See *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at 454 [36] per Gleeson CJ, Gummow and Callinan JJ.

aspect of the rule is that courts should act upon the least speculative and most current admissible evidence available. To prefer the prospective rather than the historical life expectancy tables is to do no more than that. This ground of appeal should fail.

Conjunction of circumstances

5 The other ground of appeal is more complex. It derives from the following conjunction of circumstances. First, to the date of trial there was a total of $630,000 out-of-pocket expenses; of that total, $409,906 was paid by the third-party insurer and the balance of $220,094 was paid in part by the workers' compensation insurer of the first appellant, in part by the Health Insurance Commission and, as to the rest, was unpaid at the date of trial. As in force at the time when the accident occurred, Pt 3 (ss 8-34) of the *Motor Accidents Act* 1988 (NSW) ("the 1988 Act") provided for a compulsory third-party insurance system and Pt 8 (ss 100-131) for the licensing and control of insurers[5]. The payment by the third-party insurer was in obedience to the duty imposed upon an insurer by s 45 of the 1988 Act to make certain payments once liability has been admitted against the person against whom is made a claim for damages in respect of injury caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle.

6 Secondly, where (as here) statute requires the conferral upon injured persons of pecuniary benefits, such as the immediate payments made by the third-party insurer in this case, a question arises as to the treatment of those payments when damages against the tortfeasor fall for assessment on a final basis and as to the placement of the onus of proof in any dispute respecting those payments[6].

7 Thirdly, the agreed assessment of the contributory negligence of the first respondent, by reason of his failure to wear a seat belt, was 30 per cent. As well as making special provisions such as s 45 with respect to third-party insurers, the

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5 The *Motor Accidents Compensation Act* 1999 (NSW) makes provision for motor vehicle accidents occurring after its commencement and the 1988 Act continues to apply to the accident with which this case is concerned: 1988 Act, s 2AA.

6 See *Manser v Spry* (1994) 181 CLR 428 at 434-437; *Harris v Commercial Minerals Ltd* (1996) 186 CLR 1 at 16-17. No question arises in this case of the treatment by the common law of subventions of which plaintiffs have had the benefit and the complex case law on that subject discussed in Balkin and Davis, *Law of Torts*, 3rd ed (2004) at 394-396 [11.22]-[11.24].

1988 Act, in provisions of Pt 6 to which reference is made below, incorporates a contributory negligence scheme.

8 Critically, s 45(4) of the 1988 Act provides that in proceedings for damages there is a "defence" to the extent of the amount of a payment made under s 45 by an insurer before judgment is obtained for damages against the defendant. It is upon the construction of s 45, and in particular sub-s (4), that the second issue on the appeal to this Court depends. Section 45(4) was not drawn in terms which reflect in plain language an awareness of the need to accommodate all three of the circumstances remarked above, in particular the need to deal with the treatment at trial of advance payments made by an insurer where there is also an assessment of contributory negligence.

Contributory negligence

9 Part 6 of the 1988 Act (ss 68-82A) is headed "Awarding of damages". Sub-sections (1) and (3) of s 74 deal as follows with contributory negligence[7]:

> "(1) The common law *and enacted law* as to contributory negligence apply to claims in respect of motor accidents, except as provided by this section.
>
> ...
>
> (3) *The damages recoverable* in respect of the motor accident *shall be reduced* by such percentage as the court thinks just and equitable in the circumstances of the case." (emphasis added)

The reference to "enacted law" is to the revision of the doctrine of contributory negligence made by the *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW) ("the 1965 Act")[8].

10 It is fundamental but appropriate to repeat here that (i) 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 that class of risk and (ii) if proved by the

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7 Further, and special, provisions with respect to contributory negligence are made by other sub-sections of s 74. One of these, s 74(2)(b), was considered in *Joslyn v Berryman* (2003) 214 CLR 552. None is relevant to the present appeal.

8 *Joslyn v Berryman* (2003) 214 CLR 552 at 574-575 [69].

defendant, the contributory negligence of the plaintiff defeats the plaintiff's cause of action in negligence[9].

11 Section 10(1) of the 1965 Act[10] commenced:

> "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".

12 This provision dealt somewhat elliptically with the common law by removing the common law defence, treating "the damages recoverable" in respect of the wrong as what they would have been had no common law defence existed, and then providing for the reduction of those damages. The phrase "the damages recoverable ... shall be reduced" reappears in s 74(3) of the 1988 Act. But it is clear, for example, that, in the present case, contributory negligence being agreed, at common law there would have been no damages recoverable by the first respondent.

Differing views of s 45(4)

13 The trial judge included in the assessment of the damages recovered by the first respondent the whole of the out-of-pocket expenses of $630,000, including the payments made pursuant to s 45 in the sum of $409,906. Her Honour then (i) reduced the whole of the damages by 30 per cent in respect of the contributory negligence and (ii) reduced the balance remaining by the sum of $409,906.

