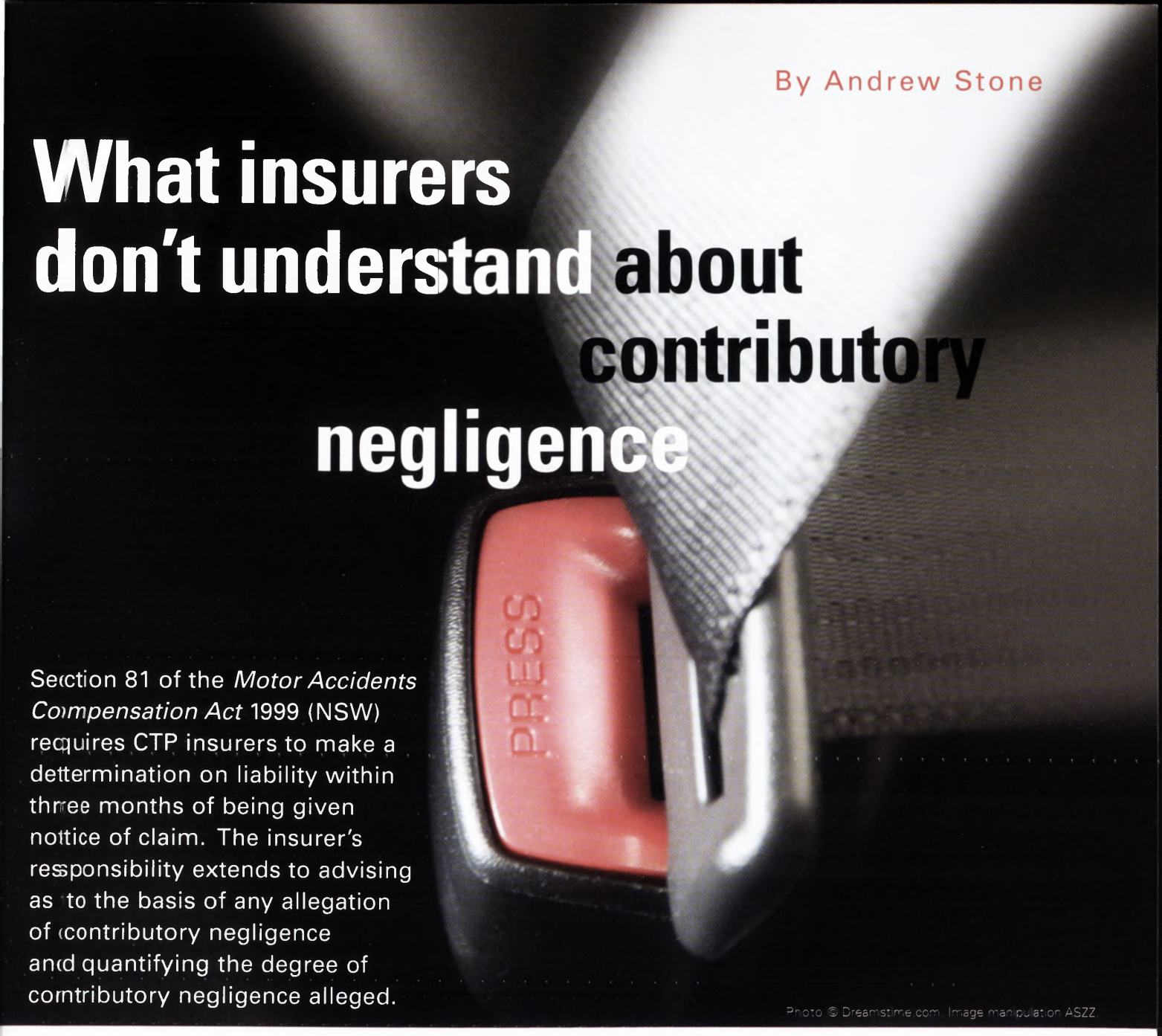
By Andrew Stone

What insurers don't understand about contributory negligence



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Section 81 of the *Motor Accidents Compensation Act* 1999 (NSW) requires CTP insurers to make a determination on liability within three months of being given notice of claim. The insurer's responsibility extends to advising as to the basis of any allegation of contributory negligence and quantifying the degree of contributory negligence alleged.

