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# The decline of contributory negligence and apportionment: Choosing the black or white of all-or-nothing over many shades of grey?

Joachim Dietrich\*

*In a range of decisions in contract, equity and under the Trade Practices Act, the High Court has rejected the possibility of the apportionment of damages as a result of a plaintiff's contributory fault. Instead, the trend of decisions is toward an all-or-nothing approach to the award of damages: either a plaintiff successfully establishes that the defendant's conduct caused the loss and recovers fully or else a defendant establishes that some intervening event (including perhaps the plaintiff's conduct) breaks the chain of causation and there is no recovery. Such a trend is to be regretted. However, its resonances may even be beginning to be felt in torts law, where some cases have denied that a defendant owes a duty of care, or has breached such duty if owed, in part because of some failure by the plaintiff to have regard for his or her own safety.*

## Introduction

A plaintiff who suffers loss as a result of a defendant's breach of a common law, equitable or statutory duty will generally be entitled to compensation for such loss. Where, however, a plaintiff was himself or herself partly responsible for such loss, through some negligent or otherwise blameworthy conduct,<sup>1</sup> it seems intuitively an appropriate response in many such situations that responsibility for the plaintiff's loss be apportioned between the parties. In other words, a plaintiff's award of compensation ought sometimes to be reduced proportionally, instead of the plaintiff recovering all of his or her loss or none of it (an all-or-nothing loss allocation).

In the most significant area of law concerned with the compensation of losses, namely the tort of negligence, the common law historically took what has been described as 'an appalling turn which no one deigns to support'<sup>2</sup> and set itself against any apportionment, instead opting for a complete denial of a contributorily negligent plaintiff's claim. Legislative reforms in the middle of last century replaced the all-or-nothing approach with a statutory regime of apportionment as a court 'thinks just and equitable having regard to the

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1 Such conduct may have arisen prior to a defendant's wrong or subsequent to it and includes a failure to mitigate against such loss. In either case, the plaintiff's conduct has been a cause of, or has exacerbated, the loss ultimately suffered by the plaintiff.

2 G Davis and J Knowler, 'Astley v Austrust Ltd. Down but Not Out: Contributory Negligence, Contract, Statute and Common Law' (1999) 23 *MULR* 795 at 795, citing *Butterfield v Forrester* (1809) 11 East 60; 103 ER 926 (KB).

claimant's share in the responsibility for the damage'.<sup>3</sup> The apportionment<sup>4</sup> regime has generally worked well enough,<sup>5</sup> even if there will always be an element of arbitrariness in weighing up the parties' relative 'share in the responsibility for the damage'.<sup>6</sup> Acceptance of the apportionment regime undoubtedly stems from the fact that it replaces the extremities and potential harshness of an all-or-nothing approach and, further, encapsulates a significant moral idea that plaintiffs in many situations must bear some responsibility for safeguarding their own personal welfare and economic wellbeing.

Despite the need for legislative intervention in tort law, other areas of law have not been so lacking in creativity as to preclude loss-sharing remedies in some cases. The law of contribution and maritime general average contribution are obvious examples.<sup>7</sup> In any case, it is difficult to take issue with the views of Cooke P of the New Zealand Court of Appeal, who has said:

It would be strange if after all these centuries the common law (in the widest sense of the expression) had been able to produce only instruments of remedy so blunt and inefficient that apportionment of responsibility where it rightly belongs is impossible. . . . [A]pportionment in accordance with true responsibility will always be available when required by the justice of the case.<sup>8</sup>

Despite such sentiments and the clear signal from legislatures in relation to contributory negligence in the tort of negligence, at least,<sup>9</sup> recent decisions of the High Court of Australia at common law, in equity, and under statute, have denied, or at least cast doubt upon, the availability of apportionment-of-loss remedies where a plaintiff is in part the author of such loss. Such decisions will inevitably lead to the injustice of all-or-nothing determinations of liability. The intuitively sensible conclusion that in many cases, justice demands the flexibility of apportionment remedies, having regard to a plaintiff's own contribution to his or her loss, is in danger of being displaced with an all-or-nothing shifting of losses from plaintiffs to defendants. Such developments are all the more worrying because they do not appear to be in

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3 See Wrongs Act 1936 (SA) s 27A. For references to the relevant legislation in other jurisdictions, see H Luntz and D Hambly, *Torts: Cases and Commentary*, 5th ed, Butterworths, Sydney, 2002, p 378 (Luntz and Hambly). The defence will not be available in relation to intentionally caused harms: see *Horkin v North Melbourne Football Club Social Club* [1983] 1 VR 153.

4 Note that, although strictly speaking the legislation allows for the *reduction* of a plaintiff's damages and not necessarily for the *apportionment* of loss between plaintiff and defendant, the latter approach has generally been followed: see Luntz and Hambly, above n 3, p 387.

5 Though note Luntz and Hambly, *ibid*, p 379, who point to some of the anomalies created by the 'superficial fairness' of such a scheme.

6 This involves balancing both the relative culpability of the parties and the significance of these acts in causing the damage. See Luntz and Hambly, *ibid*, p 389.

7 See J Dietrich, *Restitution: A New Perspective*, Federation Press, Sydney, 1998, Ch 7, for further discussion of the use of loss-sharing remedies in a range of circumstances at common law and in equity.

8 *Mouat v Clark Boyce* [1992] 2 NZLR 559 at 563 and 566.

9 Recent High Court decisions (*Astley v Austrust Ltd* (1999) 197 CLR 1; 161 ALR 155, and *Pilmer v The Duke Group Ltd (in liq)* (2001) 207 CLR 165; 180 ALR 249 discussed below) have held, or suggest, that the legislation does not apply to other areas of law. This conclusion is questionable, but even if correct, it should not preclude other creative approaches being used to achieve like results. These matters will be considered further below.

tune with modern conceptions of justice<sup>10</sup> or with legal developments in other jurisdictions, nor are such developments necessarily and inevitably driven by the existing state of precedent and legal doctrine. There are seemingly no impassable conceptual legal barriers to the expansion of apportionment ideas into other areas of law, but there appears to be a reluctance to do so and a tendency, perhaps increasing, to support all-or-nothing loss allocation rules. After a brief survey of these recent developments in contract, equity and under the Trade Practices Act 1974 (Cth), this article considers how such a trend towards an all-or-nothing approach to the compensation of losses may even be re-asserting itself in the context of the tort of negligence.