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9 *Astley v Austrust Ltd* (1999) 197 CLR 1 at 11 [21]; *Joslyn v Berryman* (2003) 214 CLR 552 at 558-559 [16]-[18].

10 Since the enactment of the 1988 Act, s 10 of the 1965 Act has been recast, along with other provisions of the 1965 Act, by the *Law Reform (Miscellaneous Provisions) Amendment Act* 2000 (NSW). Although made with retrospective operation, the amendments concerning contributory negligence did not apply to the first respondent's action as it was a pending proceeding within the ambit of cl 4 of the new Sched 1 to the 1965 Act, having been commenced prior to 22 January 2001.

14 The Court of Appeal identified the relevant issue as whether the amount of the payment under s 45 should be removed from the damages calculation before or after the reduction on account of contributory negligence. It concluded that the trial judge had erred in reducing the assessment of damages for contributory negligence before deducting from the net amount the s 45(4) "defence" of $409,906. The Court held that the amount referable to s 45(4) should have been deducted from the total damages, before the reduction in the balance by 30 per cent for contributory negligence.

15 The first respondent was better off by the proportionate reduction for contributory negligence being applied in this way. The Court of Appeal held that a recalculation in favour of the first respondent, to allow also for the variation in the calculation of life expectancy, was to be undertaken. The necessary calculations were then provided and an order made accordingly.

16 In this Court, the appellants seek, in effect, a reinstatement of the construction and operation of s 45 which was adopted at trial. The appellants submit that the whole of the damages assessment, including the s 45 payments, are apportioned for contributory negligence, and only then are the s 45 payments deducted from the balance to reach the amount of judgment. The result is that the first respondent loses the benefit of the s 45 payments to the extent of the contributory negligence.

17 The first respondent supports the approach taken by the Court of Appeal. How, the first respondent asks, does it give effect to s 45(4) as stipulating a "defence", by treating the payments by the insurer as part of the total assessment, before reduction for contributory negligence, when the payments were not a head of damages because they were the subject of a "defence"? The effect of the first respondent's submissions is that the s 45 payments are immunised from the effects of his contributory negligence. But this would mean that the insurer would have credit for only 70 per cent of the payments it made under s 45, an apparently unjust result for the insurer and a windfall to the first respondent which would be at odds with the spirit of the contributory negligence provisions of the 1988 Act.

18 There also would be a disparate treatment of third-party providers of advance payments made by entities to which s 45 does not apply. The present case provides an example. Section 45 does not apply to the payments made by the workers' compensation insurer of the first appellant or by the Health Insurance Commission. The appellants correctly stress the curiosity of an outcome if the payments under s 45 alone were given special treatment with respect to the contributory negligence of the first respondent. The appellants also point to the particular treatment of contributory negligence in legislation dealing with workers' compensation, a matter to which it will be necessary to return.

Part 5 of the 1988 Act

19 Attention first should be directed to the place of s 45 in the 1988 Act. Part 5 (ss 40-67) is headed "Claims and court proceedings to enforce claims". A "claim" is relevantly defined in s 40(1) as meaning a claim for damages in respect of death or injury to a person caused by the fault of the owner or driver of a motor vehicle in the course of its use or operation. The term "insurer" relevantly means an insurer who insures the person in question against liability for damages in respect of a "claim", whether or not under a third-party policy (s 40(1)).

20 The objects of Pt 5 are stated in s 40A as including the early investigation and assessment of claims by the bringing of claims quickly to the attention of insurers. In its form at the relevant date, s 45 stated:

> "(1) It is the duty of an insurer to endeavour to resolve a claim, by settlement or otherwise, as expeditiously as possible.
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> (2) Once liability has been admitted (wholly or in part) or determined (wholly or in part) against the person against whom the claim is made, it is the duty of an insurer to make payments to or on behalf of the claimant in respect of:
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> (a) hospital, medical and pharmaceutical expenses, and
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> (b) rehabilitation expenses, subject to Part 4[11], and
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> (c) respite care in respect of a claimant who is seriously injured and in need of constant care over a long term,
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> as incurred.
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> (2A) The duty of an insurer under subsection (2) to make payments applies only to the extent to which those payments:
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> (a) are reasonable and necessary, and
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> (b) are properly verified, and

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11 Part 4 (ss 34A-39) contains special provisions dealing with rehabilitation upon which nothing turns for present purposes.

(c) relate to the injury caused by the fault of the owner or driver of the motor vehicle to which the third-party policy taken to have been issued by the insurer relates.

(3) It is a condition of a third-party insurer's licence that the insurer must comply with this section.

(4) A payment made under this section to or on behalf of a claimant before the claimant obtains judgment for damages against the defendant is, to the extent of its amount, *a defence* to proceedings by the claimant against the defendant for damages." (emphasis added)

21 As initially enacted, s 45 contained neither sub-s (2A) nor sub-s (4). Section 45(2A) was introduced by the *Motor Accidents (Amendment) Act* 1989 (NSW)[12], which also expanded the ambit of sub-s (2). The *Motor Accidents (Amendment) Act* 1990 (NSW) ("the 1990 Act")[13] added a sub-s (4) in the following terms:

"Payments made under this section are taken to form part of any damages payable to the claimant."

