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Précis Paper

Statutory Presumptions of Contributory Negligence

Mark Livesey QC discusses the statutory presumptions of contributory negligence in South Australia and in other states around the country. He looks at how these presumptions were applied in an interesting recent case decided by the High Court.

Discussion Includes

- What statutory presumptions of contributory negligence have been enacted in Australia?
- What is the difference between the South Australian and New South Wales provisions?
- Does the statutory presumption where the plaintiff relies on a drunk person incorporate the plaintiff's idiosyncrasies into the reasonable person test?
- What relevance does the "act of a stranger" doctrine have?
- Are local professional associations still important?

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Statutory Presumptions of Contributory Negligence

1. In this edition of BenchTV, Mark Livesey QC (Barrister) and Ian Benson (Solicitor) discuss the High Court's decision of *Allen v Chadwick* [2015] HCA 47. Mr Livesey appeared for the successful appellant, Allen, in the High Court.

Material Facts of *Allen v Chadwick*

2. *Allen v Chadwick* was a motor accident case involving a motor vehicle losing control and overturning. The plaintiff, Chadwick, sustained paraplegia as a result of the accident.

3. In the 12 hours preceding the accident, the plaintiff (Chadwick) and her then partner (Allen), a male friend of Allen, and a group of their children were on a driving holiday, intending to go to Port Victoria, which is a small town on the South Australian west coast. The group had arrived at Port Victoria after the men had spent the day drinking from an esky in the boot of the car. On the findings of the trial judge, the men were heavily intoxicated and after they had had their meal upon arriving in Port Victoria they went back to the bar of the hotel for more drinking. The plaintiff joined the two men at the bar after readying the children for bed. At 1-2am the trio made what the trial judge referred to as a 'curious decision' to go for a drive. The plaintiff's evidence was that they were looking for cigarettes and she was driving. She drove a short distance of 200-300 metres out of the township, then got out of the car to relieve herself behind a bush. When she returned to the car, Allen, affected by alcohol, was in the driver's seat telling her to get back into the car. She did get back into the car and he drove back into the township, doing a number of burnouts along the main street and then came back out onto the same roadway. Whilst probably speeding on the way out of the town, he lost control of the vehicle, the vehicle overturned and the plaintiff was severely injured.

District Court Proceedings - *Chadwick v Allen* [2012] SADC 105

4. The trial regrettably took over 60 days. Many issues were before the trial judge including issues of damages. It should be noted that the driver's negligence was not at issue. After the long trial, Judge Tilmouth decided three main issues.

5. The first issue was whether the plaintiff was guilty of contributory negligence because there had been a failure by the plaintiff to take reasonable care by getting into a car where the driver was known to be intoxicated. The defendant's argument was that the plaintiff should have simply walked 500 metres back to the hotel where her children were rather than getting into the car. Under s 47 of the *Civil Liability Act 1936* (SA), in contrast to the legislation

in NSW, there is not only a presumption of contributory negligence where an injured person relies on the care and skill of a person known to be intoxicated but also a minimum reduction of 25% of damages for cases where the blood alcohol is below 0.15 g/100ml and a minimum reduction of 50% where their blood alcohol is above 0.15 g/100ml. However, under ss 47(2)(b), the presumption of contributory negligence may be rebutted if the injured person establishes on the balance of probabilities that the injured person could not reasonably be expected to have avoided the risk. If that can be demonstrated by a plaintiff and the proof is on the plaintiff, then the plaintiff would have rebutted the presumption of contributory negligence.

SECTION 47:

Presumption of contributory negligence where injured person relies on care and skill of person known to be intoxicated

(1) If—

(a) the injured person—

(i) was of or above the age of 16 years at the time of the accident; and

(ii) relied on the care and skill of a person who was intoxicated at the time of the accident; and

(iii) was aware, or ought to have been aware, that the other person was intoxicated; and

(b) the accident was caused through the negligence of the other person; and

(c) the defendant alleges contributory negligence on the part of the injured person,

contributory negligence will, subject to this section, be presumed.

