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CONTRIBUTORY NEGLIGENCE AND APPORTIONMENT

Jackson v Murray[1]

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I. INTRODUCTION

In both the UK and Singapore, the legislation governing contributory negligence provides that in cases where the claimant has been contributorily negligent his damages should be reduced to such extent as the court considers just and equitable given his share in the responsibility for the damage he has sustained.[2] As this is a rather general exhortation, it offers limited practical guidance. More specific assistance is to be found in a number of authorities, the most notable of which is probably *Stapley v Gypsum Mines Ltd*,[3] where Lord Reid famously observed that as well as looking at the blameworthiness of both defendant and claimant, it is also necessary, when apportioning responsibility, to consider the relative importance of the claimant's actions. One of the most common situations in which contributory negligence is pleaded successfully is in relation to claims arising from road accidents, and in particular accidents involving pedestrians who are knocked down by drivers. In this context, more specific guidance on apportionment is to be found in decisions such as those of the House of Lords in *Baker v Willoughby*[4] and the English Court of Appeal in *Eagle v Chambers*,[5] which suggest that, due to the dangers inherent in driving and

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1 [2015] UKSC 5 [*Jackson*].

2 The *Law Reform (Contributory Negligence) Act*, 1945 (UK), 8 & 9 Geo VI, c 28 [the "*UK Act*"], s 1(1) and the *Contributory Negligence and Personal Injuries Act* (Cap 54, 2002 Rev Ed Sing) [the "*Singapore Act*"], s 3(1) contain the following identical provision:

> Where any person suffers damage as a result partly of his own fault and partly of the fault of any other persons or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering that damage, but the damages recoverable in respect thereof shall be reduced to such an extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

3 [1953] AC 663 [*Stapley*].

4 [1970] AC 467 [*Baker*].

5 [2003] EWCA Civ 1107 [*Eagle*].

the disparity in the potential for causing harm between a driver and a pedestrian, a higher burden is likely to be placed on the driver.

Another issue with respect to apportionment of damages is the difficult question of when an appellate court may alter the apportionment which has been fixed by a lower court. Although the principles governing both the role of appellate judges in general—as discussed by the House of Lords in *G v G (Minors) Custody Appeal*[6]—and their function with respect to apportionment in particular—as considered by the Court of Appeal in *Kerry v Carter*[7]—are well-established, the application of these principles can be particularly problematic, given that in order to interfere with the apportionment fixed by a lower court, the appellate court must be convinced that the lower court got things so wrong that its decision exceeded the ambit of 'reasonable disagreement'.[8]

The recent decision of the UK Supreme Court in *Jackson* deals with both these issues. The decision is of importance both because of its detailed discussion of the relevant principles and because it contains strong majority and minority decisions on the appropriateness of reviewing apportionment in the particular circumstances of the case.

II. The Facts And The Decisions Of The Courts Below

The accident which gave rise to the claim in *Jackson* occurred on a country road in Scotland early one evening in January 2004. A school minibus stopped to let off two children, one of whom, the pursuer,[9] Ms Jackson, then aged thirteen, stepped out from behind it into the path of a car driven by the defender, Mr Murray. He saw the minibus, but did not take account of the possibility that a child alighting from it might try to cross the road in front of him. He did not see Ms Jackson, but since he was driving at 50 mph (which, although within the statutory speed limit, was too fast for the prevailing conditions), he could not have braked in time anyway. Ms Jackson was struck by Mr Murray's car and sustained severe injuries. The evidence established that had Mr Murray been driving at a reasonable speed, and had he been paying proper attention, the accident would not have occurred. However, it also established that had Ms Jackson looked left at the appropriate time before stepping out from behind the bus, she would have realised that it was not safe to cross.

In the Court of Session, Ms Jackson succeeded in establishing liability against Mr Murray, but Lord Tyre held that she was 90% contributorily negligent. She appealed to the Inner House, where this figure was reduced to 70%. She then appealed to the Supreme Court, where she argued that there ought not to have been any finding of contributory negligence on her part, or alternatively that the reduction should have been less than 70%.[10]

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6 [1985] 1 WLR 647 [*G v G*].

7 [1969] 1 WLR 1372 [*Kerry*].

8 See *infra* text accompanying note 29.

9 When referring to, and quoting from, the judgment in *Jackson*, the Scottish terminology of 'pursuer' and 'defender' will be used in this note. Elsewhere, the more common terminology of 'claimant' and 'defendant' will be employed.