22 In this form, s 45(4) was an expression of legislative intent to deal with the second of the matters referred to under the heading "Conjunction of circumstances", namely, to deny treatment of the payments previously made under s 45 as an alleged collateral benefit and so disjoined from the subsequent damages assessment. But, it may be observed, proof of the making of a payment "under this section" would, in accordance with ordinary principles, have been for the party asserting that it had been so made.

23 Further, with respect to the third matter, contributory negligence, the appellants and the first respondent were agreed at trial as to the operation of s 45(4) in its original form. This was that the result at trial, for the reinstatement of which the appellants now contend, would have obtained under that sub-section. In obedience to the injunction in s 45(4), payments made under s 45 would have formed part of the damages, the reduction for contributory negligence would then have been made in respect of the whole of those damages, and the s 45 insurer would have received a credit for the whole amount of its s 45 payments.

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12 Sched 1, Item (22).

13 Sched 1, Item (13).

The *Motor Accidents Amendment Act* 1995 (NSW) ("the 1995 Act")

24 The first respondent submits that this state of affairs under the 1988 Act as amended by the 1990 Act changed with effect from 1 January 1996. With effect from that date, s 45(4) was replaced by the provision material to this litigation. This was achieved by the 1995 Act[14]. The phrase "taken to form part of any damages" was gone. Rather, "to the extent of its amount" a s 45 payment was to be a "defence" to the damages proceedings.

25 What was the perceived mischief to the remedy of which the 1995 Act was directed? The appellants point to what previously had been the onus of proof involved in the application of s 45 at trial. It was the duty of the insurer to make payments in respect of pars (a), (b) and (c) of s 45(2), but only to the extent that the payments were "reasonable and necessary", properly verified and related to the relevant injury (s 45(2A)). In the ordinary course of litigation, it would be for the plaintiff to prove these matters, although the payments had been made by the insurer. Under s 45(4) as redrawn so as to introduce the notion of a "defence", the plaintiff would be entitled to inclusion in the damages of the payments apparently made, subject to any point taken by way of defence. Legal costs of litigation might thereby be limited.

26 That understanding of the matter is consistent with what was said by the Attorney-General in the Second Reading Speech for the Bill which became the 1995 Act. He explained as follows the change being made to s 45[15]:

> "Under section 45 of the Act an insurer must endeavour to resolve a claim expeditiously and pay all reasonable medical and rehabilitation expenses once liability has been admitted. This may involve the insurer making payments on an interim or advanced basis. To avoid the incurring of unnecessary legal costs in determining damages, the bill provides for a statutory defence in respect of amounts already paid under section 45. A similar provision currently operates under the Workers Compensation Act."

27 The term "defence" does not have a single and fixed operation in legal discourse. Here, in the 1995 Act, it should be accepted that it is used not in the

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14 Sched 1, Item [20].

15 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 16 November 1995 at 3323.

sense of a plea in bar under a common law pleading system, but to place on the defendant the burden of proof on any disputed issue respecting a s 45 payment. The result, with respect to contributory negligence, was not changed by the 1995 Act. No special immunisation was given to s 45 payments, when compared, for example, with workers' compensation payments.

28 Further, contrary to the conclusion reached by the Court of Appeal, there was no variation by the new s 45(4) to the effect of the contributory negligence provision made by s 74(3) of the 1988 Act. This speaks, as does the 1965 Act, of the reduction of "[t]he damages recoverable". The term "recoverable" is apt to allow for the operation of any particular burden of proof provision.

Workers' compensation legislation

29 The last sentence of the statement by the Attorney-General does call for some consideration of what evidently was understood to be the development of the workers' compensation legislation of New South Wales (a no-fault system) and its relationship with the enforcement of concurrent common law rights.

30 The *Workers' Compensation Act* 1926 (NSW) ("the 1926 Act"), often amended, had been replaced by the time the Attorney-General spoke with the *Workers Compensation Act* 1987 (NSW). Section 63(1) of the 1926 Act had preserved any civil liability of an employer where the worker's injury was caused by the personal negligence or wilful act of the employer or some person for whose act or default the employer was responsible. The uncertainties to which s 63 in its initial form gave rise were criticised judicially, particularly by Latham CJ in *Latter v Muswellbrook Corporation*[16] and by Jordan CJ in *Mathisen v Wallarah Coal Co Ltd*[17]. The sequel was the addition in 1938[18] of s 63(5). This was recast in 1970[19], and then provided:

> "Where any payment by way of compensation under this Act has been made, the payment shall, to the extent of its amount, *be a defence* to proceedings against the employer independently of this Act in respect of the injury." (emphasis added)

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16 (1936) 56 CLR 422 at 434-435.

17 (1937) 37 SR (NSW) 530 at 534.

18 *Industrial Arbitration and Workers' Compensation (Amendment) Act* 1938 (NSW), s 5.

