

# DRINKING, DRIVING AND CAUSING INJURY: THE POSITION OF THE PASSENGER OF AN INTOXICATED DRIVER

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*Being a guest passenger in a motor vehicle with an alcohol impaired driver carries substantial risk of personal injury. No one would doubt that where an accident results, both the passenger and the driver should take responsibility for the ensuing injuries. Under existing common law principles and recent legislative reforms however, there is a possibility that the alcohol impaired defendant driver may be able to avoid liability altogether. This article explores the various defences that the driver may raise and argues that defences which absolve the defendant from all liability should be abandoned and that contributory negligence remains the most appropriate means of providing a just and socially acceptable outcome for both the driver and guest passenger.*

## I INTRODUCTION

In Australia it has been estimated that one in every eight adult drinks alcohol at a 'risky' or 'high risk level'.<sup>1</sup> As an obvious corollary, the risk of injury to people engaging in this conduct is increased.<sup>2</sup> In the seven years from 1993-4 to 2000-1 more than half a million hospitalisations occurred as a result of risky and high-risk drinking.<sup>3</sup> Although the numbers of road fatalities where alcohol use was a contributing factor, decreased

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<sup>1</sup> Australian Bureau of Statistics (ABS), *Alcohol Consumption in Australia: A Snapshot, 2004-5* (2006) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/4832.0.55.001/>> at 12 December 2007. Risk levels associated with alcohol consumption are categorised as short and long term risks. The degree of risk for each category relates to the amount of alcohol consumption. For details of the amount of alcohol consumption required to be considered 'risky' or 'high risk' see data referred to in this footnote.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid. Statistics sourced from T Chikritzhs et al, *Australian Alcohol Indicators, 1990-2—1: Patterns of Alcohol Use and Related Harms for Australian States and Territories* (National Drug Research Institute, Curtin University of Technology, 2003).

during the 1980s and 1990s,<sup>4</sup> alcohol is still attributed as the number one cause of deaths on Australian roads.<sup>5</sup>

Of particular concern are statistics which suggest that young people aged between 18 and 24 years are most likely to drink at risky or high risk levels in the short term.<sup>6</sup> High risk drinking often referred to as 'binge drinking',<sup>7</sup> is said to lead to 'an increased incidence of falls, accidents (including motor vehicle accidents) and violence'.<sup>8</sup> Despite extensive education campaigns and advertising, excessive use of alcohol is still a mainstream part of the Australian lifestyle. As Watson notes, overuse of alcohol 'derives from a cultural context which views excessive alcohol consumption as a sign of masculinity and maturity, and is part of the Australian national myth'.<sup>9</sup>

While there appears to be a general acceptance of high alcohol consumption in the community, there is little tolerance for the consequences of the resultant behaviour. The criminal courts generally do not excuse criminal behaviour on the basis that the offender was intoxicated.<sup>10</sup> Over the past few years, civil courts have similarly shown a growing reluctance to award compensation where the claimant's self-intoxication has contributed to their own injury.<sup>11</sup> As the mantra of 'personal responsibility' begins to take a firm hold in the community psyche, the media, the courts and the parliament, a growing body of injured may find themselves with limited or no compensation due to their self-intoxication, even where the direct cause of their injury was another party's negligence.<sup>12</sup> As Dietrich notes, this is particularly harsh where a young person's

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<sup>4</sup> Australian Institute of Health and Welfare (AIHW), *Statistics on Drug Use in Australia 2002* (2003) <<http://www.aihw.gov.au/publications/phe/sdua02/sdua02-c03.pdf>> at 12 December 2007.

<sup>5</sup> ABS, above n 1.

<sup>6</sup> Ibid.

<sup>7</sup> The National Health and Medical Research Council categorises 'short term risky / high risk consumption' as equating to at least seven standard drinks for males and five for women. *Australian Alcohol Guidelines: Health Risks and Benefits* (2001), referred to in *Alcohol Consumption in Australia: A Snapshot, 2004-5* (2006) ABS, above n 1.

<sup>8</sup> Ibid.

<sup>9</sup> P Watson, 'You're Not Drunk if You Can Lie on the Floor Without Holding on – Alcohol Server Liability, Duty Responsibility and the Law of Torts' (2005) 11 *James Cook University Law Review* 108, 109 (footnotes omitted).

<sup>10</sup> See for example *Criminal Code 1899* (Qld) s 28, which provides a specific defence for involuntary intoxication only. The defence fails where there is evidence that the intoxication was 'to any extent' intentionally caused. Voluntary and involuntary intoxication may be taken into account in determining whether an accused had the necessary intent, where intent is an element of the offence. In all other cases self-induced intoxication will not provide an excuse to criminal conduct.

<sup>11</sup> This has been particularly evident in the cases of server liability. See for example, *Cole v South Tweed Heads Rugby League Football Club* (2004) 217 CLR 469. For commentary on this issue see, also, Watson, above n 9; G Orr and G Dale, 'Impaired judgements? Alcohol Server Liability and Personal Responsibility After *Cole v South Tweed Heads Rugby League Football Club Ltd*' (2005) 13 *Torts Law Journal* 103; A Hamad, 'The Intoxicated Pedestrian: Tortious Reflections' (2005) *Tort Law Review* 14; R Dixon and J Spinak, 'Common Law Liability of Clubs for Injury to Intoxicated Patrons: *Cole v South Tweed Heads Rugby League Football Club Ltd*' (2004) 27(3) *University of New South Wales Law Journal* 816.

<sup>12</sup> Of particular concern in this area is the effect of s 50 of the *Civil Liability Act 2003* (NSW), which precludes recovery of damages in a negligence action where the plaintiff was intoxicated, unless the plaintiff can establish it was *likely* the injury would have occurred even if he or she was not intoxicated. For an example of the effect of this legislative provision see, *Russell v Edwards* (2006) Aust Torts Reports 81-833 (NSW CA). This provision and case are discussed further below.

momentary ‘lapse in “personal responsibility”... precludes any recovery on the part of a plaintiff.’<sup>13</sup>

It is even more difficult to comprehend that in a wealthy country such as Australia, the location where you are injured may determine whether you receive compensation for an injury or are reliant on social security for support. Differences in the legislative reforms introduced in each State and Territory at the start of the century has resulted in a plethora of different outcomes for particular plaintiffs, defendants and circumstances.<sup>14</sup> Although not a recent phenomena, Victoria, Tasmania and the Northern Territory have statutory no-fault compensation schemes which provide compensation for victims of motor vehicle accidents either as a supplement to the common law system or in place of the common law system.<sup>15</sup> New South Wales has recently introduced a no fault compensation scheme for people who suffer catastrophic injuries in motor vehicle accidents.<sup>16</sup> In other parts of the country however, in order to obtain any compensation for motor vehicle accidents, the injured claimant must be able to establish fault under the common law torts system.

Where a driver’s ability to drive is impaired due to intoxication and an accident results, no-one would doubt that the driver should be liable for any resultant injuries to other road users. The situation however becomes more complex in situations where the plaintiff is also intoxicated and accepts a lift with an intoxicated driver. As the statistics above suggest, this type of risky behaviour is more likely to occur in the younger demographic, whose experience of alcohol is less extensive. Who should bear the responsibility for the resultant injuries in such a situation?

In answering this question, the intuitively acceptable approach is to apportion responsibility for the plaintiff’s injuries between the parties on the basis of contributory negligence and thereby respective blameworthiness. On the whole this has been the approach of the courts over the past three decades. It is suggested that in doing so an appropriate balance between ‘personal responsibility’ for **both** the plaintiff and defendant is struck.<sup>17</sup> For the plaintiff this involves ‘taking responsibility for one’s own decisions and actions,’<sup>18</sup> in voluntarily accepting a lift with an intoxicated person. This applies equally to the defendant, who must also take responsibility for the consequences of his or her self-intoxication. As the defendant driver is the person ultimately in charge of the vehicle this conclusion seems self evident. By viewing driver and passenger

<sup>13</sup> J Dietrich, ‘Duty of Care under the Civil Liability Acts’ (2005) 13 *Torts Law Journal* 17, 33.

<sup>14</sup> For a review of the differences in the legislative reforms, see D Butler, ‘A Comparison of the Adoption of the Ipp Report Recommendations and Other Personal Injuries Liability Reforms’ (2005) 13 *Torts Law Journal* 203. See also Dietrich, above n 13 and the table comparing the alcohol provisions of the various States and Territories provided in Orr and Dale, above n 11, 127-8.

<sup>15</sup> *Motor Accidents (Compensation) Act 1979* (NT); *Motor Accidents (Liability and Compensation) Act 1973* (Tas); *Motor Accidents Act 1973* (Vic).

<sup>16</sup> *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW).

<sup>17</sup> This has not been the case however with other negligence situations, particularly in relation to occupiers’ liability and obvious risks where the shift to personal responsibility to the plaintiff has been seen by many as going too far. As Lumney notes the shift in the focus of attention to the plaintiff’s personal responsibility has occurred at the expense of considering what is and should be the defendant’s personal responsibility for his/her own actions. See M Lumney, ‘Personal Responsibility and the “New” Volenti’ (2005) 13 *Tort Law Review* 76.

<sup>18</sup> Justice David Ipp’s definition of ‘personal responsibility’ in ‘Taking Responsibility’ (September 2004) *Quadrant* 16.

responsibility in this way, ‘tort law is ... seen as a system of ethical rules and principles of personal responsibility (and freedom) adopted by society as a publicly enforceable statement about how its citizens may, ought and ought not behave in their dealings with one another’.<sup>19</sup> This analysis sees moral rights and obligations as the basis for liability.<sup>20</sup>

However there are still a small number of cases where attempts have been made to absolve the defendant at common law of all liability on the basis of the ‘special relationship’ between the parties.<sup>21</sup> Recent legislative reforms have also opened the door to the possibility that a plaintiff passenger who is injured in a motor vehicle accident through the negligence of an intoxicated driver may be unable to recover damages. Surprisingly, despite the amount of litigation in this area, there still exists some uncertainty about the applicability of defences and the consequent effect of the plaintiff’s intoxication both at common law and under the various legislative provisions. It is timely, therefore to review the current law of negligence as it applies to the intoxicated driver and guest passenger.<sup>22</sup>

In doing so this article follows the classic formulation of a negligence action. In Part II it considers the effect of intoxication on the duty and standard of care owed by the defendant to the plaintiff. Part III then analyses the possible defences available at both common law and under legislation. Particular focus is given to the New South Wales and Queensland civil liability legislation where the most sweeping reforms have been made.

The article concludes that in relation to the common law, the courts should abandon defences based on ‘no breach of duty’ which absolve the defendant of liability. Such defences it is argued, are centred on outmoded notions of ‘proximity’ and ‘special relationships’ that avoid the development of a consistent set of rules based on coherent general negligence principles. Analysis of the legislative provisions highlights the difficulties in interpreting the legislation, the draconian nature of some provisions and the ineffectiveness of others. It is suggested that a clearer approach to the question of alcohol impaired driver liability is required and that the established defence of contributory negligence remains the most appropriate means of providing a just and socially acceptable outcome.

