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# TAKING CAUTION AT PEDESTRIAN CROSSINGS: PEDESTRIANS BEWARE

*Asnah bte Ab Rahman v Li Jianlin*

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## I. INTRODUCTION

*Asnah bte Ab Rahman v Li Jianlin*[1] is a landmark 2016 Court of Appeal decision concerning the defence of contributory negligence in Singapore, especially where it concerns personal injury claims arising from motor accidents involving pedestrians. Aside from the rare dissenting judgment, the majority's judgment is controversial for its decision that a pedestrian, who made use of a signalised crossing with the signal in his favour, was contributorily negligent because he failed to check for vehicular traffic again at the centre-divider. The majority's judgment may be relied on by motorists and their insurers in cases far beyond the factual context in which it was made, with potentially unfair consequences. Indeed, its reasoning can be readily extended to other types of personal injury claims. Although decided in 2016, *Asnah* warrants a detailed analysis that considers its potential implications, given its significance.[2]

## II. FACTS AND THE HIGH COURT'S DECISION

### A. *Facts*

Bukit Batok West Avenue 5 is a dual-carriageway road, with two lanes of traffic going in opposite directions, separated by a centre-divider with a metal fence varying from 0.9 to 1.4 m in height.[3] The road curves to the left about 150 m before the pedestrian

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1 [2016] SGCA 16; [*Asnah*].

2 For an earlier discussion, see Lim Jia Ying & Jason Chua Dong Wei, "*Asnah* and the Puzzling Tests on Contributory Negligence" (2017) 11 Hong Kong J Leg Studies 35. See also Margaret Fordham, "Contributory Negligence and Apportionment" [2016] 1 Sing JLS 183 at 193.

3 *Asnah*, *supra* note 1 at paras 4-8, 126-128.

crossing, and straightens out about 60-70 m closer to the crossing.[4] A collision took place between a taxi driven by the Appellant ("Asnah") and the Respondent ("Li"), a pedestrian, at a signalised pedestrian crossing along this road at about 10.00pm. Li suffered severe head and hip injuries as a result; the head injuries impaired his ability to recall most of the details of the collision.

At the material time, the weather was fine, the road was well-lit and visibility was clear. The road surface was dry and traffic flow was light. The lights were in favour of Li, and the collision took place as he was embarking on his second or third step into the second half of the crossing.[5] This was about eight seconds after the lights had turned against Asnah.[6] Asnah was estimated to be driving at a speed of at least 55 km/h just before the collision.

### B. *Decision of the High Court*

The trial was bifurcated and the High Court was only required to decide on the question of liability.[7] Asnah conceded that she had been negligent, but argued that Li was contributorily negligent for failing to check for oncoming traffic before crossing the road. The learned judge, Choo Han Teck J, found that there was no evidence that Li did not look left and right before entering the pedestrian crossing.[8] He also found that, given that Li was hit only after he had crossed more than half of the crossing with the lights in his favour, he was entitled to assume that vehicular traffic had stopped, and that those which had not would do so.[9] Furthermore, Li was not crossing at a road which required a heightened sense of caution.[10] Choo J thus held that Li was not contributorily negligent.

## III. The Court of Appeal's Decision

### A. *The Majority's Judgment*

The main issue before the majority was whether the defence of contributory negligence was applicable. This revolved around three questions. First, whether Li had a duty to guard himself against Asnah's negligence ("the duty question"), and secondly, whether he had discharged that duty (if found to be owed) with due care and diligence ("the discharge question").[11] Finally, if the answer to both questions meant that Li was contributorily negligent, by how much should the awarded damages be reduced ("the apportionment question").[12] It was the majority's answer to the first two questions that turned out to be the most controversial.

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4 *Ibid*.
5 *Ibid*.
6 *Ibid* at para 142(g).
7 *Ibid* at para 11.
8 See *Li Jianlin v Asnah bte AB Rahman* [2014] SGHC 198 at para 5. There appears to be a typographical error in the paragraph, however, which may have caused some confusion.
9 *Ibid*.
10 *Ibid* at para 6.
11 *Asnah*, *supra* note 1 at para 17.
12 *Ibid*.