10 Mr Murray initially cross-appealed on the ground that the Inner House should not have interfered with the decision of the Court of Session, but the cross-appeal was not pursued.

III. The Decision Of The Supreme Court

In the Supreme Court, all five judges agreed that Ms Jackson had been contributorily negligent.[11] However, by a bare majority, the Court allowed the appeal against the 70% apportionment which had been made by the Inner House. Lord Reed, with whom Lady Hale and Lord Carnwath agreed, delivered the lead judgment. Lord Hodge, with whom Lord Wilson agreed, would have dismissed the appeal.

A. *The Majority Judgment*

Lord Reed began his judgment by identifying the two central questions to be addressed. These were: first, how responsibility should be apportioned in a case of this kind and, secondly, what principles should govern the review of an apportionment by an appellate court.[12]

1. *How Responsibility Should Be Apportioned*

In dealing with the question of how to apportion damages in cases brought by pedestrians against drivers, Lord Reed considered and approved the key cases on the determination of apportionment. His starting point was Lord Reid's statement in *Stapley*[13] that the claimant's share in the responsibility for the damage he sustains "cannot… be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness."[14]

Lord Reed then referred to Lord Reid's subsequent judgment in *Baker,*[15] in which his Lordship, after again observing that the two elements in an assessment under the relevant legislation were causation and blameworthiness, had suggested that in a road traffic accident involving a driver and a pedestrian "it is quite possible that the [driver] may be very much more to blame than the pedestrian,"[16] given that the former, who is broadly required only to look ahead, is usually travelling at some speed (with the attendant risk that any lapse of attention may be "disastrous"[17]), while the latter, who has to look in two directions before stepping onto the road, is travelling far more slowly.

Lord Reed observed that this approach had been applied in *McCluskey v Wallace*[18] and subsequently in *Eagle*,[19] where the Court of Appeal, in a judgment delivered by Hale LJ, had confirmed the need to focus when apportioning responsibility on the respective causative potency and the respective blameworthiness of the parties' acts. In this respect, Hale LJ had observed that since a car can usually do much more

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11 On the findings of fact which had been made in the Court of Session "either she did not look to the left before proceeding across the road or, having done so, she failed to identify and react sensibly to the presence of the defender's car in close proximity", *Jackson*, *supra* note 1 at para 18 (Lord Reed).

12 *Ibid* at para 3.

13 *Stapley*, *supra* note 3.

14 *Ibid* at 682, cited by Lord Reed in *Jackson*, *supra* note 1 at para 20.

15 *Baker*, *supra* note 4.

16 *Ibid* at 490, cited by Lord Reed in *Jackson*, *supra* note 1 at para 23.

17 *Baker*, *ibid*.

18 1998 SC 711 [*McCluskey*].

19 *Supra* note 5.

damage to a person than a person can do to a car, it is appropriate when determining blameworthiness to factor in this potential 'destructive disparity.'[20]

2. *The Principles Which Should Govern the Review of Apportionment by an Appellate Court*

With respect to the second question, Lord Reed noted that appeals relating to apportionment would rarely reach the Supreme Court, since they would not ordinarily involve points of law of public interest in the absence of which permission to appeal would not be granted. However, since *Jackson* was a Scottish case, no such permission was necessary.[21] Moreover, since there would be rare apportionment cases—such as *Dubai Aluminium Co Ltd v Salaam*[22]—in which permission to appeal to the Supreme Court would be granted (and rather more in which intermediate appellate courts would be faced with questions of apportionment) it was important to determine the applicable principles.

On this point, Lord Reed began by stating:

> It is not possible for a court to arrive at an apportionment which is demonstrably correct. The problem is not merely that the factors which the court is required to consider are incapable of precise measurement. More fundamentally, the blameworthiness of the pursuer and the defender are incommensurable. The defender has acted in breach of a duty… which was owed to the pursuer; the pursuer, on the other hand, has acted with a want of regard for her own interests… The court is not comparing like with like.[23]

His Lordship observed that, because of this, apportionment of responsibility would inevitably be "a somewhat rough and ready exercise"[24] and that since different judges may legitimately take different views as to what would be just and equitable in particular circumstances, those differing views should generally be respected. However, as Lord Denning had observed in *Kerry*:

