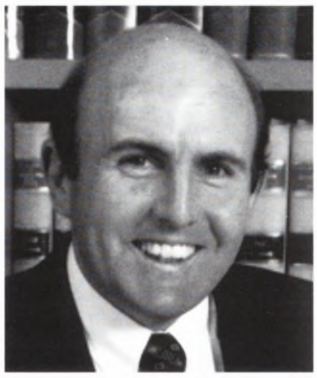
Pedestrians: compensation & contributory negligence

Richard Faulks, Canberra



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"The standard of care and skill which the law must demand from the driver of a motor car today is a very high one indeed. The motor car has become a lethal weapon. It may be that pedestrians very often feel that it is so. We know that the motor car kills thousands of pedestrians, but I have never heard of a single pedestrian, or of a thousand pedestrians combined, who killed one motor car. The standard of care and skill which the law requires today on the driver of a motor vehicle is very high indeed." (Daly vLiverpool Corp [1939] 2 All ER 142)

The above statement was made by Stable J. in 1939 but goes some way towards explaining the high duty owed by drivers of vehicles when it comes to pedestrians. The latest authorities appear to suggest that in almost every case it is possible to highlight a number of factors showing negligence on the part of the driver of a motor vehicle which hits a pedestrian even though there may also be a finding of contributory negligence on the part of the pedestrian.

In cases involving children, once some primary negligence can be established on the part of the driver of a motor vehicle, it is clear that, depending on the age of the child, it is unlikely that a finding of contributory negligence will be made. As was stated by the Tasmanian Supreme Court:

"Young children have limited perception, foresight and ability to make a reasoned judgment. Young children lack the capacity to recall and apply previously gained knowledge so as to avoid injury. Impulsiveness, selfishness and a single mindedness are idiosyncratic behaviour characteristic of childhood." (Mayne v The MTT 12 February 1992 unreported)

Cases show that especially with children under the age of five there have been rarely any findings of contributory negligence. With children who are older it will depend entirely upon the circumstances though it seems from the authorities that children as old as thirteen may escape contributory negligence even where they run into the path of passing motor vehicles. In the New South Wales Court of Appeal decision of *Williams v Mitchell* an eleven year old child ran out from behind a house into the path of the vehicle. The Court held that the driver should have foreseen the likelihood of children playing in the area and refused to make any finding of contributory negligence. In a recent unreported Queensland Supreme Court case (*Horne v Queensland*) a thirteen year old child who borrowed a bicycle and travelled on a dangerous road was held not to be guilty of contributory negligence.

The situation with adults is, of course, quite different. It is my view, however, that the most recent authorities show a trend towards finding some form of primary negligence on the part of any driver even when a pedestrian acts with apparent complete lack of regard for their own safety. It is interesting to contrast two decisions of the Full Court of the Supreme Court of New South Wales which were handed down in June 1996 and to contrast them with the most recent authorities. In *Khachikin v Michael* (unreported 7 June 1996) the Full Court was faced with a situation where the defendant was driving at approximately 40 or 50 km per hour and had moved through an intersection with a green light. The driver observed two men standing on a footpath or verge adjacent to the kerb. The defendant then watched the road ahead of her and when she was only a few metres away from where the men had been one of the men ran out between parked cars and was struck by her vehicle. The Judge at first instance found that in the circumstances the defendant was negligent but found 75% contributory negligence on the part of the plaintiff. The Full Court found that there was no negligence on the part of the defendant. The primary Judge had found that having seen the plaintiff the defendant should have kept a closer eye on the two men in case one of them moved onto the roadway. The Full Court disagreed and Cole JA said:

"That finding was not available to His Honour as he had found that the appellant had observed them when some 30 metres away but that they gave no indication of moving onto the roadway. In those circumstances it was entirely reasonable for the appellant to look ahead for any other danger."

Another case decided at about that time was the case of *Nunes v Rustandi* (unreported 20 June 1996). In this case the evidence was that the plaintiff had walked a couple of paces from the kerb in Market Street in Sydney and ran into the near side of the defendant's vehicle. The evidence was that the defendant was driving at approximately 30 or 40 km per hour and the plaintiff simply stepped onto the roadway and collided with the vehicle. The trial Judge found no negligence and the Full Court agreed suggesting that it was clear that there was nothing the defendant could have done by braking or swerving which would have avoided the accident even if the defendant had seen the plaintiff.