1. *Duty question*

The majority broke down the duty into two parts: (1) whether a pedestrian has a duty to keep a proper look out before entering the signalised pedestrian crossing when the lights are in his favour, and (2) whether the pedestrian should check for oncoming traffic again at the centre-divider of the signalised pedestrian crossing within a dual carriageway road.[13] It started by first stating that the applicable legal principle for both parts was whether Li owed himself a duty to take care of his own safety; if he ought *reasonably* to have foreseen that his failure to act as a reasonable person might have resulted in harm caused to himself.[14] There was, however, no need to take precautions against *all risks*, but only those within ordinary human experience.[15]

(a) *Part (1) of the duty question*: The majority held that Li owed himself a duty to keep a proper look out before entering the pedestrian crossing, regardless of the time that had elapsed since the lights turned in his favour.[16] This was for a number of reasons. First, the majority cited a set of statistics which showed that motorists frequently committed traffic offences involving the running of red lights.[17] It then relied on a separate set of statistics, which illustrated that a not insubstantial number of accidents occurred for the same reason.[18] The majority also cited *Straits Times* articles providing some anecdotal examples of the same.[19] Therefore, the majority concluded that it was *conceivable* that motorists might still beat the red light even after the light had turned against them for more than a few seconds, and thus, pedestrians should guard against this possibility as it should not be considered far-fetched.[20]

Next, the majority acknowledged that pedestrians had a statutory right of way at pedestrian crossings,[21] but held that this did not prevent the defence of contributory negligence from being pleaded. It cited an academic article which *implicitly* suggested that pedestrians must pay *some* attention at the pedestrian crossings.[22] Further, the majority held that given the severe consequences that may arise from a road accident, requiring the pedestrian to take some care was commensurate with the ease with which it could be fulfilled.[23]

Thirdly, the majority considered r 22 of the *Highway Code*[24], and found that its spirit was to require pedestrians to take reasonable care against the possibility of vehicles running red lights, even at signalised pedestrian crossings.[25] This "duty" was easily discharged by taking a quick glance before entering the crossing, and was not

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13 *Ibid* at para 23.
14 *Ibid* at paras 18, 19.
15 *Ibid* at para 24.
16 *Ibid* at paras 53, 54, 75.
17 *Ibid* at para 32. See Xue Jianyue, "More drivers caught with new red-light cameras" *Today* (11 November 2014), online: Today Singapore <https://www.todayonline.com/singapore/more-drivers-caught-new-red-light-cameras>.
18 *Asnah*, *ibid*.
19 *Ibid* at paras 34, 35.
20 *Ibid* at paras 33, 34.
21 *Ibid* at paras 36, 37.
22 *Ibid* at para 37. See RSTC, "Negligence at Pedestrian Crossings" (1938) 2:3 Mod L Rev 239 at 239-241.
23 *Asnah*, *ibid* at para 41.
24 Cap 276, R 11, 1990 Rev Ed Sing.
25 *Asnah*, *supra* note 1 at para 51.

extinguished merely because a number of seconds had elapsed since the lights turned against vehicular traffic.[26] Finally, there were also local case authorities requiring pedestrians to take reasonable care of themselves by keeping a proper lookout before entering signalised pedestrian crossings.[27] For these reasons, the majority held that Li owed a duty to take reasonable care of himself before entering the pedestrian crossing by keeping a proper lookout, *regardless* of the time that had elapsed since the lights turned in his favour.