### Contract

The obvious starting point for any discussion of the place of apportionment and contributory negligence in contract law is the decision of the High Court in *Astley v Austrust Ltd*.<sup>11</sup> Very briefly, the High Court decided that where a plaintiff had claims for damages both in contract and in tort, the contract claim could not be reduced for the plaintiff's contributory negligence, even though the basis of liability in the contract was a breach of an (implied!) contractual duty to take care whose content was concurrent with an independent duty of care in negligence law. Much has been written on the decision, and it is not proposed to go over ground covered by others.<sup>12</sup> For present purposes, it suffices to make three points:

1. The decision has been widely, indeed perhaps universally, criticised as incorrect both as a matter of general policy and as inconsistent with the trend of authorities throughout the common law world.<sup>13</sup> Seddon has said that '[t]he unfortunate result has been the subject of thorough and damning analysis'.<sup>14</sup>
2. It was not necessary to reach the decision which was reached, either as a matter of statutory interpretation or for wider reasons of policy or precedent. On the question of statutory interpretation alone, there are sufficient 'underlying ambiguities' in the texts of the relevant

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10 Note, in particular, the legislative responses (below n 18) to the High Court's decision in *Astley v Austrust* (1999) 197 CLR 1; 161 ALR 155, effectively reversing the decision.

11 Ibid.

12 See, eg, M Tilbury and J W Carter, 'Converging Liabilities and Security of Contract: Contributory Negligence in Australian Law' (2000) 16 *JCL* 78; M Legg, 'The High Court on concurrent liability and contributory negligence in *Astley v Austrust Ltd*' (1999) 18 *Aust Bar Rev* 262; J Davis, 'Contributory negligence and breach of contract: *Astley v Austrust Ltd*' (1999) 7 *TLJ* 1; J Swanton, 'Contributory Negligence is Not a Defence to Actions for Breach of Contract in Australian Law — *Astley v Austrust Ltd*' (1999) 14 *JCL* 251; and Davis and Knowler, above n 2.

13 Davis and Knowler, above n 2, at 803, note that, with one exception, in every reported case in Australia, England and New Zealand since 1980 in which a concluded view was expressed, the courts considered that apportionment should be available where the contract obligation was 'parallel to and concurrent with the tortious obligation of reasonable care'.

14 N Seddon, 'Contract Damages Where Both Parties are at Fault' (2000) 15 *JCL* 207 at 215. Such criticism does not necessarily extend to the outcome of the case itself, which arguably was supportable on the grounds on which the plaintiff succeeded in recovering its full damages in the South Australian Full Court, namely that the plaintiff had not in fact been contributorily negligent at all. See the discussion in Davis and Knowler, above n 2, at 797–803.

provisions such that the majority's conclusion 'to the point of near certainty'<sup>15</sup> that the legislation did not extend to actions for breach of contract may be viewed 'with some surprise'.<sup>16</sup> Further, apart from the apportionment legislation itself, contract law and other techniques could have been utilised to allow for apportionment. Seddon has suggested a range of possible techniques whereby a court could achieve some manner of apportionment where a plaintiff is also at fault in the break-down of contractual relationships generally or in the damages arising as a result thereof.<sup>17</sup>

3. The response of the legislatures in all Australian jurisdictions has been to reverse the effect of the High Court's decision: in effect, a 'wrong' for which a reduction in damages may be made now includes breaches of contractual duties of care which are 'concurrent and co-extensive with' duties of care in tort.<sup>18</sup> Outside the scope of operation of these reforms, however, the decision stands as authority for the absence of any contributory negligence defence (or presumably, any defence substantively to similar effect) in breach of contract claims. This may not be problematic in cases involving an express (or perhaps implied) contractual allocation of risk to the breaching party. However, it is not difficult to point to circumstances, as Seddon does, in which such is not necessarily the case and in which some apportionment of damages would be an appropriate response.

## Equity

Where a number of wrongdoers can be said to have caused a plaintiff's loss, equity has developed obligations requiring contribution between such parties in certain circumstances; certainly, where the parties are jointly or severally liable in respect of the same loss, or where parties share 'co-ordinate liability' or a 'common obligation' to 'make good the one loss' and where one party disproportionately has borne the burden, having made a payment in 'discharge of a common liability'.<sup>19</sup> The precise boundaries of obligations to make such equitable contribution are not certain,<sup>20</sup> but the issue I wish to raise is the possibility of an apportionment or contribution between a defendant who is responsible for a plaintiff's loss, specifically as a result of a breach of fiduciary duties, and a plaintiff who has in some way contributed to such loss through

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<sup>15</sup> (1999) 197 CLR 1; 161 ALR 155 at [71].

<sup>16</sup> Davis and Knowler, above n 2, at 805.

<sup>17</sup> See Seddon, above n 14.

<sup>18</sup> See Law Reform (Miscellaneous Provisions) Amendment Act 2001 (ACT); Law Reform (Miscellaneous Provisions) Amendment Act 2000 (NSW); Law Reform (Miscellaneous Provisions) Amendment Act 2001 (NT); Law Reform (Contributory Negligence) Amendment Act 2001 (Qld); Law Reform (Miscellaneous Provisions) Amendment Act 2001 (SA); Tortfeasors and Contributory Negligence Amendment Act 2000 (Tas); Wrongs (Amendment) Act 2000 (Vic). In Western Australia the relevant legislation is before Parliament: Law Reform (Contributory Negligence and Tortfeasors' Contribution) Amendment Bill 2001.

<sup>19</sup> See *Burke v LFOT Pty Ltd* (2002) 187 ALR 612 at [14]–[15].