19 *Supreme Court Act* 1970 (NSW), Sched 2.

Hence the analogy, albeit imperfect, seen by the Attorney-General when speaking later on the Bill for the 1995 Act.

31 Section 63(5) is an example of legislation of the kind described by Professor Luntz as follows[20]:

> "Where [workers' compensation legislation] permitted proceedings at common law despite receipt of workers' compensation – as it increasingly came to do from the 1950s to the 1970s – the legislation usually made clear provision for reimbursement of the employer or deduction from the damages, so that no double benefit should occur."

32 The introduction of the significant changes to the doctrine respecting contributory negligence made by the 1965 Act required an adjustment of the 1926 Act. This was achieved, relevantly, by what initially was par (c) of s 10(1) of the 1965 Act. Paragraph (c) also was recast in 1970[21] and then stated:

> "where any payments made to the claimant by way of compensation take effect pursuant to section 63(5) of the [1926 Act], to any extent as a defence to the proceedings by him against his employer, such payments shall be reduced to the same extent as the damages recoverable by him and shall be a defence to such reduced extent only".

33 By the time the Attorney-General spoke to the Legislative Council in 1995, the 1926 Act was no longer on the New South Wales statute book. However, s 151B of the *Workers Compensation Act* 1987 (NSW)[22] provided that, if a person recovered damages in respect of an injury from the employer liable to pay compensation under the new statute, the amount of any compensation already paid in respect of the injury concerned was to be deducted from the damages awarded or otherwise paid as a lump sum and was to be paid to the person who had paid the compensation. Curiously, it appears that the reference in the 1965 Act to s 63(5) of the 1926 Act remained, and the 1965 Act was not amended to refer to s 151B of the 1987 statute. Counsel in this Court were agreed on that state of affairs.

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20 *Assessment of Damages for Personal Injury and Death*, 4th ed (2002) at 462 [8.8.1] (footnote omitted).

21 *Supreme Court Act* 1970 (NSW), Sched 2.

22 Itself since repealed by the *Workers Compensation Legislation Further Amendment Act* 2001 (NSW), Sched 1.1[2].

34 In his detailed study of the subject, Professor Luntz notes that, when the original workers' compensation statutes were enacted, contributory negligence was a complete defence to an action at law, and continues[23]:

> "Some of the more modern statutes, or amendments to the older ones, have required a proportionate reduction [by reason of contributory negligence] in the amount repayable to the employer, or deemed [it] to be a defence to an action against the employer, commensurate with the reduction in the damages on account of contributory negligence."

35 The Attorney-General appears to have regarded the new s 45(4) of the 1988 Act, introduced by the 1995 Act, as legislation which would be similar in its operation to the workers' compensation legislation described by Professor Luntz. That was not entirely so, to the extent that s 45(4) also remedied a perceived defect in the operation of s 45 with respect to the proof of payments made thereunder.

36 The Court of Appeal was of the view that the reference by the Attorney-General to the similarity of the workers' compensation legislation assisted the first respondent's case. This was because, by analogy with that legislation, "payments under s 45 were to be treated as made regardless of fault"[24].

37 However, the apparent approval by the Attorney-General of the operation of the workers' compensation system with respect to commensurate reduction of contributory negligence is supportive of the appellants' construction of s 45(4). It lends no support to the contrary construction of s 45(4) which would have the selective immunising effect upon s 45 payments described earlier in these reasons.

Orders

38 The appeal should be allowed. In accordance with the undertaking given on the grant of special leave, the appellants should pay the first respondent's costs of the appeal and the costs orders made in the Court of Appeal and the District Court should not be disturbed. The parties prepared in an inadequate form draft consequential orders to be made by this Court. They should have 21 days from

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23 *Assessment of Damages for Personal Injury and Death*, 4th ed (2002) at 468-469 [8.8.8] (footnote omitted).

24 (2006) 45 MVR 365 at 384.

the delivery of judgment to prepare and file agreed draft consequential orders in proper form.

39 KIRBY AND HAYNE JJ. This appeal raises two questions: one about the operation of s 45 of the *Motor Accidents Act* 1988 (NSW) ("the 1988 Act"), the other, a more general question about what tables should be used in actions for personal injuries to determine life expectancies.

40 The questions arise out of a motor accident which occurred in 1997. The first respondent in the appeal to this Court ("the plaintiff") was a passenger in a vehicle owned by the first appellant. The driver of the vehicle lost control when the tread separated from one of the tyres. The plaintiff was injured very seriously. He sued the owner of the vehicle, the driver of the vehicle, and a company that had serviced the vehicle and had certified it to be roadworthy less than a month before the accident. (The driver is the second appellant; the company that issued the safety inspection report is the second respondent.) The details of the claims made and their disposition need not be noticed with any particularity. The owner and the driver admitted liability but alleged the plaintiff was contributorily negligent. The plaintiff obtained judgment against the owner and the driver. The plaintiff was held to have been 30 per cent contributorily negligent because he was not wearing a seat belt.

