

**STANDARDISING THE STANDARD
OF THE LEARNER DRIVER:
*IMBREE V MCNEILLY***

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I INTRODUCTION

More than twenty years after the High Court of Australia created an exception to the objective standard of care required of the reasonable driver by imposing a reduced standard upon inexperienced, unqualified drivers in respect to their supervising passenger, the High Court has ruled that this anomaly can no longer stand. Long a favourite of torts law examiners, the case of *Cook v Cook*,² has recently been overruled in *Imbree v McNeilly*,³ so that the standard of care now owed by inexperienced drivers to all road users, including their supervising passengers, is one and the same — that of the ‘reasonable driver’.

Although rarely applied, the case of *Cook* stood for the proposition that where a person knowingly placed themselves in the position of a supervising passenger with an unqualified and inexperienced driver, the scope of the standard of care was varied to reflect the relationship between the two parties.⁴ While the standard of care owed by the inexperienced driver to all other road users remained a duty ‘to take reasonable care to avoid injury to others’,⁵ the standard owed to the supervising passenger was lowered. It was said in *Cook* that the supervisor in such a situation could expect no more than the standard of an unqualified and inexperienced driver, which it was argued remained

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² (1986) 162 CLR 376 (*Cook*).

³ (2008) 249 ALR 647 (*Imbree*).

⁴ In the case of *Cook*, the plaintiff persuaded her niece to take over the driving of her vehicle. Her niece (the defendant driver) was unlicensed and inexperienced and, in attempting to avoid a parked vehicle, accelerated and collided with a pole. Although a lower standard of care was applied, the defendant was found to have breached the standard of the inexperienced, unqualified driver.

⁵ *Imbree* (2008) 249 ALR 647, 655 (Gummow, Hayne and Keifel JJ).

an objective inquiry by requiring the driver to exercise the ordinary prudence expected of an inexperienced driver.⁶

By holding that *Cook* should no longer be followed, the High Court has removed the inherent difficulties involved in applying variable standards to the same conduct, the difficulties in determining the level of skill expected of inexperienced drivers, and removed the anomaly that placed the supervising passenger in a different position from other road users and presumably other passengers in the car.

The practical implications of *Imbree* cannot be understated. With state and territory legislation now requiring learner drivers to undertake a minimum number of supervised hours of driving before being eligible to apply for a driver's licence, the need for family members to take on a greater role as a supervising passenger has significantly increased.⁷ With compulsory third party motor vehicle insurance available in all jurisdictions, the supervising passenger can now feel confident that provided their supervision is in all the circumstances reasonable, they will not be disadvantaged by taking on the supervisory role.

II FACTS: *IMBREE V MCNEILLY*

The appellant, Paul Imbree, was travelling through the Northern Territory on a four-wheel drive trip with his two sons, an adult friend, and the 16 year old respondent (a friend of his son). The vehicle was owned by the appellant's employer, the second respondent, although the appellant was allowed to use the car for personal use. At various times during the trip, the appellant had allowed both his son (Paul Imbree junior) and the respondent to drive the vehicle for short distances, whilst the appellant sat in the front passenger seat. Paul Imbree junior had recently obtained his learner's permit which authorised him to drive under supervision. The respondent had some experience driving his grandparent's four wheel drive vehicle, but had not yet obtained his learner's permit.

On the day of the accident, the party were travelling on a dirt road. Where the road was corrugated and hilly the appellant and his adult companion

⁶ *Cook*, 388, 389.

⁷ See, eg, *Transport Operations (Road Use Management — Driver Licensing Regulation) 1999* (Qld) s 10AA(2) which requires a learner driver to complete 100 hours of supervised driving before being eligible to apply for a provisional licence.

drove the vehicle, however, after the road widened and flattened out, the appellant permitted his son and then the respondent to drive the vehicle. Some time after the respondent took over the driving, the respondent and appellant noticed tyre debris on the road. The respondent tried to avoid it by turning right across the road. The appellant yelled at him to brake, however the respondent failed to do so, instead turning sharply to the left while at the same time accelerating. The vehicle rolled and the appellant suffered severe spinal injuries.