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<sup>19</sup> P Cane, *The Anatomy of Tort Law* (Hart Publishing, 1997) 27.

<sup>20</sup> See for example EJ Weinrib, ‘The Special Morality of Tort Law’ (1989) 34 *McGill LJ* 403; S Perry, ‘The Moral Foundation of Tort Law’ (1992) 77 *Iowa Law Review* 449.

<sup>21</sup> The basis of the special relationship forms the ‘no duty’ or ‘no breach of duty’ defence, which is discussed in detail in the next section.

<sup>22</sup> The most recent comprehensive review was provided by K Hogg, ‘Guest Passengers: A Drunk Driver’s Defence’ (1994) 2(1) *Torts Law Journal* 37. As will be discussed as this article proceeds, a number of matters discussed by Hogg have changed significantly since that time. For earlier reviews of this topic see CR Symmons, ‘Contributory Negligence Defences for the Drunken Driver’ (1977) 40 *Modern Law Review*; and RW Baker, ‘Guest Passengers and Drunken Drivers’ (1949) 65 *Law Quarterly Review* 20.

## II DUTY OF CARE AND STANDARD OF CARE

A *At Common Law*

There is no doubt that in general a driver owes a duty of care to his or her passengers and to all other road users.<sup>23</sup> The standard applied is that of the reasonable competent driver.<sup>24</sup> However the law has, in limited circumstances applied a different standard in situations where a ‘special relationship’ has been held to exist between the driver and the passenger. This ‘special relationship’ arises where the plaintiff is aware of an impairment of the defendant that may affect the ability of the defendant to drive at the standard of a reasonable competent driver.<sup>25</sup>

In some ‘exceptional’ circumstances the courts have even gone so far as to hold that because the standard to be applied is either so negligible, or impossible to define, no duty of care can be said to have arisen between the parties.<sup>26</sup> Whether referred to as ‘no duty’ or ‘no breach of duty’, the result is the same. The defendant is found not to have been negligent in his or her conduct towards the plaintiff.

Although often referred to as a defence to a negligence claim, the issue of ‘no duty’ or ‘no breach of duty’ arises at the scope of duty stage in a negligence determination.<sup>27</sup> As such, it is a question of law whether a ‘special relationship’ exists, and what is the appropriate measure of the standard of care owed. In theory this occurs prior to consideration of any available defences.<sup>28</sup> The onus, however, is on the defendant to establish that on the facts, either ‘no duty’ or ‘no breach of duty’ arose due to the special relationship between the parties. For this reason, although it will be discussed at this stage in the article, it is convenient to adopt the language that is often used when discussing the applicable standard of care in relation to intoxicated drivers and guest passengers as a ‘defence’ to a negligence action.<sup>29</sup>

1 *‘No Breach of Duty’- History of the ‘defence’*

In 1948 the High Court recognised that in certain circumstances an intoxicated defendant driver could successfully claim that she or he did not breach a duty of care to his or her passenger.<sup>30</sup> Whether referred to as the ‘no duty’ or ‘no breach of duty’ defence, in summary the defence required the defendant to establish that the relationship between the plaintiff and the defendant was such that it could no longer be said that she

<sup>23</sup> *Cook v Cook* (1986) 162 CLR 376 (‘Cook’).

<sup>24</sup> *Ibid* 387.

<sup>25</sup> *Ibid*.

<sup>26</sup> See for example *Insurance Commissioner v Joyce* (1948) 77 CLR 39 (‘Joyce’); *Gala v Preston* (1991) 172 CLR 243; *Roggenkamp v Bennett* (1950) 80 CLR 292 (Webb J).

<sup>27</sup> *Joyce* (1948) 77 CLR 39, 60 (Dixon J).

<sup>28</sup> In *Joslyn v Berryman* (2003) 214 CLR 552 (‘*Joslyn*’) [20], McHugh J referred to the fact that the courts used to prefer analysis of the issue as a question of ‘no breach of duty’ rather than contributory negligence as this allowed the courts to control the issues. The issue of ‘no duty’ being a question of law and the defence of contributory negligence a factual matter left to the jury.

<sup>29</sup> As will be discussed further below, as Dixon J noted in *Joyce*, the practical difference between the defence of ‘no breach of duty’ and voluntary assumption of risk may be minimal; *Joyce* (1948) 77 CLR 39, 54.

<sup>30</sup> *Joyce* (1948) 77 CLR 39.

or he breached a duty of care to the plaintiff. In the seminal case of *Insurance Commissioner v Joyce*,<sup>31</sup> Dixon J referred to the ‘no breach of duty’ defence as follows:

[W]hatever be the theory, the principle applied to the case of the drunken driver’s passenger is that the care he may expect corresponds with the relation he establishes. If he knowingly accepts the voluntary services of a driver affected by drink, he cannot complain of improper driving caused by his condition, because it involves no breach of duty.<sup>32</sup>

The argument proceeded on the basis that the normally objective standard of care that is owed by a driver to other road users, including passengers, takes on a subjective quality when the passenger knowingly accepts a lift with a highly intoxicated driver.<sup>33</sup> This is because the plaintiff knowing of the driver’s disability or incapacity cannot expect the driver to perform with the skill of the objectively reasonable driver. Actual knowledge is required, and while it can be inferred from the conduct of the parties,<sup>34</sup> mere suspicions are insufficient.<sup>35</sup> If the plaintiff is fully aware of the driver’s condition the question arises; what standard of care can be expected of the highly intoxicated driver? As there is said to be no such thing as a ‘reasonable drunk driver’ all standards of care are dispensed with and no duty can be said to have been breached.<sup>36</sup>

In *Joyce* the defences of voluntary assumption of risk and contributory negligence (at the time a complete defence to a negligence action) were also pleaded. The various members of the High Court relied on, or placed differing emphasis on the available defences and by majority, dismissed the plaintiff’s appeal.<sup>37</sup> Dixon J was the greatest exponent of the ‘no duty’ defence, although he found on evidentiary grounds that the defendant had failed to prove that the plaintiff was aware of the defendant’s incapacity to drive due to intoxication. Although preferring this approach on the basis that consideration of the circumstances in which the plaintiff accepts a lift with an intoxicated driver establishes the standard of care owed, and may therefore not require defences to be argued at all, Dixon J did note that ‘little difference will be seen in the forensic application’ of this defence and the defence of voluntary assumption of risk.<sup>38</sup>

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<sup>31</sup> Ibid.

<sup>32</sup> Ibid 56-7.

<sup>33</sup> Although it takes on this subjective quality, the courts still refer to the test as objective. As will be discussed below this is because the test becomes whether a defendant has objectively breached the lower standard of care.

<sup>34</sup> See for example *Hanson v The Motor Accidents Insurance Board* [1987] Supreme Court Tas 58/1987 List “A” 112/1984 (Unreported, Cosgrave J, 18 November 1987).

<sup>35</sup> *State Government Insurance Office (Qld) v Russell* (1979) 27 ALR 548, where the High Court referred with approval to Dixon J’s statement in *Joyce* (1948) 77 CLR 39, 61: that the defendant’s failure to give evidence ‘does not authorise the court to substitute suspicion for inference or to reverse the burden of proof or to use intuition instead of ratiocination’.

<sup>36</sup> Similarly this has been described as a situation where no duty of care is said to be owed. This is particularly so where the intoxication by the defendant is coupled with joint illegal activity such as the unlawful use of a car. See for example *Gala v Preston* (1991) 172 CLR 243; *Kickett v State Government Insurance Commission* [1996] Supreme Court Full Court WA, 73 of 1996 (Unreported, Kennedy, Owen and Scott JJ, 21 November 1996).

<sup>37</sup> *Joyce* (1948) 77 CLR 39, 46, 49. Although recognising the applicability of the ‘no breach of duty defence’, Latham CJ relied on the more established defences of contributory negligence and voluntary assumption of risk. Rich J also preferred to rely on voluntary assumption of risk in dismissing the plaintiff’s claim.

<sup>38</sup> Ibid 54.

While this may generally be the case, it should be noted there is a difference between the issues to be proved in the ‘no breach of duty’ and the voluntary assumption of risk defence. As Burt CJ pointed out in *Jeffries v Fisher*.<sup>39</sup>

[T]here does appear to be the one difference of some importance in that the “no breach of duty” principle is satisfied when the gratuitous passenger’s injuries are caused by the improper driving caused by the known drunken condition of the driver. For the defence of *volenti non fit injuria* to succeed, however, not only must the injury to the gratuitous passenger be caused by improper driving caused by the driver’s intoxicated condition, but in addition to that, and as a further step, it must be established that the gratuitous passenger fully appreciated the risk and voluntarily accepted it. Of course in many cases that appreciation and acceptance can readily be inferred from knowledge, but the point to be made is that knowledge alone is insufficient whereas knowledge alone is enough to attenuate the duty which lies at the basis of the no breach of duty principle.<sup>40</sup>

## 2 *Applicability of the ‘No Breach of Duty Defence’*

Although, after *Joyce*, courts were prepared to acknowledge the existence of the ‘no breach of duty’ principle, courts preferred to rely on the two exculpatory defences of contributory negligence and voluntary assumption of risk in dismissing a plaintiff’s claim against an intoxicated driver.<sup>41</sup> The introduction of apportionment legislation in the middle of the last century saw an even greater reliance by the courts on the defence of contributory negligence.<sup>42</sup> This defence had a more attractive and just outcome. The defendant, guilty of socially unacceptable and dangerous conduct, could not avoid liability. At the same time, the plaintiff, who also engaged in socially unacceptable conduct, could not avoid the consequences of his or her failure to take care of their own safety. The availability of compulsory statutory insurance also influenced the courts approach.<sup>43</sup> It had been suggested that with the introduction of apportionment legislation, the authoritative value of the earlier cases which applied the ‘no breach of duty principle’ was questionable.<sup>44</sup>

However with the High Court’s decision in *Cook v Cook*,<sup>45</sup> the existence of a ‘no breach of duty’ defence was confirmed. The case, coming at the rise of proximity as a determinant to the existence and scope of a duty of care, found that in exceptional circumstances, the duty owed by the defendant driver to a passenger could be lowered

<sup>39</sup> [1985] WAR 250.

<sup>40</sup> Ibid 253. See also *Avram v Gusakoski* [2006] WASCA 16, [21].

<sup>41</sup> See for example *Jansons v Public Curator of Queensland* [1968] Qd R 40; *O’Shea v The Permanent Trustee Company of New South Wales* [1971] Qd R 1; *Roggenkamp v Bennett* (1950) 80 CLR 292 (where only Webb J dismissed the plaintiff’s appeal on the basis of the ‘no breach of duty defence’, the remaining judges McTiernan and Williams JJ preferring the defence of voluntary assumption of risk). See also *Radford v Ward* (1990) ATR 81-064; *Wills v Bell* [2002] QCA 419.

<sup>42</sup> *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) pt 3; *Law Reform Act 1995* (Qld) pt 2 div 3; *Civil Liability Act 1936* (SA) s 50; *Wrongs Act 1954* (Tas) s 4; *Law Reform (Miscellaneous Provisions) Act 1955* (ACT) pt V; *Law Reform (Miscellaneous Provisions) Act 1956* (NT) pt V; *The Law Reform (Contributory Negligence and Tortfeasors’ Contribution) Act 1947* (WA).