<sup>20</sup> This is evidenced by the differing opinions expressed in *Burke v LFOT Pty Ltd* (2002) 187 ALR 612, discussed further below.

his or her own conduct. The question of apportionment in response to such contributory conduct is relevant in the fiduciary context because of the possibility of compensatory remedies being awarded for losses incurred as a result of breach of fiduciary duties. Indeed, compensation in equity may be calculated on more generous grounds than at common law: the position is often stated with reference to Street J's judgment in *Re Dawson (dec'd)*<sup>21</sup> that questions of 'causation, foreseeability and remoteness do not readily enter into the matter'.<sup>22</sup> This statement should not be taken to obviate the need for a causative connection between a breach and a loss, however. As Street J stated, there still needs to be an inquiry as to 'whether the loss would have happened if there had been no breach',<sup>23</sup> an approach to causation which has been equated with a 'but for' test by Kirby J.<sup>24</sup>

Impetus for the development of a contributory negligence (or some such like) defence in the context of fiduciary law has come from decisions in other common law jurisdictions. In New Zealand and Canada, it has been accepted that in some circumstances, equity may reduce a plaintiff's entitlement to damages for breach of fiduciary duty as a result of fault on the plaintiff's part which contributed to the losses suffered.<sup>25</sup> In *Day v Mead*,<sup>26</sup> for example, the plaintiff had been advised to buy shares in a company in which his defendant solicitor had an interest. After having taken a considerable interest in the company himself (and after further advice from the solicitor), the plaintiff bought a further parcel of shares. He suffered loss when the company went into liquidation. The New Zealand Court of Appeal allowed some reduction of the damages claim, though Cooke P noted that:

Of course, before reducing an award on the ground that the claimant has been partly the author of his or her own loss, the court will have to give much weight to the well-established principle that, largely for exemplary purposes, high standards are expected of fiduciaries. A strong case is needed to relieve the fiduciary of complete responsibility.<sup>27</sup>

Importantly, Cooke P did not think it was necessary to find that the apportionment legislation applies to the situation in order to reach such conclusion:

Assuming that the Contributory Negligence Act [1947 (NZ)] does not itself apply, it is nevertheless helpful as an analogy, on the principle to which we in New Zealand are increasingly giving weight that the evolution of judge-made law may be influenced by the ideas of the legislature as reflected in contemporary statutes and other current trends . . .<sup>28</sup>

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21 [1966] 2 NSW 211.

22 *Ibid.*, at 215.

23 *Ibid.*

24 See *Maguire v Makaronis* (1997) 188 CLR 449 at 492; 144 ALR 729 at 759.

25 For a detailed consideration of the authorities, see *Duke Group Ltd (in liq) v Pilmer* (1999) 73 SASR 64 at [850]–[879].

26 [1987] 2 NZLR 443.

27 *Ibid.*, at 452.

28 *Ibid.*, at 451. Cooke P considered that assessing damages on the footing that the plaintiff should share some responsibility was an 'obviously just course, especially now that law and equity have mingled or are interacting. It is an opportunity for equity to show that it has not petrified and to live up to the spirit of its maxims'.

Although such decisions have been criticised by some commentators (Meagher, Gummow and Lehane consider that *Day v Mead* is not 'consistent with the way in which compensation has traditionally been awarded in equity'),<sup>29</sup> none the less they engender a suitably flexible approach. Such an approach accepts that in some circumstances it may be appropriate to reduce damages where a plaintiff was partly the author of his or her own loss, especially given the wide range of factual circumstances which may amount to a breach of fiduciary duty, and the wide range of possible consequent losses arising from many different causative factors.<sup>30</sup>

The prospect of such developments being followed in Australia seems virtually non-existent. In *Pilmer v Duke Group Ltd (in liq)*,<sup>31</sup> although the joint majority of McHugh, Gummow, Hayne and Callinan JJ did not ultimately decide the matter, since no fiduciary duties were owed in the circumstances of the case, none the less they observed in relation to 'contributing fault' that:

the decision in *Astley v Austrust Ltd* indicates the severe conceptual difficulties in the path of acceptance of notions of contributory negligence as applicable to diminish awards of equitable compensation for breach of fiduciary duty. . . . Contributory negligence focuses on the conduct of the plaintiff, fiduciary law upon the obligation by the defendant to act in the interests of the plaintiff. Moreover, any question of apportionment with respect to contributory negligence arises from legislation, not the common law. *Astley* indicates that the particular apportionment legislation of South Australia which was there in question did not touch contractual liability. The reasoning in *Astley* would suggest, *a fortiori*, that such legislation did not touch the fiduciary relationship.<sup>32</sup>

Kirby J dissented in finding that a fiduciary duty existed, but reached a similar conclusion in relation to the issue of contributory negligence, adding that:

In the face of that decision [in *Astley*] and the repeated recognition by this court that, in Australia, the substantive rules of equity have retained their identity as part of a separate and coherent body of principle, the attempt to push common law notions of contributory negligence, as now modified by statute, into equitable remedies collapses in the face of insurmountable obstacles.<sup>33</sup>

Contrary to the suggestion of the majority of the High Court in *Pilmer*<sup>34</sup> that 'any question of apportionment with respect to contributory negligence arises from legislation, not the common law',<sup>35</sup> this takes too narrow a perspective on the issue. Undeniably, equity has developed ideas of contribution and apportionment amongst joint and several *wrongdoers* responsible for the same wrong, as well as amongst parties who bear a common burden disproportionately. It would not involve any significant conceptual jumps to

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29 R Meagher, D Heydon and M Leeming, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*, 4th ed, Butterworths, Sydney, 2002, p 208.

30 See also *Canson Enterprises Ltd v Boughton and Co* (1991) 85 DLR (4th) 129 per La Forest, Sopinka, Gonthier and Cory JJ.

31 (2001) 207 CLR 165; 180 ALR 249.

32 *Ibid*, at [86] (footnotes omitted).

33 *Ibid*, at [173] (footnotes omitted).

34 *Ibid*.

35 *Ibid*, at [86].

extend such principles to conduct of a *plaintiff* contributing to his or her own loss. As Cooke P indicated, one can reach such a conclusion by the development of equitable principles themselves, analogously to the statutory developments.<sup>36</sup>

This is not to suggest that in the fiduciary context, apportionment for contributory fault will be a commonly appropriate response: in many situations, especially if the fiduciary concept is narrowly confined,<sup>37</sup> a principal may well be able to say that 'I did not need to, or was not able to, adequately consider or safeguard my own interests precisely because I was vulnerable to the fiduciary's actions and trusted and relied on him or her to act in my interests'. Recognition of this undoubted truth, however, does not necessarily mean that we ought not to at least keep open the option of reducing damages as a result of contributory fault in exceptional circumstances, or that such a step 'inevitably will work a subversion of fundamental principle'.<sup>38</sup> Situations no doubt will arise in which, say, a fiduciary *honestly* transgresses his or her duty or merely carelessly disregards the possibility of a conflict of duty and interest and can point to conduct of the principal which so disregards the latter's own interests as to warrant some reduction at least in the compensation to be awarded.