III PROCEEDINGS IN THE TRIAL COURT AND COURT OF APPEAL

Both the primary judge and the Court of Appeal held that they were bound by the High Court decision of *Cook*. In doing so, both courts held that an attenuated standard of care applied, due to the exceptional circumstance created by the plaintiff's voluntary supervision of the inexperienced respondent driver. At first instance, Studdert J held that the respondent had 'behaved with carelessness over and above what could be attributed merely to inexperience'.⁸ Demonstrating the difficulty inherent in defining this standard, the Court of Appeal was split as to whether the respondent had breached the lower standard. The majority (Beazley and Basten JJA), held that he had, while Tobias JA found the defendant driver's conduct did not breach the standard to be expected of a person with his level of skill and experience.

All judges held that the appellant had failed to properly instruct the respondent and by doing so had contributed to his injuries. At first instance contributory negligence was assessed at 30 per cent, and by majority in the Court of Appeal this was increased to two thirds.⁹

IV ISSUES ON APPEAL

The appellant appealed to the High Court arguing that *Cook* should be overruled and that the standard to be applied should be that of the reasonable driver. It was further argued that there was either no contributory negligence established against the appellant or, if there was, the apportionment was incorrectly assessed as it was measured against the incorrect lowered standard of care. Alternatively they

⁸ *Imbree v McNeilly* [2006] NSWSC 680, [86].

⁹ *McNeilly v Imbree* [2007] Aust Torts Reports 81-895.

argued the trial judge's assessment of contributory negligence should have been left to stand.

The respondents cross-appealed arguing that although *Cook v Cook* applied to the situation it needed to be restated 'in contemporary terms'.¹⁰ They argued that Tobias JA had correctly adopted this approach in the Court of Appeal by holding that the appellant could expect no higher standard of care than that demonstrated by the respondent driver's limited skills and experience. In other words, the respondents argued that there had been no breach of this lower standard of care.

V THE HIGH COURT

All judges, apart from Heydon J, held that *Cook* could no longer stand. Hayne, Gummow, and Keifel JJ delivered a joint judgment with Crennan J agreeing. While also agreeing with the orders of the joint judges, Gleeson CJ and Kirby J delivered separate judgments. Somewhat surprisingly, Heydon J did not consider that the appeal as argued raised the issue of the correctness of the *Cook* principle.¹¹ Rather, His Honour held that the respondent had been found liable in both Courts below, even with the lower standard, and that the question of contributory negligence as formulated in the appeal did not require reconsideration of *Cook*. This was primarily due to the fact that the appellant argued that if a finding of contributory negligence was to be found, then the Trial Judge's original apportionment of 30 per cent was appropriate. Despite his differing approach, Heydon J ultimately agreed with the orders in the joint reason.

A Proximity

The joint judges acknowledged that *Cook* was decided at a time when proximity was a defining feature of both the existence and scope of the duty of care.¹² As such, in *Cook* the 'proximate relationship' between the supervisor and driver created the necessary factual basis to define the content of the duty of care.¹³ According to the plurality in *Cook*,

¹⁰ *Imbree* (2008) 249 ALR 647, 657 (Gummow, Hayne and Keifel JJ).

¹¹ *Ibid* 691 (Heydon J).

¹² *Ibid* 658.

¹³ *Cook v Cook* (1986) 162 CLR 376, 383 where it was defined as 'that which is reasonably to be expected of an unqualified and inexperienced driver in the circumstances in which the pupil is placed' (Mason, Wilson, Deane,

the nature of the instructor and pupil relationship, transformed it from the ordinary driver — passenger relationship, so that the content of the duty needed to be defined by reference to the ‘special’ relationship that existed.¹⁴ Despite the High Courts rejection of ‘proximity’ as a test for duty of care in the late 1990s,¹⁵ the joint judges and Gleeson CJ in *Imbree* held that while this primary foundation for the *Cook* decision could no longer stand, this was an insufficient reason on its own to reject the decision.¹⁶ There were three reasons given by the joint judges for this. Firstly, the question in this case involved only the appropriate content of the duty, not the existence of the duty.¹⁷ Secondly, Brennan J in *Cook* did not rely on proximity (a concept he had consistently rejected) to find an attenuated standard applied, but rather based his decision on the plaintiff’s knowledge and thirdly the court in *Cook* referred with approval to the approach of the High Court in *Insurance Commissioner v Joyce*,¹⁸ decided well before the rise of ‘proximity’ as a determinative test for duty of care.

