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CONTRIBUTORY NEGLIGENCE IN PI CLAIMS

THE BASICS & SOME RECENT CASES

A talk for APIL (Devon & Cornwall Group)

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THE BASICS: a reminder

Law Reform (Contributory Negligence) Act 1945:

Section 1

(1) Where any 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

This small sub-section provides for many things:

- (1) “... *suffers damage as the result ...*”. This provides that in order for the claimant's acts or omissions to entitle the court to make a reduction, those acts or omissions must have been part of the cause of the damage. A claimant's careless or unlawful behaviour, however reckless or heinous, which does not cause the damage claimed for cannot be the basis for a reduction in his damages.⁽¹⁾
- (2) “... *partly of his own fault and partly of the fault of any other ...*”. This provides that in order for the claimant's conduct to result in a reduction of his damages, that conduct must be “partly” the cause of the damage. If it is the sole cause, then there is no causation between the defendant's wrongful conduct and the damage sustained and the claim fails.
- (3) “... *fault ...*”. This is defined in Section 4 of the Act as meaning “*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*”. It includes carelessness, breach of statutory duty, including

⁽¹⁾ See e.g. Lertora v Finzi [1973] RTR 161 and Stanton v Collinson [2009] EWHC 342 (QB) (Cox J). In both cases the claimant was at fault for failure to wear a seatbelt. In both cases the defendant failed to prove that a seatbelt would have made a difference. Therefore no reduction was made.. Similarly see Smith v Finch [2009] EWHC 53 (QB): cyclist at fault for failure to wear helmet, but no reduction because defendant failed to prove that a helmet would have made a difference.

strict liability. It includes intentional acts (such as assault/battery (Murphy v Culhane [1977] QB 94 (CA)) and suicide (Reeves v Commissioner of the Metropolitan Police [2000] 1 AC 360). It includes strict liability under the Animals Act 1971 (see s.10) and under Part 1 of the Consumer Protection Act 1987 (see s.6(4)). It includes vicarious liability (liability for the fault of another). It includes breach of contract if the contractual duty was coextensive with a coexistent but independent common law duty of care – Firsikringsaktieselskapet Vesta v Butcher [1986] 2 All ER 488 (CA).

- (4) “... *a claim shall not be defeated* ...”. This abolishes the position at common law where contributory negligence was a complete (all or nothing) defence and any negligence of the plaintiff (however slight) afforded a complete defence if it was part, even a small part, of the cause of the damage.
- (5) “... *the claimant’s share in the responsibility for the damage* ...”. This provides that the reduction is to reflect the extent to which each party is “responsible” for the damage. “Responsibility” refers to more than mere causal responsibility, it includes the amount of blame that attaches to the conduct. The more blameworthy the conduct, then the greater the share of the responsibility.
- (6) “... *just and equitable* ...”. Provided that both the claimant’s and defendant’s fault were each responsible for the damage, the deduction is to be what is just and equitable. What is just and equitable may reflect considerations other than the causative potency or blameworthiness of the fault. For instance in Russell v Smith [2003] EWHC 2060 (QB), 147 Sol Jo LB 1118, because the 10 year old cyclist was a vulnerable road user it was just and equitable to reduce his damages by only 50% instead of the 75% which reflected his share of the blame.

No such thing as 100% contributory negligence

If the damage is as the result of partly the defendant's fault and partly the claimant's own fault, it follows that there cannot be "100% contributory negligence". If the accident is entirely due to the claimant's own fault such that there is no causal link between the defendant's breach and the claimant's damage, then this is not a case of contributory negligence, because the claimant's fault was not "contributory", it was in fact the sole cause. If the damage is partly the result of the defendant's fault, then the claimant's own fault cannot be the sole cause and therefore the deduction must be for *less than 100%* – Pitts v Hunt [1991] 1 QB 24 (CA) see per Beldam LJ at 50.⁽²⁾

Contribution to the injury

The contribution is contribution to the injury as opposed to simply contribution to the event that caused the injury. Thus in Froom v Butcher [1976] QB 286 (CA), the claimant was in no way responsible for the road traffic accident that injured him, he was however responsible for the extent of his injuries because he was not wearing a seatbelt. The Court ruled that if the failure to wear a seatbelt in no way contributed to the injuries, then no reduction was to be made, where it contributed to some degree then a 15% reduction was appropriate and where it would have completely prevented the injury or substantially reduced its severity, then 25% was appropriate.⁽³⁾ In Badger v MoD [2005] EWHC 2941 (QB), [2006] 3 All ER 173, the claimant's

⁽²⁾ The apparent finding in Jayes v IMI (Kynoch) Ltd [1985] ICR 155 (CA), that the claimant's contributory negligence amounted to 100% responsibility for the damage was an anomalous decision and ought not to be followed, see Anderson v Newham College [2002] EWCA Civ 505, [2003] ICR 212 per Sedley LJ at para 19.

