

NEGLIGENCE AND INTOXICATION – HAS CIVIL LIABILITY REFORM GONE TOO FAR?

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[This paper focuses on two recent appeals¹ before the High Court of Australia involving negligence actions for damages by intoxicated plaintiffs. The analysis of these pre-statutory reform cases, in the light of the new civil liability legislation, suggests that some of the statutory reforms are an overreaction by parliaments, and fail to strike a balance between, on the one hand, the legitimate pursuit of compensation where the defendant's blameworthy conduct has caused damage and on the other, the limitation of negligence litigation by an attitudinal change towards personal responsibility for one's actions and choices, thereby shifting the loss to the victim where the latter's conduct has been instrumental in causing its own damage.]

I INTRODUCTION

The impetus for widespread civil liability reform in Australia had its genesis in the increased volume of tort litigation for negligence and large damage awards. Underpinning the volume of this litigation were factors such as speculative actions by lawyers; an increased awareness by the public through media coverage of their rights to sue for negligence; and potentially large damage awards. Furthermore, courts had opened the door to claims, not just for personal injury or property damage, but also for purely financial loss (eg, negligent financial advice causing economic loss). A greater awareness in the community of a right to sue for negligence had led to class actions for mass torts such as environmental pollutants, defective products, etc. The result of this litigation was an unworkable increase in premiums for liability insurance and/or the withdrawal of insurers from this area altogether. The reaction of the insurance industry was motivated in part by actuarial evidence of potential risk. Consequently, Governments and courts reacted to an ever-increasing burden placed on the community, with the former (governments, State and Federal) implementing statutory reforms limiting the scope of civil liability.

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¹ *Joslyn v Berryman: Wentworth Shire Council v Berryman* (2002) 214 CLR 552; *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 207 ALR 52.

It is suggested in this paper that some of the statutory initiatives are the result of an overreaction by governments and that in some instances, the provisions lack fairness and balance resulting in unjust outcomes, and the denial of a legitimate right of recovery for negligently inflicted damage or injury.

This paper focuses particularly on those statutory provisions dealing with intoxication and their effect on civil liability.

Do the provisions relating to intoxication strike a fair balance between the rights and obligations of plaintiff victims and negligent defendants? To answer this question, an analysis of two High Court of Australia appeals, *Joslyn v Berryman: Wentworth Shire Council v Berryman* ('*Joslyn*')² and *Cole v. South Tweed Heads Rugby League Football Club Limited* ('*Cole*')³ will be undertaken. These cases predated the civil liability reform legislation, but it is proposed to examine them in the light of the new legislation, and to assess the potential effect and outcome had they been decided under the relevant statutory provisions.

II *JOSLYN V BERRYMAN: WENTWORTH SHIRE COUNCIL V BERRYMAN*

McHugh J recited the facts and issues in *Joslyn* as follows:

When Sally Inch Joslyn (appellant) noticed that the first respondent, Allen Troy Berryman, was falling asleep at the wheel of the vehicle that they were travelling in, she insisted that she drive the vehicle. Shortly after Ms Joslyn commenced to drive, the vehicle overturned causing injury to Berryman. The accident occurred about 8.45 a.m. The driving capacity of both parties was affected by their intoxication. They had been drinking at a party until about 4.00 a.m. The vehicle also had a propensity to roll over, and its speedometer was broken. The respondent (Berryman) having suffered severe injuries in the accident 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. 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 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

² (2003) 214 CLR 552.

³ (2004) 207 ALR 52.

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. 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 (Priestly JA, Meagher JA and Ipp AJA) allowed Mr Berryman's appeal, holding that he was not guilty of contributory negligence.⁴

Section 74(2) of the *Motor Accident 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."

The issues on appeal to the High Court of Australia were:

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

By a majority, the High Court of Australia allowed the appeals and found that Mr Berryman was guilty of contributory negligence at common law and by reason of the direction in s 74 of the *Motor Accident Act 1988* (NSW) 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 also by reason of the direction in s 74 since he was a voluntary passenger and ought to have been aware that Ms Joslyn's ability to drive was impaired by alcohol.