(2) Subject to the following exception, the presumption is irrebutable.

Exception—

The injured person may rebut the presumption by establishing, on the balance of probabilities, that—

(a) the intoxication did not contribute to the accident; or

(b) the injured person could not reasonably be expected to have avoided the risk.

(3) In a case in which contributory negligence is to be presumed under this section, the court must apply a fixed statutory reduction of 25 per cent in the assessment of damages.

(4) A passenger in a motor vehicle is taken, for the purposes of this section, to rely on the care and skill of the driver.

(5) If, in the case of a motor accident, the evidence establishes—

(a) that the concentration of alcohol in the driver's blood was .15 grams or more in 100 millilitres of blood; or

(b) that the driver was so much under the influence of intoxicating liquor or a drug as to be incapable of exercising effective control of the vehicle,

the fixed statutory reduction prescribed by subsection (3) is increased to 50 per cent.

6. On the critical issue of whether the plaintiff was confused about where she was when she got back into the car, the trial judge accepted the plaintiff's evidence. On the basis that she was confused and on the basis that she had no reasonable alternative, the trial judge found the presumption of contributory negligence was rebutted and thus did not reduce damages on this issue.

7. The second issue concerned the plaintiff's failure to wear a seatbelt. Under s 49 of the *Civil Liability Act 1936* (SA) there is not only a presumption of contributory negligence where a plaintiff fails to wear a seatbelt but there is also a minimum reduction of 25% in the assessment of damages.

> **SECTION 49:**
> ***Non-wearing of seatbelt etc***
>
> *(1) If the injured person was injured in a motor accident, was of or above the age of 16 years at the time of the accident and—*
> *(a) the injured person was not, at the time of the accident, wearing a seatbelt as required under the Road Traffic Act 1961; or*
> *…*
> *contributory negligence will, subject to this section, be presumed.*
> *(2) Subject to the following exception, the presumption is irrebutable.*
> *Exception—*
> *In the case mentioned in subsection (1)(b)(ii)*
> *—the injured person may rebut the presumption by establishing, on the balance of probabilities, that the injured person could not reasonably be expected to have avoided the risk.*
> *(3) In a case in which contributory negligence is to be presumed under this section, the court must apply a fixed statutory reduction of 25 per cent in the assessment of damages.*

8. The issue turned on the 'act of a stranger' doctrine, as the plaintiff relied on it as an excuse for failing to wear a seatbelt. The doctrine recognises a defence to charges of offences of strict liability where a person charged is prevented from complying with a statutory requirement by the conduct of another. The plaintiff argued that the doctrine applied as a defence since she had no reasonable opportunities to put on her seatbelt due to the nature of the driving of the defendant, which involved speeding and burn-outs. Relying on expert evidence indicating that she did have a reasonable opportunity to apply her seatbelt, the trial judge found that the 'act of a stranger' defence did not apply on the facts, and her failure to not wear a seatbelt should not be excused. Accordingly, he reduced her damages by 25%.

9. The third issue regarded damages. The trial judge initially assessed damages to be in excess of $2 million, but because of the 25% reduction in damages due to the contributorily

negligence of the plaintiff for failing to wear a seatbelt and payments already made pre-trial, the plaintiff was only entitled to around $1.3 million.

10. The defendant, Allen, appealed to the Full Court of the Supreme Court of South Australia.

Full Court of the Supreme Court of South Australia – *Allen v Chadwick* [2014] SASCFC 100; 120 SASR 350

11. The discussion of the Full Court, by and large, focussed on the alcohol and seatbelt arguments.

12. On the first issue of whether the plaintiff reasonably ought to have declined to get back into the car due to the driver's intoxication, the majority (Gray and Nicholson JJ) applied a test, which was very different to the common law test of contributory negligence, having regard to a number of subjective issues including the plaintiff's feelings of panic and helplessness. The majority rejected the defence's arguments that evidence to that effect should be rejected. Consequently, the majority declined to reduce the damages claim on account of the alcohol issue. It should be noted that Kourakis CJ dissented on this issue, stating that it was not reasonable for the plaintiff to get into the car and she should have simply walked back to the hotel, notwithstanding the fact that she was a young woman, was 10 weeks pregnant and it was about 2 am at night in an unfamiliar country area.