⁽³⁾ Similar has been applied to passengers, motor cyclists and pedal cyclists. See e.g. O'Connell v Jackson [1972] 1 QB 270 (CA) (motorcycle passenger's failure to wear helmet), Capps v Miller [1989] 1 WLR 139 (CA) (10% reduction for failure to buckle up helmet) and Biesheuvel v Birrell (1999) unrep QB (rear seat passenger's fail to wear seatbelts) and Smith v Finch [2009] EWHC 53 (QB) (Griffith Williams J) (cyclist's failure to wear helmet). However riding as a passenger in a vehicle that does not have seatbelts fitted may or may not be contributory negligence, depending on the circumstances – see e.g. Condon v Condon [1978] RTR 483 (reasonable not to wear seatbelt because of phobia), Mackay v Borthwick 1982 SLT 265 (reasonable because of hiatus hernia) and Cross v Smith (1999) CA unrep 05.11.99 (claimant travelling unsecured in back of works van not guilty of contributory negligence because, in reality, he did not have much choice). In all cases, the failure to wear the seatbelt or the buckled up

smoking was not causative of his exposure to asbestos, but it was contributory to his developing lung cancer. Damages were reduced by 20%.⁽⁴⁾

There must be a reduction even if the extent of the contribution is unknown

The burden of proof is upon the defendant to prove that the claimant's fault contributed to his injury. Once the defendant has proved this then a reduction must be made even where it is impossible to say how much the claimant contributed to his injuries. Therefore the Court ought not to speculate on what other or greater injuries would have been sustained if a seatbelt had been worn, but confine itself to what difference a seatbelt would have made to the injuries that were in fact sustained – Patience v Andrews [1983] RTR 447.⁽⁵⁾

Causative potency

The fault of the Claimant must have “causative potency” before a reduction can be made. In St George v The Home Office [2008] EWCA Civ 1068, [2009] 1 WLR 1670, a 29 year old prisoner fell out of bed as a result of a seizure caused by going through withdrawal from alcohol and illegal drugs, to which he had been addicted since a teenager. As a result of the fall he sustained a head injury resulting in brain damage. Although he was at fault for becoming addicted to drugs and alcohol many years ago, that fault was too remote in time, place and circumstances and

helmet must be shown to have actually increased the extent of the damage.

Despite calls to the contrary by HHJ Thompson QC in Hitchens v Berks CC (1999) unrep QBD (Winchester) 13/10/99, the conventional discounts provided in 1976 by Froom are still applicable in modern times – Jones v Wilkins [2001] RTR 283; [2001] PIQR P179 (CA), Gawler v Raettig [2007] EWHC 373 (QB) (Gray J), Palmer v Kitley [2008] EWHC 2819 (QB) (Judge Richard Seymour QC) and Stanton v Collinson [2009] EWHC 342 (QB) (Cox J).

Discounts can be greater if there is further contributory negligence over and above the failure to wear a seatbelt — see e.g. Gregory v Kelly [1978] RTR 426 (QBD) (40% reduction where claimant not wearing seatbelt in car which he knew had defective brakes before accepting a lift in it) and Gleeson v Court [2007] EWHC 2397 (QB) (30% discount for travelling in the boot of a car knowing the driver to be drunk).

⁽⁴⁾ In Shortell v Bical Construction Ltd (2008) unreported QBD 16/5/2008 (Mackay J) Lawtel, the discount was 15%. In Horsley v Cascade Insulation Services Ltd [2009] EWHC 2945 (QB) (Eady J) it was 20%.

⁽⁵⁾ For a recent application of this principle, see Palmer v Kitley [2008] EWHC 2819 (QB).

was not sufficiently connected with the event of the fall or the negligence of the prison staff.

Failure to take reasonable care for one's own safety.

Contributory negligence need not involve breach of a legal duty, it can simply be a failure to take reasonable care for one's own safety.

Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person 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; and in his reckonings he must take into account the possibility of others being careless – Jones v Livox Quarries Ltd [1952] 2 QB 608 (CA) per Denning LJ at 615

Negligence depends upon a breach of duty, whereas contributory negligence does not. Negligence is a man's carelessness and breach of duty to others. Contributory negligence is a man's carelessness in looking out 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 — Froom v Butcher [1976] QB 286 (CA) per Denning MR at 291G - H.

