# A CONTRIBUTION TO CONTRIBUTORY NEGLIGENCE


**Robert Horner 15th June 2011**

## The Basics

- Section 1(1) Law Reform (Contributory Negligence) Act 1945

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

- Requirements:

(i) Fault on the part of the claimant as well as the defendant;
(ii) which has contributed to the damage sustained by the claimant;
(iii) for which it is just and equitable to reduce the damages recovered by the claimant.

- *Wakling v McDonagh* [2007] EWHC 1201 (QB)
- *Tierney v Barbour* 22.2.01 unreported

- Remember:

(i) Must be pleaded.
(ii) Burden is on the Defendant.
(iii) Proved on a balance of probabilities.
(iv) A question of fact.

- *Dawes v Aldis & NIG Plc* [2007] EWHC 1831 (QB), Eady J. in refusing to find contributory negligence:

*'...it remains, of course, a strong possibility but I cannot elevate it to a probability'*

# The Concepts

**A question of causation or of fault?**

- Both concepts are useful, but neither are complete.

***Causation***

- The courts have often spoken in terms of causation:
    - *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152, Lord Atkin: *'I find it impossible to divorce any theory of contributory negligence from the concept of causation…'*
    - *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 KB 291, Denning L.J.: *'Now the courts have regard to all the causes and apportion the damages accordingly.'*

- *Jones v Livox Quarries* [1952] 2 Q.B. 608:
    - The failure on the part of the claimant need only contribute to the damage, and need not contribute to the occurrence that inflicted the damage.
    - In determining whether the claimant's failure contributed to his injury, the basic rules of factual causation apply.
    - It is irrelevant whether the operative fault of the claimant is prior, contemporaneous, or subsequent to the wrongdoing of the defendant.
    - Foreseeability of the precise manner of injury is not relevant.

***Fault***

- Section 4 Law Reform (Contributory Negligence) Act 1945:

    *"fault' means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence'*

- 'Fault' is more accurate than 'Negligence': *Froom v Butcher* [1976] Q.B. 286, Lord Denning:

    *'Negligence depends on a breach of duty, whereas contributory negligence does not. Negligence is a man's careless and breach of duty to others. Contributory negligence is a man's carelessness in looking after his own safety. He is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man, he might hurt himself'.*

    (See also *Reeves v Metropolitan Commr* [2000] 1 AC 360)

**The overriding concept: Responsibility**

- 'Causation' and 'Fault' are useful concepts that build towards the overriding concept of 'Responsibility'.

- *Munkman on Employers' Liability, LexisNexis, 15th edition, para 6.23:*

  *'Assessment of the injured person's share in the responsibility is undertaken first through consideration of his or her relative blameworthiness and then of the causative potency of the relevant act/omission'.*

## A Combined Approach

1. Fault: Identify each aspect of each party's fault.
2. Blameworthiness: Consider the extent to which each aspect of fault falls below the reasonable standard.
3. Causation: Consider how causative each aspect of the fault is to the loss sustained.
4. Apportion: Compare/weigh the factors of blame and cause for each party against the other.

**A worked example**

*Gleeson v Court* [2007] EWHC 2397 QBD

6 in a Fiesta. All drunk. C driving. All knew C drunk. G got in the boot. RTA. G injured. Liability admitted. Trial on contributory negligence of G.

- Identify the fault:

| C: | G: |
|---|---|
| - | - |
| - | - |
| - | - |
| - | - |

Held: 30Y.

## Apportionment

***100%***

- A finding of 100% contributory negligence is not possible as this indicates a complete break in the chain of causation from any fault on the part of the defendant. *Pitt v Hunt* [1991] 1 QB 24, Beldham L.J.:

  *'To hold that he [the claimant] is entirely responsible for the damage effectively defeats his claim...To hold that the claimant is 100 per cent responsible is not to hold that he shared in the responsibility for the damage.'*

***Less than 20%***

- Where contributory negligence is found to be less than 20% the courts have increasingly found that the claimant was momentarily inadvertent or understandably disregarded what was not a gross and obvious risk. *Butcher v Cornwall County Council* [2002] EWCA 1640, Sedley L.J.:

  *'10% is so nearly a token figure that ones first reaction is that it betokens an absence of significant fault on the claimant's part.'*

***More than one defendant***

- Where there is more than one defendant, the claimant's share of responsibility is to be assessed first and then the balance divided between the defendants. *Fitzgerald v Lane* [1989] AC 328.

***A limit to interpretation***

- Contributory negligence is a comparative assessment as between the parties. The degree of finding in no way indicates the objective degree of fault; rather it indicates the level of fault of the one party in comparison to the other.

## Breach of Statutory Duty by an Employer

- There is an oft stated rule of thumb that, in cases of breach of statutory duty by an employer, contributory negligence should not normally exceed 50%.

- Two factors support such an approach:

1. The statutory duties place non-delegable responsibilities upon employers in order to protect employees. *Staveley Iron & Chemical Co Ltd v Jones* [1956] A.C. 672, Lord Tucker:

   *'In Factory Act cases the purpose of imposing the absolute obligation is to protect the workmen against those very acts of inattention which are sometimes relied upon as constituting contributory negligence so that too strict a standard would defeat the objective of the statute'*

   See also *Ashbridge v Christian Salvesen* [2006] CSOH 79, Lord Glennie.

