8. Contributory Negligence, Assumption of Risk and Duties of Protection

Terms of Reference

1. Inquire into the application, effectiveness and operation of common law principles applied in negligence to limit liability arising from personal injury and death, including:

(e) contributory negligence; and

(f) allowing individuals to assume risk.

3. In conducting this inquiry, the Panel must:

(b) develop and evaluate proposals to allow self assumption of risk to override common law principles;

(c) consider proposals to restrict the circumstances in which a person must guard against the negligence of others.

Contributory negligence

8.1 In relation to claims for negligently-caused personal injury and death, contributory negligence is failure by a person (typically the plaintiff) to take reasonable care for his or her own safety, which contributes to the harm the person suffers.

8.2 Legislation in all Australian jurisdictions provides for the 'apportionment' of damages (that is, reduction of the damages to which the plaintiff is entitled) when a person has been contributorily negligent. We shall refer to this legislation as the 'Apportionment Legislation'. Under the Apportionment Legislation, the court has a very wide discretion to reduce the plaintiff's damages to the extent the court considers just and equitable having regard to the plaintiff's share of responsibility for the harm suffered. Essentially, the court's discretion is exercised by comparing the degree of culpability of the defendant with that of the plaintiff. The defendant's negligence is compared to the contributory negligence of the plaintiff. Regard is had to the degree to which each departed from the requisite standard of care and to the relative causative importance of the conduct of each.

8.3 Because the apportionment of damages under the Apportionment Legislation is essentially an evaluative exercise involving a comparison of degrees of fault and causal contribution, an appeal court will not lightly interfere with the apportionment of damages decided by a trial judge or jury.[1]

8.4 In the context of this Review, the Panel considers that there are three questions about the current law relating to contributory negligence and the apportionment of damages that deserve attention:

(a) Should the standard of care applicable to contributory negligence be the same as that applicable to negligence?

(b) Should particular types of contributorily negligent conduct attract a minimum reduction of damages fixed by statute?

(c) Should the law allow apportionment for contributory negligence in such a way as to deny the contributorily negligent person any damages at all?

8.5 Although these questions arise in relation to the law of negligence generally, we shall discuss them only in the context of claims for personal injury and death.

The same standard of care

8.6 The basic principle underlying the defence of contributory negligence is that people should take reasonable care for their own safety as well as for that of others. Contributory negligence is an objective concept that refers to the care that the reasonable person in the plaintiff's position would have taken for his or her own safety.

8.7 Should the law allow people to take less care for their own safety than it requires others to take for their safety? This question concerns the standard of care applicable to contributory negligence. Should the standard of care applicable to contributory negligence be the same as that applicable to negligence? Another way of putting this question is to ask whether the standard of care applicable to victims of the negligent conduct of others should be different from that applicable to the negligent person merely because they are victims?

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1 *Liftronic Pty Limited v Unver* (2001) 179 ALR 321.

8.8 We have explained that the negligence calculus provides a framework for deciding what precautions the reasonable person would have taken to avoid harm to others and, hence, what precautions the defendant could reasonably be expected to have taken (paragraph 7.8). Although it is rarely used in this way, the calculus can also provide a framework for deciding what precautions the plaintiff could reasonably be expected to have taken for his or her own safety. The common factor is the reasonable person. This is the basis for the view that there is only one standard of care, namely that of the reasonable person, and that it is common to both negligence and contributory negligence.[2]

8.9 Nevertheless, it might also be said that the standard of care should be determined on the basis that people can reasonably expect others to take more care for their safety than those same people are expected take for their own safety. Under this approach, victims of the negligence of others are treated differently merely because they are victims.

8.10 In the opinion of the Panel, there is in the Australian community today a widely-held expectation that, in general, people will take as much care for themselves as they expect others to take for them. This is an application of the fundamental idea that people should take responsibility for their own lives and safety, and it provides powerful support for the principle that the standard of care for negligence and contributory negligence should be the same.

8.11 Leading textbook writers have asserted that in practice, the standard of care applied to contributory negligence is lower than that applied to negligence despite the fact that, in theory, the standard should be the same.[3] There is a perception (which may reflect the reality) that many lower courts are more indulgent to plaintiffs than to defendants. In some cases judges have expressly applied a lower standard of care for contributory negligence.[4] This may result, for example, in motorists being required to keep a better lookout than pedestrians. In the Panel's view, this approach should not be supported.