Contributory negligence does not require that the claimant reasonably foresee the particular risk to which he succumbs. It requires only that he should foresee the general risk. For example in Jones v Livox Quarries Ltd [1952] 2 QB 608, the claimant disobeyed an instruction not to ride on the back of a lorry. In doing so he ought to have foreseen that he might fall off and be injured. He sustained crush injuries when another lorry drove into the back of the lorry on which he was riding. There was contributory negligence because his carelessness exposed him to the risk of falling and of being crushed. If he had been shot by a negligent nearby sportsman, there would not have been contributory negligence because whilst being struck by another vehicle was within the general risks against which he ought to have protected himself, being shot was not.

Disobedience to an order

It will be easier for the Defendant to establish contributory negligence where the

Claimant has acted in disobedience to an order. However the Claimant still needs to have foreseen that the disobedience exposed him to a risk of injury.

For instance in Jones v Livox Quarries Ltd (above), the claimant should have foreseen that disobeying the order not to ride on the back of the lorry would expose him to risk of injury.

In Westwood v The Post Office [1974] 1 AC (HL), an employee at work fell through a defective trap door in a room which he entered in contravention of a notice on the door which said "No unauthorised entry". Because there was no reason for the claimant to believe there was any danger in the room and the notice did not suggest that there was, then the fact that the claimant was a trespasser when he entered the room had no bearing on what he might or might not reasonably foresee as dangerous. Any fault on his part had been of disobedience, not carelessness, and so he was not guilty of contributory negligence.

In Toole v Bolton MBC [2002] EWCA Civ 588, C failed to wear the heavy duty gloves that he had been told to wear when clearing up used hyperdermic needles. However the heavy gloves were inadequate and there was thus a failure to provide adequate protective gloves. The claimant's failure to wear the inadequate heavy gloves as instructed was not fault on his behalf. Furthermore it was not causative of the injury.

Inadvertence and taking a reasonable risk

In workplace accidents, especially workplaces where the nature of the work is fraught with danger, for an employee's conduct to constitute contributory negligence, it needs to go beyond mere inadvertence, or reasonable risk taking. Mere inadvertence need not give rise to responsibility for the damage

... it is not for every risky thing which a workman in the factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence. — Flower v Ebbw Vale Steel, Iron & Coal Ltd [1934] 2 K B 132, per Lawrence J.

I am of the opinion that the care to be expected of the plaintiff in the circumstances will vary with the circumstances; and that a different degree of care may well be expected from a workman in a factory or a mine from that which might be taken by an ordinary man not exposed continually to the noise, strain and manifold risks of factory or mine. — Caswell v Powell Duffryn Associated Collieries Ltd [1940] AC 152, per Lord Atkin.

... what section 1 requires the court to apportion is not merely degrees of carelessness but "responsibility" and that an assessment of responsibility must take into account the policy of the rule, such as the Factories Acts, by which liability is imposed. A person may be responsible although he has not been careless at all, as in the case of breach of an absolute statutory duty. And he may have been careless without being responsible, as in the case of "acts of inattention" by workmen. — Reeves v Commissioner of Police of the Metropolis [2000] 1 AC 360 per Hoffman LJ at 371F.

It is very easy for a judge with the advantage of hindsight to identify some act on the part of the employee which would have avoided the accident occurring. That in itself does not demonstrate negligence on the part of the employee. As Lord Tucker put it in Staveley Iron & Chemical Co Ltd v Jones [1956] AC 627 at 648, one must avoid treating every risky act by an employee due to familiarity with the work or some inattention resulting from noise or strain as contributory negligence — Cooper v Carillion [2003] EWCA Civ 1811 per Keene LJ

In Scott v Kelvin Concrete 1993 SCLR 41; 1993 SLT 935 (OH), C suffered injury from a machine on which he was working without having isolated its power supply. However not only was his employer liable for failure to fence under s.14 Factories Act 1961 but also for rendering the safety features inoperative by disconnecting them and tying them up. No reduction for contributory negligence was made for working on the machine without having first disconnected its power supply.

Taking an obvious risk as to one's own safety

Unless the claimant is himself in breach of an absolute statutory duty, contributory negligence always involves taking an obvious risk as to one's own safety. The question is always as to whether it was reasonable for the claimant to take that risk or whether, on the other hand, taking that risk imposes on him a share of the responsibility for the damage.

Where C's actions are risky because of D's negligence/breach of statutory duty, C's taking the risk need not be negligent — e.g. Scott v Kelvin Concrete (above: C's failure to unplug the machine was only dangerous because its guards and other safety features had been removed). C's failure to use the safety equipment provided is obviously his taking a risk, but it may be (on the individual facts of the case) that it was reasonable for him to take that risk. For example in Gibson v

British Insulated Callenders Construction Ltd 1973 SC (HL) 15; 1973 SLT 2, C's not wearing a safety harness was found not to be contributory negligence, because whilst the harness protected against some risks (including the fall that actually happened) it in fact created others. C was not negligent in choosing to run one risk rather than another.