A common experience has been that insurers *'over allege'* contributory negligence. There are two possible explanations. Either the insurer treats the allegation of contributory negligence as an ambit claim, or they simply don't understand the applicable principles. Perhaps the reality lies somewhere between.

Either way, it is all too common to see allegations of 70 per cent, 80 per cent or even 100 per cent contributory negligence alleged in cases where a passenger has been injured as a consequence of an intoxicated driver's loss of control.

The reality is that allegations of 80 per cent or higher are usually unrealistic and reveal a misunderstanding of how contributory negligence is assessed. Even where the passenger knew the driver was intoxicated or was unlicensed, or where the passenger wasn't wearing a seatbelt, the proper assessment of *'relative culpability'* should usually see the greater proportion of responsibility allocated to the driver.

The central thesis of this article is that it is only the exceptional case where the passenger's culpability exceeds that of the driver.

GENERAL PRINCIPLES OF CONTRIBUTORY NEGLIGENCE

The leading Australian case addressing the principles of contributory negligence continues to be *Podrebersek v Australian Iron & Steel*.[1]

Although the case is oft cited, the facts are rarely referred to. The plaintiff was injured in 1969 (it took 16 years for the case to reach the High Court!), when a gas pipe exploded at his work. The plaintiff was the worker responsible for inserting pins back into the pipe after cleaning and he had failed to properly screw a pin back in.

In a joint judgment, five members of the High Court dismissed the worker's appeal against the jury's apportionment >>

of contributory negligence, citing the well-established principle that, although on issues of apportionment of contributory negligence there may be differences of opinion by different minds, appellate interference should be restrained.

The enduring statement of principle is that the making of an apportionment as between a plaintiff and a defendant for their respective share of responsibility involves a comparative judgement, both of the '*relative culpability*' of the parties and the '*causal potency*' of their respective negligent acts.

APPLICATION OF THE PRINCIPLES TO MOTOR VEHICLE CASES

A contributorily negligent act, such as failure to wear a seatbelt, may have a high degree of causal potency (the plaintiff is thrown through the windscreen rather than being restrained safely in a seat). However, the driver who has run off the road and hit a telegraph pole has also engaged in a highly causally potent departure from the standard of care. It is rare to see a finding in excess of 50 per cent for failure to wear a seatbelt. It is usually also worth pointing out that the driver who drives with a passenger unrestrained is committing an ongoing criminal offence.

When it comes to relative culpability, the driver is the one behind the wheel and in charge of the vehicle, while the passenger usually exercises a significantly lesser degree of control.

In cases involving drivers and pedestrians, the courts have traditionally looked at the relative culpability of each party, having regard to the lethal capacity of the motor vehicle (for which the driver assumes responsibility).

In *Smith v Zhang*,[2] Macfarlan JA cited with approval the comments of the High Court in *Pennington v Norris* as follows:[3]

> 'Here, as in Pennington, the respondent was driving a vehicle which had the potential to cause considerable harm to others if he failed to drive it carefully. Thus the responsibility that he undertook, along with other drivers on the public roads, was a heavy one. In contrast, the [pedestrian] appellant's conduct was unlikely to cause harm to anyone other than herself. Her responsibility was thus more limited and her neglect of it was less significant than the respondent's neglect of his own.'

Focusing on cases as between passenger and driver, the Supreme Court of Ireland neatly summarised the general principle in *Moran v Fogarty*,[4] stating:

> '...in general it can be said that the blame-worthiness of the driver will be greater than that of a passenger permitting himself to be driven. The decision to drive is that of the driver and it is he that poses the risk to his passengers and to other road users. Accordingly, an apportionment to such a passenger will normally be less than that to the driver.'

THE EXCEPTIONAL CASES

Perhaps the reason that insurers in NSW keep alleging 80 per cent contributory negligence or more in passenger/driver cases is that they don't understand that the few cases where findings of such magnitude have been made were truly exceptional.

The two cases most frequently cited by insurers to support allegations of contributory negligence in excess of 50 per cent for an injured passenger are *Berryman* v *Joslyn* and *Mackenzie v The Nominal Defendant*. Both cases involved the passenger exercising an unusual degree of control over the driving exercise.

It is this greater degree of control that has led to the apportionment of contributory negligence in excess of 50 per cent. Without this greater degree of control on the part of the passenger, the usual principles would apply – the driver bears a greater proportion of the responsibility for the driving activity than the passenger.

It is worth examining the facts and principles in each case to establish why the cases are exceptional.