41 It is convenient to deal first with the question about the 1988 Act.

Motor Accidents Act

42 The 1988 Act was enacted to repeal the *Transport Accidents Compensation Act* 1987 (NSW) and to abolish the scheme for compensating victims of transport accidents known as "TransCover" which had been established under that earlier Act. As originally enacted, the 1988 Act contained no statement of its objects. The *Motor Accidents Amendment Act* 1995 (NSW) amended the 1988 Act by inserting s 2A. The objects of the 1988 Act, as amended in 1995, included[25] "to re-instate a common law based scheme under which damages can only be awarded after a finding of negligence". But as the 1988 Act also recorded[26], "the clear legislative intention" was to limit benefits for non-economic loss in the case of relatively minor injuries. In addition, stricter procedures for the making and assessment of claims for damages were introduced by the Act.

43 Two other objects of the 1988 Act should be noticed. First, by the scheme under the 1988 Act, recovery and early and effective rehabilitation, where

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25 s 2A(1)(b).

26 s 2A(2)(b). See also s 2A(1)(c)(i).

appropriate, were encouraged "as a key feature of the scheme"[27]. Secondly, the scheme was intended "to encourage the speedy, efficient and effective provision of benefits balanced by the need to investigate claims properly and the need to encourage an early return to employment"[28].

44 Section 45 of the 1988 Act imposed a number of duties on compulsory third party insurers. In particular, once liability was admitted or determined against a person against whom a claim was made, the 1988 Act imposed[29] a duty on an insurer to make payments to or on behalf of the claimant in respect of certain expenses as they were incurred. Section 45(4) of the 1988 Act, in the form it took at the times relevant to this matter, provided that a payment of this kind, made before the claimant obtained judgment for damages against the defendant, was "to the extent of its amount, a defence to proceedings by the claimant against the defendant for damages".

45 If, as was the case in the present matter, the insurer made payments of these kinds before judgment was entered for damages, and the claimant was held to have been contributorily negligent, how was the amount of the payments that had been made to be taken into account in deciding the amount for which the claimant recovered judgment? Were the payments that had been made to be apportioned, with the consequence that the insurer bore only that part of the payments made that represented the insured defendant's contribution to the accident? Or was the claimant to retain the whole benefit of the payments that had been made? The 1988 Act, on its better construction, required the latter conclusion.

46 The construction of the 1988 Act must have due regard to the objects of that Act set out in s 2A. Examination of those objects, and of the history of other particular provisions of the Act recently considered in this Court[30], reveals, however, that it would be wrong to approach the task of construction from the premise that the Act was a piece of remedial legislation intended to work only for the benefit of those who have suffered injury in motor accidents. On the contrary, as is apparent from those objects of the 1988 Act referred to earlier in these reasons, the Act was intended to effect a compromise between the interests

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27 s 2A(1)(c)(v).

28 s 2A(1)(c)(vi).

29 s 45(2).

30 *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568; *Nominal Defendant v GLG Australia Pty Ltd* (2006) 80 ALJR 688; 225 ALR 643.

of injured claimants and the interests of those who insured against the risk of liability to such claimants.

47 The particular provision at the heart of the present litigation – s 45 – has been amended several times and the provision, as amended, does not necessarily sit comfortably with other, unamended provisions of the Act.

48 As it stood at the relevant time, s 45 provided:

> "(1) It is the duty of an insurer to endeavour to resolve a claim, by settlement or otherwise, as expeditiously as possible.
>
> (2) Once liability has been admitted (wholly or in part) or determined (wholly or in part) against the person against whom the claim is made, it is the duty of an insurer to make payments to or on behalf of the claimant in respect of:
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> (a) hospital, medical and pharmaceutical expenses, and
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> (b) rehabilitation expenses, subject to Part 4, and
>
> (c) respite care in respect of a claimant who is seriously injured and in need of constant care over a long term,
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> as incurred.
>
> (2A) The duty of an insurer under subsection (2) to make payments applies only to the extent to which those payments:
>
> (a) are reasonable and necessary, and
>
> (b) are properly verified, and
>
> (c) relate to the injury caused by the fault of the owner or driver of the motor vehicle to which the third-party policy taken to have been issued by the insurer relates.
>
> (3) It is a condition of a third-party insurer's licence that the insurer must comply with this section.
>
> (4) A payment made under this section to or on behalf of a claimant before the claimant obtains judgment for damages against the defendant is, to the extent of its amount, a defence to proceedings by the claimant against the defendant for damages.
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> **Note.** Section 45 places obligations on insurers to act as expeditiously as possible, and to make certain payments of an interim nature once liability has

> been admitted or determined. The obligations are consistent with the insurer's obligations regarding the rehabilitation of the claimant under sections 37 and 38.
>
> Failure to observe the obligations in individual cases exposes the insurer to an award of interest under section 73. Continual failure to observe the obligations places an insurer's licence at risk (section 45(3)).
>
> In order to meet its obligations, the insurer must have sufficient information to enable it to properly investigate and assess the claim, and make an appropriate offer of settlement. This requires early notice of the claim under section 43, and the provision of full particulars of the claim under section 48."

