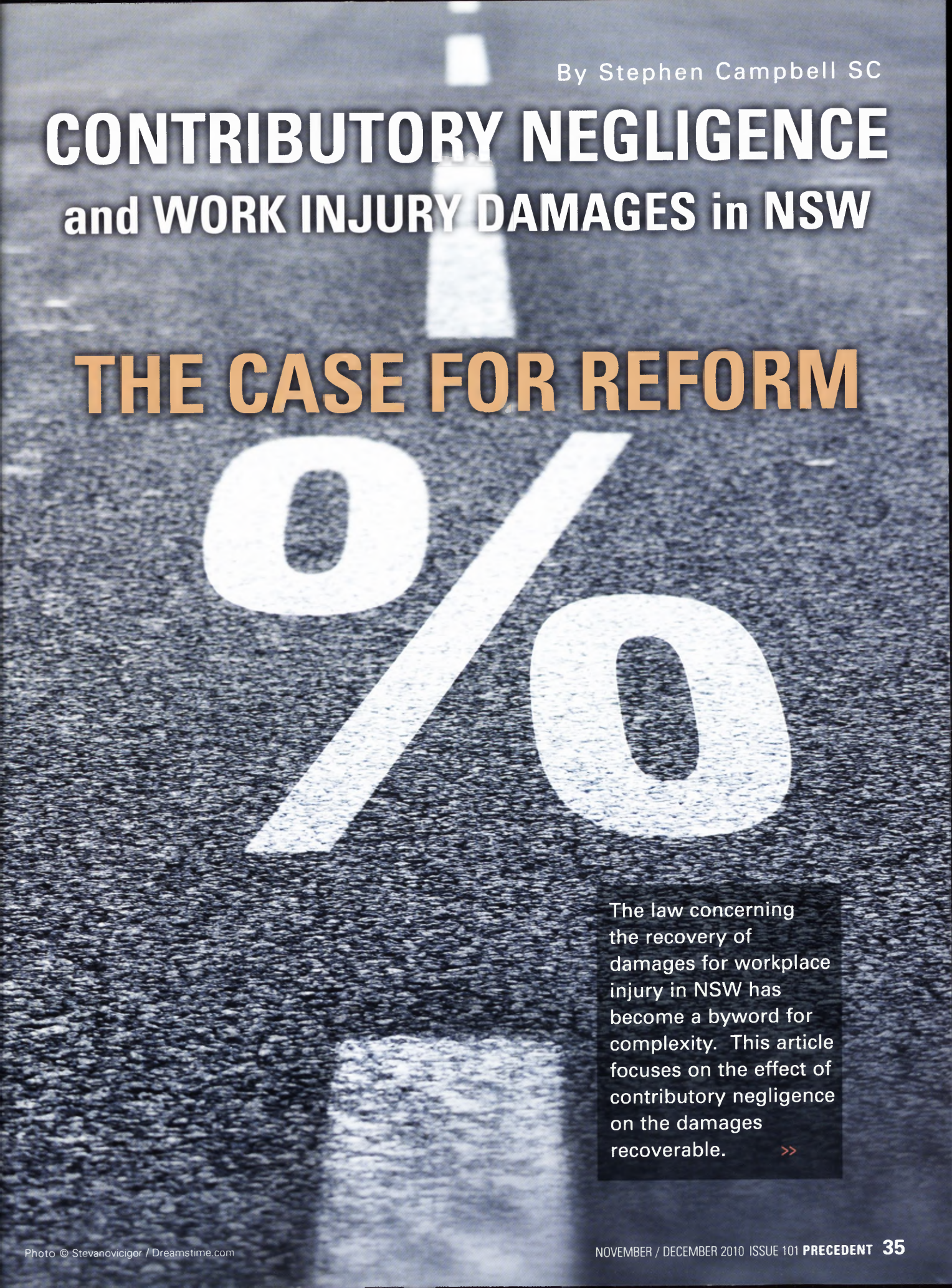

By Stephen Campbell SC

CONTRIBUTORY NEGLIGENCE and WORK INJURY DAMAGES in NSW

THE CASE FOR REFORM

The law concerning the recovery of damages for workplace injury in NSW has become a byword for complexity. This article focuses on the effect of contributory negligence on the damages recoverable. >>

Section 9 of the *Law Reform (Miscellaneous Provisions) Act* 1965 comes into operation if a person suffers injury as the result partly of his or her failure to take reasonable care and partly of the wrong of another. The person's claim in respect of the damages is not defeated by reason of the contributory negligence. Rather, the damages recoverable in respect of the wrong are to be reduced to the extent that the court thinks just and equitable, having regard to the plaintiff's share in the responsibility for the damage.