B Plaintiff’s Knowledge

The joint judges identified that in the earlier cases the plaintiff’s knowledge of the defendant’s inexperience had also provided the justification for the attenuated standard of care.¹⁹ In *Cook* the plurality had held that once the plaintiff’s knowledge and acceptance of the driver’s inexperience was established, the ‘special relationship’ of supervising passenger and learner driver required a different categorisation of the relationship and standard of care. The standard applied not to the particular defendant, but to a class of person, the hypothetical inexperienced driver, to which the defendant belonged.

Dawson JJ).

¹⁴ *Ibid.*

¹⁵ *Perre v Appand Pty Ltd* (1999) 198 CLR 180.

¹⁶ *Imbree* (2008) 249 ALR 647, 660 (Gummow, Hayne and Keifel JJ).

¹⁷ *Ibid.*

¹⁸ (1948) 77 CLR 39 (‘Joyce’).

¹⁹ *Imbree* (2008) 249 ALR 647, 660. In particular in *Cook*, Brennan J relied on the plaintiff’s knowledge of the defendant’s lack of skill as the reason for the attenuated standard. In doing so Brennan J’s judgment provides for a more general principle than the joint judges, and would be likely therefore to apply to any passenger, not just the supervising passenger. This was not specifically addressed by the joint judges in *Imbree*.

The joint judges in *Imbree* noted however, that defining the relationship as ‘special’ or ‘exceptional’ and thereby treating it differently from other learner drivers and third parties, or the standard driver — passenger relationship, did not accord with basic legal principle. It was held to be inconsistent with the principle that the standard of care is objective and does not fluctuate with an individual person’s ‘aptitude or temperament’.²⁰

In particular they argued that knowledge of the defendant’s inexperience alone could not create the necessary ‘special’ relationship, as the principle stated by the plurality in *Cook* applied only to the supervising passenger and not other passengers or road users who may also have knowledge of the defendant’s inexperience.²¹ The joint judges argued there was no sound principle why the supervising passenger should be treated differently from other passengers with similar knowledge. Rejecting both proximity and knowledge as sufficient basis for the attenuated standard, denied the *Cook* case validity.²²

C *Defining the Relevant Standard of the ‘Inexperienced’ Driver*

Difficulties inherent in defining the level of competence or standard expected of the ‘inexperienced and unqualified driver of ordinary prudence’ were also noted. Varying degrees of inexperience made use of the term ‘ordinary prudence’ or ‘reasonable inexperienced driver’ void of a sufficiently precise definition on which to base an objective standard.²³ Similarly the fact that someone was ‘unqualified’, in the sense that they had not received a licence from a licensing authority, did not answer the central question ‘what would a reasonable driver do?’²⁴

D *Role of the ‘Supervisor’*

Describing the plaintiff as the instructor or supervisor to distinguish his position from other road users or passengers, and thereby justifying

²⁰ Ibid 661.

²¹ Ibid.

²² Ibid 662.

²³ Examples were given in argument of the fact that inexperience is a relative term, so that the tourist who arrives in Australia and has never driven on the left-hand side of the road or on outback roads is inexperienced in those conditions. See *Imbree* (2008) 249 ALR 647, 650.

²⁴ *Imbree* (2008) 249 ALR 647, 662.

different treatment was, as noted above, rejected.²⁵ After considering the legislative regime governing learner drivers, the judges concluded that the system in the Northern Territory where the accident occurred, required the passenger to provide no more than supervision to the learner driver, and that there are significant limits to what supervision or instruction can achieve.²⁶ It was argued that without dual controls the operation of 'the vehicle depends entirely upon the aptitude and experience of the learner driver'.²⁷ Thus if the standard was to be lowered because the plaintiff was the supervisor, it would necessarily be based on the fact that the supervisor was in a position to influence the outcome, a question more appropriately dealt with as an inquiry into contributory negligence. As the focus of the standard of care is on the defendant's conduct, the enquiry must relate to what the defendant did or did not do, and whether that was reasonable, not whether the plaintiff could have behaved differently in order to avoid the injury. As the court noted, 'if the supervisor could not have influenced the outcome, what is the relevance of the supervisory role to the standard of care the learner should exercise in operating the vehicle?'²⁸

E A Varying Standard of Care

It has long been established that in certain circumstances the standard of care will be adjusted to reflect characteristics of the defendant which are enjoyed by a class of persons to which the defendant belongs. The most obvious example of this is the professional person, who is expected to act in the manner of a 'reasonable professional person' possessing the relevant professional skills.²⁹ This objective standard is not dependant on the level of experience of the professional rather it is applied uniformly by reference to the level of skill expected of such professional persons.³⁰ Furthermore this objective standard is applied to

²⁵ Ibid.