Section 45 has since been replaced by s 83 of the *Motor Accidents Compensation Act* 1999 (NSW) which, for all practical purposes, is in terms identical with the form of s 45 set out above, but applies to accidents occurring after 5 October 1999.

49 As noted earlier, the immediate question in this appeal is how s 45(4) was engaged when, in proceedings brought against the owner and the driver, the plaintiff, for whose benefit payments had been made under s 45, was held to have been contributorily negligent.

50 At the trial of the plaintiff's action in the District Court of New South Wales, the primary judge (Judge Balla) dismissed the claim against the company that had serviced the vehicle and issued the safety inspection certificate. In assessing the damages to be allowed against the owner and the driver of the vehicle, the primary judge first assessed the damages to be allowed to the plaintiff (including in that assessment the amounts that had already been paid under s 45 by the insurer of the vehicle). Those damages were assessed at $2,791,761. The primary judge then reduced that amount by 30 per cent on account of the plaintiff's contributory negligence, allowed an amount for funds management[31] and from the resulting amount deducted the s 45 payments of $409,906 yielding a judgment sum of $1,468,671.

51 On the plaintiff's appeal to the Court of Appeal of New South Wales, several questions were agitated about the assessment of the plaintiff's damages, including the questions about the operation of s 45 of the 1988 Act and the use of life expectancy tables that are raised in the appeal to this Court. Questions about the liability of the company that had issued the safety inspection certificate were also considered but it is not necessary to examine what was said on that subject.

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31 Neither the allowance of this amount nor its allowance at this point of the calculation of damages was in issue in this Court.

The Court of Appeal (Ipp, McColl and Basten JJA) held[32] that the primary judge had erred in assessing the plaintiff's damages. In particular, Basten JA, with whose reasons the other members of the Court agreed, held[33] that the s 45 payments should not have been included in the initial assessment of damages to which the proportionate reduction on account of contributory negligence was then applied. The consequence was that the amount to be recovered by the plaintiff was larger than had been allowed at trial.

52 Examination of the questions presented in this appeal by s 45 of the 1988 Act must begin at a legislative point anterior to the enactment of the 1988 Act.

53 The *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW) altered the doctrine of contributory negligence. Until that Act, contributory negligence was a complete defence to a plaintiff's claim for damages for negligence. Part 3 of the *Law Reform (Miscellaneous Provisions) Act* (ss 7-10) contained a number of relevant provisions[34]. First, by s 10(1) it was provided that the contributory negligence of the claimant did not defeat a claim in respect of the damage suffered by the claimant. Rather, "the damages recoverable" in respect of the wrong were to be reduced to the extent thought by the court to be just and equitable having regard to the claimant's share in the responsibility for the damage. Section 10(2) of that Act required that if the damages recoverable by a claimant were subject to any reduction under Pt 3, "the court shall find and record the total damages which would have been recoverable if the claimant had not been at fault". Special provision was made, by s 10(1), for cases in which payments had been made to the claimant by way of compensation under the *Workers' Compensation Act* 1926 (NSW). (Section 63(5) of the 1926 Act had provided that "[w]here any payment by way of compensation under this Act has been made, the payment shall, to the extent of its amount, be a defence to proceedings against the employer independently of this Act in respect of the injury.") No provision like s 10(1) has been made in the *Law Reform (Miscellaneous Provisions) Act* in respect of the *Workers Compensation Act* 1987 (NSW) or the 1988 Act.

54 The 1988 Act built upon the foundation afforded by s 10 of the *Law Reform (Miscellaneous Provisions) Act* by providing, in s 74(1), that:

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32 *Zhang v Golden Eagle International Trading Pty Ltd* (2006) 45 MVR 365.

33 (2006) 45 MVR 365 at 383 [85], 385 [94].

34 Reference is made to the text of the provisions as first enacted. Minor amendments have since been made but it is not necessary to notice their detail.

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

Particular provision was made in s 74 of the 1988 Act for certain cases in which a finding of contributory negligence had to be made. Section 74(3) provided:

> "The damages recoverable in respect of the motor accident shall be reduced by such percentage as the court thinks just and equitable in the circumstances of the case."

55 What were referred to in s 74(3) as "[t]he damages recoverable in respect of the motor accident" must be understood as a particular application of the more general expression found in s 10(1) of the *Law Reform (Miscellaneous Provisions) Act* – "the damages recoverable" in respect of the wrong. The *Law Reform (Miscellaneous Provisions) Act* required that it was this sum – "the damages recoverable" in respect of the wrong – that was to be reduced to the extent found to be just and equitable. It follows that what s 74 of the 1988 Act called "[t]he damages recoverable in respect of the motor accident" should also be understood as the amount of the total damages that would have been recoverable had there been no contributory negligence by the claimant. It is that amount which s 10(2) of the *Law Reform (Miscellaneous Provisions) Act* required the court to find and record.