> [The appellate court] will interfere if the judge has gone wrong in principle or is shown to have misapprehended the facts… [and] even if neither of these is shown, we will interfere if we are of opinion that the judge was clearly wrong… We are here to put right that which has gone wrong. If we think the judge below was wrong, then we ought to say so, and alter the apportionment accordingly.[25]

The power to alter apportionment would, though, be used sparingly. As Lord Justice-Clerk Wheatley had indicated in *Beattie v Halliday*,[26] an appellate court would not "lightly interfere with an apportionment fixed by the judge of first instance" and indeed would "only do so if it appears that he has manifestly and to a substantial degree gone wrong."[27] And as Lord Fraser of Tullybelton had stated in more general

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[20] *Ibid*, cited by Lord Reed in *Jackson*, *supra* note 1 at paras 25, 26.

[21] This will change when s 117 of the *Courts Reform (Scotland) Act 2014*, ASP 18 comes into force.

[22] [2003] 2 AC 366.

[23] *Jackson*, *supra* note 1 at para 27.

[24] *Ibid* at para 28.

[25] *Kerry*, *supra* note 7 at 1376.

[26] Unreported, 4 February 1982 [*Beattie*].

[27] *Jackson*, *supra* note 1 at para 32, citing the reference to *Beattie* by Lord Justice-Clerk Ross in *McCusker v Saveheat Cavity Wall Insulation Ltd* 1987 SLT 24 at 29.

terms in *G v G*,[28] interference by an appellate court would be justifiable only when the court below had "not merely preferred an imperfect solution" which was different from the one the appellate court would have adopted, but when it had "exceeded the generous ambit within which a reasonable disagreement is possible."[29] Moreover, an appellate court would not alter the apportionment fixed by a lower court merely because of a disagreement as to precise figures. Rather, it would intervene only if it took a fundamentally different view of whether the parties bore equal responsibility or one party bore much greater responsibility than the other. As Hale LJ had observed in *Eagle* when lowering the claimant's contribution from 60% to 40%, a finding that one party was more responsible than the other for the damage sustained was different from a finding as to the precise extent of a contribution of less (or more) than 50%. There was therefore a qualitative difference between a finding that the claimant's contribution was 60% as opposed to 40%, which was less apparent in a finding that the claimant's contribution was 40% as opposed to 20%.[30]

3. *The Decision*

After a detailed analysis of the facts of the case, and taking account of the specific guidance to be obtained from the dicta in *Stapley*, *Baker* and *Eagle* as to how apportionment should be determined in actions by pedestrians against drivers, Lord Reed indicated that, like Hale LJ in *Eagle*, when assessing the respective blameworthiness of the parties he would take account of the potentially dangerous nature of a car being driven at speed. However, even if one left this out of account, he would not have assessed "the causative potency of the conduct of the defender as being any less than that of the pursuer."[31] Unlike precedent cases where apportionment had been made on the basis that either the pedestrian (as in *Ehrari v Curry*)[32] or the driver (as in *Eagle*)[33] was clearly more to blame, here the injury had been caused by a combination of Ms Jackson attempting to cross the road when she should not have done so and Mr Murray driving at an excessive speed without keeping a proper look-out. In these circumstances, Lord Reed was unable to discern in the reasoning of the Inner House a satisfactory explanation for its apparent conclusion that Ms Jackson had been far more to blame than Mr Murray. Indeed, it appeared to his Lordship that "the defender's conduct played at least an equal role to that of the pursuer in causing the damage and was at least equally blameworthy."[34] That being so, his Lordship concluded:

> The view that parties are equally responsible for damage suffered by the pursuer is substantially different from the view that one party is much more responsible than the other. Such a wide difference exceeds the ambit of reasonable

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28 *Supra* note 6 at 651.

29 *Ibid* at 652.

30 *Jackson*, *supra* note 1 at para 38.

31 *Ibid* at para 40.

32 [2007] RTR 521 [*Ehrari*], where a pedestrian stepped directly into the path of a car being driven at a reasonable speed, and damages were reduced by 70%.

33 *Eagle*, *supra* note 5, in which the driver hit a pedestrian who had been careless as to her own safety but who had been in the driver's line of vision long enough for the driver easily to have avoided impact, and damages were reduced by 40%. (See too *McCluskey*, *supra* note 18, where in similar circumstances the pedestrian's damages were reduced by 20%.)