The risk must be positively run. Mere inadvertence is not enough to constitute negligence as to your own safety, particularly so where D's primary liability is all the more clear cut.

The claimant is entitled, when considering the risks, to assume that his employer has complied with his statutory duties.

For instance in Grant v Sun Shipping [1948] AC 549, C went into the dark unlit part of a ship where he knew men had previously been working. He did not take a torch but he believed the workmen would have covered up the hatchways. They had not. He fell down one. HL agreed that the reasonably foreseeable negligence of others must always be guarded against. But what negligence is foreseeable depends on each individual case. Covering the hatchways was such a basic and fundamental thing to do, that C was entitled to assume that it had been done and his relying on this assumption was not contributory negligence.

Another example is Westwood v The Post Office [1974] 1 AC (HL) (see above, the defective trapdoor beyond the no unauthorised entry sign).

Another example is Cooper v Carillion [2003] EWCA Civ 1811 (see case summaries at end of this paper).

An employee taking a risk which is obvious to him, need not be contributory negligence if running that risk is inherent in following D's system of work. For example in Moffat v Atlas Hydraulic Loaders 1992 SLT 1123 (OH), it was the normal practice of D's employees to clean machinery whilst it was still in motion. This practice continued even after the guard had been removed. 4 months after the guard had been removed, C was injured whilst cleaning the moving machinery. Held no contributory negligence.

If C's only choice is to refuse to work in the manner adopted by his employer, it is

not contributory negligence for him to carry on working.

Whether running a risk is reasonable depends on how reasonable it would be not to run it. For instance in Neil v Harland & Wolff Ltd (1949) 82 Lloyd's Rep 515 (CA), C was working on electric cables but did not remove the fuses because to do so would shut down the entire shipyard. The court found no contributory negligence.

The claimant's own breach of a statutory duty

The alternative to carelessness is breach of a positive legal duty. One obvious example is the claimant's own breach of a statutory duty placed on the employee under health and safety legislation. Some examples of statutory duties placed upon the employee are attached at the end of this paper.

If the employee's breach of duty is the sole cause of his injury, then as there has been no causative breach by the employer, the claim will fail. So too if the only causative breach by the defendant is committed vicariously by the claimant's own carelessness – Ginty v Belmont Building Supplies Ltd [1959] 1 All ER 414 (QBD, Pearson J).

As many duties imposed upon employers under health and safety legislation are intended to require the employer to guard against the carelessness of the employee, then where the employer is in breach of such a duty, the employee's share of the responsibility, if any, is likely to be less. For example Scott v Kelvin Concrete 1993 SLT 935 (OH) (no contributory negligence where employee failed to turn off power supply on machine from which employer had removed the guards and other safety features).

In Jerred v Roddam [1948] 2 All ER 104 (Atkinson J), the duty (under reg 34 of the Dock Regs 1934) to secure a ship's hatch beams was placed upon both the employer and the employee. The ship's crew incorrectly stated that a beam was secure, so neither the plaintiff nor his foreman checked. It wasn't and it fell injuring the plaintiff. The judge ruled that although the plaintiff was in technical breach of the regulation, he had acted reasonably and thus bore no responsibility for his accident. It is noteworthy that this decision was not long after the 1945 Act and the courts

were still used to the days where contributory negligence was an all or nothing defence. Perhaps if the case were heard today, similar justice would be done by a finding that there was contributory negligence but that it was only a minimal cause.

It is not usual for there to be marked findings of contributory negligence in a breach of statutory duty case, and it is, I am bound to say in my experience, very unusual indeed for there to be a finding of contributory negligence at the level of 75 per cent. If in a statutory duty case the judge finds himself driven in that direction, he should, in my judgement, seriously consider whether he is not in fact finding that there has been no causal connection at all between the breach of statutory duty and the injury.

Secondly, in a breach of statutory duty case the court has to have very clearly in mind the reasons why the duties that go beyond best endeavours are provided in the particular statute.

I would venture to mention some words of Lord Tucker in Staveley Iron & Chemical Co Ltd v Jones [1956] AC 672, at page 648:

“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 object of the statute.”

And I would also venture to mention the comment on that passage of Lord Hoffmann in Reeves v Commissioner of Metropolitan Police [2000] 1 AC 360 at page 371, where his Lordship pointed out that the Contributory Negligence Act requires the court to apportion not degrees of carelessness but the relative responsibility of the two parties, and that an assessment of responsibility must take into account the policy of the rule, such as that of the Factories Act, by which the liability is imposed – Toole v Bolton MBC [2002] EWCA Civ 588, per Buxton LJ at paras 13 - 15.