<sup>43</sup> See for example C Sappideen et al, *Torts Commentary and Materials* (Thomson Law Book Co, 9<sup>th</sup> ed, 2006) 861, referring to the compulsory statutory schemes available in all States and Territories in relation to motor vehicle accidents.

<sup>44</sup> Hogg, above n 22, 5, referring to JG Fleming, *The Law of Torts* (The Law Book Co Ltd, 8<sup>th</sup> ed, 1992) 304. See also *Jansons v Public Curator of Queensland* [1968] Qd R 40, 44 (Lucas J).

<sup>45</sup> (1986) 162 CLR 376 (‘*Cook*’).

to take into account the experience and ability of the defendant driver.<sup>46</sup> In *Cook* the plaintiff's knowledge that the defendant did not hold a licence and was a learner driver meant that the plaintiff could not expect from the defendant a standard of care she was unable to attain.<sup>47</sup> This did not detract from the objectivity of the inquiry but imported the normative consideration of the effect of the particular relationship between the parties. In coming to this conclusion the court referred with approval to the approach of the court in the earlier decision in *Joyce* with respect to the 'no breach of duty' defence. In particular Brennan J noted:

A passenger who accepts carriage in a vehicle with knowledge of a condition which disables the driver from attaining the standard of care ordinarily to be expected of a prudent driver or who knows of a defect in the vehicle establishes a relationship with the driver which is different from the driver's relationship with other users of the highway. Knowledge of the disabling condition of the driver or the defect is knowledge of an unusual condition which may affect the application of the standard of care that would otherwise be expected.<sup>48</sup>

Thus as Hogg notes, *Cook* legitimised the 'no breach of duty' defence first raised in *Joyce* by explaining it in terms of general principle.<sup>49</sup> However, the application of the defence to intoxicated drivers remained difficult, and diverged from the general principle enunciated in *Cook* in a significant way. Whereas *Cook* allowed the objective standard of care to be modified, courts were reluctant to consider that a driver's standard of care could vary in accordance with his or her degree of intoxication and the plaintiff's knowledge and appreciation of the condition. Applying a standard of the 'reasonable intoxicated driver' ran counter to public policy and would, it was held, be impossible to articulate.<sup>50</sup>

The way in which this was rationalised in subsequent cases, in the face of the clearly stated general principle in *Cook*, was to hold that the principle would only apply in situations where the defendant driver was so affected by alcohol as to be *totally* incapable of driving the vehicle.<sup>51</sup> Where the plaintiff was aware of the defendant's condition, the applicable standard of care owed would be so slight as to be negligible and / or incapable of determination. Thus no breach of duty could arise. This, it was held, accorded with the court's repeated statement in *Cook* that the standard of care

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<sup>46</sup> Note however that Brennan J did not embrace the proximity concept as the basis for the decision. He preferred the reasoning of Dixon J in *Joyce*.

<sup>47</sup> In fact in this particular case, the plaintiff's conduct had exhibited more than mere knowledge of the defendant driver's inexperience. Fully aware of this fact, the plaintiff actively encouraged the defendant to drive the vehicle on the basis that she would supervise the defendant driver.

<sup>48</sup> (1986) 162 CLR 376, 383 (Brennan J).

<sup>49</sup> Hogg above n 22, 43. The availability of the defence was further confirmed by the High Court in the case of *Gala v Preston* (1991) 172 CLR 243, where the plaintiff and defendant's joint drinking spree, ended in the parties involved in a high speed chase in a stolen vehicle which the defendant was driving. While intoxication of the parties played a part in the court's determination of no duty, of greater significance was the joint illegality involved.

<sup>50</sup> *Radford v Ward* 11 M.V.R. 509, 511 (Murphy, Teague JJ); *Wills v Bell* [2002] QCA 419, 320 (White J); *Gala v Preston* (1991) 172 CLR 243, 255, 279 – 280. See also *Joslyn v Berryman* (2003) 214 CLR 552 (McHugh J [36]; Gummow and Callinan JJ [73]; Kirby J [149]), where the court in the context of contributory negligence has referred to the reasonable person as a sober person.

<sup>51</sup> *Radford v Ward* 11 M.V.R. 509, 514.

could only be attenuated in ‘special and exceptional circumstances’.<sup>52</sup> In the case of the intoxicated driver and guest passenger, ‘special and exceptional circumstances’ equated with a state of intoxication depriving the defendant driver of any ability to competently drive the vehicle, thereby eliminating a standard of care from arising.

The conceptual difficulty with this approach is evident in the judgment of Murray AJA in the case of *Avram v Gusakoski*.<sup>53</sup> In finding that both the plaintiff and defendant were heavily intoxicated he stated:

[w]hile the respondent [plaintiff] knew that the appellant [driver] was intoxicated, and quite substantially so, there was nothing to suggest that he knew that the level of intoxication was such as to be translated into a reduced capacity to properly control and manage the car, so that the way in which the accident was caused reflected that fact.<sup>54</sup>

With respect, it is suggested that such a statement is hard to substantiate in light of the general and widely accepted knowledge of the effect of intoxication on driving ability. What Murray AJA is attempting to avoid is a principle which it is suggested he sees as producing an unjust and unacceptable result.

In many cases, the requirement of *actual* knowledge by the plaintiff of the defendant’s condition excluded the defence applying. This was because the plaintiff’s self-intoxication precluded him or her from the ability to appreciate the defendant driver’s impairment. Where the plaintiff is also intoxicated, the defence is therefore unlikely to apply, unless the plaintiff and defendant had been drinking together in the full knowledge that they would later be driving the vehicle in an intoxicated state. Accordingly, it is unlikely that where the plaintiff passenger is also intoxicated, the defence will apply outside of the situations where the parties have been on a joint drinking spree.<sup>55</sup>

<sup>52</sup> Ibid. For situations where *Cook* has been successfully argued see, *Imbree v McNeilly* [2006] NSWSC 680; *Rickets v Laws & Anor* (1988) 14 NSWLR 311.

<sup>53</sup> [2006] WASCA 16 (Unreported Judgment).

<sup>54</sup> Ibid [77] (Murray AJA).

<sup>55</sup> See for example *Hanson v The Motor Accidents Insurance Board* [1987] Supreme Court Tas 58/1987 List “A” 112/1984 (Unreported, Cosgrave J, 18 November 1987), where the passenger and defendant driver had been on a joint drinking spree while they were driving around the Tasmanian country side. The court held the defence of no duty applied, as there was a time at which it must have been obvious to the plaintiff that the driver was going to reach a point where he became totally incapable of driving the motor vehicle. Accordingly, the plaintiff was held to be aware of the defendant’s incapacity and no breach of duty arose. Cf *Wills v Bell* [2002] QCA 419, where there had been no earlier intention of the parties to drive and by the time such a decision was made it was held that the plaintiff was no longer capable of knowing of the defendant drivers incapacity. As White J noted ‘[i]f, because of his own intoxication the passenger did not fully appreciate the driver’s condition or its extent then the defence would, in general, not be made out’, 321.

### 3 'No breach of Duty' - Relevance Today?

Calls for courts to decline to follow *Cook* have been unsuccessful.<sup>56</sup> In 2006, the New South Wales Supreme Court applied the principle arising from *Cook* to the situation of an inexperienced and unlicensed driver.<sup>57</sup> Similar to *Cook* the defendant driver was found to have fallen below the attenuated standard of the inexperienced driver.<sup>58</sup> In other recent cases, the courts have acknowledged the defence, although finding on the facts, that it has not applied.<sup>59</sup> In the most recent pronouncement by the High Court on the relationship between an intoxicated driver and his or her passenger, McHugh J in obiter stated as follows:

Now that this Court has rejected the doctrine of proximity, it may be that it would no longer follow the reasoning in *Cook* and *Gala*. Moreover, the notion of a standard of care that fluctuates with the sobriety of the driver is one that tribunals of fact must have great difficulty in applying. While *Cook* and *Gala* stand, however, they are authorities for the proposition that, in special and exceptional circumstances, it would be unreasonable to fix the standard of care owed by the driver by reference to the ordinary standard of care owed by a driver to a passenger. In some cases, knowledge by a passenger that the driver's ability to drive is impaired by alcohol may transform the relationship between them into such a category.<sup>60</sup>

It is submitted that adherence to the *Cook* principle is no longer warranted. With the demise of proximity, principles so intricately connected to the notion of proximity within the relationship of the plaintiff and defendant should, it is argued, be either reformulated in line with current principles applicable to the determination of the existence and scope of a duty of care or no longer applied as representing the law. As McHugh J notes, adopting a variable standard of care involves difficult considerations. Applying a variable standard for some impairments, such as the inexperienced driver, and not others, such as the intoxicated driver, results in a haphazard and unprincipled approach. Would a lower standard of care apply if the passenger knows that the driver had a hearing impairment as Dixon J in *Joyce* suggests?<sup>61</sup> Of even greater anomaly is the situation where there are two passengers in a car, one who is aware of the defendant driver's inexperience the other is not. Under the *Cook* principle each would be owed a different standard of care. It was this type of reasoning which lead courts in the United Kingdom to avoid the *Cook* approach.<sup>62</sup> As Deitrich notes:

<sup>56</sup> See for example *Imbree v McNeilly* [2006] NSWSC 680, [44]-[5], where Studdert J stated: 'Dr Morrison submitted that the decision of the High Court in *Cook v Cook* ... was no longer to be regarded as the law...I note Dr Morrison's submission but I consider that I am obliged to follow *Cook v Cook*, and that the principles to be found in that decision are directly in point'. See also *Preston v Dowell* (1987) 45 SASR 111; *MacMorran v MacMorran* (1989) 10 MVR 343; *Ricketts v Laws* (1988) 14 NSWLR 311.

<sup>57</sup> *Imbree v McNeilly* [2006] NSWSC 680.

<sup>58</sup> *Ibid* [84]. Even though the defendant driver breached this standard the plaintiff's damages were reduced on the basis of contributory negligence, the passenger being guilty of failing to adequately supervise and instruct the learner driver.

<sup>59</sup> See for example *Avram v Gusakoski* [2006] WASCA 16 (Unreported Judgment).

<sup>60</sup> *Joslyn* (2003) 214 CLR 552, [30] (McHugh J) (footnotes omitted).

<sup>61</sup> *Joyce* (1948) 77 CLR 39, 56.

<sup>62</sup> See for example *Nettleship v Western* [1971] 2 QB 691.

no-duty situations are contrary to the development of a principled, general law of negligence; 'special cases' cannot readily be justified. Privileged defendants or disentitled plaintiffs tend to undermine the application of, and underlying moral precepts for, general principles of fault-based liability (where such fault causing harm to a plaintiff can be established).<sup>63</sup>

An approach that avoids the difficulties as outlined above is easily attained through the use of the defence of contributory negligence and apportionment legislation. Take for example the classic situation of *Cook*, the inexperienced driver and the knowing passenger. If *Cook* was **not** applied, the inexperienced driver would owe the same standard of care to both the passenger and all other road users. If the driver's standard fell below that of a reasonable competent driver, the duty owed to all injured as a result of the defendant's driving would be breached. The defendant driver may however be able to claim contributory negligence against the passenger. By allowing themselves to be driven by the inexperienced driver,<sup>64</sup> or failing to adequately supervise and instruct the learner driver,<sup>65</sup> they may have fallen below the standard of care a reasonable person would take for themselves and thereby have contributed to the injuries sustained.<sup>66</sup> This applies equally to the situation of the intoxicated driver and guest passenger.