2. It is important to remember that workman may have momentary lapses of attention when carrying out their duties. Inadvertence is foreseeable. *Caswell v Powell Duffryn* [1940] A.C. 152, Lord Macmillan:

   *'What is all important is to adapt the standard of what is negligent to the facts, and to give due regard to the actual conditions under which men work in a factory or mine, to the long hours and the fatigue, to the slackening of attention which naturally comes from constant repetition of the same operation, to the noise and confusion in which the man works, to his pre-occupation in what he is actually doing at the cost perhaps of some inattention to his own safety'.*

- Factor 2 arises not only in respect of repetitive, low skilled activity, where monotony is a constant factor, but also to more highly skilled activities, where inadvertence to ones safety can arise through pre-occupation with an absorbing task. *Jones v BBC* (22.6.07 unreported)

- The material issue is the dividing line between excusable inadvertence and contributory negligence.

## Seatbelts

***The general rule: Froom v Butcher* [1976] Q.B. 286**

1. Where an injury would have been prevented altogether by the use of a seatbelt, damages should be reduced by 25%.
2. Where there would still have been some injury, damages should be reduced by 15%.
3. If the injuries would not have been considerably different despite the use of a seatbelt, no reduction.

***A recent challenge: Gawler v Raettig* [2007] EWHC 373**

- R driver. G front passenger. RTA. G, not wearing a seatbelt, was ejected from the car. The expert reconstruction evidence was that, had G been wearing a seatbelt, the injuries would largely have been avoided.

- G sought to rely on *Froom* and a 25% reduction. R sought to argue for a 50% reduction, asserting:
  i) The comments in *Froom* were obiter and gave guidance only.
  ii) The present case was an exception to *Froom*.
  iii) If *Froom* was binding, it required reconsideration as public awareness regarding the importance of wearing seatbelts had increased since it was decided.

- High Court: The comments in *Froom* were not obiter. The present case was no exception. There was no reason to revisit *Froom*. The judges in that case were aware of the importance of wearing seatbelts.

- Court of Appeal: G did not contest appeal to the Court of Appeal following agreement with R that the outcome of such an appeal would not affect his case. The Court of Appeal would not allow an appeal on a purely academic basis in this case.

***A final answer? Stanton v Collinson (decd)* [2010] EWCA Civ 81**

- Five in an Astra. Two in the back. Two in the front passenger seat. One driver. RTA. Expert road safety engineers in agreement that the wearing of a seatbelt would probably have been beneficial to reduce the severity of the head injury, but a complete prevention of serious head injury was unlikely. No medical evidence.

- High Court: No contributory negligence proven. Not shown that a seatbelt would have reduced the injuries sufficiently.

- Court of Appeal: With regard to *Froom*, the court was agreed that:

  *'...there is a powerful public interest in there being no such enquiry into fine degrees of contributory negligence, so that the vast majority of cases can be settled according to a well understood formula and those few that entail trial do not mushroom out of control. Froom v Butcher so states and is binding'* (per Hughes L.J.)

C sought to argue that the road safety experts had strayed beyond their expertise. They could not give evidence as to injuries.

The Court of Appeal held that the road safety experts could give evidence not only about mechanics, (which bit of the claimant's head might have struck which bit of the vehicle), but they also had sufficient experience to give evidence about the kind of injuries that generally ensued. Medical evidence was not required in every seatbelt case. Each case would depend on its facts and proportionality. The need or appropriateness for medical evidence was something that ought to be capable of proper consideration and resolution in the case management process.

**In Practice**

1. Get accident reconstruction evidence in the first instance; then,
2. Consider if medical evidence may also assist.
3. The test is *'a considerable difference'* and *'a good deal less severe'*, not merely *'a lesser difference'*.

## Cycle helmets

***A new dawn?***

- *Smith v Finch* [2009] EWHC 53 QB, Griffiths Williams J.: *'...there can be no doubt that the failure to wear a helmet may expose the cyclist to the greater risk of injury; such a failure would not be 'a sensible thing to do'....'*

- *Hubble v Coles* [2011] EWHC 363 QB, Wilcox J.: *'[Cycle helmets] vary considerably in strength, design and effectiveness. There is a school of thought that thinks that the wearing of them gives a rider a false confidence that can lead him or her into dangerous situations. The wearing of a helmet in some circumstances may increase or cause injury'.*

- As with pedestrian claimants, the issue of relative blameworthiness may inhibit change: *Eagle v Chambers* [2004] RTR, Hale L.J.: *'It is rare indeed for a pedestrian to be found more responsible than a driver unless the pedestrian has suddenly moved into the path of an oncoming car...The court has consistently imposed upon drivers of cars a high burden to reflect the fact that the car is potentially a dangerous weapon'.*
  (See *Baker v Willoughby* [1970] AC 467, but also note *Belka v Prosperini* [2011] EWCA Civ 623)

## Part 36 Offers

- Trials on contributory negligence only are still trials on liability. Therefore, where the sole issue at trial is contributory negligence, a finding of contributory negligence, provided it is not matched or bettered by an offer on the part of the Defendant, is still a win for the Claimant. *Sonmez v Kebabery Wholesale Ltd* [2009] EWCA Civ 1386.

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