If the employer’s breach of statutory duty was committed solely by the employee failing to act as instructed and if it was reasonable in all the circumstances for the employer to instruct the employee to comply with the duty, then the breach of duty is wholly the responsibility of the employee and so there is no liability on the employer – Boyle v Kodak [1969] 1 WLR 661 (HL).⁽⁶⁾ In practice a high standard of proof is required before the claimant’s own conduct can be relied upon as the sole

⁽⁶⁾ Such was the result in the earlier case of Ginty v Belmont Building Supplies Ltd [1959] 1 All ER 414 (QBD, Pearson J). Experienced roofers failure to use the roofing boards which he knew were available and to be used rendered both him and his employer liable for breach of reg 31(3)(a) of the Building (Safety, Health and Welfare) Regulations 1948, by virtue of reg 4. As the employer’s breach was due solely to the employee’s mis-conduct, the employer was not liable at all.

cause of the defendant's breach of statutory duty.

The questions whether the claimant has indeed breached a statutory duty or whether that breach can be said to have caused the damage tend, in practice, not to be construed as strictly as they are against the defendant employer.

This is not so illogical as may appear at first sight when it is remembered that contributory negligence is not founded on breach of duty, although it generally involves a breach of duty, and that 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 object of the statute – Staveley Iron & Chemical Co Ltd v Jones [1956] AC 627, per Lord Tucker at 648.

Relative blameworthiness

The amount of the reduction to be made does not simply reflect the relative causative potency of the claimant's and defendant's respective fault, but also the relative blameworthiness.

A court must deal broadly with the problem of apportionment and in considering what is just and equitable must have regard to the blameworthiness of each party, but the Plaintiff's share in the responsibility for the damage cannot I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness. – Stapley v Gypsum Mines Ltd [1953] AC 663, per Lord Reid at 682.

Once contributory negligence has been established, the court must take into account both the extent of the Claimant's responsibility for his injury and damage and the blameworthiness of his conduct as opposed to that of the Defendant in deciding on the reduction in damages that is just and equitable. The decision as to the appropriate reduction in the Claimant's damages is to be dealt with in a broad, jury like and common sense way. – Badger v MoD [2005] EWHC 2941 (QB), [2006] 3 All ER 173, per Stanley Burnton J.

The fact the Defendant is not itself at fault, but only vicariously liable for the fault of one its employees, does not reduce the share to be attributed to that fault – Collins-Williamson v Silverlink Trains Ltd [2009] EWCA Civ 850

More onerous expectations upon an employer

In employers' liability cases, when assessing the respective responsibilities, the court should remember that whilst the claimant is entitled to assume that the employer has complied with its statutory duties (Grant v Sun Shipping above), the employer is expected to foresee the carelessness of the employee (see e.g. Hindle v Birtwistle [1897] 1 QB 192, per Wills J at 195; John Summers & Sons Ltd v Frost [1955] AC 740, per Lord Reid at 765 and Robb v Salamis (M&I) Ltd [2006] UKHL 56, [2007] ICR 175, per Lord Hope of Craighead at para 9).

The Claimant's age and experience is relevant

The Claimant's age and experience is relevant. A young inexperienced worker cannot be expected to be as safe as a more experienced one. This is relevant both to the question of whether there was any contributory negligence (see e.g. Yachuk v Oliver Blais Co Ltd [1949] AC 386) and to the question of by how much the damages should be reduced.

In Russell v Smith [2003] EWHC 2060 (QB), the 10-year-old claimant who, without giving way, cycled straight out of a side road into the path of the defendant's car was more to blame. He was found to be 75% responsible, but, because he was a vulnerable road user, it was just and equitable for the reduction to be only 50%.

Rescuers

Running a risk as a rescuer is usually not contributory negligence — Brandon v Osborne, Garrett Co [1924] 1 KB 548 and Ward v T E Hopkins & Sons Ltd [1959] 3 All ER 225.

Conventional discounts

In practice, apart from the formulaic reductions in Froom v Butcher (seatbelts: 25% for failure to fully prevent, 15% for failure to reduce) the reduction for contributory negligence is rarely, less than 20% and very rarely more than 80% (see the cases

of Toole and Butcher).

PROCEDURE

The burden of proof is upon the defendant

The burden of proof is upon the defendant to prove both that the claimant was at fault *and* that that fault was a cause of the damage – Wakelin v L & SW Rly (1886) 12 App Cas 41, 47.