8.12 It is important to note that applying the same standard of care to contributory negligence as to negligence does not entail ignoring the identity

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2 *Commissioner of Railways v Ruprecht* (1979) 142 CLR 563 per Mason J at 571-3.

3 G. Williams, *Joint Torts and Contributory Negligence* (1951), 353-4; J.G. Fleming, *The Law of Torts*, 9th edn (1998), 466.

4 *Commissioner of Railways v Ruprecht* (1979) 142 CLR 563 per Murphy J 577-8; *Cocks v Sheppard* (1979) 25 ALR 325; *Watt v Bretag* (1982) 56 ALJR 760; *Pollard v Ensor* [1969] SASR 57, *Evers v Bennett* (1982) 31 SASR 228.

of the plaintiff or the nature of the relationship between the plaintiff and the defendant. If, for instance, the defendant was an adult and the plaintiff was a child, applying the same standard of care to the plaintiff as to the defendant would not entail treating the plaintiff as an adult (any more than it would entail treating the defendant as a child). Again, if the defendant was a teacher and the plaintiff was a pupil, or the defendant was an employer and the plaintiff was an employee, it would be perfectly consistent with applying the same standard of care to both parties to take account of the fact (for instance) that there is a relationship of authority between teacher and child, or that employees typically have less control over the work environment than employers. The requirement to apply the same standard of care in dealing with the issue of contributory negligence as is applied in dealing with that of negligence means only that the plaintiff should not be treated differently from the defendant merely because the plaintiff is the person who has suffered harm. It would not, for instance, involve ignoring the fact that of the two parties, the defendant was in the better position to avoid the harm. But the mere fact that a person has suffered harm, rather than inflicted it, says nothing about that person's ability, relative to that of the inflicter of the harm, to take precautions to avoid it.

8.13 In the view of the Panel, a legislative statement setting out the approach to be followed in dealing with the issue of contributory negligence, emphasising that contributory negligence is to be measured against an objective standard of reasonable conduct, stating that the standard of care applicable to negligence and contributory negligence is the same, and establishing the negligence calculus as a suitable basis for considering contributory negligence, could discourage the tendency of courts to be overly indulgent to plaintiffs when apportioning damages for contributory negligence.

Recommendation 30

The Proposed Act should embody the following principles:

(a) The test of whether a person (the plaintiff) has been contributorily negligent is whether a reasonable person in the plaintiff's position would have taken precautions against the risk of harm to himself or herself.

(b) For the purposes of determining whether a person has been contributorily negligent, the standard of the reasonable person is the same as that applicable to the determination of negligence.

(c) In determining whether a person has been contributorily negligent, the following factors (amongst others) are relevant:

(i) The probability that the harm would occur if care was not taken.

(ii) The likely seriousness of the harm.

(iii) The burden of taking precautions to avoid the harm.

(iv) The social utility of the risk-creating activity in which the person was engaged.

(d) Whether a plaintiff has been contributorily negligent according to the criteria listed in (a) and (c) must be determined on the basis of what the plaintiff knew or ought to have known at the date of the alleged contributory negligence.

Minimum reduction of damages

8.14 It has been suggested to the Panel that the law of negligence should be changed to require a court to reduce damages by a certain minimum percentage in cases involving certain categories of conduct that constitute contributory negligence.

8.15 One such case is where the plaintiff's ability to take care for his or her own safety, at the time of death or injury, was impaired as a result of being intoxicated.[5] Another such case is where a person is injured or killed in a motor vehicle accident while not wearing a seatbelt. For example, a court might be required to reduce, by a minimum of 25 per cent, the damages payable to such a person, even if it is likely that the injury or death would still have occurred had the person not been intoxicated, unless the court is satisfied that the person's intoxication did not contribute in any way to the injury or death. Such a provision has three components: (a) a fixed minimum reduction of damages; (b) a presumption that a certain type of conduct was contributorily negligent unless the court is satisfied that it did not contribute in any way to the injury or death; and (c) a shifting of the burden of proof on the issue of contributory negligence to the plaintiff.

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5 See *Wrongs (Liability and Damages for Personal Injury) Amendment Act* 2002 (SA), s 35A(j); cl 51 of the consultation draft of the Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW).

8.16 The Panel is of the opinion that such provisions are generally undesirable. Negligence and contributory negligence come in an infinite variety of forms. From one case to another, the respective culpability of the plaintiff and defendant, and their relative causal contributions to the death or injury may differ widely. It is impossible to fix a minimum, just and equitable apportionment of responsibility to the plaintiff applicable to cases where the plaintiff's contributory negligence involves a certain type of behaviour. In the opinion of the Panel, any such fixed reduction would be arbitrary and unprincipled, and could work injustice in some cases. The Panel considers that any fettering of judicial discretion to apportion damages for contributory negligence is undesirable.