34 *Jackson*, *supra* note 1 at para 43.

> disagreement, and warrants the conclusion that the court below has gone wrong. I would accordingly allow the appeal and award 50% of the agreed damages to the pursuer.[35]

B. *The Minority Judgment*

Lord Hodge opened his judgment by indicating that he agreed with Lord Reed's analysis of both the facts and the applicable principles. His dissent, the necessity for which he regarded as "unfortunate" given that it did not "raise a disputed issue of legal principle,"[36] was based purely on the application of the established principles to the facts of this case. Agreeing that an appellate court can intervene only in situations where the decision of a lower court falls "outside the generous limits of reasonable agreement,"[37] he concluded that in this case the decision of the Inner House had not fallen outside these limits, and that it was therefore inappropriate to disturb its decision. In this respect, his Lordship indicated that while the Inner House had been entitled to hold that Lord Tyre in the Court of Session had "gone wrong to the requisite degree"[38] in reducing Ms Jackson's damages by the extreme figure of 90% (which failed adequately to take account of the speed at which Mr Murray was travelling at the moment of impact), he was not persuaded that the decision of the Inner House, lowering the reduction to 70%, was open to the same criticism. Rather, he considered that the findings of fact by the Court of Session that either Ms Jackson had not looked at all before attempting to cross the road from behind the minibus, or that she had "failed to identify and react sensibly to the presence of the defender's car in close proximity"[39] were capable of supporting the Inner House's conclusion that she was more responsible for the accident than Mr Murray. On these unchallenged findings, the Inner Court had been "entitled to view her behaviour as both very seriously blameworthy and of major causative significance."[40] It had also, as a consequence, been entitled to attribute to her the major share of responsibility.

While concluding that had he been apportioning damages on these facts he might have reduced them by two-thirds rather than 70%, Lord Hodge stressed that it was not open to an appellate court to substitute its judgment for that of the court below unless that court had plainly been wrong. Since in this case there was no suggestion that the Inner House had failed to take account of material facts or that it had misunderstood the evidence, its assessment was "one of broad judgment" in which there was "ample room for reasonable disagreement."[41]

IV. Discussion

The primary significance of the decision in *Jackson* is the Supreme Court's unanimous endorsement of principles to be found in earlier cases with respect to both the

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35 *Ibid* at para 44.
36 *Ibid* at para 45.
37 *Ibid* at para 46.
38 *Ibid* at para 48.
39 *Ibid* at para 57, citing the judgment of Lord Tyre.
40 *Ibid*.
41 *Ibid* at para 58.

approach to be taken to apportionment in situations where pedestrians are injured in road accidents and the circumstances in which an appellate court may interfere with the apportionment fixed by a lower court. However, the Court's application of these principles leaves some rather knotty issues unresolved.

Although assessing apportionment will, as Lord Reed observed in *Jackson*, always be a somewhat rough and ready exercise, guidance from precedents may help to ensure a level of predictability and consistency. In *Jackson*, both the majority and the minority judges acknowledged the significance in actions by pedestrians against drivers of the destructive disparity approach formulated by Hale LJ in *Eagle*, under which the inherently dangerous activity of driving is compared with the far less dangerous activity of walking when determining the causative potency and blameworthiness of the parties' respective acts. Yet in the 12 years since *Eagle* was decided, a number of appeals heard by the Court of Appeal involving claims by pedestrians against drivers have resulted in outcomes where drivers have either been exonerated completely[42] or have been apportioned only a small amount of responsibility,[43] thus demonstrating that the destructive disparity approach will not be determinative in every situation. Indeed, in cases where a pedestrian moves suddenly into the path of a driver, the Court of Appeal has specifically cautioned against a counsel of perfection when assessing the action which it is reasonable to expect of a driver.[44]

Moreover, in *Jackson* itself, Lord Reed reasoned that "[e]ven leaving out of account the potentially dangerous nature of a car being driven at speed" he would not have considered the causative potency of Mr Murray's conduct to be any less than that of Ms Jackson.[45] The fact that his Lordship then lowered the reduction in Ms Jackson's damages from 70% to 50% to reflect the majority's finding that the parties were, in fact, equally responsible for the accident suggests that the destructive disparity consideration had little (if any) practical bearing on the ultimate determination of Mr Murray's responsibility. Although his Lordship did briefly distinguish the facts at hand from both *Eagle*-type situations, in which the driver is primarily to blame, and situations such as that in *Ehrari*,[46] where the pedestrian steps straight into the path of a car, he did not explore the reasons for the Court of Appeal having eschewed a counsel of perfection in some of its more recent decisions. In this respect—while it would almost certainly not have affected the decision—his judgment might have offered a more thorough analysis of the relevant law if, in addition to considering