⁴ *Joslyn* (2003) 214 CLR 552, 554-556.

A Relevant Provisions Under Civil Liability Legislation

The relevant section in New South Wales under the *Civil Liability Act 2002* (NSW) is s 50 set out hereunder:

50 No Recovery where person intoxicated

- (1) This section applies when it is established that the person whose death, injury or damage is the subject of proceedings for the recovery of damages was at the time of the act or omission that caused the death, injury or damage intoxicated to the extent that the person's capacity to exercise reasonable care and skill was impaired.
- (2) A court is not to award damages in respect of liability to which this Part applies unless satisfied that the death, injury or damage to property (or some other injury or damage to property) is likely to have occurred even if the person had not been intoxicated.
- (3) If the court is satisfied that the death, injury or damage to property (or some other injury or damage to property) is likely to have occurred even if the person had not been intoxicated, it is to be presumed that the person was contributorily negligent unless the court is satisfied that the person's intoxication did not contribute in anyway to the cause of the death, injury or damage.
- (4) When there is a presumption of contributory negligence, the court must assess damages on the basis that the damages to which the person would be entitled in the absence of contributory negligence are to be reduced on account of contributory negligence by 25 % or a greater percentage determined by the court to be appropriate in the circumstances of the case.
- (5) This section does not apply in a case where the court is satisfied that the intoxication was not self-induced.

It is suggested that had *Joslyn* been determined under s 50 the court would have been disabled and prohibited from awarding any damages to the plaintiff (Mr Berryman). The effect of s 50 (2) is to prevent the recovery of damages by an intoxicated plaintiff unless the court can be satisfied that the injury and subsequent damage to the plaintiff was likely to have occurred even if the plaintiff had not been intoxicated. The facts in *Joslyn* suggest that had the plaintiff not been intoxicated he would not have relinquished the driving position to his intoxicated female companion and the accident and subsequent

injuries would not have occurred. There is nothing in the evidence to suggest that the plaintiff, had he not been affected by alcohol, would have had reason to give over the driving to an intoxicated passenger or that any accident would have occurred. Consequently, the plaintiff would not have recovered any damages whatsoever under the New South Wales reform legislation.

It is interesting to compare this outcome with the findings in the case under the existing common law. It is also instructive to analyse the likely outcome in *Joslyn* had the case been decided under civil liability legislation in other States.

B Findings Under Existing Common Law Principles

As noted above, at the trial of this action the court found the defendant driver (Joslyn) 90 % responsible for the accident and the local authority, 10 % responsible, but reduced the damages to be awarded to the plaintiff by 25 % because of the plaintiff's contributory negligence in allowing Ms Joslyn to drive, when he ought to have been aware that she was unfit to drive.

The principles relating to contributory negligence were concisely stated by McHugh J:

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. 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.⁵

McHugh J concluded that:

A plaintiff cannot escape a finding of contributory negligence by pleading ignorance of facts that a reasonable person would have known or ascertained. Contributory negligence is independent of the idiosyncrasies of the particular person whose conduct is in question. 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.⁶

⁵ Ibid 558.

⁶ Ibid 567.

The drastic effect of s 50 under the New South Wales civil liability reforms is apparent in *Joslyn*. A plaintiff, who may have recovered damages of perhaps some millions of dollars under common law, even despite the reduction for contributory negligence, will recover nothing under s 50. The practical effect of s 50, as *Joslyn* indicates, is substantial, and represents a major policy shift with respect to intoxication. Whether the policy underpinning s 50 is justified, and whether the drafting of s 50 is an appropriate response to the underlying policy will be discussed later in this paper.

C Other State Civil Liability Legislation

A less severe approach to the intoxicated plaintiff has been adopted in the other States in their civil liability legislation. Generally the approach of other States⁷ is to reduce the damages to be awarded to the plaintiff, due to the plaintiff's intoxication, but not to deny any recovery whatsoever as in New South Wales. The legislation in other States raises a presumption of contributory negligence unless the plaintiff can establish that its intoxication did not contribute in any way to their harm. The relevant Queensland provisions deserve special attention since, not only do they embody this less stringent approach to the intoxicated plaintiff, but additionally, they are prescriptive as to the percentage of the plaintiff's contributory negligence.