8.17 The possibility of injustice is increased where a minimum reduction of damages is coupled with a presumption that certain types of behaviour constitute contributory negligence unless the court is satisfied that the behaviour did not in any way contribute to the plaintiff's death or injury. As has already been noted, the standard of care that the law expects of a plaintiff is that of a reasonable person in the plaintiff's position and in all the circumstances of the case. As circumstances differ from case to case, it is not possible to say in advance that certain types of behaviour will always and in all circumstances amount to contributory negligence. For example, being intoxicated will sometimes, perhaps often, amount to contributory negligence, but not necessarily always.

8.18 Furthermore, the onus of showing that the plaintiff was guilty of contributory negligence has traditionally rested on the defendant. As it cannot be presumed that certain types of behaviour will always and in all circumstances be contributorily negligent, a reversal of the onus of proof is, in the Panel's opinion, undesirable.

8.19 Accordingly, the Panel recommends that there be no provision that certain conduct by plaintiffs attracts a minimum reduction for contributory negligence. The Panel recommends that courts retain their wide discretion to apportion damages in cases of contributory negligence. The Panel further recommends that there be no provision that certain types of conduct be presumed to amount to contributory negligence unless the plaintiff can show that the conduct did not contribute in any way to the death or injury suffered by the plaintiff.

Assumption of risk and 100 per cent contributory negligence

8.20 As noted in paragraph 8.2, the Apportionment Legislation gives the court a very wide discretion to reduce the damages payable to a plaintiff who has been contributorily negligent. The only guidance the Apportionment Legislation gives to courts is that the reduction should be such as the court considers 'just and equitable'.

8.21 In exercising this discretion, courts have reduced a plaintiff's damages by as much as 90 per cent.[6] However, the High Court has held that a reduction of 100 per cent is not permissible.[7] The basis of this decision is that an apportionment of 100 per cent contributory negligence amounts to a finding that the plaintiff was wholly responsible for the damage suffered, whereas the Apportionment Legislation operates on the premise that the plaintiff suffered damage partly as a result of his or her own fault and partly of the fault of another person.[8] In one case, a reduction of the plaintiff's damages by 95 per cent was overturned on appeal on the basis that such a large reduction amounted, in effect, to a holding that the plaintiff was entirely to blame.[9] The view has been expressed that the reasons given by the High Court for not permitting a reduction in damages of 100 per cent would preclude a reduction of any more than 90 per cent because a reduction of any greater amount would necessarily mean that the defendant's fault was so negligible that it should be ignored.[10]

8.22 Despite these decisions, the Panel's view is that a provision that a court is entitled to reduce a contributorily negligent plaintiff's damages by 100 per cent would be a desirable reform of the law of negligence. Our reason rests on our understanding of the relationship between the defences of contributory negligence and voluntary assumption of risk in the light of Terms of Reference 1(f) and 3(b).

8.23 Voluntary assumption of risk is a complete defence in the sense that it provides the basis for denying the plaintiff any damages at all. A person will be held to have voluntarily assumed a risk only if they were actually aware of the precise risk in question and freely accepted that risk. Since the introduction

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6 *Podrebersek v Australia Iron and Steel Pty Limited* (1985) 59 ALR 529.

7 *Wynbergen v Hoyts Corporation Pty Limited* (1997) 149 ALR 25.

8 *Wynbergen v Hoyts Corporation Pty Limited* at 29-30 per Hayne J.

9 *Civic v Glastonbury Steel Fabrications Pty Limited* (1985) Aust Torts Reports 80-746.

10 *Kelly v Carroll* [2002] NSWCA 9, [37] per Heydon JA.

of the defence of contributory negligence, the defence of voluntary assumption of risk has become more or less defunct. This is because any conduct that could amount to voluntary assumption of risk would also amount to contributory negligence. Courts prefer the defence of contributory negligence because it enables them to apportion damages between the parties, thus allowing the plaintiff to recover something, even in cases where the plaintiff bears a very significant share of responsibility for the harm suffered.