None the less, in Australia, such a possible approach is all but precluded. It is perhaps ironic, therefore, that in some circumstances the possibility remains that extreme conduct of a plaintiff (or a third party) may be such as to break the chain of causation, even under equity's more generous causation principles, so that a plaintiff may not receive any compensation at all. The evidence for this view derives from the endorsement by at least one justice of the High Court, Kirby J,<sup>39</sup> as well as respected commentators,<sup>40</sup> of the minority judgment of McLachlin J in *Canson Enterprises Ltd v Broughton & Co.*<sup>41</sup> In that case, McLachlin J stated that:

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36 See above n 28. Although it may well be desirable, one need not therefore go so far as Cooke P himself does in adopting a more radical, fusionist approach in order to achieve such an outcome.

37 The High Court in cases such as *Pilmer v The Duke Group Ltd (in liq)* (2001) 207 CLR 165; 180 ALR 249 and *Breen v Williams* (1996) 186 CLR 71; 138 ALR 259 has given a clear indication that the fiduciary concept will not be widely interpreted to extend to relationships not having the necessary qualities which justify the imposition of loyal conduct, that is, where having to place a principal's interests in a matter ahead of the fiduciary's self-interest can rightfully be expected of a fiduciary. Contrary to Canadian developments, there does not seem to be in Australia a 'tendency apparent in some recent decisions too readily to classify as fiduciary in nature relationships which might better be seen as purely contractual or as giving rise to tortious liability': *Maguire v Makaronis* (1997) 188 CLR 449 at 474; 144 ALR 729.

38 See W M C Gummow, 'Compensation for Breach of Fiduciary Duty' in T G Youdan (Ed), *Equity, Fiduciaries and Trusts*, Carswell, Toronto, 1989, p 57 at p 86 (footnotes omitted).

39 See *Maguire v Makaronis* (1997) 188 CLR 449 at 492; 144 ALR 729, and *Pilmer v The Duke Group Ltd (in liq)* (2001) 207 CLR 165; 180 ALR 249 at [152].

40 See, eg, Meagher, Gummow and Lehane, above n 29, p 637, who also endorse the separate views of Stevenson J at 165 that the losses claimed were 'too remote, not in the sense of failing the "but for" test, but in being so unrelated and independent that they should not, in fairness, be attributed to the defendant's breach of duty'.

41 (1991) 85 DLR (4th) 129.



While the plaintiff will not be required to act in as reasonable and prudent a manner as might be required in negligence or contract, losses stemming from the plaintiff's unreasonable actions will be barred. . . . This approach to mitigation accords with the basic rule of equitable compensation that the injured party will be reimbursed for all losses flowing directly from the breach. When the plaintiff, after due notice and opportunity, fails to take the most obvious steps to alleviate his or her losses, then we may rightly say that the plaintiff has been 'the author of his own misfortune'. At this point the plaintiff's failure to mitigate may become so egregious that it is no longer sensible to say that the losses which followed were caused by the fiduciary's breach. But until that point, mitigation will not be required.<sup>42</sup>

Although McLachlin J states the issue in terms of the failure to *mitigate* losses after a breach has occurred, there appears to be no conceptual reason why a plaintiff's contributing fault generally may not be held to break the chain of causation between the defendant's breach and the loss in some cases. One can also imagine situations in which a plaintiff's conduct *prior* to the defendant's breach might be deemed to have been the sole cause of any loss. In short, if this interpretation is correct, courts may be faced with the choice of all-or-nothing recovery.

### Trade Practices Act: ss 52 and 82

Where a defendant engages in misleading or deceptive conduct contrary to s 52 of the Trade Practices Act, numerous decisions have confirmed that a failure to check the accuracy of such information will not disqualify a plaintiff from relying on the misleading conduct to found a claim for damages,<sup>43</sup> nor will it justify any reduction of any damages under s 82.<sup>44</sup> Accepting this proposition (it is not proposed to discuss the matter further), however, does not answer the important question of whether a plaintiff's entitlement to damages may not be reduced as a result of other types of contributory fault or conduct. Yet in such cases as well, the High Court has set itself against any reduction in, or apportionment of, damages. This is despite the fact that s 52 may have been breached innocently and irrespective of how 'gross' (with one possible exception to be noted below) the plaintiff's 'contributory fault' may have been.<sup>45</sup> Such a conclusion need not inevitably flow from the interpretation of s 82 itself, which is so broadly worded that a range of concepts need to be incorporated into it.<sup>46</sup> (Section 82 provides that loss or damage is recoverable where a person 'suffers loss or damage *by* conduct of another' [in contravention of s 52].) This interpretation of ss 52 and 82 has been, rightly, much criticised.<sup>47</sup> Nor need such a result flow inevitably from the consumer protection purpose of the Trade Practices Act as a whole, since s 52 is not

42 Ibid, at 161–2, Lamer CJC and L'Heureux-Dubé J concurring.

43 See, eg, *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546; 79 ALR 83 (Fed Ct of A, FC). See also *Henville v Walker* (2001) 206 CLR 459; 182 ALR 37 at [13] per Gleeson CJ.

44 See, eg, *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 192 ALR 1 at [182] per Kirby J. The case is discussed below.

45 See *Henville v Walker* (2001) 206 CLR 459; 182 ALR 37, discussed below.

46 For example, the term 'by' invokes the common law concept of causation: *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514; 109 ALR 247. See also *Henville v Walker* (2001) 206 CLR 459; 182 ALR 37 at [18] per Gleeson CJ.