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42 See *eg*, *Ahanonu v South East London & Kent Bus Co Ltd* [2008] EWCA Civ 274 [*Ahanonu*], in which the Court of Appeal substituted for a 50% reduction in damages by the trial judge a finding that the defendants were not liable, and *Qamili v Holt* [2009] EWCA Civ 1625 [*Qamili*] and *Birch v Paulson* [2012] EWCA Civ 487 [*Birch*], in both of which the Court of Appeal dismissed the claimant's appeal against the trial judge's decision that the defendant was not liable.

43 See too *Paramasivan v Wicks* [2013] EWCA Civ 262 [*Paramasivan*], in which the Court of Appeal substituted for a 50% reduction in the claimant's damages by the trial judge a reduction of 75%.

44 See *eg*, *Paramasivan*, *ibid*. In that case, the trial judge had apportioned damages at 50% each in a case where the claimant, a boy of thirteen, suddenly ran out in front of a car driven by the defendant. In reducing the driver's responsibility for the accident to 25%, the Court of Appeal warned of the danger of a court making liberal use of hindsight. The Court referred in this respect to an earlier Court of Appeal decision in *Ahanonu*, *supra* note 42, in which it was held that the trial judge's conclusion that a bus driver was negligent in failing to check his rear-view mirror had imposed on the driver a counsel of perfection which ignored the reality of the situation.

45 *Jackson*, *supra* note 1 at para 40.

46 *Supra* note 32.

destructive disparity, it had also discussed the cases in which the Court of Appeal has warned of the injustice which may result from imposing on drivers standards which they cannot realistically be expected to meet.[47]

The question of when an appellate court may review a lower court's decision gives rise to more intractable problems. Both the majority and the minority judges in *Jackson* approved the principle that an appellate court will disturb the apportionment fixed by a lower court only where that lower court has gone wrong "manifestly and to a substantial degree"[48] and where its decision falls outside "the generous ambit within which a reasonable disagreement is possible."[49] This suggests that the powers of interference on the part of an appellate court referred to by Lord Denning in *Kerry*[50] will not (or certainly should not) be exercised very often.[51] Since the Supreme Court hardly ever hears appeals involving issues of apportionment, decisions such as *Jackson* will indeed be very rare at that level. In the Court of Appeal, though, the situation appears to be a little different. If one looks, for example, at the cases involving claims by pedestrians decided after *Eagle* and before *Jackson*, there are a number in which apportionment was varied,[52] suggesting that while interfering with apportionment is not the norm, neither is it extremely uncommon.

The subjectivity inherent in assessing whether, on a given set of facts, a lower court's apportionment of damages actually meets the criteria for appellate intervention is apparent in both the majority and minority judgments in *Jackson*. Lord Reed and Lord Hodge undertook detailed re-examinations of factual minutiae which had already been exhaustively raked over by both the Court of Session and the Inner House. Their judgments leave one feeling that the facts as determined at trial might have lent themselves to any number of plausible interpretations. This perception may be due in part to the fact that the apportionment issue in this case had already been determined by two lower courts rather than one, which magnified the sense that the rough and ready nature of apportionment will always militate against the possibility of accuracy, no matter how many times a given set of facts may fall to be reconsidered. However, even putting to one side the fact that in *Jackson* the exercise was one of third-guessing rather than merely second-guessing, the decision illustrates the vagaries involved in determining when the decision of a lower court is so flagrantly wrong that it is appropriate to undertake an appellate review of the apportionment which it has fixed. For this reason, while the majority's decision that the parties should be held equally responsible certainly offers the more attractive

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47 See *eg*, *Ahanonu*, *supra* note 42 and *Paramasivan*, *supra* note 43.

48 *Beattie*, *supra* note 26, (Lord Justice-Clerk Wheatley).

49 *G v G*, *supra* note 6 at 652 (Lord Fraser).

50 *Kerry*, *supra* note 7 at 1376.