²⁶ Ibid 664. It was noted in *Imbree* that requirements differ slightly in each Australian jurisdiction so that in some States there is a requirement to instruct the learner driver, in other states/territories there is a requirement to supervise. In the Northern Territory supervision only was required.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid. See also, *Rogers v Whittaker* (1992) 175 CLR 479.

³⁰ See eg, *Wilsher v Essex Area Health Authority* [1987] QB 730, 77E where the court stated '[T]he law requires the trainee or learner to be judged by the same standard as his more experienced colleagues. If it did not,

all plaintiffs whose injury is caused by the professional person's conduct. This differs significantly from the standard as applied in *Cook* which is varied according to the particular relationship between the defendant and the plaintiff. So that under the *Cook* principle, two plaintiffs injured in the same incident through the same conduct could be owed differing standards of care, an approach that the joint judges argued in *Imbree* 'departed from fundamental principle ... achieved no useful result' and was no longer warranted.³¹

It should be noted that courts have held that child defendants will be subjected only to a standard of care that can reasonably be expected from a child of comparable age.³² The reason for the allowance for children was not explored in *Imbree* and, as will be discussed further, remains conceptually difficult to justify.

F *The Joyce 'No Breach of Duty' Defence*

Although the court did not explain the rationale that allows the standard to vary for child defendants according to their age, they did discuss the application of the 'no breach of duty' defence as defined in *Joyce*. In *Joyce*, the court had held that a voluntary guest passenger's knowledge of a defendant driver's intoxication prevented the passenger from expecting that the driver would exercise the skill of the objectively reasonable driver.³³ Unlike *Cook* however, the standard was not lowered but held to be non-existent as it was said to be impossible to set the standard of a 'reasonable drunk driver'.³⁴ Knowledge of intoxication and impairment meant that there was no duty owed or, alternatively stated, no breach of duty.³⁵

inexperience would frequently be urged as a defence to an action for professional negligence' (Glidewell LJ).

³¹ *Imbree* (2008) 249 ALR 647, 665.

³² *McHale v Watson* (1966) 115 CLR 199.

³³ See *The Insurance Commissioner v Joyce* (1948) 77 CLR 39, 56-7 where Dixon J, who was the greatest proponent of the no breach of duty defence, stated '[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.'

³⁴ *The Insurance Commissioner v Joyce* (1948) 77 CLR 39.

³⁵ *Ibid.* For other examples where the court has held no duty exists see *Gala*

The joint judges in *Imbree* noted that at common law, the application of the defence of voluntary assumption of risk results in the same conclusion, namely that no duty of care was owed in the circumstances.³⁶ Accordingly they stated that underpinning the defence was the requirement of the plaintiff's actual knowledge of the defendant's impairment, which led to a conclusion that no duty was owed.³⁷ They argued, however, that the same reasoning could not be applied to attenuate an already existing duty of care. To do so would require the articulation of a missing step linking the plaintiff's knowledge to the varying standard of care applied to the defendant. They concluded that 'the state of the plaintiff's actual knowledge of the defendant's deficiencies provides no certain basis for a conclusion about what is the relevant standard of care'.³⁸

G Finding

By dispensing with the *Cook* principle the defendant driver was held to owe the plaintiff the standard of a reasonable driver.³⁹ As the courts below had held that the defendant had breached an even lower standard, there was no difficulty in finding negligence proved. In regards to the issue of contributory negligence, the joint judges held that although the basis and particulars of the primary judge's reasoning differed from theirs, the result was sufficiently similar to warrant adoption of the primary judge's apportionment of 30 per cent contributory negligence.⁴⁰

v Preston (1991) 172 CLR 243 (where intoxication and joint illegality combined in the unlawful use of a motor vehicle meant that the defendant driver did not owe the plaintiff passenger a duty of care) and *Kickett v State Government Insurance Commission* [1996] Supreme Court Full Court WA, 73 of 1996 (Unreported, Kennedy, Owen and Scott JJ, 21 November 1996).

³⁶ *Imbree* (2008) 249 ALR 647, 668. See also *Joyce* (1948) 77 CLR 39, 54, Cf, however, *Jeffries v Fisher* [1985] WAR 250 where Burt CJ noted the difference between the two defences as 'no breach of duty' requires proof of the plaintiff's knowledge of the defendant driver's intoxication only, whereas volenti requires knowledge and proof of appreciation and acceptance of risk.