47 See, eg, N Seddon, 'Misleading Conduct: The Case For Proportionality' (1997) 71 ALJ 146.

limited to plaintiffs who are consumers. Again, a harsh and unsatisfactory approach has been adopted by the courts. The effect of this approach can be illustrated by the following simple example. A tortfeasor who *negligently* advises a plaintiff may have the damages liability reduced for the plaintiff's contributory negligence (in tort law), whereas a person who innocently makes a false statement (in breach of s 52) which causes a plaintiff loss may be liable for the full extent of such loss (under s 82), no matter how carelessly the plaintiff disregarded his or her own wellbeing.<sup>48</sup>

Seddon has criticised such an interpretation of ss 52 and 82. He argues that such an approach is 'wrong in principle and not dictated by the legislation'.<sup>49</sup> As he states:

Although the legislation does not specifically provide a mechanism for proportionate responsibility, either between applicant and respondent or between several respondents, there is nothing in the legislation to prevent the application of a proportionality principle. A court could decide, simply as a matter of causation, that the applicant was partly responsible for her or his own misfortune, or that a respondent was not responsible for the entire loss suffered by the applicant, and adjust the remedy accordingly.<sup>50</sup>

In short, a court could determine that *in part* a plaintiff's loss was caused by the defendant, and in part by the plaintiff.

It appears that such criticisms by Seddon and others,<sup>51</sup> have not influenced the High Court. In the recent decision of *Henville v Walker*,<sup>52</sup> the majority (McHugh, Gummow and Hayne JJ) reiterated the view that contributory negligence could not be relied on in order to reduce a plaintiff's claim for damages. Once a 'but-for' causal connection between a plaintiff's loss and the defendant's misleading conduct has been established, there is no scope for apportionment. In dissent,<sup>53</sup> Gaudron J also rejected the relevance of contributory fault, stating that 'considerations of foreseeability and contributory negligence are irrelevant to the exercise required by s 82(1)'. She went on to state, however:

that does not mean that, where the loss is the result of two or more acts or events, causation is irrelevant to the task of identifying the loss or the amount of the loss recoverable. To treat causation as irrelevant would be to ignore the requirement in s 82(1) that a person suffer loss or injury by contravening conduct.<sup>54</sup>

While this statement expressly rejects contributory negligence, it accepts that if the plaintiff's negligence gave rise to a distinct and severable loss, then such

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48 Compare the facts of *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 192 ALR 1, discussed below, in which the misleading conduct appears to have been negligent.

49 Seddon, above n 47, p 146.

50 *Ibid*, p 147.

51 See, eg, J C Campbell 'Contribution, Contributory Negligence and Section 52 of the Trade Practices Act' (1993) 67 ALJ 87 and 177.

52 (2001) 206 CLR 459; 182 ALR 37.

53 Both Gleeson CJ and Gaudron J would have allowed the plaintiff to recover only part of the losses he had incurred as a result of entry into a development project induced by the defendant's misleading conduct. The majority would have allowed the plaintiff to recover his losses in full, but since the plaintiff had only sought a reinstatement of the trial judge's orders, all five judges agreed as to the orders to be made in the appeal.

54 (2001) 206 CLR 459; 182 ALR 37 at [66].

loss will not be recoverable. The difficulty with such an approach is that determining whether the overall loss incurred has distinct and severable parts may not be easy and may involve an element of artificiality. The very difference of opinion on the facts of *Henville v Walker* between Gaudron J (and Gleeson CJ, who reached a similar conclusion) and the majority, as to whether part of the loss incurred had a distinct cause, illustrates the difficulty. It should also be noted that a determination that part of the loss is severable and that this part was caused by the fault of the plaintiff alone (and hence damages for it are not recoverable) has the practical effect of apportioning the total loss.

Having rejected the possibility of apportionment on the facts of *Henville v Walker*, on the basis of either a defence of 'contributory negligence' or some other means, such as causation, the majority in *Henville v Walker* none the less did not exclude the possibility that in some circumstances, a plaintiff's conduct may be such as to preclude, *absolutely*, a claim for damages. As McHugh J stated:

There may, of course, be cases where the injured person's failure to take care is such that it can be characterised as the sole cause of the loss or damage suffered. In that event, there will be no causal connection between the breach of the Act and the 'loss or damage' to which s 82 refers.<sup>55</sup>

Such an approach could result in judges, confronted with a plaintiff's conduct which can be seen as more irresponsible than that of the defendant, concluding that the 'contributory' negligence was the sole cause of the loss. Some such motivation may well have been behind the conclusion of the Full Court of the Supreme Court of Western Australia in *Henville v Walker*, denying the plaintiff's claim altogether on the basis that he 'was the author of his own misfortune and his conduct in preparing and relying on the erroneous feasibility study is to be regarded as the sole cause of his decision to proceed with the development'.<sup>56</sup> This appears almost to be a reversion to the barbaric common law position prior to the apportionment legislation: if a plaintiff was the last person whose conduct had the capacity to avoid the loss, then such conduct could be seen as the sole cause of the loss. This can have appalling consequences for plaintiffs. But perhaps courts are left with little alternative since the far more sensible and just option of apportionment has been denied them. As Seddon has said:

The 'all-or-nothing approach to liability' means that the courts take no account of the *proportionate* responsibility of the parties to an action based on misleading conduct. This is wrong in principle because this application of the legislation, when a successful claim is brought, places all the responsibility on the person who has engaged in misleading or deceptive conduct and none on the other party.<sup>57</sup>

In light of the majority's obiter comments in *Henville v Walker*, it can now be added that, conversely, in some exceptional cases *all* responsibility may be

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<sup>55</sup> Ibid, at [138]. This view was confirmed by the majority in the High Court in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 192 ALR 1, discussed below. See, eg, at [85] per McHugh J.

<sup>56</sup> *Walker v Henville* [1999] WASCA 117 (9 August 1999, unreported, BC9904528) at [64] per Malcolm CJ, Ipp and Steytler JJ.

<sup>57</sup> Seddon, above n 47, at 146.

placed on the party 'relying' on the misleading conduct, and none on the person engaging in it.

In a more recent six to one majority decision, the High Court in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*<sup>58</sup> has confirmed the decision in *Henville v Walker*. *I & L Securities* has also shed light on the judgments of Gleeson CJ and Gaudron J in *Henville*, explaining them in a way which suggests that there is no divergence in legal principle between their judgments and the majority judgments of McHugh, Gummow and Hayne JJ in that case.