This apportionment legislation is familiar to every personal injury lawyer. Its original enactment ameliorated the common law under which a plaintiff's contributory negligence was a complete defence to an action in negligence. From the time of its original enactment, the need to provide for the interplay between the apportionment legislation and the provisions of the workers' compensation legislation providing for the avoidance of double satisfaction of the loss suffered by an injured worker has been recognised.[1] This task has been achieved by s10 of the apportionment legislation. The differential operation of this provision lies at the heart of the problem.

Basically, the amendments to s10 have not kept up with the changes in the law governing the quantum of damages for injury in the workplace since 30 June 1987. The anomalies in the operation of the present system can be illustrated by reference to the following scenarios:

1. A worker eligible to claim work injury damages sues the employer only.
2. A worker who is receiving workers' compensation sues a third party to the employment relationship only.[2]
3. A worker who is receiving workers' compensation sues a third party to the employment relationship *and* the employer brings proceedings for the indemnity provided by s151Z(1)(d).
4. The dependants of a deceased worker, who was guilty of contributory negligence, who have received death benefits under the workers' compensation legislation bring a claim against either the employer or a third party to the employment relationship under the *Compensation to Relatives Act* 1897.

SCENARIO A

Under s151A of the *Workers' Compensation Act* 1987 (WCA) a person who recovers damages in respect of an injury from the employer liable to pay compensation under the WCA ceases to be entitled to any further compensation under WCA, *and* the amount of any weekly payments of compensation already paid is to be deducted from the damages[3]

A cursory glance at the provisions of s10 of the apportionment legislation demonstrates that s151A (and its predecessor, the former s151B) is not mentioned in that provision. The old s63(5) of the 1926 Act is In respect of that old provision, the defence (or deduction) of compensation paid is to be reduced to the same extent as the damages recoverable by the worker are reduced for contributory negligence. The omission of a reference to s151A means that a worker found to have been guilty of contributory negligence in this scenario will have his or her damages reduced, but will have to repay from those reduced damages (or have deducted) the whole of the relevant weekly payments of compensation without reduction. At least, this is the construction adopted by Master Malpas (as he then was) in *Zampetides v State of NSW*,[4] affirmed by the NSW Court of Appeal in *Tabvena Pty Ltd v Oag*.[5]

> Contributory negligence on the part of a worker does not reduce the indemnity; it merely reduces the cap on the funds available to satisfy the indemnity.

In *Zampetides*, it had been argued that the failure to amend s10 of the apportionment legislation to refer to s151B (the predecessor of s151A), unlike s151Z, at the time of the amendments, to give effect to the reintroduction of modified common law damages to WCA in 1989, was a clear oversight of a type that justified words being read into s10 according to established canons of statutory construction,[6] but this argument was rejected.

In *Oag*, Meagher JA carried out a careful review, in an appendix to his judgment, of the relevant legislative history, but he, too, did not think the omission could be made good by the court.

This position is different from the law that applies to Scenario B.

SCENARIO B

In dealing with this and the next scenario, I will assume that the employer was not negligent in the circumstances giving rise to the workplace injury. This avoids factoring the added complexities arising from the application of s151Z (2) WCA into the discussion.

The law applied here is straightforward and familiar. It operates according to the apparent original intent of s10(2) of the apportionment legislation, which provides that if the claimant is liable to re-pay compensation to his or her employer, *inter alia*, under s151Z WCA, *the amount of compensation so payable is to be reduced to the same extent as the damages recoverable by the claimant are reduced.*

Section 151Z (1) WCA operates to prevent a worker who receives an injury for which compensation is payable under WCA, which was caused under circumstances creating a liability in a third party to pay damages, from retaining both the workers' compensation and the damages The intent of the provision is to prevent the worker from achieving double satisfaction in respect of the one loss.