8.24 It is important to note that, like the defence of contributory negligence, the defence of voluntary assumption of risk is only applicable once it has been decided that the defendant was negligent and that the harm suffered by the plaintiff was a result of that negligence. This shows that denying the plaintiff any damages need not be viewed as inconsistent with a finding that the defendant was negligent. In other words, there may be cases in which the plaintiff's relative responsibility for the injuries suffered is so great that it seems fair to deny the plaintiff any damages at all. It is important to remember that apportionment of damages is concerned with the issue of appropriate remedy, not with liability. It does not follow from a decision that the plaintiff should be denied any damages at all that the defendant was not at fault. Such a decision only means that as between the two parties at fault, the plaintiff should bear full legal responsibility for the harm suffered.

8.25 Our view is that while the cases in which it will be appropriate to reduce the damages payable to a contributorily negligent plaintiff by more than 90 per cent will be very rare, there may be cases in which such an outcome would be appropriate in terms of the statutory instruction to reduce the damages to such an extent as the court considers 'just and equitable'. The sort of case we have in mind is where the risk created by the defendant is patently obvious and could have been avoided by the exercise of reasonable care on the part of the plaintiff. Dealing with such cases in this way is, in the Panel's opinion, preferable to creating a general 'obvious risk' defence, wider than that contained in Recommendation 11, because it is more flexible than an obvious risk defence would be, thus allowing the court to take proper account of the interests of both plaintiff and defendant. In our view, such a provision, coupled, with those contained in Recommendations 7, 11 and 14, would promote the objective underlying Terms of Reference 1(f) and 3(b) in a significant and justifiable way.

8.26 Such a provision might also give a signal to judges in the ordinary run of cases that it is appropriate to hold plaintiffs responsible for their own negligence on the same basis as defendants are held responsible for theirs.

8.27 Accordingly, the Panel recommends that the Proposed Act provide that under the Apportionment Legislation, a court is entitled to reduce a plaintiff's damages by 100 per cent where the court considers that it is just and equitable to do so.

Recommendation 31

The Proposed Act should embody the following principle:

Under the Apportionment Legislation (that is, legislation providing for the apportionment of damages for contributory negligence) a court is entitled to reduce a plaintiff's damages by 100 per cent where the court considers that it is just and equitable to do so.

Assumption of risk

8.28 As noted in 8.23, the defence of assumption of risk has become more or less defunct since the introduction of apportionment for contributory negligence. Three techniques have been used to this end: first, courts are very unwilling to hold that the plaintiff actually knew of the risk. In order to establish the defence of assumption of risk, it is not enough that the plaintiff ought to have known of the risk. The plaintiff must actually have been aware of the risk. Secondly, courts are unwilling to hold that the plaintiff freely and voluntarily accepted the risk. This is the main reason why the defence has long been effectively unavailable in relation to work risks. Because most decisions to take risks are made subject to some external pressure or influence, it is usually possible to attribute to such pressure the effect of rendering the decision non-voluntary. Thirdly, in this context, courts tend to define risks narrowly and at a relatively high level of detail. The more narrowly a risk is defined, the less likely it is that a person will have been aware of it. For instance, a person may be aware of the risk of suffering bodily injury as a result of engaging in a particular activity. But the person may not be aware of the risk of suffering bodily injury in a particular way.

8.29 Making it easier to establish the defence of assumption of risk would obviously promote objectives underlying the Terms of Reference, and it would do so more directly than the proposal contained in Recommendation 31. The Panel's opinion is that there are two ways in which the law could be changed that might encourage greater use by courts of the defence of assumption of risk.

8.30 The first would be to reverse the burden of proof on the issue of awareness of risk in relation to obvious risks as defined in Recommendation 12. This could be done by a provision to the effect that for the purposes of the defence of assumption of risk, it would be presumed that the person against whom the defence is pleaded was actually aware of an obvious risk unless that person could prove, on the balance of probabilities, that he or she was actually not aware of the risk.

8.31 The second possible change would be to provide that for the purposes of the defence of assumption of risk, the test of whether a person was aware of a risk is whether he or she was aware of a risk of the type or kind of risk and not of its precise nature, extent or manner of occurrence.

8.32 The Panel recommends provisions embodying these principles. We would not recommend any provision dealing with the issue of voluntariness. Whether or not a risk was taken voluntarily is ultimately an evaluative question about which it would be difficult to make general provision.

Recommendation 32

The Proposed Act should embody the following principles:

For the purposes of the defence of assumption of risk:

(a) where the risk in question was obvious, the person against whom the defence is pleaded (the plaintiff) is presumed to have been actually aware of the risk unless the plaintiff proves on the balance of probabilities that he or she was not actually aware of the risk.