56 It is against the background provided by the *Law Reform (Miscellaneous Provisions) Act* that s 45(4) was to be understood as operating. In particular, it was against that background that the reference to payments, made under s 45 to or on behalf of a claimant, being "to the extent of [that] amount, a defence to proceedings by the claimant against the defendant for damages", was to be understood and applied.

57 Amounts paid under s 45 were not to be included in the amount of damages that would have been allowed to a claimant if the claimant had not been contributorily negligent. Amounts paid under s 45 were all paid before judgment. Although the payments were made to or on behalf of the claimant, the claimant was under no obligation to reimburse the payer. Because the amounts had been paid, and the claimant was under no liability to reimburse the party who had made the payments, the claimant had suffered no loss on that account at the time when judgment was to be entered and would not thereafter suffer loss on that account. It was in that sense that the 1988 Act spoke of the defendant having "a defence" to proceedings by the claimant "to the extent of" the amounts that had been paid. The damages recoverable in respect of the motor accident (the relevant species of the genus described in s 10 of the *Law Reform (Miscellaneous Provisions) Act* as "the damages recoverable" in respect of the wrong) did not include such sums because the claimant had not, at the time of judgment, suffered damage (past, present or future) on that account. The reduction made in

consequence of the application of s 74(3) was a reduction in the amount of damages that was assessed, and the amount to be assessed did not include any allowance for payments that had been made under s 45 to or on behalf of the claimant.

58 That this is the proper construction of s 45(4) is supported by reference to the legislative history of the provision. Section 45(4) in its previous form provided that:

> "Payments made under this section are taken to form part of any damages payable to the claimant."

It may be noticed that s 45(4) spoke of "damages *payable* to the claimant" whereas s 74(3) spoke of the "damages *recoverable* in respect of the motor accident". But neither side sought to make an argument in the present appeal that depended on attributing significance to this difference. In the course of oral argument, we were informed that this earlier form of s 45(4) had been applied in the courts of New South Wales by including amounts paid under s 45 in the damages that would have been recoverable had there been no contributory negligence, reducing that total sum on account of contributory negligence where appropriate, and then making an order allowing the full amount that had been paid under s 45 as an amount already paid in partial satisfaction of the resulting judgment entered. Neither side sought to submit that the making of orders of this kind did not give proper effect to the previous form of s 45(4). But whether or not it did, the central difference between the two forms of s 45(4) is that whereas payments were once part of the damages payable to the claimant, under the form of the Act that must now be considered, a payment made was (to the extent of its amount) a defence to the claim.

59 Much attention was given in oral argument to what was said in the Second Reading Speech in support of the Bill by which the new form of s 45(4) was introduced into the 1988 Act[35]. What was said in that speech offers no sure guidance to the construction of the Act. The Attorney-General said[36]:

> "Under section 45 of the Act an insurer must endeavour to resolve a claim expeditiously and pay all reasonable medical and rehabilitation expenses once liability has been admitted. This may involve the insurer making payments on an interim or advanced basis. To avoid the incurring

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35 The Bill became the *Motor Accidents Amendment Act* 1995 (NSW).

36 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 16 November 1995 at 3323-3324.

> of unnecessary legal costs in determining damages, the bill provides for a statutory defence in respect of amounts already paid under section 45. A similar provision currently operates under the Workers Compensation Act. Currently, claimants are not obliged to attempt to resolve claims quickly. While the Act contains certain provisions requiring cooperation by claimants, insurers are commonly experiencing difficulty in obtaining full details of the claimant's losses prior to the commencement of proceedings, as well as responses to offers of settlement."

Some emphasis was given in oral argument to three aspects of this passage: the reference to "interim or advanced" payments, the reference to the "similar provision currently operat[ing] under the Workers Compensation Act" and the reference to avoiding the "incurring of unnecessary legal costs". Little useful purpose is served by close analysis of any of these expressions.

60 First, what is to be made of the reference to "interim or advanced" payments? Because the payments that were to be made under s 45 had to be made before judgment was entered in the claim brought by a claimant, it is sensible to refer to those payments as "interim or advanced" payments. But recognising this to be so leaves unanswered the separate question of what is meant by the payment being "to the extent of its amount, a defence to proceedings by the claimant". The characterisation of the payments as "interim or advanced" provides no assistance in answering that question.

61 As for the reference to the *Workers Compensation Act*, the parties did not identify any then current provision of that legislation to which the reference made in the Second Reading Speech would attach. As noted earlier, under the *Workers' Compensation Act* 1926, provision had been made in s 63(5) that:

> "Where any payment by way of compensation under this Act has been made, the payment shall, to the extent of its amount, be a defence to proceedings against the employer independently of this Act in respect of the injury."