By s151Z(1)(b), a worker who recovers, first, compensation and, secondly, damages, *is liable to repay out of those damages* the amount of compensation the employer has paid. And the right to compensation comes to an end.

The *Hickson* case concerned the question of whether the phrase *damages recoverable by the claimant*, where it appears in s10(2) of the apportionment legislation, refers only to court-awarded damages to the exclusion of the proceeds of a compromise. The High Court of Australia held that the provisions apply to both. Section 10(2) and s151Z(1)(b) are linked. It is necessary to consider how they operate in combination. Section 10(2) is not confined to those cases in which the claim for damages *proceeds to judgment with curial determination of the extent of the worker's contributory negligence.*[7]

SCENARIO C

It will be recalled that Scenario C is concerned with the situation where the worker sues the third party *and* the employer brings what might be referred to as a 'piggy-back' action to enforce its entitlement to indemnity under s151Z(1)(d). As is well-known, the statutory right to indemnity is limited to the amount of the damages recoverable by the worker. These 'piggy-back' actions are increasingly common in NSW.

This introduces a new factor into the equation, which has the effect of nullifying the beneficial interplay between apportionment legislation and s151Z(1)(b) WCA. As Justice Bell pointed out in *Hickson*, s10(2) speaks to paragraph (b) only and not to paragraphs (d), (e) and (e1).[8] Accordingly, it was not necessary to consider those other paragraphs for the determination of the *Hickson* appeal.

The effect of the worker's contributory negligence in an action for the statutory indemnity is only to diminish the notional fund of damages available to indemnify the employer.[9] There is no apportionment of the pay-back.

An obvious tension arises between the effect of paragrah (b), on the one hand, and paragraph (d), on the other. Both affect the amount of the plaintiff's net recovery. But they have a differential effect. Paragraph (b) affects the net recovery directly, because of the worker's statutory liability to repay, adjusted by s10(2) of the apportionment legislation. Paragraph (d) affects the recovery indirectly, because by paragraph (e) the payment by the third party under the indemnity prior to judgment in favour of the worker gives rise to a defence to that covers the whole amount of the payment. There is no adjustment, because s10(2) of the apportionment legislation speaks to the case where the worker has a liability to repay, not where the third party has a liability to indemnify.

Even if the third party pays after the judgment in the worker's favour, but before satisfaction of the judgment, the whole of the payment, to the extent of it, satisfies the judgment against the third party by dint of paragraph (e1). Contributory negligence on the part of a worker does not reduce the indemnity, as already stated; it merely reduces the cap on the funds available to satisfy the indemnity.

In a 'piggy-back' action, both proceedings will usually >>

be ordered to be heard together, with evidence in one standing as evidence in the other. Judgment will be entered simultaneously. Especially where there has been a finding of contributory negligence on the part of the worker, the third party will be bound to satisfy the indemnity first, relying upon the protection provided by paragraph (e1). Otherwise, the third party may be forced to pay twice.

By way of illustration, let us suppose that the worker obtains judgment after reduction for 30 per cent contributory negligence in the sum of $500,000 and the employer recovers judgment in respect of its statutory indemnity for the whole of the compensation paid in the sum of $150,000. If the tortfeasor pays the worker first, the worker need repay only 70 per cent of the compensation, or $105,000. The worker keeps $395,000. But the employer has judgment for $150,000 against the third party. It receives $105,000 from the worker and can enforce the balance of $45,000 against the tortfeasor. Paragraph (e1) seems to envisage that the tortfeasor will protect itself against this unhappy outcome by paying the employer first, then the worker.[10] If the tortfeasor looks to its own financial self-interest and pays the employer first, the worker is worse off to the tune of $45,000.

SCENARIO D

This scenario concerns the effect of contributory negligence on the part of a deceased worker on the net recovery of the claim brought by his or her dependants under the *Compensation to Relatives Act* 1897. As I will seek to demonstrate, the damages under that Act will be reduced for that contributory negligence, but the workers' compensation recovery may not.