Must be pleaded

Contributory Negligence must be pleaded before the court has jurisdiction to reduce the claimant's damages – Fookes v Slaytor [1978] 1 WLR 1293 (CA). The court's jurisdiction to find contributory negligence is limited to the particular allegations that the defendant makes in its pleading and the court cannot find contributory negligence on a basis that has not been pleaded – Dziennik v CTO Gesellschaft Fur Containertransport MBH & Co Ms Juturna KG [2006] EWCA Civ 1456. An application to amend to add a new allegation of contributory negligence can be refused if the prejudice to the claimant caused by the lateness is greater than that to the defendant caused by the refusal – Lenton v Abrahams [2003] EWHC 1104 (QB).

An issue of quantum

Contributory negligence is not a defence to liability, it is a question of quantum. Therefore a default judgment deals only with the issue of the defendant's liability and still leaves contributory negligence to be dealt with at the assessment of damages – Maes Finance v A L Phillips & Co (1997) unrep ChD 10.03.97 and Lunnun v Singh (1999) unrep CA 01.07.99. So too, summary judgment against D (on the basis that it has no real prospects of successfully defending) still leaves open the separate issue of contributory negligence, see e.g. Sowerby v Charlton [2005] EWCA Civ 1610, [2006] 1 WLR 568. Permission to amend to plead contributory negligence may be refused after liability has been disposed of and the relevant evidence lost –

Lenton v Abrahams [2003] EWHC 1104 (QB).

A substantive, not procedural, issue

The issue of contributory negligence is substantive and not procedural. Therefore in accidents abroad, but tried here, it is the foreign country's law of contributory negligence that applies under s.11(1) Private International Law (Miscellaneous Provisions) Act 1995 (subject to displacement of that rule under s.12).

Part of the final issue

The costs of the issue of contributory negligence relate to the final issue of the defendant's liability. In Onay v Brown [2009] EWCA Civ 775, D admitted primary liability but alleged contributory negligence which C denied. D made a Part 36 offer of 25% reduction which C accepted. The judge ordered C to pay D's costs. The Court of Appeal held that as C's offer had been accepted, C was entitled to his costs under CPR 36.10. The offer related to liability and not to only a part of the claim. This was followed in Sonmez v Kebabery Wholesale Ltd [2009] EWCA Civ 1386. The fact that a defendant succeeds in establishing contributory negligence at trial does not mean that it has succeeded and should get its costs. If liability is established (even though subject to a reduction), it is the claimant who has won and should get his costs, unless Part 36 requires otherwise.

Reduction must be before apportionment

The Court should make the reduction before apportionment between co-defendants. Thus if there is 1 claimant and 2 defendants in a claim and the court apportions blame on the basis that, of the 3 of them, they were each just as much to blame as each other, then the reduction is 50%, not 33% — Fitzgerald v Lane [1989] AC 328.

Fatal accidents

Damages due to dependants under the Fatal Accidents Act 1976 will be reduced to reflect any contributory negligence of the deceased which caused his/her death – s.5 FFA 1976. Damages can be further reduced as a result of the dependant's own contributory negligence – Mulholland v McCrea [1961] NI 135. The contributory negligence of one dependant does not reduce the damages of another dependant – Dodds v Dodds [1978] QB 543.

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13 January 2010

SOME “RECENT” CASES:

Parker v PFC Flooring Supplies Ltd [2001] EWCA Civ 1533

C was second in command to his father in his family's small business and shortly due to take charge. An employee told him that some cable was hanging from the roof so C went to investigate. The employee warned C against going onto the roof but C did so, despite wearing leather soled boots and knowing it was slippery. He slipped and fell through a skylight. The judge found that D was in breach of Reg 13 of the Workplace Regs (duty to prevent falls so far as reasonably practicable) as it was foreseeable that employees would gain access to the roof and yet it was not prevented or forbidden. However, C was equally to blame. 50% reduction. Appeal dismissed.

Boyce v Wyatt Engineering (2001) Times 14.6.2001

C was up scaffolding when his boss called him by mobile phone. In order to get better reception, the claimant climbed an unsecured ladder which then fell away. He sued under the Construction Regs. At the defendants' invitation, the trial judge dismissed the claim at half time (end of the claimant's case) on the ground that the accident was entirely C's own fault. The Court of Appeal allowed the claimant's appeal, not only on the basis that dismissing cases at half time was wrong in principle (as the defendant had not been put to an election as to whether to call any evidence) but also on the basis that the evidence before the judge disclosed that the defendant was in breach of absolute and non-delegable statutory duties (to provide a safe place of work and to prevent falls) which, if not breached, would have prevented the accident. Therefore, the Defendant must bare a share of the responsibility. The matter was remitted for retrial by a different judge.