51 See *eg*, James Goudkamp, "Rethinking Contributory Negligence" in Stephen GA Pitel, Jason W Neyers and Erika Chamberlain, eds, *Tort Law; Challenging Orthodoxy* (Oxford and Portland, Oregon: Hart Publishing, 2013) 309. Goudkamp observes at 310: "The circumstances in which a trial judge's apportionment of damages will be adjusted on appeal are… severely constrained. A trial judge's holding in this regard must be 'plainly', 'fundamentally' or 'clearly' incorrect before appellate interference will be justifiable." In this respect, Goudkamp refers to *Phethean-Hubble v Coles* [2012] EWCA Civ 349 at para 86 and *Dixon v Clement Jones Solicitors (a firm)* [2004] EWCA Civ 1005 at para 51, as well as Lord Denning's judgment in *Kerry*, *supra* note 7 at 1376.

52 See *eg*, the decisions in *Paramasivan*, *supra* note 43, where the Court of Appeal increased the claimant's share of responsibility from 50% to 75%, and *Rehill v Rider Holdings Limited* [2012] EWCA Civ 262, where the Court of Appeal increased the claimant's share of responsibility from one-third to 50%.

middle-ground, Lord Hodge's minority judgment against disturbing the decision of the Inner House[53] arguably reflects a more faithful approach to the constrained circumstances in which an appellate court should treat the apportionment set by a lower court as falling outside the ambit of reasonable disagreement.

V. The Position In Singapore

In Singapore, as elsewhere, actions by pedestrians who have been injured by drivers are relatively common, and many such cases involve findings of contributory negligence. When determining apportionment of damages, courts in this jurisdiction tend to be guided largely by the provisions of the *Road Traffic (Pedestrian Crossings) Rules*[54] and the *Highway Code*,[55] as well as some older UK cases.

In *Ng Weng Cheong v Soh Oh Loo*,[56] for example, where a pedestrian appealed against a finding that he had been solely responsible for an accident in which he had been injured while using a pedestrian crossing which displayed the red man symbol, the Court of Appeal held that the driver of the car which injured him should have been keeping a proper lookout and should have accorded him precedence, as required by rule 5 and rule 7 of the *Pedestrian Crossings Rules*.[57] Since he had not done so, the driver was accordingly held 30% responsible for the accident. In reaching this conclusion, the Court referred to the decision in *London Passenger Transport Board v Upson*,[58] in which the House of Lords held that a driver must travel at a slow enough speed to be able to stop before reaching a pedestrian crossing. In *Cheong Ghim Fah v Murugian s/o Rangasamy*,[59] V K Rajah JC (as he then was) referred to rule 7 and rule 8 of the *Highway Code*[60] when finding that a jogger had been contributorily negligent when he jogged with his back to traffic and failed to use the adjoining pavement.[61] (In the course of his judgment, Rajah JC observed that "[a]pportionment is more an exercise in discretion than in clinical science; it is one that involves imponderables"[62]). Similarly, in *Khoo Bee Keong v Ang Chun Hong*,[63] when deciding a case in which a bus had collided with a pedestrian and a dog at a traffic-controlled junction, Phang JC (as he then was) made reference to the

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53 *Jackson*, *supra* note 1 at para 59. However, interestingly—and perhaps somewhat confusingly—Lord Hodge *did* approve the Inner House's decision to lower from 90% to 70% the reduction in damages which had been fixed by the Court of Session. This he did even though, at para 45, he expressed implicit agreement with Lord Reed's view, at para 38, that an alteration in apportionment will not be appropriate where the disagreement relates merely to precise figures, and will normally be undertaken only where the court below either (i) failed to recognise that the parties were equally responsible or (ii) assigned primary responsibility to the wrong party. (See too the discussion above and the text accompanying note 30).

54 Cap 276, R 24, 1990 Rev Ed Sing [*Pedestrian Crossing Rules*].

55 Cap 276, R 11, 1990 Rev Ed Sing.

56 [1993] 1 SLR (R) 532 [*Ng Weng Cheong*].

57 *Supra* note 54.

58 [1949] AC 155.

59 [2004] 1 SLR (R) 628 [*Cheong Ghim Fah*].

60 *Supra* note 55.

61 In this respect, Rajah JC observed that s 112 of the *Road Traffic Act* (Cap 276, 2004 Rev Ed Sing) provides that while breaches of the *Highway Code* do not themselves render persons liable to criminal or civil liability, they may be relied on in "proceedings as tending to establish or negative any liability which is in question in those proceedings." See *Cheong Ghim Fah*, *supra* note 59 at para 55.