The relevant provisions in Queensland are set out below:

47 Presumption of contributory negligence if person who suffers harm is intoxicated

- (1) This section applies if a person who suffered harm was intoxicated at the time of the breach of duty giving rise to a claim for damages and contributory negligence is alleged by the defendant.
- (2) Contributory negligence will, subject to this section, be presumed
- (3) The person may only rebut the presumption by establishing on the balance of probabilities:
 - (a) that the intoxication did not contribute to the breach of duty; or
 - (b) that the intoxication was not self-induced.

⁷ See, eg, *Civil Liability Act 1936* (SA) ss 46,47,48; *Civil Liability Act 2002* (WA) s 5L; *Civil Liability Act 2003* (Qld) ss 46,47,48,49

- (4) Unless the person rebuts the presumption of contributory negligence, the court must assess damages on the basis that the damages to which the person would be entitled in the absence of contributory negligence are to be reduced, on account of contributory negligence, by 25% or a greater percentage decided by the court to be appropriate in the circumstances of the case.
- (5) If, in the case of a motor vehicle accident, the person who suffered harm was the driver of a motor vehicle involved in the accident and the evidence establishes
 - (a) that the concentration of alcohol in the driver's blood was 150mg or more of alcohol in 100ml of blood; or
 - (b) that the driver was so much under the influence of alcohol or a drug as to be incapable of exercising effective control of the vehicle;

the minimum reduction prescribed by subsection (4) is increased to 50%.

48 Presumption of contributory negligence if person who suffers harm relies on care and skill of person known to be intoxicated

- (1) This section applies to a person who suffered harm ("plaintiff") who:
 - (a) was at least 16 years at the time of the breach of duty giving rise to the harm; and
 - (b) relied on the care and skill of a person who was intoxicated at the time of the breach of duty ("defendant"); and
 - (c) was aware, or ought reasonably to have been aware, that the defendant was intoxicated.
- (2) If the harm suffered by the plaintiff was caused through the negligence of the defendant and the defendant alleges contributory negligence on the part of the plaintiff, contributory negligence will, subject to this section, be presumed.
- (3) The plaintiff may only rebut the presumption if the plaintiff establishes, on the balance of probabilities, that:
 - (a) the defendant's intoxication did not contribute to the breach of duty; or
 - (b) the plaintiff could not reasonably be expected to have avoided relying on the defendant's care and skill.

- (4) Unless the plaintiff rebuts the presumption of contributory negligence, the court must assess damages on the basis that the damages to which the plaintiff would be entitled in the absence of contributory negligence are to be reduced, on account of contributory negligence, by 25% or a greater percentage decided by the court to be appropriate in the circumstances of the case.
- (5) The common law defence of voluntary assumption of risk does not apply to a matter to which this section applies.

49 Additional presumption for motor vehicle accident

- (1) This section applies to a plaintiff and defendant mentioned in section 48.
- (2) If:
 - (a) the breach of duty giving rise to the harm suffered by the plaintiff was a motor vehicle accident; and
 - (b) the plaintiff was a passenger in the motor vehicle; and
 - (c) the motor vehicle was driven by the defendant; and
 - (d) either:
 - (i) the concentration of alcohol in the defendant's blood was 150mg or more of alcohol in 100ml of blood; or
 - (ii) the defendant was so much under the influence of alcohol or a drug as to be incapable of exercising effective control of the vehicle;
 the minimum reduction prescribed by section 49(4) is increased to 50%.
- (3) The plaintiff is taken, for this section, to rely on the care and skill of the defendant.

To emphasise the policy choice in Queensland that intoxicated plaintiffs are not prohibited from recovering some damage, s 48 specifies that the common law defence of voluntary assumption of risk is not available.⁸ However, the legislation raises a presumption of a minimum 25% contributory negligence⁹ or in the case of a motor vehicle, the minimum reduction in the damages to be awarded to the plaintiff is 50%¹⁰.