³⁷ *Imbree* (2008) 249 ALR 647, 668.

³⁸ *Ibid* 669.

³⁹ *Ibid*.

⁴⁰ *Ibid* 670.

H Gleeson CJ and Kirby J — the Relevance
of Compulsory Third Party Insurance

Despite the fact that neither the appellant nor the respondent had considered the existence of compulsory insurance to be a relevant factor,⁴¹ Kirby J argued that statutory compulsory third party motor vehicle insurance provided the ‘new legal ingredient’ necessary to depart from the common law principle enunciated in *Cook*.⁴² Relying firstly on Lord Denning’s reference in *Nettleship v Weston*⁴³ to the ‘high standard’ imposed on drivers under Road Traffic Acts as a reason which influenced judicial findings of liability against drivers,⁴⁴ Kirby J traced developments in the United Kingdom, New Zealand and Australia where the availability of insurance had been considered (if only peripherally) in determining liability.⁴⁵ Accepting that the relevance of insurance to negligence determinations was still a ‘controversial’ proposition,⁴⁶ Kirby J argued that the practical importance of *compulsory* insurance made it a factor which must be considered in motor vehicle cases. Acknowledging that the statutory framework in which the parties’ relationship exists is a significant consideration in determining the existence and scope of duty of care, Kirby J reasoned that third party motor vehicle insurance mandated in all Australian jurisdictions was a relevant consideration in determining the standard of care in motor vehicle cases.⁴⁷ In other words, the existence, purpose and policy underlying compulsory third party insurance provided the statutory context which defined the scope of the duty of care owed by *all* drivers to third parties.⁴⁸ The reality and practicality of this form of insurance which allows recovery of significant damages often in circumstances where there was only minor inadvertence could not be overlooked. His Honour, Kirby J argued that ‘the existence of such insurance’ provided ‘a persuasive reason for departing from the individual culpability principle previously expressed ... in *Joyce*’s case and applied in *Cook*’.⁴⁹ Its universal applicability was

⁴¹ *Imbree v McNeilly* [2008] HCA Trans 182.

⁴² *Imbree* (2008) 249 ALR 647, 673.

⁴³ [1971] 2 QB 691.

⁴⁴ *Ibid* 699–703.

⁴⁵ *Imbree* (2008) 249 ALR 647, 684, 685, 686, 687.

⁴⁶ *Ibid* 680.

⁴⁷ *Ibid* 674.

⁴⁸ *Ibid* 690.

⁴⁹ *Ibid* 674.

fundamental to the conclusion that all drivers owe a single objective standard of care to all other road users, including the supervising passenger.

While agreeing with the joint reasons, Gleeson CJ also took time to address and reject the argument raised by Kirby J that the existence of compulsory third party insurance was relevant to the determination of duty and standard of care. Gleeson CJ argued that '[t]he statutory insurance regime operated upon — it did not create — the legal liability'.⁵⁰ Noting that the statutory schemes were introduced well before the determination in *Cook*, His Honour argued that Lord Denning's reference to insurance in *Nettleship* was not determinative of his decision not to impose an attenuated standard on the learner driver, but rather the decision to impose a consistent objective standard reflected the existing legislative policy.⁵¹ The difficulties inherent in defining general legal principle based on the existence of insurance, were expressed by Gleeson CJ as:

The problem of the objectivity of the standard of care of an inexperienced person, or the comparative standards of care owed by an inexperienced person, or a person suffering from some other form of disability or impairment, and an 'ordinary' person, is not one peculiar to the drivers of motor vehicles that are subject to a scheme of compulsory third party insurance. A similar problem would arise in many other contexts, where there is no compulsory insurance. If the answer to the problem in the present case depends on the existence of compulsory insurance, then presumably a different answer would, or at least may, be given in a case where there is no compulsory insurance. The result is both 'morally incoherent', as Professor Stapleton described it, and productive of legal confusion.⁵²

While differing in their approach both Gleeson CJ and Kirby J held that *Cook* must be overruled and each adopted the orders proposed by the joint judges.

⁵⁰ Ibid 652.

⁵¹ Ibid.

⁵² Ibid 653 (Gleeson CJ).