In my view it is only in the type of circumstances suggested in the *Nunes* case that a defendant could successfully argue no negligence based on the more recent authorities. The most recently decided cases refer at length to the judgments in *Stocks and Anor v Baldwin* 24 MVR 416. In that case the plaintiff was crossing a busy street comprising three lanes on each side of a median strip some 40 metres from traffic lights. A pedestrian crossed the median strip and moved through banked up vehicles in the middle lane into the ▶

kerb side lane where she was struck down by the defendant who was driving his car at about 40 km per hour. The trial Judge had found that the defendant was negligent for the reason that he was travelling at an excessive speed in the circumstances and found that the plaintiff was contributorily negligent on the basis that she did not check adequately as to whether there was any traffic in the kerb side lane. 40% contributory negligence was attributed. On appeal the Full Court dismissed the appeal. Even though a driver of a vehicle on a busy street is entitled to act on the assumption that pedestrians will take precautions for their own safety, it was foreseeable that in the circumstances a pedestrian might not take reasonable care for his or her own safety. Mahoney P. in his judgment stressed that vehicles may not be driven at a speed which involves a foreseeable risk of injury. As he said:

"As cases which come before this Court evidence, it not infrequently occurs - and is therefore foreseeable - that a person may step suddenly from behind a parked van or other obstruction into the path of an oncoming vehicle."

His Honour went on to describe the "balancing" process which was stressed by Mason J. in *Wyong Shire Council v Shirt* 146 CLR 40 at 47-8. He indicated that in these cases four things must be borne in mind and they are:

1. The extent of the damage that may be done by a driver to a pedestrian;
2. The degree of likelihood that a pedestrian will suddenly come into the path of an oncoming vehicle;
3. The consequent extent of the precautions which a driver must take against that eventuality; and
4. The extent of what a driver is able to do when confronted with such a danger.

All of the most recent cases stress, as Mahoney P. stated in *Stocks v Baldwin*, that "pedestrians sometimes act carelessly". A prudent driver must be aware of that eventuality and take precautions.

A further case in the Full Court at about that time further demonstrates these principles. In *Z Yu v W Yu* (unreported 16 October 1996) the Court had to deal with a situation where a plaintiff crossed a pedestrian crossing when faced with a "Don't Walk" sign. The evidence appeared to suggest that the plaintiff had been running. It was common ground that the defendant had a green light at the crossing and the defendant's vision of the plaintiff was obscured by traffic. The trial Judge found negligence on the part of the defendant and that finding was upheld on appeal. The Court found that it was common knowledge that pedestrians cross at pedestrian crossings with or against the lights and motorists should expect that and take precautions. The Court quoted extensively from the case of *Stocks v Baldwin*. The Court imposed a finding of 65% contributory negligence on the part of the plaintiff.

Assuming some primary negligence can be established on the part of the driver, it is unlikely that a finding of contributory negligence will be found in pedestrian accidents involving children.

There has been a further recent case in the Full Court of the New South Wales Supreme Court which follows this line. In *Schieb v Abbott* (unreported 19 March 1998) the trial Judge had found no negligence on the part of a motorist whose vehicle collided with a pedestrian who had walked on to a busy roadway at night without looking after hailing a taxi. The Full Court allowed the appeal from this decision and found that a reasonable person driving a motor vehicle must take into account the fact that persons are sometimes careless with their safety. The authorities such as *Stocks* and *Yu* were referred to. A finding of 65% contributory negligence was made.

It is therefore suggested that in most cases it will be possible for a plaintiff to establish through the factors outlined in the Stocks case, some primary negligence on the part of a motorist. It is suggested that it is likely that decisions such as *Khachikin* would be decided differently today.

The question still remains as to how a Court will assess any contributory negligence on the part of a pedestrian. It appears from the authorities that findings of contributory negligence of between 40% and 65% are likely. The High Court in Podreberesk vAustralian Iron and Steel Pty Limited (1985) 5ALR 529 said at page 532:

"A finding on a question of apportionment is a finding upon a question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds."