(b) *Part (2) of the duty question*: The majority held that Li did owe himself a duty to check for oncoming traffic again at the centre-divider of the pedestrian crossing.[28] Their reasoning was twofold: first, r 20 of the *Highway Code* was applicable, as the centre-divider in this case appeared to be wide enough to offer shelter from traffic to a few people.[29] This meant that it fell within the definition of a "refuge" based on a Hong Kong case authority.[30] By virtue of r 20, this meant that the pedestrian crossing in the present case should be treated as two crossings and Li had to check for oncoming traffic when he reached the "central refuge".[31] Nonetheless, the majority recognised that no evidence was admitted on the exact dimensions of the centre-divider and thus did not decide that Li was contributorily negligent *entirely* on that basis.[32]

The second reason was that Li was required, under r 22 of the *Highway Code*, to assure himself that traffic from both sides of the dual-carriageway had come to a stop or was slowing down before entering the pedestrian crossing. Because of the road layout and the reduced visibility at night, it was held that Li was unable to reliably assess whether vehicular traffic on the second half of the dual-carriageway had come to a stop or was slowing down.[33] Therefore, he had a duty to re-check for oncoming traffic when he approached the centre-divider.

### 2. *Discharge question*

The majority held that in order for Li to discharge the duty he owed to himself, the level of care and diligence required was that he ought to have re-checked for oncoming traffic when he reached the centre-divider of the pedestrian crossing, as it should have been treated as two separate crossings. The majority, relying on circumstantial evidence, found that Li had entered the second half of the crossing even though a vehicle was hurtling towards him at speed and within close proximity, and this meant that it was *evident* that he did not check for oncoming traffic, or even if he did, that it was not a reasonable assessment.[34] Thus, Li did not discharge the duty he owed to himself with the requisite care and diligence. This was *despite* the

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26 *Ibid* at paras 52-54.

27 *Ibid* at paras 65-67. See *Khoo Bee Keong v Ang Chun Hong* [2005] SGHC 128 and *Yip Kok Meng Calvin v Lek Yong Han* [1993] 1 SLR(R) 147 (HC).

28 *Asnah*, *ibid* at paras 76, 111.

29 *Ibid* at para 89.

30 *Ibid* at para 87. See *Chun Sung Yong v Au Sze Hung Christopher* [1991] 1 HKC 556 at 563.

31 *Asnah*, *ibid* at para 89.

32 *Ibid*.

33 *Ibid* at paras 97-99.

34 *Ibid* at para 114.

majority acknowledging that the burden of proof was on Asnah, and the fact that no direct evidence existed to substantiate her case.[35]

3. *Apportionment question*

The majority held that for the purposes of s 3(1) of the *Contributory Negligence and Personal Injuries Act*[36] [the *Act*], the key considerations for a court to exercise its discretion to reduce the damages owed to the plaintiff in a just and equitable manner are the (1) relative moral blameworthiness of the parties and (2) relative causative potency of the parties' conduct.[37] In this case, the court held that Asnah was mostly to blame for the accident, and that Li had taken some precautions in crossing the road in compliance with the signal, although he was also at fault as he should have checked for oncoming traffic at the centre-divider to avoid the collision. Thus, Asnah had a greater share of causative potency and blameworthiness in causing this collision through her atrocious driving, and Li's damages were reduced by a *modest* 15%.[38]

### B. *The Dissenting Judgment*

The Chief Justice, Sundaresh Menon CJ, in a rare dissenting judgment, disagreed with the majority and agreed with Choo J that Li was not contributorily negligent.[39] This was because whether Li was contributorily negligent or not could not be judged *solely* based on his conduct, viewed in isolation, but *also* required an inquiry into the circumstances of the present case, which included the egregiousness of Asnah's conduct.[40] Given that Asnah drove as if there was no traffic light or pedestrian crossing at all, which Menon CJ noted was "downright dangerous",[41] he thought that this was not a risk which Li could *reasonably foresee* and was expected to guard against, especially since it had been several seconds after the lights had turned against Asnah.[42] Further, he was of the view that the duty of a pedestrian to guard against the risk of being knocked down by a motorist at a signalised pedestrian crossing was greatly attenuated by the passage of time after the lights had turned in favour of the pedestrian.[43] Thus, he would have dismissed the appeal.[44] Menon CJ disagreed with the majority judgment for a number of reasons, as discussed below in Part IV.

## IV. Discussion

### A. *Duty Question*

The majority's judgment with respect to the duty question is problematic for a variety of reasons as set out below.