VI COMMENT

By overruling the *Cook* principle, the High Court has dispensed with an incongruity and provided for a more principled approach to the determination of the standard of care in motor vehicle cases. As Dietrich notes:

[S]pecial 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).⁵³

Accepting that the plaintiff's knowledge of the defendant driver's inexperience is more appropriately dealt with as an issue of contributory negligence, the High Court has acknowledged that at common law the standard of care question should focus primarily on the defendant's conduct measured against a consistent and objective standard. It could be argued that the decision in some respects departs from recent High Court cases where personal responsibility and the plaintiff's knowledge of the obviousness of the risk has been a significant factor in determining the content of duty of care owed.⁵⁴ The difference is, however, that the approach in the 'obvious risk' cases does not involve distinguishing between two plaintiffs with the same knowledge based on the ill-defined construct of a 'special relationship' and applying variable standards to each.

The decision in *Imbree* has also avoided the inherent conceptual difficulties involved in applying a variable standard to one particular impairment namely inexperience and not to others, As Dixon J noted in *Joyce*, other known impairments may similarly affect a person's ability to perform at an objective standard, yet the law has consistently regarded personal attributes to be irrelevant to a question of what is reasonable conduct.⁵⁵ Furthermore in relation to professionals there is no distinction made between the levels of experience particular to

⁵³ J Dietrich, 'Duty of Care under the Civil Liability Acts' (2005) 13 *Torts Law Journal* 17, 33.

⁵⁴ For examples of recent cases where the obviousness of the risk was considered in determining the scope of the duty of care see *Neindorf v Junkovic* (2005) 222 ALR 631; *RTA (NSW) v Dederer* (2007) 238 ALR 761; *Vairy v Wyong Shire Council* (2005) 223 CLR 422;

⁵⁵ *The Insurance Commissioner v Joyce* (1948) 77 CLR 39, 56.

each individual professional person, the recently admitted solicitor for example is expected to perform at the same standard as the more experienced solicitor.⁵⁶ Why should an exception be made in relation to inexperienced drivers who exert the same degree of control and potential for harm as other drivers who chose to drive on public roads?

While the decision in *Imbree* has provided consistency in motor vehicle cases, the question, which was not explored in *Imbree*, remains as to why children are treated differently to all other defendants, so that a child's conduct is measured against a lower standard of care.⁵⁷ As noted earlier the conceptual basis for this distinction remains unclear. While logic suggests that we cannot expect children to behave in the same manner as the hypothetical 'reasonable person', why are not the elderly, or the mentally impaired, who may also be incapable of performing at the 'reasonable' standard, not to be accorded the same privilege?⁵⁸ If the answer was purely because of age or intellectual capacity then there is no ground for distinguishing between children and the elderly or mentally impaired.⁵⁹

An explanation often provided is that the standard applied to the child is still capable of at least a partially objective analysis as it is measured against the standard of the reasonable child of that age and is not dependant on the idiosyncrasies of the particular child which may include impaired intellectual capacity.⁶⁰ Applying a consistent standard to the elderly is not so easily achieved, but would necessarily depend on the capabilities of the individual person, which would require a more overtly subjective analysis. While this provides a rationale for the

⁵⁶ See, eg, *Wilsher v Essex Area Health Authority* [1987] QB 730, which referred to the inexperienced surgeon as being required to perform at the same objective standard as the reasonable surgeon.

⁵⁷ *McHale v Watson* (1966) 115 CLR 199.

⁵⁸ In argument in *Imbree* it was suggested that the adult suffering Alzheimer's disease may be no different to a child in terms of their conduct and ability, *Imbree v McNeilly* [2008] HCA Trans 182. See also, Nicki Bromberger 'Capacity and the Law of Negligence — Ignorance and Prejudice Guiding the Way' (Paper presented at the Australasian Law Teachers Association Conference, Perth, September 2007) where she argues that requiring people with mental illness to perform to the same standard as the reasonable person is inappropriate and a form of 'sanism'.

⁵⁹ *Imbree v McNeilly* [2008] HCA Trans 182.

⁶⁰ *McHale v Watson* (1966) 115 CLR 199.

application of the varying rules, it does little to address the underlying fairness or legal principles for the differing treatment.⁶¹

In *Imbree*, counsel for the appellant suggested that the exception created for children is best explained, not on the basis of the age or intellectual capacity of the child, but because the child was engaged in a childish activity at the time the harm occurred.⁶² So that the child playing darts is required to exercise only the reasonable care expected of a child of that age,⁶³ yet the child who chooses to engage in an adult activity such as driving must exercise the care of a reasonable adult.⁶⁴ As children are rarely sued in negligence, it is unlikely the answers to these questions will be forthcoming anytime soon.