Berryman v Joslyn [2004] NSWCA 121

Mr Berryman was injured as a passenger in his own ute. The driver was Sally Joslyn. The pair had attended a party at a property near Darenton in south-western New South Wales, drinking until about 4.00am. Berryman then slept in the back of the ute.

Upon awakening early on the Sunday morning, Joslyn and Berryman decided to drive to Mildura for breakfast. They safely made it to Mildura and Berryman ate, but upon the return journey to the property Berryman, who was driving, started to doze behind the wheel. Berryman then elected to hand over the driving to Joslyn, despite knowing that she had lost her licence, had not driven for over three years, that she was still intoxicated from drinking the night before, that she had had little sleep and that the ute was difficult to handle and had a propensity to roll.

Unsurprisingly, Joslyn crashed the ute. Berryman sued. Joslyn's BAC at the time of accident (about 8.45am) was estimated to be 0.13, while Berryman's was a somewhat higher 1.90.

The trial judge deducted 25 per cent for contributory negligence. Berryman appealed, complaining about the 25 per cent contributory negligence finding, while Joslyn's insurer cross-appealed, asserting contributory negligence should have been 90 per cent. The Court of Appeal held that there was no contributory negligence at all, on the basis that Berryman had not actually detected that Joslyn was displaying signs of intoxication at the time he handed over the driving. The Court of Appeal seemingly also took into account that Berryman was too drunk to really appreciate what was happening.

Joslyn appealed to the High Court, which held that the measure of contributory negligence was objective and that Berryman's own intoxication was no excuse for putting Joslyn in the driver's seat. The matter was remitted to the Court of Appeal for further determination of the contributory negligence issue.

On remitter, the Court of Appeal re-assessed contributory negligence at 60 per cent. Part of the reasoning of the court in reaching that figure was that Berryman was the owner of the vehicle and, thus, was in a position to exercise control over its use.[5]

Berryman could have elected to pull to the side of the road and let them both sleep. Instead, Berryman made the deliberate decision to let Joslyn drive when she was unlicensed, had never driven the vehicle, had no idea of its propensity to roll and had not driven for three years. Joslyn had not eaten at the McDonalds restaurant and had had less sleep than Berryman. All this and still only 60 per cent!

The circumstances of this accident are relatively unusual. Far more common are the circumstances where a passenger accepts a lift home with an inebriated driver, where the driver is also the owner of the vehicle and in charge of it. Such facts are significantly different from *Berryman v Joslyn*. Remove the additional element of control by Berryman over the use of his own vehicle and it is hard to see how the assessment of contributory negligence would have been at or over 50 per cent.

Mackenzie v The Nominal Defendant [2005] NSWCA 180

Mackenzie and Brown were both shearers. Over a weekend, the two men engaged in extensive drinking at a variety of locations. Their bender ended after the pair reached the decision that it would be a good day to go for a motorbike ride on Mackenzie's unregistered Harley Davidson motorcycle.

Mackenzie had a suspended licence and did not want to risk a further suspension. He instead elected to let Brown ride his motorcycle, despite the fact that Brown was not licensed to ride a motorcycle and had no experience with the Harley Davidson. Mackenzie was the pillion passenger on his own bike.

Both men were drunk. Brown's BAC was estimated at 0.187, while a much rougher estimate of Mackenzie's intoxication (there was no blood sample) was in the order of 0.25.

The trial judge assessed 100 per cent contributory negligence on the basis that it was Mackenzie who put Brown in the driver's seat, creating a situation where an accident would almost inevitably occur.

The Court of Appeal held that it was open for the judge to make an assessment of 100 per cent contributory negligence, stating:

> 'If the intoxicated appellant, knowing (despite his intoxication) that Mr Brown was unlicensed, inexperienced and wholly unfit to be allowed to ride the motorcycle and was severely intoxicated, invited Mr Brown to ride the motorcycle and joined him as a pillion passenger, the judge's determination was open to him.'

This statement contains no analysis of Brown's relative culpability. The Court of Appeal went on to hold that the >>

trial judge had erred by failing to take into account that the plaintiff had not intended to go motorbike-riding before he started drinking and had only arranged the ride once his judgement was significantly impaired by alcohol. Apparently, this lessened the departure from the standard of care of a reasonable man, such that the court re-assessed contributory negligence at 80 per cent.