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35 *Ibid* at para 113.
36 Cap 54, 2002 Rev Ed Sing.
37 *Asnah*, *supra* note 1 at para 118.
38 *Ibid* at para 120.
39 *Ibid* at paras 124, 145.
40 *Ibid* at paras 139-141.
41 *Ibid* at paras 143, 150.
42 *Ibid* at paras 145, 147, 150.
43 *Ibid* at para 147.
44 *Ibid* at para 187.

1. *Part (1) of the duty question*

The court found that for part (1) of the duty question, Li, a pedestrian, was under a duty to keep a proper lookout before entering a signalised pedestrian crossing regardless of the time elapsed since the lights had turned in his favour. However, it was rightly pointed out by Menon CJ that the statistics relied on, the *Straits Times* articles referred to, and the academic article cited do not *specifically* illustrate how Li should have *reasonably* foreseen that a motorist like Asnah would be completely oblivious to the traffic signal against her and drive in such a dangerous manner.[45] They merely illustrate that motorists beating red lights are not uncommon, but do not shed any light on how incidents similar to the present case are common enough for pedestrians to reasonably foresee their occurrence. Just because a scenario is conceivable or possible does not mean it is reasonably foreseeable. The local cases cited also do not illustrate this point, since they mainly stand for the proposition that pedestrians ought to check for traffic before entering a pedestrian crossing, but they do not *expressly* state that this is still the case even after a period of time had elapsed since the light had turned in favour of the pedestrians.

The majority's reliance on r 22 of the *Highway Code* is thus the only *plausible* argument for their view that a pedestrian must keep a proper lookout before entering a pedestrian crossing, regardless of the time elapsed since the light had turned in his favour. Indeed, when read in isolation, r 22 simply urges pedestrians to wait on the footway and check that traffic has stopped. Its scope does not seem to be restricted only to when the green man first appears, as there are no references to the time that had elapsed since the lights turned in the pedestrians' favour. This argument is, however, problematic. As a preliminary point, many pedestrians may not be very familiar with the *Highway Code*.[46] Furthermore, the interpretation of r 22 by the majority is one possible interpretation, and Menon CJ's more restrictive interpretation, that r 22 only applies when the lights have just turned in the pedestrians' favour, is equally plausible. Indeed, as Menon CJ pointed out, r 22 does not include the phrase "when the green man appears", or any reference to the time that had elapsed since the lights turned in the pedestrians' favour, as the rule was meant to apply additionally but only to the alternate scenario where pedestrian crossings featured centre-dividers with footways, such that a pedestrian should check before entering the crossing again.[47] Therefore, there is nothing in r 22 which precludes Menon CJ's more restrictive interpretation.

Indeed, if one examines the *Highway Code*, r 22 arguably should not be read in isolation but should be read with rr 23-25 as an entire part which applies to a pedestrian crossing. When read as a whole, these rules appear to be setting out sequentially what a pedestrian should do before entering the signalised pedestrian crossing, *where the signal to enter has not yet been given*, *ie*, that he should wait on the footway and check that traffic has stopped, and enter the pedestrian crossing after he is given the signal to do so under r 23 or r 24. The restrictive interpretation of r 22 by Menon CJ is thus more consistent with this approach towards understanding this part of the *Highway Code*. It is also more in accordance with r 7 of the *Road Traffic*

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45 *Ibid* at paras 152-154.

46 Lim & Chua, *supra* note 2 at 41, 42.

47 *Asnah*, *supra* note 1 at para 156.

*(Pedestrian Crossing) Rules*[48], which states that pedestrians should have precedence at signalised pedestrian crossings, *even if* the lights have turned against them. It follows that this must also be so when the lights are in their favour and have been for some time. Therefore, the majority judgment's conclusion that Li owed a duty to keep a proper lookout, regardless of the time elapsed since the lights had turned in his favour, was arguably made on a shaky footing.

### 2. *Part (2) of the duty question*

Another problematic part of the majority judgment was that it chose to treat the pedestrian crossing in question as two separate crossings, thereby requiring Li to re-check for traffic after he had reached the centre-divider. To recap, this was because r 20 of the *Highway Code* applied, and due to the particular conditions of the road.