In *I & L Securities*, the issue was simple and directly of relevance to the concerns in this article. The appellant had made a loan of \$950,000 to a borrower, relying upon the respondent's valuation of over \$1.5m of land which was to provide security for the loan. This valuation was misleading and in breach of s 52. When the borrower defaulted, the appellant's losses exceeded \$660,000. Prior to making the loan, the appellant had failed to make prudent risk assessments as to the borrower's capacity to repay the loan. The trial judge allowed a one-third reduction of the appellant's recoverable damages on the basis of this contributory negligence, holding under s 82 that only part of the loss which it had incurred was the result of the misleading conduct. A unanimous five-judge decision of the Queensland Court of Appeal re-affirmed the order, but on different grounds, relying instead on the discretionary power vested in the courts under s 87 to make orders as to an award of damages 'in whole or in part'. In the High Court the appellant successfully argued against both these approaches.

The s 87 point can be dealt with quickly. All the majority judgments (that of Gleeson CJ, the joint judgment of Gaudron, Gummow and Hayne JJ, and those of McHugh and Callinan JJ)<sup>59</sup> rejected the proposition that the discretion allowed for in s 87 could be used to diminish a party's right to damages under s 82.

The majority rejected the view that s 82 damages could be reduced or apportioned as a result of any contributorily careless conduct of the person relying on misleading conduct. It must be noted, however, that Callinan J expressed the view that such an interpretation, though dictated by the statute, was unfair and unjust, and he called for amendment by the legislature of the Trade Practices Act. Gleeson CJ stressed that misleading conduct need only be a cause of a loss in order for a party to recover all of its damages caused by such loss.<sup>60</sup> He explained his decision in *Henville v Walker* by suggesting that that case was one in which a party, in reliance upon a misrepresentation, 'entered into a complex business venture, with adverse consequences unrelated to the falsity of the misrepresentation in any sense other than that, but for the misrepresentation, the venture would not have been undertaken'.<sup>61</sup> Gleeson CJ and the other majority judges accepted that the only qualification to the unavailability of any apportionment of damages is where 'identifiable

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58 (2002) 192 ALR 1.

59 Kirby J dissented.

60 (2002) 192 ALR 1 at [31]–[33].

61 *Ibid.*, at [24].

particular elements of the overall loss' are attributable to particular causes;<sup>62</sup> or where some 'identifiable part of the loss' was not caused by the misleading conduct, but was caused by factors 'independent' of the contravention.<sup>63</sup> Such qualification appears to be of only minor relevance, however. Gaudron, Gummow and Hayne JJ considered that 'cases in which it will be necessary and appropriate to divide up the loss that has been suffered and attribute parts of the loss to particular causative events are likely to be rare'.<sup>64</sup>

Hence, it appears that the divergence in outcomes in *Henville v Walker* can be rationalised on the basis of the application of the same legal principles. McHugh J summarised the position in the following terms:

[There is a] crucial distinction, when considering s 82, between *part* of the loss, in the sense of a distinct and separate portion of the whole loss, and playing a *part* in the sustaining of the entire loss. All members of this court recognised that distinction in *Henville*, although the majority and minority justices differed as to whether part of the loss was in fact caused by the respondent in that case.<sup>65</sup>

With all due respect to the majority, there is much force in Kirby J's view that:

There is an inescapable artificiality in labelling a causative factor as a 'particular component' and separating it as such from other causes. Such distinctions have no apparent foundation either in the language of the Act or in a common sense approach to causation repeatedly endorsed by decisions of this court.<sup>66</sup>

None the less, we are now faced with a legal position which forces courts into such artificial exercises of trying to link particular conduct with separately identifiable component parts of losses. This will be so in cases raising similar facts to *I & L Securities*, where the obvious justice of the 'defence' raised by the misleading party led all six lower court judges to favour a one-third reduction in damages.<sup>67</sup> It will be all the more so if the misleading conduct is *innocently* engaged in; a possibility which the majority of the High Court seemingly continue to ignore. For example, Gaudron, Gummow and Hayne JJ in *I & L Securities* instead set up a false dichotomy by stressing the impossibility of comparing (contributorily) negligent conduct with deceitful conduct.<sup>68</sup>

As an aside, it can be noted that the potential harshness of the anti-apportionment approach may be exacerbated by the restricted availability, according to McHugh J at least, of claims for equitable contribution by parties in breach of s 52 from persons whose tortious (or perhaps other wrongful) conduct has also contributed to plaintiffs' losses. In *Burke v LFOT Pty Ltd*,<sup>69</sup> the vendor of property, whose misleading conduct had caused another to

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62 Ibid, at [62] per Gaudron, Gummow and Hayne JJ.

63 Ibid, at [30] per Gleeson CJ; see also at [28].

64 Ibid, at [62].

65 Ibid, at [89] (footnote omitted).

66 Ibid, at [145].

67 Indeed, overall seven judges out of 13 would have decided in favour of such reduction, and one of the six who rejected apportionment (Callinan J) considered the result to be unfair and unjust.

68 (2002) 192 ALR 1 at [59]. In a case of deceit, as is the case in other intentional torts, no apportionment would be appropriate for a plaintiff's contributory negligence.

69 (2002) 187 ALR 612.

purchase the property at \$700,000 above its actual value, was held not to be entitled to contribution from the purchaser's solicitor whose negligent failure to make routine inquiries was also a cause of the purchaser's loss. Certainly, the conclusion of the majority (Gaudron and Hayne JJ in a joint judgment, McHugh and Callinan JJ, Kirby J dissenting) refusing contribution may well be justified. The judgment of Gaudron and Hayne JJ and that of Callinan J are consistent with the view that apportionment was simply not just and equitable in the circumstances where the vendor had profited by \$700,000 and any contribution from the solicitor would thus result in the vendor still profiting from its wrong.<sup>70</sup> Although McHugh J's judgment also emphasises such concerns, he too appears to view the availability of equitable contribution in narrow terms where breach of s 52 is involved. He suggests that the parties to the proceedings:

must have shared a common burden arising out of a pre-existing relationship. If the parties are not on the same level of liability, there can be no common interest and no common burden with joinder in a common end and purpose by the several obligations.<sup>71</sup>

### Tort: Negligence

Does this worrying trend towards an all-or-nothing approach to liability in other areas of law have any resonances in tort law, where apportionment for contributory negligence is established by legislation? Unfortunately, there is some evidence that all-or-nothing ideas are also gaining ground in recent decisions of the High Court in negligence cases.