13. All three judges were unanimous on the seatbelt issue by applying the 'act of a stranger' doctrine. The doctrine is very rarely applied, except in the case of criminal prosecutions of regulatory offences. The judges found that the plaintiff had no reasonable opportunity to put her seatbelt on because the defendant accelerated from the stopping point with such force that it was too hard to do so. The rest of the driving also made it too difficult for her to put her seatbelt on at a later point. On that basis, the Full Court found that the 'act of a stranger' doctrine applied and they declined to reduce the claim by 25%.

14. The defendant, Allen, backed by his insurer, decided to seek special leave to appeal to the High Court on the two issues regarding alcohol and the use of a seatbelt. Special leave was granted.

High Court - *Allen v Chadwick* [2015] HCA 47

15. The two points of law requiring the High Court's attention were:

    1. The test to be applied for contributory negligence in connection with the alcohol argument and
    2. The operation and application of the 'act of a stranger' doctrine in connection with the seatbelt argument.

Under the *Australian Road Rules*, the rules across all the States and Territories of Australia are now the same, so if the 'act of a stranger' doctrine applied it could have an impact on many prosecutions across Australia.

16. The High Court were unanimous and essentially restored the decision of the trial judge. The ultimate result was that the alcohol reduction was not applied but the seatbelt reduction was applied.

17. On the alcohol aspect of the contributory negligence argument, the High Court applied well understood principles that had been cast into some doubt by the decision of Gray and Nicholson JJ in the court below. Rejecting the approach of the majority in the Full Court, the High Court reinforced the notion that the idiosyncrasies or feelings of the plaintiff should not be incorporated into the reasonable person in s 47(2)(b). Rather the issues to be determined are of the hypothetical reasonable person. The High Court made the point that that represents a Parliament's view about an appropriate balancing of the interests between a plaintiff and a defendant. Consequently, the decision is useful in expressing the legal approach to contributory negligence.

18. The High Court rejected the defendant's argument that it was clear and obvious what the reasonable person's response would have been once one knew what the objective circumstances were. The High Court emphasised the need to put the objectively reasonable person into the particular plaintiff's position, including all of the things that had happened leading up to the decision to stop, get out and then get back into the car. It is at that moment of making the decision to get back into the car, that one brings to account all that occurred on that trip. One can have regard to the plaintiff's evidence but not accepting all aspects of it insofar as they stray from what might be expected from the objectively reasonable person in those circumstances.

19. On the question of fact about whether it was reasonable for the plaintiff to get back into the car, the court accepted that it was a very small town, a short walk to the hotel, there were street lights only 200 metres in each direction which showed the plaintiff the way home, but importantly the High Court emphasised its acceptance of the trial judge's finding that the trip to that point was a confusing one due to the yelling of the two intoxicated men. Thus, they held it was readily understandable that anyone, including the plaintiff, would have been confused as to where she was at that point.

20. On the 'act of a stranger' doctrine, the High Court did not ultimately need to decide whether the defence was open on the *Australian Road Rules*, but made the point that there are some defences which apply to regulatory type offences, for example the defence of voluntariness if a person is asleep and put into a car without their knowledge and does not put on a seatbelt

as a result. The High Court went back to the trial judge's finding that there were reasonable opportunities for the plaintiff to put her seatbelt on. The High Court relied on the findings of fact made by the trial judge. The evidence before the trial judge was supported by expert evidence which demonstrated that there were periods of some seconds each when there were opportunities for the plaintiff to apply her seatbelt, even on extreme assumptions of manner of acceleration or the turning of the car while doing burnouts. It is on that factual basis that the High Court very clearly found that the 'act of a stranger' doctrine was not made out by the plaintiff.