(a) *Rule 20*: It is unclear that r 20 even applies in *Asnah*, which involved a signalised pedestrian crossing. It is possible to argue that the structure of the *Highway Code* is such that rr 15-20A were meant to apply *only* to non-signalised pedestrian crossings. This is because the *Highway Code* has rules which distinguish between signalised pedestrian crossings and non-signalised pedestrian crossings, such as r 80, which applies specifically to the former, and rr 22-25, which is expressly applicable only to signalised pedestrian crossings as well. Additionally, there is some repetition of content if one examines rr 15-20A and rr 22-25 of the *Highway Code* closely.[49] The relevant regulatory authority, the Land Transport Authority ("LTA"), also seems to describe central refuges only in the context of non-signalised pedestrian crossings,[50] which, though not conclusive, further reinforces the argument that r 20 potentially only applies to non-signalised pedestrian crossings.

More importantly, even if r 20 was applicable to signalised pedestrian crossings, it is unlikely to be applicable to the facts of this case for two reasons. First, centre-dividers are not central refuges, and the LTA clearly distinguishes the two.[51] Next, even if centre-dividers can be treated as central refuges, they have to fall within specified dimensions by LTA, and this is again not the case here.[52] Indeed, as pointed out by Menon CJ, the divider in question had barely enough space for a single person's width, and a very generous interpretation of r 20 is required to consider it a central refuge.[53]

(b) *Particular conditions of road*: The majority relied on the particular layout of the road, such as the fences, the bend of the road, and in general, the poor visibility at night, to justify finding that Li's initial assessment of traffic on the further end of

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48 Cap 276, R 24, 1990 Rev Ed Sing.

49 For example, r 15 is largely similar to r 22, where both rules require the pedestrian to check before entering the pedestrian crossing.

50 See Land Transport Authority, Annex to "Factsheet: Enhancing Safety on Our Roads for All Road Users" (2014), online: Land Transport Authority <www.lta.gov.sg/data/apps/news/press/2014/20140311_RdSafety-Annex.pdf>. See also *Asnah*, *supra* note 1 at para 158.

51 *Ibid*. See also Lim & Chua, *supra* note 2 at 42.

52 *Asnah*, *supra* note 1 at para 158.

53 *Ibid*. See also Lim & Chua, *supra* note 2 at 42, 43.

the crossing would be unreliable, and thus he ought to have re-checked for traffic when reaching the centre of the crossing. This argument is problematic as not every pedestrian will be familiar with the characteristics of the road before entering a pedestrian crossing, especially where they have not been to the place before. The pictures also do not clearly show that a pedestrian such as Li would have had an obstructed view of vehicular traffic due to the fence.[54] Finally, it is not clear if these road conditions are truly so unique—common experience suggests that these are fairly common features at many pedestrian crossings—and the fact that both Choo J and Menon CJ (an equal number of judges to the majority) thought that the crossing in question did not require increased caution suggests that it may not be so obvious to pedestrians that they should be more cautious. Thus, it is debatable whether these conditions can be relied on and read together with r 22 to require a pedestrian to re-check for traffic at the centre of the crossing.

### 3. *Egregiousness of defendant's conduct*

It is also important to note that in general, contributory negligence can only be found where there is a duty to take reasonable care of oneself, in circumstances that one can *reasonably foresee* that failure to do so will result in personal harm. The egregiousness of the defendant's conduct must clearly be part of the factual matrix to be taken into account to consider if it was reasonably foreseeable to the plaintiff such that a duty to take care of oneself arises. Thus, the plaintiff's conduct cannot be seen in isolation from the factual matrix and circumstances of the case, when determining if he had been contributorily negligent.[55] Menon CJ was therefore correct to state that Asnah's dangerous driving, in being oblivious to the traffic signals, was not foreseeable to Li and thus, he was not under a duty to guard himself against such conduct. Indeed, the majority judgment creates a rule that allows contributory negligence to be raised, regardless of the egregiousness of the defendant's conduct, since the focus is now solely on the plaintiff's conduct. As a result of the majority judgment, questions have now been raised as to whether it is possible to be contributorily negligent even in situations where the motorist was recklessly driving against the direction of traffic.[56]

## B. *Discharge Question*

The majority's conclusion that the fact that Li was knocked down must have meant that he did not check, or if he did check, his assessment was wrong, is also problematic. First, the burden of proof was on Asnah to show that Li did not check, and Asnah had no direct evidence to prove this.[57] The inferences by the majority from the circumstantial evidence were plausible, but as Menon CJ pointed out, there were other

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54 *Asnah*, *ibid* at para 175(c).