While the attraction of the 'no breach of duty' defence for the intoxicated driver resides in its ability to provide a complete defence, the same result may be attained under civil liability reforms in some States. Although not advocated by the writer as a principled response, this option remains available. The provision in these States, that allows a court to apportion contributory negligence of 100%, may be applied to deny the plaintiff compensation in circumstances where the court 'considers it just and equitable to do so.'<sup>67</sup> In recommending the provision, the Ipp Panel<sup>68</sup> noted:

Our view is that while the cases in which it will be appropriate to reduce the damages payable to a contributory 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 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.<sup>69</sup>

As will be discussed further below in relation to contributory negligence, it is difficult to justify a conclusion that the defendant's conduct was negligent and caused the

<sup>63</sup> Dietrich, above n 13, 24.

<sup>64</sup> *Cook v Cook* (1986) 162 CLR 376.

<sup>65</sup> *Imbree v McNeilly* [2006] NSWSC 680. In this case the court first applied the lower standard of care and after finding it was breached applied contributory negligence.

<sup>66</sup> *Froom v Butcher* [1976] QB 286.

<sup>67</sup> *Civil Liability Act 2003* (Qld) s 24. See, also, *Civil Law (Wrongs) Act 2002* (ACT) s 47; *Civil Liability Act 2002* (NSW) s 5S; *Wrongs Act 1954* (Tas) s 4(1); *Wrongs Act 1958* (Vic) s 6(3).

<sup>68</sup> The Ipp Panel of 'eminent persons' was appointed by a joint State, Territory and Federal ministerial meeting. Its brief was to review the law of negligence: Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002) ('Ipp Panel') <<http://revofneg.treasury.gov.au/content/review2.asp>> at 12 December 2006.

<sup>69</sup> *Ibid* [8.25]. The Ipp Panel referred to situations above 90% as courts prior to this provision had refused to allow a reduction of damages based on contributory negligence of above 90%. See, eg, *Civic v Glastobury Steel Fabrications Pty (Limited)* (1985) Aust Torts Reports 80-746.

plaintiff injury, yet at the same time finding that the plaintiff is not ‘worthy’ of any compensation whatsoever. The continued relevance of the ‘no breach of duty’ defence is therefore questionable and despite its application only in extreme cases its potential to cause injustice warrants its reconsideration.

## B *Civil Liability Legislation*

### 1 *The Relevant Provisions*

In the ‘plaintiff-friendly’ era of the 1980s and 1990s, the possibility that a plaintiff or class of plaintiffs may have been inadvertent or careless in taking care for their own safety was, where reasonably foreseeable, a relevant factor in determining the standard of care that applied to the defendant.<sup>70</sup> This included inadvertence or carelessness by the plaintiff as a result of alcohol consumption. However, more recently, the courts have developed a less tolerant view of a plaintiff’s behaviour and are ‘attributing greater weight to the notion of personal responsibility when determining liability in negligence cases’.<sup>71</sup>

This view has been reflected in the Queensland and New South Wales civil liability legislation, where provisions stipulate that a person’s intoxication is irrelevant to the determination of the existence of a duty of care.<sup>72</sup> Similarly, ‘the fact that a person is or may be intoxicated does not of itself increase or otherwise affect the standard of care owed to the person’.<sup>73</sup>

In other words, where a person’s ‘capacity to exercise proper care and skill [to protect themselves] is impaired’<sup>74</sup> through alcohol consumption, there is no need to take any greater precautions to avoid causing them harm or injury than would be taken where the person is sober. The New South Wales legislation has gone further by precluding damages in situations where a plaintiff was intoxicated at the time of the injury and they are unable to satisfy the court that they would have been ‘likely to have incurred the harm even if not intoxicated’.<sup>75</sup> As commentators have noted, this ‘draconian’ provision applies to all plaintiffs irrespective of ‘the greater control, experience, or superior position of a defendant or for the age or other physical or mental incapacity or

<sup>70</sup> See for example *March v Stramere (EMH) Pty Ltd* (1991) 171 CLR 506, 519, 520, 536-7; *Pennington v Norris* (1956) 96 CLR 10; *McLean v Tedman* (1984) 155 CLR 306, 311, 312; *Nagle v Rottneest Island Authority* (1993) 177 CLR 423, 431. See, also, B McDonald, ‘The Impact of the Civil Liability Legislation on Fundamental Policies and Principles of the Common Law of Negligence’ (2006) 14 *Torts Law Journal* 268.

<sup>71</sup> The Honourable Justice David Ipp, ‘Personal Responsibility in Australian Society and Law : Striving for Balance’ (Edited version of Oration delivered at the Annual Scientific Meeting of the Australian and New Zealand College of Anaesthetists, Perth, 1 May 2004). See, also, Orr and Daly, above n 11. Recent cases demonstrating this trend include: *Cole v South Tweed Heads Rugby League Football Club* (2004) 217 CLR 469; *Vairy v Wyong Shire Council* (2005) 221 ALR 711; *Mulligan v Coffs Harbour City Council* (2005) 221 ALR 764.

<sup>72</sup> *Civil Liability Act 2003* (Qld) s 46; *Civil Liability Act 2002* (NSW) s 49. No similar provisions exist in other states or territories.

<sup>73</sup> *Civil Liability Act 2003* (Qld) s 46(1)(c). It should be noted that this provision does not apply to actions occurring on licensed premises. See also *Civil Liability Act 2002* (NSW) s 49(1)(c).

<sup>74</sup> This is the definition for intoxication provided in sch 2 *Civil Liability Act 2003* (Qld). This is discussed further below.

<sup>75</sup> *Civil Liability Act 2002* (NSW) s 50.

vulnerability of a plaintiff.<sup>76</sup> For the 16 year old plaintiff in *Russell v Edwards*,<sup>77</sup> who was supplied with alcohol at a friend's parents place, the stark consequences of this provision are evident. Intoxicated to the point of being unable to properly exercise judgment, the young man dived into the shallow end of his friend's pool. While it was accepted that the parents had failed to adequately supervise the party, the plaintiff was unable to recover as he was unable to establish that the injury would have occurred even if he had been sober. This provision takes the law 'much further even than the increasingly defendant-friendly common law',<sup>78</sup> and in doing so allows the clearly negligent defendant to avoid responsibility for their actions while at the same time making the plaintiff totally responsible. As this section specifically does not apply to motor vehicle accidents, its application is not considered further.<sup>79</sup>

## 2 Meaning of 'Intoxication' under Civil Liability Legislation

Under the *Civil Liability Act 2003* (Qld), intoxication is defined as meaning, 'that the person is under the influence of alcohol or a drug to the extent that the person's capacity to exercise proper care and skill is impaired.'<sup>80</sup> No guidance as to the degree of impairment required to satisfy the provisions is provided.

Impair means to damage or weaken.<sup>81</sup> In relation to traffic offences, it is clear that the legislature considers that an unacceptable degree of impairment occurs when a person's blood alcohol concentration is in excess of 50mgs of alcohol per 100mls of blood.<sup>82</sup> In South Australia and the Northern Territory 80mgs of alcohol per 100mls of blood is conclusive of intoxication.<sup>83</sup> Under the common law, in order to establish intoxication a far greater degree of impairment has often been required. The courts treatment of what it means to be intoxicated has not been consistent and appears to be defined according to the outcome desired. In some cases, for example, a plaintiff's self-intoxication has been interpreted as not so gross as to be incapable of becoming a voluntary passenger, yet too high to be able to appreciate that the driver was not capable of driving.<sup>84</sup>

In *Russell v Edwards*,<sup>85</sup> the plaintiff referred to his own state of intoxication as being 'unable to control...normal co-ordination skills and slurred speech'.<sup>86</sup> As he accepted that he was 'unable to exercise his judgment properly',<sup>87</sup> the definition of intoxication under the New South Wales legislation was not further explored. The court however

<sup>76</sup> McDonald, above n 70, 297.

<sup>77</sup> [2006] NSWCA 19.

<sup>78</sup> Ibid.

<sup>79</sup> *Civil Liability Act 2002* (NSW) s 3B(1)(e).

<sup>80</sup> *Civil Liability Act 2003* (Qld) sch 2. In New South Wales intoxication refers to 'a person being under the influence of alcohol or a drug': *Civil Liability Act 2002* (NSW) s 48.

<sup>81</sup> JM Hughes, P A Mitchell and W S Ramson (eds), *The Australian Concise Oxford Dictionary* (Oxford University Press, 2<sup>nd</sup> ed, 1993).

<sup>82</sup> See for example *Transport operations (Road Use Management) Act 1995* (Qld) s 79.

<sup>83</sup> *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 16; *Civil Liability Act 1936* (SA) s 48. For a list and comparison of the definitions in each of the States and Territories see, Orr and Dale, above n 11.

<sup>84</sup> See for example *Howard v Hamilton* [1996] Supreme Court of Western Australia 74/95 (Unreported, Rowland, Franklyn, Murray JJ, 9 May 1996).

<sup>85</sup> [2006] NSWCA 19.

<sup>86</sup> Ibid [10].

<sup>87</sup> Ibid [11].

noted the difficulty in determining at what point the plaintiff became ‘intoxicated’, referring to him as being affected by beer he had been drinking and later in the evening intoxicated after consuming several rums.<sup>88</sup>

It is suggested that the ordinary meaning of the words contained in the statutory definition of ‘intoxication’ imports a low threshold test.<sup>89</sup> This interpretation is consistent with the objects of the Act and the emphasis on putting ‘personal responsibility back into the law.’<sup>90</sup>

### 3 *Application of the Intoxication Standard of Care Provisions*

Difficulties in the interpretation and application of the sections dealing with the standard of care owed to intoxicated plaintiffs have already been evident. In the case of *Vale v Eggins*,<sup>91</sup> the court was concerned with the application of s 49 of the *Civil Liability Act 2002* (NSW) to the situation of an intoxicated pedestrian. Similar to the Queensland provision, s 49(c) provides ‘the fact that a person is or may be intoxicated does not of itself increase or otherwise affect the standard of care owed to the person’.<sup>92</sup> At first instance, the trial judge interpreted the section as meaning that a person who was affected by alcohol and as a result acted unpredictably (in this case by walking in front of oncoming traffic) was not entitled to claim compensation. On appeal all members of the court categorically rejected this interpretation,<sup>93</sup> with Bryson JA stating ‘[i]t is not the meaning of s 49(1)(c) that the standard of care is lowered in the case of a person who may be intoxicated, in comparison of the standard of care to a person who is not intoxicated. If and insofar as the Trial Judge expressed such a view, it has my disapproval.’<sup>94</sup> As Beazley JA noted the standard of care remained that of the ‘ordinary prudent driver,’<sup>95</sup> who was required to act reasonably in the circumstances. This involved taking care of all other road users, including pedestrians such as the plaintiff. There was no evidence that the defendant was aware of the plaintiff’s intoxication. Furthermore, any suggestion that the defendant was entitled to presume the plaintiff was intoxicated, and then to behave in a way that treated him as a sober person crossing the road normally, was dismissed.