A starting point is the decision of the court in *Agar v Hyde*.<sup>72</sup> In the two cases decided together, the plaintiffs suffered serious spinal injuries as a result of playing club rugby union. The injuries occurred as a result of the impact of scrum formations on the plaintiffs' necks, breaking them. The plaintiffs sued, amongst other parties, members of the International Rugby Football Board (IRFB), an unincorporated association of national rugby unions whose duties included making and amending the rules of the game. The question before the High Court was essentially a procedural one of whether the plaintiffs were entitled to proceed against the overseas defendants, thereby putting them to the trouble and expense of defending such claims, or whether the court should instead decline to exercise jurisdiction on the basis of there being insufficient prospects of success by the plaintiffs. For our purposes, that question was answered by reference to the plaintiffs' prospects of success in negligence claims and, specifically, by reference to whether the plaintiffs could establish that the defendants owed them a duty of care.

In a unanimous decision, consisting of the joint judgment of Gaudron,

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<sup>70</sup> See further on the relevance of benefit, N G Rein, 'Just and equitable! The relevance of benefit in a claim for contribution against a joint tortfeasor or wrongdoer' (2001) 9 *TLJ* 298. And note Kirby J's rejection of this factor as precluding contribution in the circumstances of the case, (2002) 187 ALR 612 at [111]–[112].

<sup>71</sup> (2002) 187 ALR 612 at [62].

<sup>72</sup> (2000) 201 CLR 552; 173 ALR 665. For a recent decision applying these cases, see *Haylen v New South Wales Rugby Union Ltd* [2002] NSWSC 114 (Einstein J, 15 March 2002, unreported, BC200200955).

McHugh, Gummow and Hayne JJ, and separate judgments of Gleeson CJ and Callinan J, the court rejected the plaintiffs' claims. A number of reasons were given in the judgments as to why no duty of care arose and, given the 'list'-like approach of the judges in setting out these reasons, it is difficult to determine the individual weight which can be attached to any particular reason. None the less, it is interesting to note, for our purposes, that all three judgments placed some significance on the fact that, as participants in sports, the plaintiffs were taken to have 'consented to the application of physical force in accordance with the laws of the game'.<sup>73</sup> The plaintiffs' concern, of course, was that the laws themselves were not adequately drafted with due regard to the welfare of players, but the judgments emphasised that the freedom to engage in the sports carried with it the responsibility for any injuries that may occur. Indeed, part of the attraction of the sport to participants was that very element of danger.<sup>74</sup> The point is made in the joint judgment in the following terms:

The decision to participate is made freely. That freedom, or autonomy, is not to be diminished. But with autonomy comes responsibility. To hold that the appellants owed a duty of care to [one of the plaintiffs] would diminish the autonomy of all who choose, for whatever reason, to engage voluntarily in this, or any other, physically dangerous pastime. It would do so because it would deter those who fulfil the kind of role played by the IRFB and the appellants in regulating that pastime from continuing to do so lest they be held liable for the consequences of the individual's free choice.<sup>75</sup>

Gleeson CJ made a similar point, even though he first reiterated the accepted position that 'voluntary participation' in sport:

does not imply an assumption of any risk which might be associated with the activity, so as to negate the existence of a duty of care in any other participant or in any person in any way involved in or connected with the activity. That, however, is not to deny the significance of voluntary participation in determining the existence and content, in a given case, or category of cases, of an asserted duty of care.<sup>76</sup>

As has been pointed out by Opie, however, the imposition of a duty of care to ensure that the rules were changed to reduce the risk of serious spinal injuries during scrums would not necessarily have threatened the values of allowing persons the opportunities to engage in 'adventurous and physically challenging activity'.<sup>77</sup> Opie argues that the existence of and content of any duty of care should be derived partly by looking at what a defendant can reasonably infer as risks run by the plaintiff through his or her participation.<sup>78</sup> Although participants may well be said to accept the risks of a range of injuries 'inherent' in the sport in question, it may be quite another thing to say that they 'accept the risk of an immensely severe injury which, according to emerging knowledge, is on the increase and is linked to one aspect of play and

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<sup>73</sup> (2000) 201 CLR 552; 173 ALR 665 at [88].

<sup>74</sup> See *ibid.* at [89]; and at [15] per Gleeson CJ and at [127] per Callinan J.

<sup>75</sup> *Ibid.* at [90]. See also *ibid.* at [127] per Callinan J.

<sup>76</sup> *Ibid.* at [15].

<sup>77</sup> H Opie, 'The sport administrator's charter: *Agar v Hyde*' (2001) 9 *TLJ* 131 at 141. See also J Kirk and A Trichardt, 'Sports, Policy and Liability of Sports Administrators' (2001) 75 *ALJ* 504.

<sup>78</sup> Opie, *above* n 77, at 141.

certain playing positions'.<sup>79</sup> Instead, participants may well be trusting organisers to provide a 'product' which is not 'defectively designed'.<sup>80</sup> The content of any duty of care would thus be to require a sporting body to monitor the sport 'to assess developments in knowledge of its risk and to take reasonable safety measures'.<sup>81</sup> These are matters which an ordinary player would simply not know because they 'represented developing scientific knowledge not necessarily widely known, even in a general way'.<sup>82</sup>

The essential difficulty with the reasoning in *Agar v Hyde* is that it allows a potential defendant to escape scrutiny as to the reasonableness of his or her activities in part because the plaintiff had (or ought to have had) some knowledge of some of the risks associated with the sport. Indeed, such reasoning could even be harsher in its potential operation than a voluntary assumption of risk (*volenti non fit injuria*) defence, since it is based on generalisations about what participants in general are presumed to know and accept by way of risk, rather than (as is *volenti*) on an assessment of the individual plaintiff's conduct and knowledge. Further, rather than considering a plaintiff's level of knowledge of risk and his or her conduct in light of such knowledge for the purposes of apportionment of damages, the plaintiff does not even get to 'first base' in establishing liability.