55 *Ibid* at para 139.

56 See Daniel Goh & Johnston Lee, "Proceed with caution: Is it enough to merely obey traffic light signals?" (1 January 2017), online: Characterist <http://www.characterist.com/news/proceed-with-caution-is-it-enough-to-merely-obey-traffic-light-signals/>.

57 *Asnah*, *supra* note 1 at paras 113, 178, 179. See also *Evidence Act* (Cap 97, 1997 Rev Ed Sing), s 104.

equally plausible explanations.[58] To simply infer that Li did not discharge his duty with care and diligence produces the result that whenever a pedestrian is knocked down by a motorist, he is now almost inevitably contributorily negligent, since the fact that he is knocked down must mean that he did not check for vehicular traffic.[59] Such a position may result in potential abuse by motorists and their insurers.

### C. *Apportionment Question*

For the apportionment question, the majority was correct to consider the (1) relative moral blameworthiness of the parties and (2) relative causative potency of the parties' conduct before engaging on the exercise of apportionment. The apportionment in this case also arguably cannot be faulted in the quantitative sense. However, this was a missed opportunity by the majority to more clearly set out any guidelines in assessing the moral blameworthiness and causative potency of the parties, in the context of personal injury claims by pedestrians against motorists—even if the majority thought that it was not a difficult case in this respect.[60]

The decision of *Jackson v Murray*[61] is instructive on the assessment of moral blameworthiness and causative potency of the parties. However, although cited by the majority, it was only discussed cursorily.[62] Indeed, *Jackson* points out that with respect to moral blameworthiness, a court should consider the "destructive disparity" between a pedestrian and a motor vehicle.[63] This is because a pedestrian has to look to both sides and forwards before crossing the road, and is rarely a danger to anyone else at his walking speed, unlike a motorist, who is not required to look sideways and whose conduct may be disastrous for other road users due to his considerable speed.[64] For causative potency, *Jackson* suggests that a court should consider if the accident was a result of the conduct of a pedestrian, for example, by a pedestrian stepping directly into the path of a car travelling at a reasonable speed, or if it was caused by a motorist, who had had the pedestrian in his line of vision for a long period of time, such that he could have easily avoided the latter.[65]

### D. *Other Issues*

The majority's discussion of the United Kingdom ("UK") case of *Bailey v Geddes*[66] raises an interesting issue regarding the scope of the Act's application. *Bailey*

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58 *Ibid* at para 180.

59 *Ibid*.

60 *Ibid* at para 120.

61 [2015] UKSC 5 [*Jackson*]. *Jackson* is also a significant case for setting out the relevant principles in relation to when an appellate court may review the apportionment of liability undertaken by the lower courts. However, these principles are not relevant to *Asnah*, since it was not an appeal with respect to an alteration of apportionment, and will not be discussed further.

62 *Asnah*, *supra* note 1 at para 119.

63 *Jackson*, *supra* note 61 at para 26, discussing *Eagle v Chambers* [2003] EWCA Civ 1107 [*Eagle*] at para 15. See also *Asnah* at para 119, which briefly discussed *Eagle*.

64 *Jackson*, *ibid* at para 23, citing *Baker v Willoughby* [1970] AC 467 at 490 (HL). This was also alluded to by the Chief Justice in *Asnah* at para 185.

65 *Ibid* at para 40.

