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CALCULATING THE REDUCTION OF DAMAGES FOR A CONTRIBUTORILY NEGLIGENT PLAINTIFF IN A BLAMELESS ACCIDENT

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IN ISSUE

- Consideration of the extent to which damages should be reduced for contributory negligence in a blameless accident.

THE BACKGROUND

At 1:40am on 14 August 2010, the appellant was walking along an unlit road when he was struck from behind by a car driven by the respondent. Both the appellant and the respondent were affected by alcohol at the time of the accident.

THE DECISION AT TRIAL

The trial judge found that the respondent had driven her vehicle off the bitumen road and onto the gravel verge where the appellant was walking. The trial judge found the appellant 40% contributorily negligent as he had walked along a narrow, unlit road facing away from oncoming traffic. The trial judge awarded damages in the sum of $1,556,378.80.

THE ISSUES ON APPEAL

The appellant appealed the decision on the ground that the damages award was inadequate. The respondent cross-appealed against the finding that she was negligent.

THE DECISION ON APPEAL

The Court of Appeal allowed the cross-appeal and set aside the trial judge's orders. It held that the evidence

did not support the finding that the appellant was standing on the gravel verge of the road immediately before the accident. During the hearing, the appellant was granted leave to file an amended Notice of Appeal ("the amended appeal").

THE ISSUES ON THE AMENDED APPEAL

The appellant submitted that the trial judge erred in failing to find in the alternative that it was a blameless accident within the meaning of s 7A of the *Motor Accident Compensation Act 1999* (NSW) ("MACA"). The respondent sought leave to argue that *Axiak v Ingram* [2012] NSWCA 311 was wrongly decided insofar as it held that a plaintiff could rely on the blameless motor accident provisions of the MACA notwithstanding that the plaintiff was contributorily negligent.

THE DECISION ON THE AMENDED APPEAL

The Court of Appeal refused to grant leave to the respondent to argue that *Axiak v Ingram* was wrongly decided. The Court of Appeal held that in a blameless accident case, the reduction of damages awarded to a contributorily negligent plaintiff is not based on a comparison between the conduct of the plaintiff and that of the defendant. The relevant question is how far the plaintiff has departed from the standard of care he or she is required to observe in the interests of his or her own safety. The Court of Appeal held that the appellant showed a serious disregard for his own safety but noted that he was not walking in the middle of the road and he was walking with another person. The Court of Appeal found it just and equitable to reduce the appellant's damages by 50% and awarded the appellant $1,034,256.50.

IMPLICATIONS FOR YOU

This decision confirms that *Axiak v Ingram* is the test to use for calculating a reduction of damages for a blameless accident case. It also confirms that the fault of the plaintiff is not a relevant consideration for "fault" under s 7A MACA.

Serrao (by his Tutor Serrao) v Cornelius (No. 2) [2016] NSWCA 231

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