It is suggested that in each case the Court must carry out a comparison between the respective shares in responsibility for the damage caused to the plaintiff. An interesting illustration can be found in a decision of the Supreme Court of the Australian Capital Territory by Miles CJ (*Tallarida v Perrin* 19 December 1986 unreported). In that case the plaintiff was involved in crossing a busy thoroughfare at an angle. As the plaintiff started to cross the road the defendant was approaching the area. The evidence was that the defendant's vehicle had struck the plaintiff when she was in the lane furthest from the kerb and closer to the median strip, that is, she had almost completed her journey across the thoroughfare. His Honour found that the defendant was negligent in driving at a speed that was excessive in all the circumstances taking into account the likelihood of pedestrians in the area. The Court also noted that the plaintiff had made some

movement of her arm which the defendant had interpreted as an invitation to pass in front of her. Miles CJ found that the said interpretation was unreasonable.

Having found primary negligence on the part of the defendant His Honour went on to make some useful comments about the way in which contributory negligence should be assessed:

"The question that arises is as to the extent to which is just and equitable to reduce the plaintiff's damages having regard to the contribution by each of the parties to the plaintiff's injuries.... It was, after all, the vehicle driven by the defendant which struck the plaintiff. Her injuries were not caused by her walking into the vehicle. The defendant was under an obligation to comply with the traffic laws and to take reasonable care to control a potentially dangerous object without injuring others. He drove in excess of the speed limit and he drove into the plaintiff after failing to take reasonable care. In my view, it was just and equitable that the defendant should bear a greater share of responsibility for the damage which flowed from his breach of his duty towards other road users. I think the plaintiff's damages should be reduced by one third for her own contributory negligence".

Clearly in each case the Court will have to undertake a balancing exercise. In some cases the only negligence on the part of a defendant may be the failure to pay proper regard to the risk of pedestrians moving out or running out onto a roadway. In such circumstances it appears the Court is likely to impose contributory negligence of at least 50% - 65%.

In summary I suggest that the recent authorities stress again the warning expressed by Stable J. as long ago as 1939, that there is such a risk of significant injury that can be caused by a motor vehicle to a pedestrian, that the driver bears a very high duty indeed. Further, in light of some of the more recent cases, it will be rare where there can be no finding of negligence whatsoever even in circumstances where a plaintiff has deliberately disobeyed a "Don't walk" sign or has run out onto a roadway without looking properly. ■

Richard Faulks is Managing Partner with Snedden, Hall & Gallop in Canberra. **Phone** (02) 6201 8985 or **email** shg@netinfo.com.au

Workers Compensation SIG

Simon Garnett, Melbourne

The Workers Compensation SIG was established at the 1997 National Conference and now has approximately 90 members throughout Australia.

The State and Territory convenors are:
Paul Mulvany (Vic)
Anthony Monaghan (NSW)
Simon Morrison (Qld)
Garry Schneider (NT)
Guy Stubbs (WA)
Robert Phillips (Tas)
Richard Faulks (ACT)
Stephen Lieschke (SA)

The Group's aims are:

- to encourage communication and the exchange of information between members allowing for more effective representation and outcomes for injured workers.
- to encourage best practices amongst members representing workers compensation claimants
- to encourage networking between members.
- to create and maintain a data base of educational material, expert witnesses and commentaries concerning legislative and judicial transient workers compensation law.
- to monitor practices of Workers Compensation Authorities and Insurers to ensure proper compliance with existing legislation and regulations.
- to promote legislative reform for the benefit of injured workers and to provide a forum for reviewing legislative amendments to workers compensation schemes in Australia.
- to enhance APLA's role as an effective lobby group pursuing the aforementioned aims.

We are in the process of finalising our SIG Website which will include:

- commentaries on National/State/Territory legislative developments in workers compensation
- articles of interest for workers compensation practitioners
- current workers compensation campaigns
- a list of registered SIG members
- an email list serving facility which members can subscribe to obtain up to date judicial decisions/settlements accross the country

To subscribe to the list-server, email workers-request@apla.com and type 'subscribe' (without the quotation marks) in the body of your email message. You will receive an email confirming that you have been added to the mailing list. To circulate information to all subscribers, send your message to: worker@apla.com

I therefore take this opportunity to encourage members to join the SIG (at no extra cost) by contacting the National Office. ■

Simon Garnett is a Partner at Ryan Carlisle Thomas and is the National Convenor of the Workers Compensation SIG. **Phone** (03) 9238 7878, **fax** (03) 9238 7888