62 *Cheong Ghim Fah*, *ibid* at para 87.

63 [2005] SGHC 128.

Pedestrian Crossings Rules and the *Highway Code*, as well as the dictum of Denning LJ in *Davies v Swan Motor Co (Swansea) Ltd*[64] that:

> [W]hen a man steps into the road he owes a duty to himself to take care for his own safety, but he does not owe any duty to a motorist who is going at an excessive speed to avoid being run down.[65]

And, more recently, in *Koh Kiak Cheng v Wacoal Singapore Pte Ltd and Tan Chee Peng*,[66] which involved a claim by a pedestrian who had been knocked down at a light-controlled crossing at which the green man symbol was flashing, Loo Ngan Chor DJ reduced the pedestrian's damages by 10% to reflect the fact that under rule 24 of the *Highway Code* he should not have started to cross the road in such circumstances.

Few cases make it to the appeal stage, and of those which do, the appeal sometimes (as in *Ng Weng Cheong*) relates not to an alteration of apportionment as such, but rather to the question of whether a party who was exonerated at trial ought in fact to bear some responsibility. However, in *Cai Xiao Qing v Leow Fa Dong*,[67] which concerned an accident involving a cyclist and a car at a pedestrian crossing, Lai Siu Chiu J in the High Court did alter the apportionment fixed by the District Court when she increased the cyclist's share of responsibility from 10% to 30% to reflect the fact that he had collided with the car. In so doing, she made no reference to the principles which guide an appellate court when altering the apportionment fixed by a lower court.

VI. Conclusion

The decision in *Jackson*, while theoretically confirming established principles, in practice leaves a number of issues unresolved. Although their Lordships' espousal of the views expressed in prior authorities—in relation both to the determination of apportionment and the circumstances in which the apportionment fixed by a lower court may be disturbed—are generally to be welcomed, the significance of the decision is diluted by its arguably incomplete analysis of the principles governing the respective responsibility of drivers and pedestrians and by the divided conclusions of the majority and the minority on the appropriateness of reviewing apportionment in the circumstances of the case.

In view of the fact that, in Singapore, cases involving actions by pedestrians against drivers have to date been decided largely by reference to applicable legislation, and that there has been no specific discussion of the appellate function in varying the apportionment of damages, it is unlikely that *Jackson* will make large ripples in this jurisdiction. On the other hand, since this category of cases is of such statistical significance, and since reference is still commonly made to UK authorities in the course of interpreting and applying the relevant local provisions, it is possible that the courts here will choose to take note of the decision. For this reason, its potential significance cannot be dismissed.

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64 [1949] 2 KB 291.
65 *Ibid* at 324.
66 [2015] SGDC 197.
67 [2012] SGHC 67.

VII. Postscript

On 17 March 2016, after this issue of the journal went to print, the Singapore Court of Appeal in *Asnah Bte Ab Rahman v Li Jianlin*[68] (a rare 2:1 decision) held a pedestrian 15% to blame for an accident in which he was injured by a taxi when crossing the second half of a dual carriageway with the green man symbol in his favour. In the High Court, Choo Han Teck J had held the taxi driver wholly responsible for the accident.[69] However, on appeal, Chao Hick Tin JA and Quentin Loh J, the two majority judges, pointed to rule 22 of the *Highway Code*,[70] which they viewed as requiring pedestrians to check oncoming traffic and cross with care even when a steady green man symbol shows.[71] Chief Justice Sundaresh Menon dissented.[72] In a separate judgment explaining his reasons, he concluded that the effect of the ruling would be to require pedestrians at controlled crossings to "safeguard themselves in the same manner… as if they were jaywalking".[73] The majority referred briefly to the decision in *Jackson*,[74] and to the general principles applicable to the determination of apportionment,[75] though not to the circumstances in which appellate intervention is appropriate.

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68 [2016] SGCA 16.
69 *Li Jianlin v Asnah bte AB Rahman* [2014] SGHC 198.
70 *Supra* note 55.
71 *Supra* note 68 at para 50.
72 *Ibid* at paras 124 *et seq.*
73 *Ibid* at para 187.
74 *Supra* note 1.
75 *Supra* note 68 at paras 118, 119.