21. The High Court's finding that there were reasonable opportunities for the plaintiff to put her seatbelt on was important because properly understood, the 'act of a stranger' doctrine is not about whether a plaintiff is or is not acting reasonably but whether the commission of the offence is beyond the control of the person concerned. For example, in the case of *Boucher v G J Coles & Co* (1974) 9 SASR 495 a can of spoiled peas was found on a shelf of a shop and the shopkeeper had no way of observing whether the can contained spoiled peas such that it was beyond the shop keeper's control. The Full Court of the Supreme Court of South Australia said in *Boucher* that the doctrine did not apply as it is a question of shopkeepers having to be on their guard, making random inspections and perhaps weighing cans of peas. Thus, in the case of *Allen v Chadwick*, the fact that it was difficult to put the seatbelt on was not enough, rather it had to be shown that it was impossible or beyond the plaintiff's control whether by virtue of the acts of others (strangers) or acts of God. As there were no acts that fit those descriptions, the defence failed.

22. Mr Livesey notes that it is usually a question of whether the plaintiff can marshal sufficient facts together to raise the potential operation of a criminal law defence, such as the 'act of a stranger' doctrine, which is usually very difficult and requires extreme facts, for example, the plaintiff being completely unaware they were in the car because they were asleep. Only once the plaintiff establishes facts that give rise to the operation of the defence under the criminal law, is it for the defendant, in the shoes of the prosecutor, to negate that on the balance of probabilities.

<u>Application of s 47 to Other States and Territories</u>

23. In NSW, s 138(2) of the *Motor Accidents Compensation Act 1999* (NSW) contains the presumption of contributory negligence and opportunity for rebuttal, but not the minimum reduction mandated by s 47 of the *Civil Liability Act 1936* (SA).

Damages Issue regarding GST

24. There was a GST damages issue worth about $50,000. The issue was that the trial judge had incorporated a GST component in the calculation for future care over the plaintiff's life. The argument mounted against was that, properly understood, the GST legislation contained an exemption so it was quite wrong for the trial judge to incorporate GST. The Full Court, in a supplementary judgment, dealt with the issue by saying precision in damages is impossible and it was not going to make any difference. Special leave to appeal was granted on this issue to the High Court. Ultimately, a small reduction to damages was made.

Issue of Length of the Case

25. The fact that the trial took 60 days was noted as a cause of concern by the High Court in [3] of their judgement. If the defendant had succeeded on the s 47 and s 49 arguments regarding alcohol and seatbelts respectively, the plaintiff would have recovered a judgment much less than $500,000 and the legal costs alone would have outweighed that after a 60 day trial and Full Court appeal.

Costs Order

26. It should also be noted that special leave to the High Court was granted on the basis that there would be no disturbance of the costs below and the applicant would pay the costs in the High Court in any event. The High Court frequently, when dealing with institutional litigants such as insurers or the tax office, recognises that the resolution of the points before it have important ramifications for those litigants in many other matters. Consequently, the 'price' of a grant of special leave to appeal to the High Court often involves an undertaking not to seek to disturb the costs orders made below.

BIOGRAPHY

Mark Livesey QC

Bar Chambers, Adelaide

Mr Livesey joined the SA Bar in 2000 and was appointed Queen's Counsel in 2006. His practice includes appellate advocacy, civil litigation, commercial litigation, insurance, medical negligence and wills and family provision. Mr Livesey was President of the Australian Bar Association 2014-2015.

Ian Benson

Ian Benson is Special Counsel at AR Conolly and Company and holds a First Class Honours degree in law.

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Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_11-12-2015_insurance_banking_construction_government.pdf

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