In accordance with this interpretation, it is difficult to envisage a situation involving a negligent intoxicated driver and intoxicated guest passenger where this section would be relevant. Taken literally however could it be used in relation to the ‘no breach of duty’

<sup>88</sup> Ibid [9].

<sup>89</sup> The ‘golden rule’ of statutory interpretation requires that words be given their grammatical and ordinary sense, unless it would lead to absurdity: *Grey v Pearson* (1857) 10 ER 1216, 1234 (Lord Wensleydale).

<sup>90</sup> Queensland, *Second Reading Speech*, Legislative Assembly, 11 March 2003, 369 (Rod Welford, Attorney General of Queensland).

<sup>91</sup> [2006] NSWCA 348.

<sup>92</sup> *Civil Liability Act 2002* (NSW) s 49.

<sup>93</sup> While all members agreed that this was not the effect of s 49, they diverged on the factual issue of whether there was in fact a breach of duty: Beazley and McColl JA finding for the plaintiff, Bryson JA finding for the defendant.

<sup>94</sup> *Vale v Eggins* [2006] NSWCA 348, [69]. The court held that the trial judge had erroneously incorporated s 50 *Civil Liability Act 2002* (NSW), which requires a denial of damages in the case of an intoxicated plaintiff into the application of s 49. As noted above s 50 has no application to motor vehicle accidents.

<sup>95</sup> *Vale v Eggins* [2006] NSWCA 348, [27].

defence? Take for example the situation of a sober person knowingly accepting a lift with a clearly intoxicated person. The sober person would be said to be aware of the intoxication and could not expect the driver to exercise the care of a reasonable sober driver. Therefore the applicable standard would be so negligible that no breach of duty would arise. Under the legislation, the fact the passenger was intoxicated could not alter the standard owed, which if sober would be non-existent. Thus the ‘no breach of duty’ defence would apply even though the passenger was drunk and without knowledge. This interpretation and application of the section would dramatically change the common law position, and is not an interpretation likely to be favoured by the courts on current authority.<sup>96</sup>

### III NEGLIGENCE DEFENCES

#### A *Contributory Negligence*

##### 1 *At Common Law*

No-one would doubt that a passenger who accepts a lift from an intoxicated driver risks injury to him or herself. In doing so, the passenger has failed to take reasonable care for their own safety and may be held to have contributed to the injuries that result from the defendant’s negligent driving.<sup>97</sup> This is particularly so where the plaintiff is aware of the defendant’s intoxication and still accepts the lift. Similarly, as contributory negligence imposes an objective test, the defence may be pleaded where the plaintiff was not aware of the defendant’s intoxication but ‘ought’ to have been aware.<sup>98</sup> Thus constructive knowledge is sufficient.

However, prior to the High Court’s decision in *Joslyn v Berryman*,<sup>99</sup> self-intoxication by the plaintiff could, in certain circumstances, defeat an intoxicated defendant driver’s plea of contributory negligence. The argument proceeded on the basis that where the plaintiff’s self-intoxication had prevented him or her from assessing the defendant driver’s impairment, in situations where the plaintiff had not intended prior to drinking to get a lift with the defendant, contributory negligence would not arise.

In *Joyce*,<sup>100</sup> Dixon J referred to the plaintiff’s self-intoxication in this way: ‘but for the plaintiff, who was not driving the car, to drink until he was too stupid to observe the defendant’s condition can hardly be considered contributory negligence of which the accident was a reasonable or natural consequence’.<sup>101</sup>

Cases that subsequently followed this reasoning, established a line of authority that held the intoxicated passenger liable for contributory negligence only in situations ‘where the plaintiff knew, at the time he or she began drinking, that he or she was likely to travel as

<sup>96</sup> See for example *Grice v Queensland* [2005] QCA 272, [25].

<sup>97</sup> *Froom v Butcher* [1976] QB 286, confirmed that contributory negligence requires a finding that the plaintiff’s failure to take reasonable care for their own safety was causally connected to the resultant injury.

<sup>98</sup> *Joslyn* (2003) 214 CLR 552.

<sup>99</sup> *Ibid.*

<sup>100</sup> (1948) 77 CLR 39.

<sup>101</sup> *Ibid* 60, cf however, 47 (Latham CJ).

a passenger with the defendant and that the defendant was likely to drink.<sup>102</sup> Although this clearly appears to import a subjective test into contributory negligence, it was argued that the test remained objective as it asked what the person *in the circumstances* that the plaintiff found him or herself in, ought to have known. Constructive knowledge would arise, it was held, on the basis that in the circumstances the plaintiff ought to have known of the defendant's incapacity or should not have allowed him or herself to drink to the point where he or she was unable to assess the defendant's condition, in situations where he or she should have foreseen that such an assessment may have become necessary.<sup>103</sup>

These cases came at the height of the 'plaintiff-friendly' era. The prevailing view was that it was acceptable for a passenger in these circumstances to fail to take reasonable care for their own safety, provided they did not deliberately set out to do so, or were reckless to the chance that accepting a lift with an intoxicated driver may occur.<sup>104</sup> In other words, it was not considered unreasonable for a plaintiff to become intoxicated to the extent that they might unknowingly enter a vehicle with an intoxicated driver, where such was unplanned and unexpected. As King CJ noted 'in a common social situation, one indeed which is commonly recommended in road safety publicity, one person assumes responsibility for driving leaving the others to drink as they see fit'.<sup>105</sup>

Under this application of contributory negligence, the question of fact which arose was: was it unreasonable for the plaintiff to become intoxicated to the extent that they did?<sup>106</sup> This required knowledge (including constructive knowledge) by the plaintiff of either the amount of alcohol consumed by the defendant or the defendant's outward manifestation of an incapacity to safely drive the vehicle. In analysing the applicability of the defence to the intoxicated driver and intoxicated passenger Hogg noted at the time:

[u]nless or until the common law recognises that becoming drunk is enough, on its own, to give rise to the defence of contributory negligence, an extension of the law as undertaken by Cooper J in *Morton v Knight* cannot be justified. It is wrong to state as a general principle that self-intoxication will never be an excuse to the defence of contributory negligence.<sup>107</sup>

<sup>102</sup> See for example Hogg, above n 22, 33. See also, *McPherson v Whitfield* [1996] 1 Qd R 474 (CA); *Nominal Defendant v Saunders* (1988) 8 MVR 209; *Banovic v Perkovic* (1982) 30 SASR 34, 36-7. See also the discussion of these cases in *Joslyn* (2003) 214 CLR 552, 566 (McHugh J).

<sup>103</sup> *Joyce* (1948) 77 CLR 39, 46; *Roggenkamp v Bennett* (1950) 80 CLR 292.

<sup>104</sup> Hogg, above n 22, 36, where she states: 'The consumption of alcohol to that extent could also be regarded as contributory negligence in a situation where the plaintiff did not, prior to becoming inebriated, make any arrangements to ensure a safe journey home.'

<sup>105</sup> *Banovic v Perkovic* (1982) 30 SASR 34, 37; cf however, *Morton v Knight* [1987] Supreme Court, Brisbane No 1893 (Unreported, Cooper J, 18 April 1990).

<sup>106</sup> See for example Hogg, above n 22, 36.

<sup>107</sup> *Ibid.* In *Morton v Knight* [1987] Supreme Court, Brisbane No 1893 (Unreported, Cooper J, 18 April 1990), Cooper J had refused to accept that a plaintiff's inability to assess the defendant's incapacity, due to their own intoxication, could deny the existence of contributory negligence. In that case, the plaintiff, who had been drinking at a Hotel and had previously indicated an intention not to drive home, met with the defendant later in the day, at which time the plaintiff was grossly intoxicated. The defendant who, on the objective evidence before the court, was also visibly intoxicated, offered the plaintiff a lift home. During the journey, the defendant lost control of the vehicle and collided with a pole, causing injury to the plaintiff. Cooper J interpreted the authorities as stating that self

In 2003, the High Court finally put the matter to rest by confirming that the objective standard of care that applied to the plaintiff to determine contributory negligence was the standard of the reasonable *sober* person.<sup>108</sup> After reviewing the history of contributory negligence cases, McHugh J rejected the line of cases that suggested ‘that a passenger is guilty of contributory negligence in accepting a lift from an intoxicated driver only if the passenger knew, or was aware of signs indicating, that the driver was intoxicated.’<sup>109</sup> Instead His Honour stated:

[T]he issue is not whether a reasonable person in the intoxicated passenger’s condition – if there could be such a person – would realise the risk of injury in accepting the lift. It is whether an ordinary reasonable person – a sober person – would have foreseen that accepting a lift from the intoxicated driver was exposing him or her to a risk of injury by reason of the driver’s intoxication. If a reasonable person would know that he or she was exposed to a risk of injury in accepting a lift from an intoxicated driver, an intoxicated passenger who is sober enough to enter the car voluntarily is guilty of contributory negligence. The relevant conduct is accepting a lift from a person whose driving capacity is known, or could reasonably be found, to be impaired by reason of intoxication.<sup>110</sup>

There was no suggestion in that case that the plaintiff did not voluntarily accept the lift. Rather, the plaintiff had argued that he was not guilty of contributory negligence because at the time he allowed the defendant to drive the vehicle, the defendant driver, was not exhibiting outward manifestations of intoxication. The plaintiff argued that the test of whether he acted reasonably for his own safety should be considered at the moment that he handed over the keys, and that consideration of the earlier conduct of the parties, when he was clearly intoxicated was irrelevant.<sup>111</sup> The High Court categorically rejected this argument, holding that in determining what the plaintiff ought to have known of the defendant driver’s condition, the circumstances preceding the actual driving of the vehicle must be taken into account.<sup>112</sup> Thus the plaintiff who had been at a party with the defendant the previous night and had been drinking with her heavily two days beforehand should have been aware that with only a few hours sleep, the defendant driver was still under the influence of alcohol when she took over the driving. Coupled with the defendant driver’s inexperience and the unsafe condition of the vehicle, the plaintiff’s conduct in allowing the defendant to drive the vehicle was a departure from the standard of care expected of the reasonable sober person.

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induced intoxication was irrelevant to the objective determination of whether the plaintiff *ought* to have known of the defendant’s inability to drive.

<sup>108</sup> *Joslyn* (2003) 214 CLR 552, applied since in numerous cases. For intoxicated drivers and guest passengers see, *Avram v Gusakoski* [2006] WASCA 16 (Unreported Judgment); *Mackenzie v The Nominal Defendant* [2005] NSWCA 180.

<sup>109</sup> *Joslyn* (2003) 214 CLR 552, [36].

<sup>110</sup> *Ibid* [38].

