recognising a duty to children, such that if it is reasonable to require any person to have in contemplation the risk of psychiatric injury to another, then it is reasonable to require an employer to have in contemplation the children of an employee.

McHugh J formulated a principle similar to the 'neighbour' principle in *Donoghue v Stevenson*, and held that persons who had a close tie of love with the deceased could bring actions for nervous shock, and that this should not be limited to children. The focus of the inquiry should be the relationship, not its legal status.

Gummow and Kirby JJ stated:

'Australian law seeks to protect, in an appropriate case, the plaintiff's freedom from serious mental harm which manifests itself in a recognisable psychiatric illness.'

Despite the High Court's decisions, there are traces of arbitrary rules (once thought to be part of Australian common law) in the mental harm provisions of the *Civil Liability Act* 2002 (NSW). One glaring example is section 32 which provides that a person does not owe a duty of care to another person to take care not to cause the plaintiff mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.

Despite the High Court's clarity of principle in formulating a common sense approach to the common law by applying the 'neighbour' principle, legislatures have intervened, bringing the spectre of arbitrary rules, which could result in unjust outcomes for meritorious claims. The situation poses yet another challenge to lawyers seeking to advance the rights of injured plaintiffs.

Endnote: 1 (2002) 76 ALJR 1348.

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Driver intoxication and a passenger's contributory negligence

Joslyn v Berryman; Wentworth Shire Council v Berryman [2003] HCA 34

The relevant standard in assessing whether a passenger who is injured in a motor vehicle accident is guilty of contributory negligence, where he or she knew or ought to have known that the driver was intoxicated, is an objective one. This is the case both at common law and under the *Motor Accidents Act* 1988 (NSW), although the common law test is broader in its application.

Background

The plaintiff was injured when his vehicle, in which he was a passenger, overturned. The defendant driver was in an intoxicated state.

The previous evening, the plaintiff and the defendant had attended a party where they both drank heavily. Shortly before the accident, the plaintiff had been driving and the defendant had noticed he was dozing off.

The defendant remonstrated with the plaintiff who responded: 'Well, you drive the car then.'

The plaintiff knew that his vehicle had a broken speedometer and a propensity for rolling over and that the defendant had lost her licence. The defendant accepted the invitation to

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change drivers. Shortly afterwards the vehicle rolled, causing serious injuries to the plaintiff.

Decision at Trial

The trial judge found the defendant negligent. However, damages were reduced 25% on account of the plaintiff's contributory negligence. The court held that the plaintiff had allowed the defendant to drive when he ought to have known she was unfit to do so.

Court of Appeal

The Court of Appeal held that the trial judge erred in finding the plaintiff guilty of contributory negligence.

In applying section 74 of the Motor Accidents Act, which provides that a person is guilty of contributory negligence if he 'was aware, or ought to have been aware' that the driver's ability to drive was impaired by alcohol, the court held that the relevant facts were confined to those that the plaintiff observed, or ought to have observed, at the time the defendant took over the driving.

Meagher JA said: 'One must view matters as they stood at the time of handing over control of the car, (not as they were in the previous 24 hours).'[1] His Honour considered that there was no evidence at trial to support the conclusion that the plaintiff had any reason to think the defendant was intoxicated.

The High Court Decision

The court stressed that the standard imposed on a plaintiff in assessing whether they are guilty of contributory negligence is an objective one.

McHugh J succinctly clarified the questions to be answered: 'The issue is not whether a reasonable person in the intoxicated passenger's condition – if there could be such a person – would realise the risk of injury in accepting the lift. It is whether an ordinary reasonable person – a sober person – would have foreseen that accepting a lift from the intoxicated driver was exposing him or her to a risk of injury by reason of the driver's intoxication.'[2]

The court considered that an ordinary, reasonable person would not allow themselves to be a passenger in the situation where they knew:

- The driver did not have a licence.
- The vehicle's speedometer was broken.
- The vehicle had a propensity to roll.

The driver has consumed excessive amounts of alcohol the night before and had been staggering around in the early hours of the morning.

Taking into account the above factors, the court considered the plaintiff guilty of contributory negligence at common law.

Motor Accidents Act ('the Act') and Contributory Negligence

Section 74(6) of the Act, requires that a passenger must be a 'voluntary passenger'. The court considered the plaintiff had met this requirement, relying on several factors that indicated that it would have been reasonable for him to decline to become a passenger.

The court held that the test regarding contributory negligence under section 74(2) of the Act is narrower than at common law. Under the Act, factors such as the vehicle's defective nature and the defendant's lack of licence were not to be taken into account.

The court considered that the word 'ought' in section 74(2) imposed an objective standard.[3] In contrast to the Court of Appeal, the High Court considered the circumstances leading up to the accident, namely the plaintiff's knowledge of the defendant's drinking over the 12 hours prior to the accident were relevant in measuring this standard.

The appeals were allowed with costs and the proceedings remitted to the Court of Appeal. PL

Endnotes: 1 (2001) 33 MVR 441 at 446 [21]. 2 [2003] HCA 34 at 14 [38]. 3 [2003] HCA 34 at 16 [44].