But as also noted earlier, s 10(1) of the *Law Reform (Miscellaneous Provisions) Act* had made special provision for the consequences to be attached to the making of such payments when dealing with questions of contributory negligence. There was no provision directly equivalent to s 63(5) of the *Workers' Compensation Act* 1926 to be found in the *Workers Compensation Act* 1987; there was no equivalent special provision made in the *Law Reform (Miscellaneous Provisions) Act* for the treatment of workers' compensation payments made under the 1987 Act when dealing, in a common law action by an employee against an employer, with questions of contributory negligence.

62 Some emphasis was also given to the Attorney-General's reference to the avoidance of "incurring of unnecessary legal costs in determining damages". It is not apparent, however, how s 45 could have that effect. Since first enacted, s 45 has limited the kinds of payment that may properly be made by an insurer to or on behalf of a claimant. Section 45(4), both in the form now under consideration and in its earlier form, dealt only with payments "made under this section". No matter what consequence was to be attached to the making of such payments, there would remain room for debate about whether the payments met the criteria prescribed by s 45 and thus satisfied the description "made under this section".

63 For these reasons, the Second Reading Speech provides no useful guidance to the proper construction of s 45(4).

64 The Note to s 45 is set out earlier in these reasons with the text of the section. The Note is extrinsic material upon which reliance may be placed in construing the Act[37]. The Note refers to "payments of an interim nature". But for the reasons given earlier, Basten JA was right to conclude[38] that the Note's characterisation of the payments in this way provides no relevant assistance to the construction of the Act.

65 Ultimately, the point turns on the proper construction of the words of s 45 of the 1988 Act, unassisted by extrinsic materials and unassisted by there being a discernible single purpose of the legislation. No single purpose is to be discerned because, read as a whole, the 1988 Act bears all the hallmarks of the legislature's attempt to effect a workable compromise between two, if not three, competing considerations. It seeks to balance the reinstatement of a common law based system of compensation for motor accident victims with a purpose of containing the cost of that scheme. And those conflicting purposes were to accommodate promoting the speedy rehabilitation of injured persons. (In this last respect, it may be observed that requiring insurers to pay to or on behalf of injured persons expenses of the kinds with which s 45 deals will, in at least some cases, give the insurer a measure of control over those expenditures that might be used to further the rehabilitative purposes of the Act as well as reduce the overall costs of the scheme.)

66 Effect is best given to the provision that "[a] payment ... is, to the extent of its amount, a defence to proceedings by the claimant against the defendant for damages" by holding that it meant that the defendant was not liable to the claimant for the particular items of damage which the claimant would otherwise

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37 *Interpretation Act* 1987 (NSW), ss 34, 35(2)(c) and (5).

38 (2006) 45 MVR 365 at 383 [88].

have suffered but which had been met by payment under s 45. As Dixon CJ pointed out in *The National Insurance Co of New Zealand Ltd v Espagne*[39], the tort of negligence is committed at the moment when the claimant is injured. His Honour continued[40]:

> "What we are concerned in is the consequences to [the injured plaintiff]. The consequences must be traced out and so far as they lie in the future they must be pre-estimated and the result assessed together with *the consequences which have already accrued and translated into money*." (emphasis added)

As Dixon CJ went on to say[41]:

> "There are many consequential heads of damage to which it is customary to direct evidence and which are submitted to a distinct or separate consideration. But in theory as I see it these are really evidentiary even if the evidence is often conclusive to show that they or some notional element based directly upon them must go into the assessment."

When an insurer has paid for a s 45 expense like medical expenses, it is known before judgment that the claimant has suffered and will suffer no financial consequence on account of the treatment for which payment has been made. When s 45(4) speaks of the payment being a defence, it is to be understood as providing that no allowance is to be made in the assessment of damages on that account.

67 For these reasons the Court of Appeal was correct in its construction and application of s 45 of the 1988 Act.

Life expectancy tables

68 The primary judge assessed the plaintiff's life expectancy by reference to historical tables published by the Australian Bureau of Statistics. Those tables were based upon annual information with respect to deaths and made no allowance for any future improvement in life expectancy.

69 The plaintiff submitted at trial that life expectancy should be calculated by reference to certain prospective tables also published by the Australian Bureau of

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39 (1961) 105 CLR 569 at 572.

40 (1961) 105 CLR 569 at 572.

41 (1961) 105 CLR 569 at 572.

Statistics. Those tables take account of the predicted improvement in life expectancy. The tables look forward rather than confining attention to what history has already revealed about life expectancy.

70 The Court of Appeal held[42] that "it is appropriate for the courts to make their estimations on the basis of the best information available: the projected tables would appear to be a more accurate assessment of future trends than the historical tables." There is no reason to doubt that the Court of Appeal was correct in its conclusion that the projected tables published by the Australian Bureau of Statistics were more likely to give an accurate estimate of future life expectancy than the historical tables published by the Bureau. That being so, it follows that the Court of Appeal was right to conclude that, despite the then prevailing practice in the courts of New South Wales, the primary judge should have used the prospective rather than the historical tables.

Conclusion and orders

71 For these reasons we would dismiss the appeal with costs.

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42 (2006) 45 MVR 365 at 376 [55].