⁸ *Civil Liability Act 2003* (Qld) s 48(5).

⁹ s 48 (4).

¹⁰ s 49 (2).

If *Joslyn's* case had been decided under the Queensland provisions, the plaintiff would not have been denied recovery, but would have had the award of damages reduced by at least 50%. The suggestion in this paper (discussed below) is that the policy choice reflected in the Queensland provisions is fair and strikes a balance between recognition of personal responsibility for one's actions (self-induced intoxication), and a right to recover some compensation where another's fault has caused harm to the plaintiff. This balance is lacking in the New South Wales legislation.

III **COLE V SOUTH TWEED HEADS RUGBY LEAGUE FOOTBALL CLUB LIMITED**

The facts and issues in *Cole* were concisely stated by Gleeson CJ:

The appellant (Mrs Cole) was injured as a result of being run down by a motor car on a public road. The driver of the motor car was also sued, but she is not involved in the present appeal. The respondent (South Tweed Heads Rugby League Football Club Limited) had no connection with the motor car, or the driver. The respondent's alleged connection with the appellant's injuries arose in the following manner. At the time she was run down (about 6.20 p.m. on a Sunday evening), the appellant was walking in a careless manner along the roadway. The motorist was unable to avoid her. The appellant's explanation of her careless behaviour was that she was drunk. The appellant had spent most of the day at or around the respondent's licensed club. The respondents supplied her with some, but not all, of the drinks she consumed. The appellant blames the respondent for her presence on the road in an intoxicated state, and for her injuries.

Two aspects of the conduct of the respondent are said to involve fault. First it is said that the respondent supplied the appellant with drink at a time when a reasonable person would have known she was intoxicated. Secondly, it is said that the respondent allowed the appellant to leave its premises in an unsafe condition, without proper and adequate assistance.¹¹

The appeal in the High Court was dismissed. A majority refused to recognise the existence of any general duty of care on clubs or more generally, suppliers of alcohol in a commercial setting, to monitor and moderate the amount of alcohol consumed by patrons. There were strong dissenting judgments by McHugh J¹² and Kirby J¹³ who found a duty owed and breached by the Club. The Chief Justice while denying any general duty of care on Clubs, referred to

¹¹ Ibid 53-54.

¹² Ibid 59ff.

¹³ Ibid 70ff.

the possibility that there may be circumstances in which a supplier of alcohol comes under a duty to take reasonable care to protect a particular person from the risk of physical injury resulting from self-induced intoxication.¹⁴

At first instance in *Cole* before the Supreme Court of New South Wales, the trial judge found the plaintiff (appellant) 40% responsible for her own injury, the driver who struck her, 30% responsible, and the Club, 30% responsible. However, these findings of negligence against the driver and Club were reversed on appeal to the Court of Appeal of New South Wales.¹⁵

A *Section 50 of the Civil Liability Act 2002 (NSW) and its Effect on Cole*

While the application of s 50 in *Cole*'s case would not have resulted in any injustice, since the plaintiff failed to establish any negligence by the driver, or against the Club who supplied her with alcohol, it is interesting to speculate on the application of s 50 in a case where, despite the plaintiff's intoxication, a driver has negligently struck the intoxicated pedestrian, or where, as referred to by Gleeson CJ, there are special circumstances in which the supplier of alcohol does owe a duty of care to protect a particular person from physical injury.

The irony under s 50(2) in New South Wales, is that if the court is not satisfied that the event (eg, being struck on the road by a negligent driver) which caused the intoxicated plaintiff's injuries was likely to have occurred even if the plaintiff was sober, then the very party who may have negligently breached a duty of care to prevent that intoxication (the supplier of alcohol to the plaintiff) will be immune from any claim for damages with respect to the intoxicated plaintiff. Further, the negligent driver who could have avoided the intoxicated pedestrian and prevented any injury, will also be protected from any claim for damages.

IV THE POLICY CHOICES

It is suggested that the policy choice in New South Wales, reflected in the drafting of s 50(2), essentially returns the law to the middle of the 20th century when the contributory negligence of a plaintiff was a complete defence to an action for negligence. The fact that a plaintiff is disqualified from recovering

¹⁴ *Ibid* 57-58.