66 [1938] 1 KB 156 [*Bailey*].

involved a pedestrian using a non-signalised pedestrian crossing who was knocked down and injured by a car just as he was about to reach the other end of the crossing. The UK Court of Appeal in *Bailey* held that the defence of contributory negligence was not applicable.[67] The majority in the present case, however, held that Li could not rely on the reasoning in *Bailey*, as it had been qualified by subsequent cases.[68] Although it may no longer be authoritative, what is interesting and relevant for our purposes was that the majority suggested that *Bailey* had to be read in its context, when contributory negligence was a complete defence. At that time, whether contributory negligence applied depended on the test of whose conduct was the "effective or predominant cause" of the accident. The majority suggested that in *Bailey*, the UK Court of Appeal was merely stating that the pedestrian could not be the "effective or predominant cause", rather than that the pedestrian could not be at fault.[69] This discussion is significant as the relevant test to determine if the *Law Reform (Contributory Negligence) Act 1945*[70] [the *UK Act*] (and the *Act*, which is *in pari materia*) applies to apportion liability is now based on "fault", and is no longer the "effective or predominant cause" test. Therefore, the majority is suggesting that while the plaintiff in *Bailey* might not have been the "effective or predominant cause" of the accident, he might still have been at fault, and a plaintiff in a case with identical facts might likewise be found to be at fault and thus, contributorily negligent today.

The majority's cautious approach towards following decisions made prior to the passage of the *UK Act* due to the different applicable tests may be a positive development. This approach may be contrasted with the approach by the Singapore courts in cases where they had to consider whether contributory negligence was a defence in other torts, such as deceit[71] or trespass to land[72]. Most of them decided these questions by relying on the UK approach[73], in which the *UK Act* would not apply to apportion liability if the defence of contributory negligence did not apply at common law, prior to the passage of the *UK Act*.[74] The rationale behind this approach is that the *UK Act* was passed to offer relief where previously the entire claim would have been defeated by the full defence of contributory negligence in common law, and not to reduce damages awarded where the defence did not apply previously.[75] Under this approach, if *Bailey* had remained authoritative, the *UK Act* cannot apply to apportion liability in a case with identical facts, since it was decided in *Bailey* that the defence of contributory negligence did not apply. This is unlike the majority's approach as stated above. The UK approach has been criticised as anachronistic, since it is based on the

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67 *Ibid* at 163, 166, 167.

68 *Asnah*, *supra* note 1 at paras 72-74.

69 *Ibid* at para 71.

70 (UK), 8 & 9 Geo VI, c 28.

71 *DBS Bank Ltd v Carrier Singapore (Pte) Ltd* [2008] 3 SLR(R) 261 at paras 92, 108, 109 (HC).

72 *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 [*Cavenagh*] at paras 36, 37 (HC).

73 See *Standard Chartered Bank v Pakistan National Shipping Corporation (Nos 2 and 4)* [2003] 1 AC 959 (HL) and *Pritchard v Co-operative Group Ltd* [2012] QB 320.

74 See Joshua Pike, "Contributory Negligence and Intentional Trespass to the Person: Rethinking *Pritchard* & the Section 4 Definition of Fault" (2015) Oxford U Undergraduate LJ 3 at 5.

75 *Cavenagh*, *supra* note 72 at para 36. This approach thus far has only been relied on to determine if contributory negligence applied as a defence to a particular cause of action, but it can potentially also apply where the facts of the case are *identical* to cases decided before 1945, where it was decided that in such cases contributory negligence does not apply. Under this approach, the *UK Act* will not apply as well.

common law before the *UK Act* was passed, and can potentially lead to unfairness.[76] If the majority had intended that its *obiter* view was to be read this way, such that the UK approach should not be followed, this will definitely be a positive development as it avoids the criticisms of the UK approach.