<sup>111</sup> The Court of Appeal applied this test finding that at the moment that the plaintiff handed over the keys to the defendant, she was not showing any outward manifestations of intoxication, therefore it was reasonable to assume her driving ability was not adversely affected by alcohol: *Berryman v Joslyn* (2001) 33 MVR 441.

<sup>112</sup> *Joslyn* (2003) 214 CLR 552, [16], [37], [38] (McHugh J); [76] (Gummow and Callinan JJ); [140] (Kirby J); [156] (Hayne J). Although it should be noted in *Joslyn* the court was concerned with the interpretation and operation of the presumed contributory negligence provisions in the *Motor Accidents Act* 1988 (NSW) s 74(2).

Even though *Joslyn* concerned interpretation of the provisions relating to contributory negligence under the *Motor Vehicle Act 1998* (NSW), the same principles were held applicable to the common law concept of contributory negligence and have been applied in a number of cases since.<sup>113</sup>

## 2 *Civil Liability Legislation Reforms*

The Ipp Panel considered how the law should deal with contributory negligence.<sup>114</sup> The panel referred to three areas they considered required attention, the standard of care applicable to contributory negligence, whether any minimum reduction of damages should be statutorily imposed and whether apportionment of culpability should allow denial of damages to the contributory negligent person.

### (a) *The Standard of Care Applicable to Contributory Negligence*

The Ipp Panel commented that ‘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.’<sup>115</sup> They commented that despite this view, courts were applying a lower standard of care to plaintiffs. In other words courts were making findings that reflected a view that it was acceptable for plaintiff’s to take less care for themselves than for others.<sup>116</sup> While this view may seem intuitively correct, it was seen to run counter to the underlying philosophy of personal responsibility that requires people to consider the effect of their failure to take care for themselves, on the greater community, social security and welfare system.<sup>117</sup>

In pursuing the goal of personal responsibility, the Ipp Panel recommended that the same objective standard should apply to contributory negligence for plaintiffs as the standard of care applicable to defendants. All States subsequently adopted this recommendation as part of the legislative reforms.<sup>118</sup> How this will really affect the previous common law position is questionable as the courts have always applied a test of reasonableness which would necessarily include the position the plaintiff finds themselves in. In relation to the intoxicated driver and guest passenger this provision is unlikely to significantly change the common law position, which since *Joslyn* has

<sup>113</sup> *Joslyn* (2003) 214 CLR 552, [43-5] (McHugh J). For examples where the courts have applied the principles in *Joslyn* (2003) 214 CLR 553; see, *Binks v North Sydney Council* [2006] NSWSC 463; *Chandley v Roberts* [2005] VSCA 273; *Ballerini v Berrigan Shire Council* [2004] VSC 321; *Uzabeaga v Town of Cottesloe* (2004) Aust Torts Reports 81-739.

<sup>114</sup> Commonwealth of Australia, above n 68.

<sup>115</sup> *Ibid* [8.10].

<sup>116</sup> It is suggested that this is a perfectly legitimate assessment. People generally are more reckless in relation to their own safety than to others. See, eg, *Commissioner of Railways v Ruprecht* (1979) 142 CLR 563; *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.

<sup>117</sup> See McDonald, above n 70, referring to Callinan and Heydon JJ in *Vairy v Wyong Shire Council* (2005) 221 ALR 711, [220].

<sup>118</sup> *Civil Liability Act 2002* (NSW) s 5R; *Civil Liability Act 2002* (Qld) s 23; *Civil Liability Act 1936* (SA) ss 3, 44; *Civil Liability Act 2002* (Tas) s 23; *Wrongs Act 1958* (Vic) s 62; *Civil Liability Act 2002* (WA) s 5K. The ACT and NT did not implement this recommendation.

applied the objective test of the reasonable sober person in assessing contributory negligence.<sup>119</sup>

(b) *Minimum Reduction of Damages*

In its review, the Ipp Panel recommended against the introduction of minimum percentages of contributory negligence for particular categories of conduct. This was on the basis that fixing a ‘reduction would be arbitrary and unprincipled, and could work injustice in some cases’.<sup>120</sup> Despite this, in response to community and political pressure, the legislature in all States and Territories, except Victoria,<sup>121</sup> introduced a rebuttable presumption of contributory negligence where the plaintiff was intoxicated or relied on an intoxicated defendant.<sup>122</sup> In New South Wales, Queensland, South Australia and the Northern Territory a minimum reduction of 25% was also imposed.<sup>123</sup>

The onus for establishing contributory negligence under these provisions is therefore reversed; the plaintiff is deemed to have been contributory negligence, in other words to have failed to take reasonable care for their own safety and as a result to have contributed to their own injury. The way in which the plaintiff is required to rebut the presumption varies in the different States, with significantly differing results.

It is submitted that in relation to the position of the intoxicated driver and guest passenger, provisions concerning the plaintiff’s self-intoxication will generally have the effect of imposing the minimum percentage reduction only in New South Wales. In New South Wales in order for the plaintiff to rebut the presumption she or he must satisfy the court, ‘that the person’s [plaintiff’s] intoxication did not contribute in any way to the cause of the death, injury or damage.’<sup>124</sup> The allegation of contributory negligence will be that the plaintiff failed to take care for their own safety by becoming intoxicated, failing to assess the defendant’s inability to drive safely and thereby accepting the lift. Such failure to take care and to get into the car clearly contributed to the cause of the death or injury. ‘But for’ their intoxication they would not have accepted the lift and would not have been injured. The intoxication therefore was a necessary condition of the resultant injury.<sup>125</sup>

<sup>119</sup> See *Mackenzie v The Nominal Defendant* [2005] NSWCA 180 [52], where Giles J noted that the equivalent New South Wales provision, s 5R of the *Civil Liability Act 2002* (NSW) has not diminished the authority of *Joslyn v Berryman*.

<sup>120</sup> Commonwealth of Australia, above n 68, [8.16] – the panel used the example of intoxication as an example of where a person’s self-intoxication will not always necessarily amount to contributory negligence [8.17].

<sup>121</sup> Hence, the common law position in Victoria remains the same.

<sup>122</sup> *Civil Liability Act 2003* (Qld) ss 47, 49; see, also, *Civil Law (Wrongs) Act 2002* (ACT) ss 95, 96; *Civil Liability Act 2002* (NSW) s 50(4); *Civil Liability Act 1936* (SA) ss 46, 47; *Wrongs Act 1954* (Tas) s 5; *Personal Injuries (Liabilities and Damages) Act 2003* (Vic) s 17; *Civil Liability Act 2002* (WA) s 5L.

<sup>123</sup> In Queensland and South Australia this reduction is increased to a minimum 50% where the intoxication is 150mg or more of alcohol per 100ml blood and the person who suffered harm was the driver of a motor vehicle. A similar reduction is made where the person injured relies on a person with a similar blood alcohol reading: *Civil Liability Act 2003* (Qld) ss 47(5), 49.

<sup>124</sup> *Civil Liability Act 2002* (NSW) s 50.

<sup>125</sup> This is part of the causation principles as set out in the *Civil Liability Act 2002* (NSW) s 5D.

In Queensland, however, the provision requires the plaintiff to rebut the presumption by establishing that ‘the intoxication did not contribute *to the breach of duty*.’<sup>126</sup> This is contrary to the established tests for contributory negligence which require a finding that the plaintiff’s negligence contributed to the resultant injuries.<sup>127</sup> It is also contrary to the intent of the legislature.<sup>128</sup> On the ordinary and plain meaning of these words in s 47, which it is suggested are not ambiguous, and despite commentary to the contrary, this will most likely be interpreted as the *defendant driver’s* breach of duty not the plaintiff’s breach of duty to themselves.<sup>129</sup> The earlier reference in the section to the ‘breach of duty giving rise to a claim for damages,’ further supports this interpretation.<sup>130</sup>

In other words, in order to rebut the presumption, the plaintiff must satisfy the court that their self-intoxication did not contribute to the defendant’s breach of duty. In most cases of an intoxicated driver and passenger, the particulars of the defendant driver’s breach of duty, will be concerned primarily with his or her manner of driving. It is difficult to see how the plaintiff as a passenger, even an intoxicated passenger, would contribute to the defendant driver’s manner of driving, unless the plaintiff for example, interfered with the steering wheel, or caused disruption to the driver in some other way. Generally therefore the plaintiff in these circumstances should be able to avoid the consequences of this provision.

A plaintiff however will have far greater difficulty in rebutting the presumption of contributory negligence imposed for *relying* on the care and skill of a person who they knew or ought to have known was intoxicated.<sup>131</sup> Here the plaintiff will be required to establish that the defendant’s ‘intoxication did not contribute to the breach; or the plaintiff could not reasonably be expected to have avoided relying on the defendant’s care and skill.’<sup>132</sup> As the negligent manner of driving will, in the majority of cases, be attributed at least in part to the defendant’s intoxication, the plaintiff will be unable to rebut the presumption unless in accordance with subsection (3) the plaintiff can establish that he or she could not ‘reasonably be expected to have avoided relying on the defendant’s care and skill.’<sup>133</sup>

<sup>126</sup> *Civil Liability Act 2002* (Qld) s 47(3)(a).

<sup>127</sup> *Froom v Butcher* [1976] QB 286.

<sup>128</sup> Explanatory Notes, *Civil Liability Bill 2003* (Qld) s 47(3) states: the ‘presumption may be rebutted if the intoxication was not a factor in the occurrence of the *injury*’ (emphasis mine).

<sup>129</sup> Cf, however, D Mendelson, *The New Law of Torts* (Oxford University Press, 2007) 495, where she argues that the reference in the section to contribution to the ‘breach of duty’ refers to the plaintiff’s duty to him or her self and therefore provides a ‘more literal approach to the concept of contributory negligence’.

<sup>130</sup> *Civil Liability Act 2002* (Qld) s 47(1).

<sup>131</sup> *Civil Liability Act 2002* (Qld) s 48.

<sup>132</sup> Note, also only applies if over 16.

<sup>133</sup> *Civil Liability Act 2002* (Qld) s 48(3)(b). Specific reference is made in s 49, to the situation of the passenger and intoxicated driver, which imposes a greater minimum reduction of damages where the defendant’s blood alcohol concentration is greater than 15% or so much under the influence as to ‘be incapable of exercising effective control of the vehicle.’