¹⁵ *South Tweed Heads Rugby League Football Club Ltd v Cole* (2002) 55 NSWLR 113.

damage if he or she is intoxicated at the time of their injury and the event causing that plaintiff's injuries is unlikely to have occurred if they were sober, effectively makes their contributory negligence (self-induced intoxication), a complete defence, thus resurrecting a rule which the common law had perceived as harsh and unjust.

The common law had developed principles to avoid and circumvent the severity of the contributory negligence defence. It required that the defendant carry the onus of proving contributory negligence by the plaintiff, rather than the plaintiff having to negative the plea.¹⁶ Further, the common law in the area of causation had developed the 'last opportunity' rule whereby, even if the plaintiff's negligence had contributed to the accident in the sense of a *causa sine qua non*, the plaintiff could still recover if the defendant had the last opportunity to avoid the accident, and through its negligence was the effective or immediate cause (*causa causans*).¹⁷

The harshness of the contributory negligence defence was also circumvented by the common law holding that contributory negligence was not a defence to an action for breach of statutory duty.¹⁸

Even after the abandonment of the defence of contributory negligence and the advent of apportionment legislation, courts were reluctant to see a plaintiff barred from recovery against a negligent defendant by a successful defence of *volenti non fit injuria*. This was evident in motor vehicle accidents, where the negligent defendant driver pleaded the defence of voluntary assumption of the risk against the injured passenger plaintiff.¹⁹ The common law made it almost impossible for the defence to succeed, by finding either, that the plaintiff did not fully appreciate the risk, or alternatively, had assumed the factual risk of harm but not the legal risk and thereby had not exonerated the defendant from responsibility for the tort of negligence.²⁰

The above devices of the common law were a reaction to the injustice of denying any recovery to a plaintiff whose negligence may have contributed to their own injuries, but where the defendant's negligence was also a significant

¹⁶ *Butterfield v Forrester* (1809) 11 East 60; [103 ER 926].

¹⁷ *Alford v Magee* (1952) 85 CLR 437.

¹⁸ *Bourke v Butterfield & Lewis Ltd* (1926) 38 CLR 354.

¹⁹ *Duncan v Bell & SGIO(Q)* (1967) Qd R 425; *Dodd v McGlashan* [1967] ALR 433; *O'Shea v Permanent Trustee Co of NSW Ltd* [1971] Qd R 1; *Banovic v Perkovic* (1982) 30 SASR 34; *Coan v Kirby and Redman* (1979) 20 SASR 263.

²⁰ *Ibid.*

cause of the plaintiff's harm. The courts have preferred to apportion blame in these circumstances by diminishing the damages awarded to the plaintiff rather than a blanket denial of recovery.

Sections 48, 49 and 50 of the Queensland *Civil Liability Act 2003* embody this preference of the common law. The Queensland provisions, while recognising the responsibility of individuals for their own conduct and choices (eg, self-induced intoxication and the accompanying risks) also recognise the right of an individual (even if intoxicated) to recover damages against someone whose fault and blameworthy conduct has caused injury to the plaintiff. This balance is not found in the New South Wales provisions.

The policy underlying s 50(2) of the *Civil Liability Act 2002* (NSW) is to elevate the *causa sine qua non* (ie without the plaintiff's intoxication there would not have been an accident) to the position of a complete defence, thereby ignoring the negligence of the defendant which may have been a significant causative factor in the plaintiff's injuries and permitting such negligence to go with impunity.

V CONCLUSION

It is suggested that civil liability provisions such as s 50 of the *Civil Liability Act 2002* (NSW) represent an overreaction to the need for civil liability reform. While such provisions will achieve the stated aim of reducing litigation for negligence and shifting responsibility to the individual for their choices and actions, a provision such as s 50 may also work injustice by depriving seriously injured plaintiffs of any recovery of damage against a grossly negligent defendant whose conduct is both blameworthy and a significant causative factor in the plaintiff's harm.