### E. *Practical Impact*

The majority's judgment also has serious practical implications for pedestrians and potentially other classes of personal injury claimants. First, as rightly pointed out by Menon CJ, the decision goes far beyond what has been previously decided with respect to the defence of contributory negligence as it applies to pedestrians.[77] This creates uncertainty, as there can be potentially no limit in the factual circumstances as to when the defence may apply to personal injury claims by pedestrians involving motor accidents.[78] Also, the majority's judgment is contrary to the entire purpose of pedestrian crossings (especially signalised ones), which are meant to operate as safe havens and encourage people to use them rather than to cross the roads wherever they desire.[79] As Menon CJ pointed out, pedestrians using pedestrian crossings will now have to safeguard themselves no differently from when they are jaywalking, due to the majority's judgment.[80]

Further, as abovementioned, the majority judgment, if not properly limited to its facts, can be interpreted to mean that the defence of contributory negligence can apply to personal injury claims regardless of how egregious the defendant's conduct is, and the fact that an injury occurred must mean that the claimant was contributorily negligent, even if there is no direct evidence to substantiate this defence.[81] This line of reasoning from the majority's judgment need not be limited to personal injury claims by pedestrians, and can apply potentially even to other types of personal injury claims, such as those by employees arising from accidents at workplaces, although there has yet to be any evidence of this risk. Nonetheless, the majority's judgment may have a far-reaching impact on personal injury claims, and may potentially contribute to a trend of reducing damages for personal injuries, as well as an increase in litigation costs, since defendants are more likely to raise contributory negligence as a defence, regardless of the egregiousness of their own conduct. It is unclear if this should be so, especially since motorists and employers are often the least-cost avoiders, and are insured against such liability, as compared to most personal injury claimants.[82]

Finally, as personal injury claims are often commenced in the State Courts due to the size of the claim, under its Practice Directions, parties have to undergo compulsory Court Dispute Resolution,[83] which generally involves a brief form of "Neutral

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[76] See Margaret Fordham, "The Role of Contributory Negligence in Claims for Assault and Battery" [2012] 1 Sing JLS 21 at 22, 28, 35, 36. See also Pike, *supra* note 74 at 3, 10, 11.

[77] *Asnah*, *supra* note 1 at para 186.

[78] *Supra* note 56. See also Lim & Chua, *supra* note 2 at 43.

[79] *Asnah*, *supra* note 1 at para 147(a). See also *Sparks v Edward Ash Ltd* [1943] 1 All ER 1 at 7 (KB).

[80] *Ibid* at para 187.

[81] *Ibid* at para 113.

[82] *Ibid* at para 185. See also *Motor Vehicles (Third-Party Risks and Compensation) Act* (Cap 189, 2000 Rev Ed Sing), s 3.

[83] *State Courts Practice Direction*s (2018) part VI s 38(2).

Evaluation".[84] A Neutral Evaluation is where parties to a claim, with their respective lawyers, present their respective cases and the key evidence to the evaluator, who will then provide his best estimate of the parties' likelihood of success and their liability at trial.[85] This evaluation is then commonly relied on as a starting point for settlement.[86] Given that the majority's judgment has the potential to be interpreted and relied on by defendants or their insurers in the aforementioned manner, this may contribute to a trend of reducing the recoverable damages in personal injury claims as well. This is because many of these claims do not go to trial, and are instead settled based on the estimates arising from the Neutral Evaluation, where the evaluator may be persuaded by the interpretation of the majority's judgment as abovementioned.

## V. Conclusion

The majority's judgment in *Asnah bte Ab Rahman v Li Jianlin* is problematic in terms of legal principles and its practical impact, as examined above. Although the majority claimed that the duty required of the pedestrian was not onerous, and that pedestrians would simply be required to bear a small portion of the shared responsibility to guard against accidents, it is clear that the decision has far-reaching, and perhaps unintended implications, which may lead to unfair results in personal injury claims in Singapore. The majority's judgment should thus be confined to its special facts, such that its scope of applicability is constrained, and should be reconsidered when the opportunity arises.

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[84] See State Courts, "Overview of Alternative Dispute Resolution", online: State Courts <https://www.statecourts.gov.sg/Mediation_ADR/Pages/Overview-of-Alternative-Dispute-Resolution.aspx/>.

[85] See State Courts, "An Overview of Neutral Evaluation", online: State Courts <https://www.statecourts.gov.sg/Mediation_ADR/Pages/An-Overview-of-Neutral-Evaluation.aspx/>.

[86] *Ibid*.