The critical point from the case is the finding that the plaintiff *'put Mr Brown in the driver's seat'* – again, evidencing that it is the element of control over the vehicle that has the capacity to make a passenger more liable than the driver who loses control.

GREEN v THE NOMINAL DEFENDANT [2012] NSWDC 37

This case (in fact three cases heard together) clearly illustrates the principle that even where the passengers have substantially departed from a reasonable standard of care for their own safety, measuring relative culpability will rarely see the passengers assessed at greater than 50 per cent contributory negligence. The case involved a carload of young men and women who travelled from Inverell to Tingha to attend a pool competition at a hotel.

On the return journey from Tingha to Inverell, the driver of the unregistered station wagon was the unlicensed (disqualified) Samuel Campbell. He had a BAC of just on 0.10. One of the rear seat passengers, Twilia Campbell, was not wearing her seatbelt. There were two passengers lying in the boot of the station wagon who had no seatbelt available. There were a total of eight people in the car.

During the return journey, the driver collided with and killed a kangaroo. The car stopped and the kangaroo was loaded onto the roof of the car (also unrestrained). The driver had almost made it back to Inverell when he lost control, left the road and collided with a power pole at speed. The three unrestrained passengers were ejected and injured.

Following a five-day hearing, Sidis DCJ found 35 per cent contributory negligence against Ms Campbell (the unrestrained rear seat passenger) and 40 per cent contributory negligence as against the two young men in the boot (Golding and Green).

The Nominal Defendant has appealed this assessment in all three cases, alleging that the trial judge should have found 80 per cent contributory negligence. The appeal has yet to be determined and will provide useful guidance on how an assessment of relative culpability is to be approached in passenger/driver cases.

It may well be the case that it is held on appeal that all three passengers significantly departed from the requisite standard of care for their own safety. The insurer alleges the following as departures from the standard of care the passengers owed themselves:

(i) They knew the driver had been drinking.
(ii) They knew the driver was unlicensed.
(iii) They knew the vehicle was unregistered (of marginal relevance – the vehicle would still have crashed if registered).
(iv) They elected to travel unrestrained by a seatbelt.
(v) The trip could have been avoided altogether, with the passengers sleeping over at a relatives' house in Tingha for the night.

If all these facts were considered in a vacuum, then there might be an argument for contributory negligence over 50 per cent, although the departure does not appear quite as gross as *Mackenzie v The Nominal Defendant* (a BAC for Mr Brown in *Mackenzie* of 0.187 compared to Mr Campbell's 0.100).

However, it is necessary to evaluate *relative* culpability. Consider the actions of the driver and his departure from the standard of care that he owed his passengers:

(a) The driver knew he had been drinking and was affected by alcohol.
(b) The driver knew he was unlicensed.
(c) The driver knew the vehicle was unregistered (to the extent that this is relevant).
(d) The driver knew that he had unrestrained passengers in the vehicle – there were no seatbelts for the two young men lying in the boot.
(e) The driver could have elected not to drive at all and could have slept over in Inverell with his passengers. No one made him drive.

As the above short analysis shows, for every negligent act by the passengers, there was a corresponding and equivalent negligent act by the driver. Simply comparing the two lists would lead to an assessment of 50/50 between the two parties.

However, what is missing from the second list is the most significant act of negligence on the part of the driver, unmatched by any corresponding negligence on the part of the plaintiff. It was the driver who got behind the wheel of the vehicle, it was the driver who drove at excessive speed and it was the driver who lost control, ran off the road and hit the telegraph pole. These were the most direct and causally potent acts and they were the responsibility of the driver alone.

Given these additional (and causally critical) acts of negligence on the part of the driver, the case for finding a higher degree of relative culpability on the part of the driver as compared to the passengers, seems compelling. Whether the Court of Appeal accepts that submission remains to be seen.

CONCLUSION

Passengers who travel with an intoxicated and unlicensed driver can expect a significant penalty for contributory negligence. However, that contributory negligence is unlikely to exceed 50 per cent, except in cases where it is the passenger who owns the vehicle and the passenger has been responsible for putting the driver in the driver's seat. ■

Notes: **1** *Podrebersek v Australian Iron & Steel* (1985) 59 ALR 529. **2** *Smith v Zhang* [2012] NSWCA 142. **3** *Pennington v Norris* (1956) 96 CLR 10. **4** *Moran v Fogarty* [2009] IESC 55 [at 34]. **5** [At 31].

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