(c) *Apportionment of Damages*

In 1997 the High Court had rejected the argument that 100% contributory negligence could apply to a plaintiff's negligence claim.<sup>134</sup> This was on the basis that it ran counter to the apportionment legislation that required damages to be reduced 'having regard to the claimant's share in the responsibility for the damage.'<sup>135</sup> The premise of the apportionment legislation was that both parties were partly to blame for the ensuing damage to the plaintiff. As Lord Hoffman noted in *Reeves v Commissioner of Police* when referring to an assessment of 100% contributory negligence in a matter involving police as defendant, such a finding 'gives no weight at all to the policy of the law in imposing a duty of care upon the police. It is another different way of saying that the police should not have owed [the prisoner] a duty of care.'<sup>136</sup> Accordingly, under the common law it has been held that a finding in excess of 90% contributory negligence cannot stand, as it suggests no or no appreciable negligence by the defendant at all.<sup>137</sup>

In Queensland, New South Wales, Victoria and the Australian Capital Territory, the established common law rule preventing a finding of 100% contributory negligence, has been overcome by the various legislative reforms.<sup>138</sup> In circumstances where 'the court considers it just and equitable to do so' a reduction of 100% of the damages awarded to the plaintiff can be made. According to the Ipp Panel this was because 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'.<sup>139</sup> Although accepting such circumstances would be rare, the Panel contemplated it would arise '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'.<sup>140</sup> The omission in the legislative reforms of the requirement to reduce the damages in accordance with the respective share in responsibility for the resultant damage has been interpreted as a means to better 'accommodate 100 per cent contribution'.<sup>141</sup>

The outcome is the further promotion of the objective contributory negligence tests to what were once the subjective requirements of the defence of voluntary assumption of risk. As arguably in any situation where the defence of voluntary assumption of risk arises so to does contributory negligence, there is little point in attempting to establish the more onerous defence of voluntary assumption of risk.<sup>142</sup> This section therefore has the potential to legitimize and provide another opportunity for a defendant whose

<sup>134</sup> *Wynbergen v Hoyts Corporation* (1997) 149 ALR 25.

<sup>135</sup> *Ibid* 28. For the relevant apportionment legislation for Queensland and New South Wales see, *Law Reform Act 1995* (Qld) s 10; *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) s 9.

<sup>136</sup> [2000] 1 AC 360, 369.

<sup>137</sup> See for example *Kelly v Carroll* [2002] NSWCA 9, [37] (Heydon J).

<sup>138</sup> Common law position articulated in *Wynbergen v The Hoyts Corporation Pty Ltd* (1997) 149 ALR 25.

<sup>139</sup> Commonwealth of Australia, above n 68, [8.24].

<sup>140</sup> *Ibid* [8.25].

<sup>141</sup> *Mackenzie v The Nominal Defendant* [2005] NSWCA 180, [62] (Giles J).

<sup>142</sup> This point was made by the Ipp Panel when they noted that the decline in the use of the defence of voluntary assumption of risk came about due to the preference of the courts to use the apportionment legislation, as both defences would arise on the same conduct: Commonwealth of Australia, above n 68, [8.23].

conduct is clearly negligent to avoid liability, despite the conceptually illogical outcome it produces.<sup>143</sup>

It is suggested, that the legislature by expressly prohibiting the use of the defence of voluntary assumption of risk in situations where the plaintiff relies on the care and skill of an intoxicated driver has expressed an intention that a driver in such circumstances should not be able to avoid liability.<sup>144</sup>

This point however was not considered in the recent case of *Mackenzie v The Nominal Defendant*.<sup>145</sup> Both the trial judge and Court of Appeal appeared to accept that a finding of 100% contributory negligence could be found in motor vehicle cases where intoxication was involved, despite the legislative prohibition on the finding of voluntary assumption of risk. Although the court held that the established process of comparing the culpability of both the plaintiff and defendant had not been diminished by the legislation,<sup>146</sup> the trial judge held at first instance that because the plaintiff had allowed the defendant to ride the plaintiff's motorbike with him as a pillion passenger when both were extremely intoxicated, a finding of 100% contributory negligence was warranted.<sup>147</sup> This was on the factual basis as found by the court, that despite the plaintiff's intoxication he knew of the defendant's inability to ride the motorbike.<sup>148</sup>

On appeal, the plaintiff argued that the trial judge had imported the objective test used to determine the existence of contributory negligence, into the determination of relative apportionment.<sup>149</sup> In denying that the trial judge did apply an objective test, the Court of Appeal held that in determining apportionment, notice was to be taken of the effect of the plaintiff's intoxication on his decision to participate in the conduct.<sup>150</sup> The court stated, self-intoxication can 'ameliorate [the plaintiff's] culpability and the causal potency of [the plaintiff's] contributory negligence.'<sup>151</sup> As it was held that the trial judge had failed to take into account that the plaintiff acted 'impulsively and without

<sup>143</sup> See McDonald, above n 70, 293-4.

<sup>144</sup> *Civil Liability Act 2002* (Qld) s 48(5).

<sup>145</sup> [2005] NSWCA 180 (Unreported, New South Wales Court of Appeal, 40633/04). In New South Wales the contributory negligence provisions in relation to motor vehicle accidents are found in the *Motor Accidents Compensation Act 1999* (NSW) s 138, which provides for a presumption of contributory negligence where the passenger was voluntary and defendant driver's 'ability to drive was impaired' through alcohol consumption and the passenger was aware or ought to have been aware. Section 140 prohibits a finding of voluntary assumption of risk for motor vehicle accidents 'but, where that defence would otherwise have been available, the amount of any damages is to be reduced to such extent as is just and equitable on the presumption that the injured person or deceased person was negligent in failing to take sufficient care for his or her own safety.'

<sup>146</sup> *Mackenzie v The Nominal Defendant* [2005] NSWCA 180, [62]. The process of apportionment which has been applied by the courts was stated by the High Court in the case of *Poderebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALJR 492, 494 where they said: 'The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie the degree of departure from the standard of care of the reasonable man...and of the relative importance of the acts of the parties in causing the damage.'

<sup>147</sup> *Mackenzie v Nominal Defendant* [2005] NSWCA 180, [74].

<sup>148</sup> Not only was the defendant driver intoxicated, he was also inexperienced and did not hold a license.

<sup>149</sup> *Mackenzie v Nominal Defendant* [2005] NSWCA 180, [79].

<sup>150</sup> *Ibid* [102].

<sup>151</sup> *Ibid* [108].

full consideration of what might occur' the 100% reduction was reduced on appeal to 80%.

Thus, while a finding of contributory negligence is made on the objective basis of what a reasonable, sober person ought to have known in all the circumstances, the determination of relative culpability will take into account the effect of the plaintiff's self-intoxication in failing to take care for his or her own safety. This is of particular relevance to the young and less experienced plaintiff, whose self-intoxication promotes inhibition, potential lapses of judgment and impulsive behaviour. When applied in this way, contributory negligence should be able to provide an 'appropriate and flexible remedial response which can take into account the full range of factual circumstances relevant to the causation of harms,'<sup>152</sup> however the mandated minimum percentages and the possibility of a 100% apportionment may lead to injustices.

### B *Assumption of Risk: Volenti non fit injuria and Dangerous Recreational Activities*

Civil liability reforms have included a number of provisions dealing with the obviousness of the risk of injury to the plaintiff. An obvious risk is defined as 'a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.'<sup>153</sup> Risks can be obvious even where there is a low probability of the risk occurring, or it 'is not prominent, conspicuous or physically observable'.<sup>154</sup> Being a passenger in a car with an intoxicated driver would involve an obvious risk of injury as defined under the legislation, as a reasonable person would, on current authority be a sober person.<sup>155</sup> It is necessary to consider how the obvious risk provisions apply to the defences of voluntary assumption of risk and the new dangerous recreational activity provisions.

#### 1 *Voluntary Assumption of Risk*

As has been noted, with the introduction of apportionment legislation the common law defence of voluntary assumption of risk fell out of favour.<sup>156</sup> With its reliance on establishing not only *scienter* (knowledge) but also full and voluntary acceptance and appreciation of the particular risk involved in the negligent conduct, defendants found it increasingly difficult to prove the necessary elements.<sup>157</sup>

<sup>152</sup> J Dietrich, 'The Decline of Contributory Negligence and Apportionment: Choosing the Black or White of All-or-Nothing Over Many Shades of Grey?' (2003) 11 *Torts Law Journal* 1, 17.

<sup>153</sup> *Civil Liability Act 2003* (Qld) s 13(1). See, also, *Civil Liability Act 2002* (NSW) s 5F(1); *Civil Liability Act 1936* (SA) s 36(1); *Civil Liability Act 2002* (Tas) s 15 (1); *Wrongs Act 1958* (Vic) s 53(1); *Civil Liability Act 2002* (WA) s 5F(1).

<sup>154</sup> *Civil Liability Act 2003* (Qld) s 13. See, also, *Civil Liability Act 2002* (NSW) s 5F; *Civil Liability Act 1936* (SA) s 36; *Civil Liability Act 2002* (Tas) s 15; *Wrongs Act 1958* (Vic) s 53; *Civil Liability Act 2002* (WA) s 5F.

<sup>155</sup> *Joslyn* (2003) 214 CLR 552. See discussion above in relation to contributory negligence.

<sup>156</sup> The common law defence is difficult to prove and courts have shown a reluctance to apply it in any circumstances. As commentators have noted there has been a distinct lack of any successful pleas of the defence in recent years. See, eg, F McGlone and A Stickley, *Australian Torts Law* (LexisNexis Butterworths, 2005) 252.

<sup>157</sup> *Kent v Scattini* [1961] WAR 74.

In Queensland the legislature's view that the defence is particularly inappropriate to the case of the intoxicated defendant driver is articulated under the civil liability legislation which states that the defence does not apply to situations where the plaintiff relies on the care and skill of an intoxicated defendant.<sup>158</sup> Instead the section provides for a presumption of contributory negligence in relation to plaintiffs who are over the age of 16 and were or ought to have been aware of the defendant's intoxication.<sup>159</sup>

Given the low threshold test of intoxication under the legislation, this is likely to apply to all drink driver cases (provided the plaintiff was at least 16 years at the time of the breach of duty). While the 'no breach of duty' continues to be applicable, the exclusion of voluntary assumption of risk is irrelevant as the later defence, at least at common law is more difficult to establish.<sup>160</sup> While the intent of Parliament in excluding plaintiffs under the age of 16 from the contributory negligence provision, was clearly to ensure that young people were not affected by the presumption of contributory negligence, in doing so they have exposed this group to the possibility that voluntary assumption of risk provides a total defence to a negligence claim by them.<sup>161</sup>

It is submitted however, that in light of the above, courts are unlikely to pursue the defence of voluntary assumption of risk for plaintiffs under the age of 16. Even so, it is worth considering what a defendant would be required to be established under the legislation. The first thing to note is that accepting a lift with a driver who has been drinking may constitute an *obvious risk* under the civil liability legislation.<sup>162</sup> In *Singh v Harika*,<sup>163</sup> Hodgson JA noted that:

ordinary 14 year-old children know that it is necessary to observe and/or inquire about the state of intoxication of a prospective driver who had been partying over several hours. Ordinary 14 year-old children know that it is dangerous to drink and drive and that such conduct can lead to accidents.<sup>164</sup>

Given the wide definition of an obvious risk<sup>165</sup> and the failure to operate the vehicle properly whilst under the influence of alcohol is in itself an obvious risk, accepting a lift with an intoxicated driver is likely to constitute an obvious risk. Under s 14(1) of the *Civil Liability Act 2003* (Qld) the plaintiff would be deemed to have been aware of the

<sup>158</sup> *Civil Liability Act 2002* (Qld) s 48(5). See, also, *Civil Liability Act 2002* (SA) s 47(4), s 47(6); *Motor Accidents Act 1988* (NSW) s 76.