Anderson v Newham College [2002] EWCA Civ 505

The trial judge found that the claimant's contributory negligence was 100% responsible for his for tripping over a blackboard and so, despite a finding of breach of statutory duty on the part of the defendant, the claim was dismissed. The Court of Appeal reiterated that once the defendant was found to have been negligent or in breach of statutory duty or negligence which had in some way caused the accident, then some liability must attach to the defendant. If the finding was that the claimant was 100% responsible, then that suggested that the claimant was solely responsible and there was no fault on the part of the defendant, which was contrary to the finding that there was. The Court of Appeal awarded 50% damages.

Nixon v Chanceoption Developments Ltd [2002] EWCA Civ 558

C fell from a scaffold in high winds. The trial judge found that he should never have gone onto the scaffold in high wind and that he was the cause of his own misfortune. Again the Court of Appeal found that as there were clear breaches of the Construction Regs in relation to the absence of guard rails, the defendant had to be held responsible for the damage. Furthermore, the Court found that a claimant could not be found guilty of contributory negligence simply for doing his job as he was told. No contributory negligence.

Toole v Bolton MBC [2002] EWCA Civ 588

C was jabbed by a discarded used hyperdermic needle whilst picking it up wearing rubber gloves instead of the heavy duty gloves provided. Even if he had worn the heavy gloves, they would not have protected him. Therefore D was liable for failure to provide adequate protective gloves but damages were reduced by 75% because C chose to wear the rubber gloves which he knew to be less adequate than the heavy gloves which he had been told to wear. C appealed. The Court of Appeal considered a finding of 75% contributory negligence to be very high. It suggested that were such a high deduction seemed appropriate, the judge should consider whether the defendant's breach of statutory duty was in fact causative of the accident at all. In this case, as D had failed to provide adequate gloves, and the absence of such gloves was a cause of the injury, breach and causation were established. C was required to undertake dangerous and unpleasant work and the shortcuts that he took in order to remove the needle for the protection of others was to be expected by the employer. Even if C had worn the heavy gloves, they would not have protected him. It was not contributory negligence to fail to wear gloves which, contrary to the regulations, were inadequate. In any event, the failure to wear the heavy gloves was not causative of the injury because the injury would have been sustained even if the heavy gloves had been Appeal allowed. No contributory negligence.

Young v The Post Office [2002] EWCA Civ 661

A stress claim. New computers were introduced which C was required to master without formal training or support. After a few months of symptoms, C had a break down and went off work. 4 months later C returned to what was agreed would be light duties. However, although his hours were reduced, there was still plenty of work that needed to be done and, as a result, C worked longer than agreed. After 7 weeks he was unable to continue due to stress and gave up work. The trial judge found D liable with no reduction for contributory negligence. D appealed. The Court of appeal dismissed the appeal, pointing out that C could not be described as contributorily negligent in inflicting stress upon himself, as he was a hardworking and conscientious employee who was likely to carry out whatever he was asked to do, and was also psychiatrically vulnerable. It would be a very rare case where such a man would be blamed for working hard under such circumstances.

Wells v Tinder (2002) unrep CA 9.7.2002

C got out of a car in a bus layby and crossed the road but was struck by D. The trial judge found D 100% liable for driving too fast, using only sidelights instead of head lights. D appealed. The Court of Appeal upheld the finding of negligence but found C contributorily negligent — just as D failed to see C who was visible, so too C failed to see D. The greater duty was on D as he was in charge of potentially very dangerous equipment (his car) and so the reduction was 25%.

Purdue v Devon Fire & Rescue Service (2002) unrep CA 9.10.2002

C stopped at red lights to turn right. From his right was coming a fire engine with flashing lights but no siren on. C did not look to his right and after the lights turned green pulled across the fire engines path resulting in collision. The trial judge found D's driver of the fire engine liable for failing to sound the siren and for continuing across the red-light despite seeing that C had not looked to his right. The judge made no reduction for contributory negligence. D appealed. The Court of Appeal ruled that a prudent driver

would have looked right and would have noticed the flashing lights and C's failure to do so was thus negligent. The Court of appeal deducted 20%.

Butcher v Cornwall CC [2002] EWCA Civ 1640

The retaining hook to a shed door (whereby the door could be secured open) was missing. As C was working outside the door having left it ajar, it blew against him injuring him. The trial judge found that if the hook had been present, C would have used it but that C was 10% to blame for the accident as he had failed to close the door properly. The defendant appealed, arguing that the reduction was too low. The Court of Appeal said that a reduction of 10% is so low that it calls into question whether C was in any way responsible for the accident. Such a minimal reduction means that C is hardly blameworthy at all [this is the converse of Toole, see above]. As the judge had found that C ought to but did not shut the door properly and was negligent in so doing, then the reduction must be greater than a trifling 10%. The Court of Appeal awarded 50%.