Section 13 of the apportionment legislation made it clear that no action for damages for the benefit of the dependants of a deceased person (including a worker) was to be defeated or reduced by reason of the contributory negligence of the deceased. The effect of that provision has been overtaken by tort law reform. In the case of dependants of a deceased worker suing the employer alone, s151N(5) WCA provides that s13 of the apportionment legislation does not apply so as to prevent the reduction of damages for the contributory negligence of the deceased worker. As has been noted, s151A(3), by parity of reasoning with *Zampetides* and *Oag*, operates by deducting the whole of the statutory compensation paid in respect of the death from those reduced damages.

Where the dependants sue a third party, generally, their rights will be modified by the *Civil Liability Act* 2002, except in the rare cases to which s3B(1) of that Act apply. Section 5T of that Act is in materially the same terms as s151N(5) WCA.

In a case against the third party, it may be that the language of s10(2) of the apportionment legislation is not apt to protect the position of the dependants. For the reasons I have given, it clearly does not apply to claims against the employer. The subsection in full reads as follows:

> 'If the claimant is liable to repay compensation to his or her employer under s64(1)(a) of the *Workers' Compensation Act* 1926 or s151Z of the *Workers' Compensation Act* 1987, the amount of compensation so repayable is to be reduced to the same extent as the damages recoverable by the claimant are reduced under s9.'

The claimant is defined by s9 in this way:

> 'If a person (the claimant) suffers damage as a result partly of the claimant's failure to take reasonable care (contributory negligence) and partly of the role of any other person:
>
> The claim is not defeated, but the damages recoverable are to be reduced.'

Taking 'claimant' to mean a person who suffers damage, and 'contributory negligence' to mean that person's failure to take reasonable care, one can see that s9 does not happily fit into the compensation-to-relatives mould.

Moreover, when one considers s10(2) of the apportionment legislation in its statutory context, it is difficult to understand the clause *'claimant was liable to repay compensation to his or her employer'* as accommodating dependent plaintiffs.

Although, so far, there is no decision of a superior court to the effect suggested, given the approach taken in the *Zampetides* and *Oag* decisions, the combined effect of these provisions may be that the dependants of a deceased person will have to pay back the whole of the workers' compensation received, notwithstanding the reduction of the damages recoverable by them by reason of the contributory negligence of the deceased breadwinner.

CONCLUSION

The current state of this law is very unsatisfactory. It is difficult to conceive of a reason, in principle or sound policy, that would justify inconsistent legislation that imposes the burden of contributory negligence unevenly on injured claimants, or their dependants. Urgent reform is necessary and could easily be achieved by careful, but not extensive, amendment to s10 of the apportionment legislation. ■

Notes: **1** See the discussion in *Hickson v Goodman Fielder Ltd* (2009 237 CLR 130 at [19], [32] – [34]. **2** The arcane provisions of s151Z(2) are beyond the scope of this paper. **3** Section 151A(3) WCA makes a similar provision in respect of an action under the *Compensation to Relatives Act* 1897 against the employer, and is discussed in respect of scenario D. **4** [2000] NSWSC 829. **5** [2002] NSWCA 61 per Meagher JA, with whom the other members of the court agreed. **6** *Jones v Wrotham Park Estates* [1980] AC 74 at 105 – 6. **7** *Hickson* at [44]. **8** *Ibid,* at [37]. **9** *Government Insurance of NSW v CE McDonald (NSW) Pty Ltd* (1991) 25 NSWLR 492 at 499; *QBE Workers' Compensation (NSW) Ltd v Dolan* (2004) 62 NSWLR 42. **10** *Sydney Harbour Foreshore Authority & Anor v Perrett & Anor* (2010) NSWCA 160 at [3]. The point was not decided, but the court noted that it was common ground between the parties that this was so. Cf the discussion in *Watson v Newcastle Corporation* (1962) 106 CLR 426, decided in the context of s64 of the 1926 Act, which contained no equivalent of paragraph (e1).

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