<sup>159</sup> *Civil Liability Act 2002* (Qld) s 48(1).

<sup>160</sup> As noted above, this is because of the requirement beyond knowledge of the defendant driver's total impairment to an appreciation of the risk.

<sup>161</sup> The exclusion of plaintiffs under 16 years from the presumption of contributory negligence provisions in s 48, exposes them to the possibility that the defence of voluntary assumption of risk may be raised against them, as the exclusion under s 48(5) applies only to matters to which s 48 applies.

<sup>162</sup> *Civil Liability Act 2002* (NSW) s 5F; *Civil Liability Act 2003* (Qld) s 13; *Civil Liability Act 1936* (SA) s 36; *Civil Liability Act 2002* (Tas) s 15; *Wrongs Act 1958* (Vic) s 53; *Civil Liability Act 2002* (WA) s 5F. Discussion of applicability of this section is discussed under Dangerous Recreational Activities below.

<sup>163</sup> [2005] NSWCA 157.

<sup>164</sup> *Ibid* [15].

<sup>165</sup> As noted above, an obvious risk is defined as 'a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person': *Civil Liability Act 2003* (Qld) s 13(1). See also *Civil Liability Act 2002* (NSW) s 5F(1); *Civil Liability Act 1936* (SA) s 36(1); *Civil Liability Act 2002* (Tas) s 15 (1); *Wrongs Act 1958* (Vic) s 53(1); *Civil Liability Act 2002* (WA) s 5F(1).

risk.<sup>166</sup> However, defendants would still be faced with the difficult challenge of proving that the plaintiff appreciated and accepted the obvious risk. With a young person under the age of 16 this will be even more difficult to establish. As Hodgson JA notes:

ordinary 14- year-old children do not appreciate the risk in the same qualitative way as do adults. The effect of alcohol/drugs on complex mental processes such as those involved in the assessment and response to driving risks cannot be appreciated by 14 year-old children, except in a rudimentary way.<sup>167</sup>

So again the defence of voluntary assumption of risk is likely to fail.

## 2 *Dangerous Recreational Activity*

Where the conduct falls within the new legislative provisions concerning dangerous recreational activities, the defendant will be absolved from all liability. Introduced in order to provide greater assurance and protection to recreational service providers, the section has provided a far wider defence for the negligent defendant, far exceeding the new ‘statutory’ voluntary assumption of risk.

The section provides:

- (1) A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the person suffering harm.
- (2) This section applies whether or not the person suffering harm was aware of the risk.<sup>168</sup>

Without the need to establish any appreciation and acceptance by the plaintiff of the risk involved in the activity, the defendant need only establish that the conduct engaged in was a dangerous recreational activity and that an obvious risk, as defined in the legislation, materialised.

As has been noted difficulties arise in applying this section as no guidance has been provided to the interpretation of ‘key terms’ in the definition of ‘dangerous recreational activity’, and the recent cases have failed to provide a united approach.<sup>169</sup>

First it would need to be determined whether the conduct of a passenger in a vehicle could ever be considered a recreational activity; being an ‘activity engaged in for enjoyment, relaxation or leisure’.<sup>170</sup> In the New South Wales case of *Fallas v*

<sup>166</sup> No longer need to be aware of the precise risk.

<sup>167</sup> *Singh v Harika* [2005] NSWCA 157, [15].

<sup>168</sup> *Civil Liability Act 2003* (Qld) s 19. See, also, *Civil Liability Act 2002* (NSW) s 5L; *Civil Liability Act 2002* (Tas) s 20; *Wrongs Act 1958* (Vic) s 53(1); *Civil Liability Act 2002* (WA) s 5H.

<sup>169</sup> See for example *Fallas v Mourlas* [2006] Aust Torts Reports 81-835 (*‘Fallas’*) where the three appellate judges placed slightly different interpretations on the key terms. See also P Stewart, ‘Dangerous Recreational Activity in New South Wales’ (2006) 14 *Tort Law Review* 58.

<sup>170</sup> *Civil Liability Act 2003* (Qld) s 18. This section differs from the New South Wales provision that defines a recreational activity as including: ‘(a) any sport (whether or not the sport is an organized activity, and (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure, and (c) any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure’:

*Mourlas*,<sup>171</sup> Basten JA referred to a submission by the plaintiff that ‘dangerous recreational activity’ referred to inherently dangerous sports and not activities such as driving a motor vehicle.<sup>172</sup> His Honour, however, referred to car racing on a suburban street as possibly involving the passenger in a recreational activity, depending on their knowledge and expectation of the racing activity.<sup>173</sup> Justice Ipp also noted that the ‘particular activities engaged in by the plaintiff at the relevant time’ must be taken into account in determining whether the activity was a ‘dangerous recreational activity’.<sup>174</sup> Therefore although driving is generally used for transportation, the circumstances of the intoxication and circumstances particular to the activity may convert the driving into a ‘recreational activity’.

Whether the recreational activity is dangerous will require a determination of whether it involved a ‘significant risk of physical harm’.<sup>175</sup> In *Fallas*, Ipp JA considered that significant risk included a consideration of both the gravity of the harm and the probability of the harm.<sup>176</sup> He stated that in order to be significant the risk must be more than trivial but less than ‘likely to materialise’.<sup>177</sup> His Honour further stated that ‘the dangerousness ... of the recreational activity is to be determined by the activities engaged in by the plaintiff at the relevant time. All relevant circumstances that may bear on whether those activities were dangerous ... include matters personal to the plaintiff.’<sup>178</sup>

Thus, once it was determined that in the particular circumstances the driving activity was recreational the defendant’s intoxication could render the activity dangerous. The degree of intoxication will be of determinative importance. It is submitted that while it is unlikely to require the outward manifestations of complete incapacity as required for the common law ‘no breach of duty’ defence, in order to be more than trivial there would need to be some evidence of impairment. Whether the low threshold test as set out in the definition of intoxication would suffice is questionable. It is suggested something more would be required.

Although in *Fallas*, Ipp JA considered it was not necessary for the obvious risk that materialised to be the same risk that made the activity dangerous, in the case of the

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*Civil Liability Act 2002* (NSW) s 5 K. Given the different interpretation placed on the legislation in each State it cannot be said with confidence that courts in Queensland will interpret similar provisions in the same way they have been interpreted in New South Wales. See for example *Grice v Queensland* [2005] QCA 272.

<sup>171</sup> (2006) 65 NSWLR 418 (*Fallas*).

<sup>172</sup> *Ibid* [126].

<sup>173</sup> *Ibid* [127].

<sup>174</sup> *Ibid* [47]. He noted this would include ‘relevant matters personal to the plaintiff, [50].

<sup>175</sup> *Civil Liability Act 2003* (Qld) s 18.

<sup>176</sup> *Fallas* (2006) 65 NSWLR 418, [30]. In other words a risk could be considered significant even if it had a low probability of occurring, but a possible catastrophic result if it did.

<sup>177</sup> *Ibid* [18]. Tobias JA believed it should be a risk that had a ‘real chance of materialising’, [90], while Basten JA considered that significant risk was similar to material risks as identified in *Rogers v Whittaker* (1992) 175 CLR 479.

<sup>178</sup> *Ibid* [50]. See also [43], [46] and [47] (Ipp JA); Tobias J where he states ‘in determining whether the relevant recreational activity involves a significant risk of physical harm, one must identify that activity at a relatively detailed level of distraction by including not only the particular conduct actually engaged in by the [plaintiff] but also the circumstances which provide the context in which that conduct occurs’, [92].

passenger and intoxicated driver, the risk would be the same.<sup>179</sup> That is, the risk of negligent driving. While it may be argued that in many, if not most, service provider activities the risk of the defendant being negligent is not an obvious risk,<sup>180</sup> the same cannot be said of accepting a lift with a clearly intoxicated person. Again the degree of intoxication required to make the risk obvious will be determinative. As it need not be 'prominent, conspicuous or physically observable' but includes risks that are 'patent or a matter of common knowledge' any degree of intoxication above 0.05 or 0.08gms of alcohol per 100mls of blood may be sufficient.<sup>181</sup> Again this is likely given the low threshold test of intoxication under the legislation. If therefore, an accident occurred, it may be argued that an obvious risk materialised whilst the passenger was engaged in a dangerous recreational activity; driving for enjoyment with an intoxicated driver. In this circumstance the driver would be absolved of all liability.

#### IV CONCLUSION

When Hogg reviewed this area of the law in 1994, she concluded that the defence of contributory negligence provided the most appropriate mechanism for determining liability in the situation of a guest passenger and intoxicated driver.<sup>182</sup> At the same time she argued that the 'no breach of duty' defence, applying only in the most extreme cases, where the defendant was totally incapacitated and the passenger aware of that fact, similarly provided a satisfactory result as the passenger was more culpable given their preparedness to accept a lift with someone incapable of determining whether or not they should be driving.<sup>183</sup> Over 10 years on and despite acknowledgement by the courts of the 'no breach of duty' defence, the courts continue to deny its application. Combined with the legislative intent that denies the availability of the defence of voluntary assumption of risk where a plaintiff relies on the care and skill of an intoxicated driver and a motor accident results, such a defence should finally be put to rest.

The conceptual difficulties associated with arguments that allow attenuated standards of care in relation to some relationships and conduct, and not others runs counter to the development of a principled body of law. The defence of contributory negligence has sufficiently grown, particularly as a result of the High Court's decision in *Joslyn*, to adequately cope with the concerns raised in the 'no breach of duty' cases and the wider implications of *Cook* such that a similar result can be attained.

While the full affect of the legislative reforms are yet to be experienced, we are already seeing the inconsistencies and possible injustices arising. While the legislature clearly does not want an intoxicated defendant driver to be absolved on the basis of voluntary assumption of risk, courts are prepared to accept a finding of 100% reduction in damages for the contributory negligent passengers. Mandatory minimum percentages

<sup>179</sup> *Fallas* (2006) 65 NSWLR 418, [29]. Cf, Basten JA who considered the risk must be the same, [151]

<sup>180</sup> See MacDonald, above n 70, 284-5.

<sup>181</sup> *Civil Liability Act 2003* (Qld) s 13. It is suggested that the risk is still an obvious risk despite s 13(5) as the failure of the intoxicated defendant driver to properly operate the car would in itself be an obvious risk.

<sup>182</sup> Hogg, above n 22.

<sup>183</sup> Someone who she argued may be too intoxicated to be able to determine whether or not he or she should be driving.

restrict possibilities that there are other explanations for a plaintiff's conduct that require exploration and a possible lower reduction, particularly given the very low threshold test that the intoxication definition is likely to receive. The possibility that the dangerous recreational provisions could also be used as a means of denying the plaintiff compensation cannot be ignored.

The guest passenger will be required to be particularly vigilant in accepting a lift with anyone who has been drinking at all. Of course, this is a socially desirable outcome yet at the same time, there will be errors of judgment, particularly by young people concerning when it is safe to accept a lift with a particular driver. In those circumstances a balanced apportionment of respective fault is the most appropriate response that allows a degree of recovery from the defendant, whose conduct is clearly negligent. Defences that absolve a defendant from all liability in such circumstances must be avoided.