Arguably, similar underlying themes are evident in earlier decisions of the High Court which have turned on the scope or content of a duty of care. In *Romeo v Conservation Commission of the Northern Territory*,<sup>83</sup> for example, the question turned on whether the scope of an occupier's duty of care to entrants extended to taking steps to safeguard such entrants against obvious risks. In essence, the High Court concluded, by majority, that the scope of the duty did not extend to avoiding such risks: the risks were so obvious that the entrants could be taken to have been aware of such risks such that the possibility of any harm occurring was one the defendant could disregard.<sup>84</sup> Hence, the defendant was held not to have been negligent. This was so even though some of the entrants, the plaintiff included, may foreseeably have been intoxicated (or otherwise incapacitated) and thus not necessarily in a state to adequately perceive and thus avoid the risks. The dissenting judgments of Gaudron and McHugh JJ, by way of contrast, stressed that the defence of contributory negligence was the better way to deal with the plaintiff's obvious lapse in regard for her own safety.

In *Cook v Cook*,<sup>85</sup> the High Court considered that the standard of care owed by a defendant may be lowered where the plaintiff was aware of exceptional circumstances such that the plaintiff could not realistically expect the defendant to be able to meet the standard of the reasonable person engaged in

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<sup>79</sup> Ibid, at 142.

<sup>80</sup> Ibid, at 139–40.

<sup>81</sup> Ibid, at 143.

<sup>82</sup> Ibid, at 142.

<sup>83</sup> (1998) 192 CLR 431; 151 ALR 263.

<sup>84</sup> Similar focus on the obviousness of a risk plays a significant part in the majority's decision in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 186 ALR 145 (Gleeson CJ, Hayne and Callinan JJ, McHugh and Kirby JJ dissenting), excusing a defendant's failure to warn against such risk. See further K Burns, 'It's just not cricket: The High Court, sport and legislative facts' (2002) 10 *TLJ* 234.

<sup>85</sup> (1986) 162 CLR 376; 68 ALR 353.



such activity. In the circumstances of the case, that lower standard of care had been breached, resulting in a finding of liability and an appropriate apportionment for the plaintiff's contributory negligence. However, the court clearly envisaged the possibility in some cases of *no* standard of care being applicable, a conclusion indeed reached in cases involving a further element of illegal or criminal activity.<sup>86</sup> Apart from the conceptual difficulties involved in giving content to such lower standards of care (of the reasonable drunk driver, say),<sup>87</sup> there are two points of concern about the use of such lower standards of care based on any special relationships between plaintiffs and defendants. First, it is not clear what level of knowledge of a defendant's inexperience or lack of skill or impairment (as a result of intoxication, for example) will suffice to generate this lower standard.<sup>88</sup> Is this merely the *volenti* defence in another guise (or, alternatively, is *volenti* merely the 'lower standard' defence in another guise)?<sup>89</sup> If so, then the High Court has not clearly spelt out the necessary requirements in the same strict terms as in the *volenti* defence, namely requiring a *full* appreciation of and *acceptance* of the risk. As Luntz and Hambly point out:

The courts have developed stringent requirements for the application of the defence, distinguishing between *scienti* (to one who knows) and *volenti* (to one who is willing, or consents), that is, the assumption of the risk must be truly voluntary. It would be salutary to bear these requirements in mind before too readily ascribing the relationship between plaintiff and defendant to a special and exceptional category to which the ordinary standard of care is not applicable.<sup>90</sup>

Secondly, these developments again could potentially result in plaintiffs who, in essence, have merely been careless in adequately safeguarding their own interests (for example, by accepting a lift from a drunk driver), not receiving any compensation, rather than merely having their damages appropriately reduced as a result of their contributory fault. Again, an all-or-nothing liability regime may re-emerge within our current apportionment system. It is interesting to note that there does not appear to have been any widespread application of the 'lower standard of care' approach

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86 See *Gala v Preston* (1991) 172 CLR 243; 100 ALR 29. See also *Radford v Ward* (1990) 11 MVR 509; Aust Torts Reps 81-064 (Vic AD), in which the argument that the drunk driver owed no standard of care to the passenger was rejected for a range of reasons.

87 Another difficulty is that a driver of a vehicle may owe different standards of care to different passengers, according to their awareness of his or her inadequacies as a driver, as well as owing the normal, reasonable standard to other road users without such knowledge. This could lead to quite absurd distinctions being drawn in the applications of these varying standards to determine questions of negligence. Surely the better approach is always to require the same standard of reasonable care by defendants in relation to all plaintiffs, subject to the reduction of damages for plaintiffs' contributory conduct in failing to safeguard their own safety where they have knowledge of the defendants' impairment and, but only in extreme and exceptional cases, a preclusion of liability altogether as a result of plaintiffs' voluntary assumption of such risks.

88 See also *Radford v Ward* (1990) 11 MVR 509; Aust Torts Reps 81-064 (Vic AD) on this point.

89 The defence of *volenti* itself was held not to have been made out on the facts of *Cook v Cook* (1986) 162 CLR 376; 68 ALR 353.

90 Luntz and Hambly, above n 3, p 402.

by lower courts,<sup>91</sup> but the potential for such application remains.

### Conclusion

Nothing in this article is intended to suggest that apportionment is always the appropriate response where a plaintiff's damage may have been partly caused by the plaintiff's contributory negligence. Several factors may support the view that full damages should be available, for example where a plaintiff is entitled to disregard his or her own safety having fully placed trust in the defendant to safeguard that interest.<sup>92</sup> Instead, the article merely calls for the option of apportionment as an appropriate and flexible remedial response which can take into account the full range of factual circumstances relevant to the causation of harms. The High Court increasingly appears to be rejecting such flexibility. The trend can only be regretted.

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91 See, eg, *McPherson v Whitfield* [1996] 1 Qd R 474; (1995) 21 MVR 18, where a 'lower standard of care' would have had to have been considered by the court had it been argued. For a discussion of the three possible 'defences' in the case law, see K Hogg, 'Guest Passengers: A Drunk Driver's Defences' (1994) 2 *TLJ* 37. The High Court has the opportunity to consider the issue of contributory negligence on the part of a passenger claiming against a drunk driver when handing down its decision in *Wentworth Shire Council v Berryman* (argued on 8 November 2002), on appeal from *Berryman v Joslyn* (2001) 33 MVR 441 (NSW CA).

92 As was the conclusion reached on the facts of *Astley v Austrust Ltd* (1996) 67 SASR 207 in the South Australian Full Court. See the discussion in Davis and Knowler, above n 2, at 797–803.