While *Cook* was overruled, there is no suggestion in *Imbree* that the ‘no breach of duty defence’ as applied in *Joyce*, and which influenced the court in *Cook* is no longer good law. The joint judges appear to accept the defence on the basis that it asks the same questions and draws the same conclusions as the common law defence of voluntary assumption of risk.⁶⁵ While in practice the conclusions may often be the same it is submitted that the defences are distinct in that the ‘no breach of duty’ defence requires only that the plaintiff be aware of the defendant driver’s intoxication and not, as required with *volenti*, also appreciate and accept the risk involved in being a passenger of an intoxicated driver.⁶⁶ Given the provisions in the various *Civil Liability Acts*, dealing with the effect of intoxication on contributory negligence and the suggestion in *Imbree* that consideration of the plaintiff’s knowledge is more appropriately dealt with as an issue of contributory negligence, the relevance of the ‘no breach of duty defence’ today is clearly questionable.⁶⁷

⁶¹ See eg, Bromberger above n 57.

⁶² *Imbree v McNeilly* [2008] HCA Trans 182.

⁶³ *McHale v Watson* (1966) 115 CLR 199.

⁶⁴ See, eg, *Tucker v Tucker* [1956] SASR 297

⁶⁵ *Imbree* (2008) 249 ALR 647, 666.

⁶⁶ *Jeffries v Fisher* [1985] WAR 250.

⁶⁷ See, eg, *Civil Liability Act 2003* (Qld) ss 47, 49; *Civil Liability (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* (WA) s 5L. For a comprehensive overview of these provisions and how they apply to the passenger of an intoxicated driver see Mandy Shircore, ‘Drinking, Driving and Causing Injury: The Position of the Passenger of

Kirby J's pleas that the reality of insurance be acknowledged by the courts as relevant to the determination of liability continue to go largely unheard by the remaining High Court bench. As Kirby J himself noted, counsel for the appellant did not pursue this line of argument, preferring instead to rely on general principle and the cogent reasoning of Megaw LJ in *Nettleship*.⁶⁸ There is no doubt that the availability of insurance provides the basis for the action, without insurance the young defendant would unlikely be sued. However, it is submitted that in the circumstances of this case there was no need to rely on insurance as a ground for overruling *Cook* and attributing liability. Without resort to 'special and exceptional' relationships, 'proximity' and the plaintiff's 'knowledge' as underpinning the attenuated standard of care, there was no logical basis on which the *Cook* principle could rest. In reality the exception created in *Cook* was always conceptually difficult to justify and with the availability of contributory negligence and apportionment legislation unnecessary to any determination of the defendant's liability.

VII CONCLUSION

While torts examiners may mourn the loss of the *Cook* principle as an interesting twist in the standard negligence examination, they will undoubtedly applaud the *Imbree* decision as providing a more principled and consistent approach to the standard of care determination. The *Cook* principle was always difficult to justify as it singled out one particular relationship (whether based on the role of supervision or the plaintiff's knowledge) to receive special treatment. Particularising relationships in this way is inconsistent with the development of a general law of negligence, which it is submitted should seek to apply consistent and objective standards to determine a defendant's conduct. Measuring the applicable standard of care owed by a defendant is more appropriately a consideration of what the reasonable defendant should do, with contributory negligence the point at which the plaintiff's knowledge and conduct should be considered.

It is unlikely that family members who agreed to guide the learner driver patiently through the many hours of required supervision were hitherto

an Intoxicated Driver' (2007) 7 *Queensland University of Technology Law and Justice Journal* 375.

⁶⁸ *Imbree* (2008) 249 ALR 647, 680.

aware that in taking on that role they were subjecting themselves to different and prejudicial treatment as compared to other road users and passengers. One wonders whether they would so willingly have taken on the role had they known. While according with legal principle the decision in *Imbree* provides for the practical reality that compulsory third party motor vehicle insurance guarantees that a person injured on the roads by the negligence of another receives fair compensation. As there will always be a need to supervise learner drivers through the gruelling and nerve wracking hours required by legislation, suitable protection should be provided to the supervisor. In a system dependant on proof of fault, *Imbree v McNeilly* ensures that the supervisor is no longer disadvantaged.

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