(b) An obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the plaintiff's position. Obvious risks include risks that are patent or matters of common knowledge. A risk may be obvious even though it is of low probability.

(c) The test of whether a person was aware of a risk is whether he or she was aware of the type or kind of risk, not its precise nature, extent or manner of occurrence.

Duties of protection

8.33 Term of Reference 3(c) could be interpreted as referring to situations in which a person (the defendant) has a duty to take care to provide protection against the negligence of another. Such a duty might require the defendant to take care to protect the plaintiff against their own (contributory) negligence, or it may require the defendant to protect the plaintiff against the negligence of a third party. Parents, in theory at least, owe both protective duties to their children. Prison authorities are under a duty to take care to protect prisoners from suffering harm at the hands of other prisoners, and even at their own hands. A duty to protect another from suffering negligently-caused harm will also extend to providing protection from being deliberately harmed. The potential breadth of this protective duty is illustrated by a recent decision of the English House of Lords in which a prison authority was held liable for failing to protect a prisoner (who was of sound mind) from the risk that he would take his own life.[11]

8.34 A duty to protect another from harm (or, in other words, to prevent the other suffering harm) must be distinguished from a duty not to inflict harm on another. The law is generally less willing to impose duties of protection than it is to impose duties not to harm.[12] In the abstract, a duty to protect A will normally be imposed on B only if there is a 'special relationship' between A and B. Relationships such as that of parent and child, employer and employee, and prison authority and prisoner, are examples of such special relationships on which duties of protection can be built. Even if A and B are not in one of these established 'protective relationships', a special relationship may also be found to exist where, for instance, B has undertaken to look after A.

8.35 In cases where the relevant duty is to protect the plaintiff against failure by the plaintiff to take reasonable care for his or her own safety, the imposition of a duty of protection is obviously relevant to the question of contributory negligence. The imposition of a duty of protection entails that the plaintiff is entitled to look to the defendant for protection and, to that extent, is not required to take care for his or her own safety. But the mere fact that a plaintiff is owed such a duty of protection does not mean that the plaintiff is not required to take reasonable care for his or her own safety. All it means is that in applying the standard of the reasonable person to the conduct of the

11 *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360.

12 This point is made clearly by Brennan J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 478.

plaintiff, the fact that the plaintiff was owed a duty of protection (as opposed to a duty not to inflict harm) must be taken into account (see paragraph 8.12).

8.36 Duties of protection play a very important part in the law in safeguarding the interests of vulnerable members of society. We think that this area of the law is best left for development by the courts. We think that it is neither necessary nor desirable for us to make any general recommendation about the incidence of protective relationships.

8.37 We are reinforced in this conclusion by the clear impression we have gained from our consultations and research that in general, this area of the law is not a source of controversy or of practical problems. The only context in which difficulties have been identified is that of the liability of occupiers of land to visitors. In order to discharge the duty owed to visitors, an occupier may be required to take reasonable precautions to protect visitors from their own negligence or that of third parties — although the occupier is unlikely to be required to afford such protection to a trespasser as opposed to a lawful visitor.

8.38 One way of limiting the protective obligations of occupiers might be to provide that an occupier could not be held liable for failure to take reasonable precautions to prevent a visitor suffering harm as a result of the materialisation of a risk that would have been obvious to the reasonable person in the visitor's position. In relation to a protective duty, the risk in question would be either the risk that the visitor would fail to take care for his or her own safety, or a risk that a third party would fail to take reasonable care for the visitor's safety. It is not clear in what sense it could ever be said that the risk of a visitor failing to take care for his or her own safety ought to have been 'obvious' to the visitor.

8.39 It is certainly possible to imagine cases in which it might be said that a risk of suffering harm as a result of the negligence of a third party would have been obvious to the reasonable person in the visitor's position. The Panel's view, however, is that there should be no 'obvious risk defence' wider than that proposed in Recommendation 11. It must be remembered that the damages payable to the visitor in such a case would almost certainly be reduced for contributory negligence; and Recommendation 31 is designed to encourage courts to be more willing than they may have been in the past to give proper weight, in apportioning damages for contributory negligence, to the principle that people should take reasonable care for their own safety.

8.40 It should also be noted that Recommendation 14 (no liability for failure to warn of an obvious risk), Recommendation 32 (about assumption of risk)

and Recommendation 39 (providing public authorities with a policy defence) make an important contribution to promoting the principle that people should take reasonable care for their own safety. In the Panel's view, these and other recommendations in this Report make unnecessary proposals specifically designed to limit liability for failure to prevent harm occurring.