Clench v Tanner [2002] EWHC 184 (QB)

Cyclist in a designated cycle lane who collided with the rear of a breakdown recovery vehicle that turned left into a petrol station across his path was held to be 50 per cent contributorily negligent for riding with his head down. If he had paid attention, he would have seen D signalling his intentions. They were equally to blame.

Wight v Romford Blinds & Shutters Ltd [2003] EWHC 1165 (QB)

While standing on the roof of a van to load materials on to it, C slipped and fell. The employer was negligent and in breach of statutory duty. C was simply following the method of work adopted by D. His slipping was the result of momentary inattention and should not be held against him.

Cooper v Carillion [2003] EWCA Civ 1811

C and a colleague lifted a large piece of plywood to carry it across a building site. C fell down an unfenced hole which he could not see because of the plywood. Judge deducted 10% for failure to look below the board. CA allowed C's appeal. C was entitled to expect that there would be no unfenced holes. No contributory negligence.

Burridge v Airwork Ltd [2004] EWCA Civ 459

Cyclist not required to anticipate that simply because a vehicle has pulled into the side of the road, the driver may open his door in the cyclist's path. No contributory negligence.

Lowles v The Home Office [2004] EWCA Civ 985

Claimant prison officer entered the prison via a portacabin side entrance. The portacabin was accessed via a ramp up to it. At the top of the ramp was a two-inch step created by the top of the ramp being two inches below the portacabin floor. There was a "mind the step" sign amongst various other signs and notices. The claimant tripped on the step. The defendant was liable because the traffic route's surface was not constructed as so as to be free of risk. C was 50% contributory negligent. D appealed against

the finding of liability and, in the alternative, argued that C's contrib should be 75%. The appeal was dismissed.

Sherlock v Chester City Council [2004] EWCA Civ 201

The Claimant, an experienced joiner, cut his thumb on a circular saw whilst feeding a long fascia board on to it. The employer admitted that because it had not provided a run-off table to support the board, there was breach of reg 20 PUWER (duty to stabilise). The trial judge found that the admitted breach was not causative of the accident, which was due entirely to C's own fault for failing to get a run-off table himself as the need was obvious. On appeal, CA found that as the absence of a run-off table was causative, D's failure to provide one meant liability was established. However as C was fully aware of the risks and of how to avoid them, his conscious acceptance of the risk meant he should bear most of the blame. 60% contributory negligence.

Robb v Salamis (M&I) Ltd [2006] UKHL 56, [2007] ICR 175

C worked on an oil-rig. He was required to sleep there too. He descended from his bunk bed via its ladder, but the ladder had not been properly slotted into position and so it came away causing him to fall and sustain injury. The trial judge dismissed the claim on the grounds that whilst getting out of bed C was not at work and the ladder was not work equipment and it was his own fault for not checking the ladder before using it. The appeal court dismissed C's appeal on grounds that although C was at work and the ladder was work equipment, the ladder was suitable and therefore there was no breach by D. If there had been breach, C's own failure would have amounted to 50% of the blame. The House of Lords allowed C's further appeal on the grounds that the ladder, because it could become detached, was not suitable. Their Lordships observed that the reduction of 50% seemed very high but that it was a matter for the court below, so they left it at 50%.

Piccolo v Larkstock Ltd (2007) unrep QBD 17.07.07 (HHJ J Altman)

C, a member of the public, slipped on flower petals on the floor of a railway station concourse. Although the petals would have been readily visible to C if he had been particularly vigilant, he was not required to be. The judge relied upon the dictum in Ward v Tesco that "shoppers, intent on looking to see what is on offer, cannot be expected to look where they are putting their feet". No contributory negligence.

Ellis v Bristol City Council [2007] EWCA Civ 685

Care worker in care home for the elderly slipped on urine on the floor which it had not been reasonably practicable to prevent or to have cleaned up. Because incontinence was a regular occurrence, employer was in breach of Reg 12 Workplace Regs because floor was not constructed so as to be non-slip when wet. As C was well aware that urine was likely to be present on the floor, she should have kept a special look out. Her lack of concentration had gone beyond mere inadvertence. 30% deduction for contributory negligence.

Egan v Central Manchester & Manchester Children's University Hospitals NHS Trust [2008] EWCA Civ 1424

“The fault of each party has ‘caused’ the injury in that, if either had taken proper care, the accident would probably have been avoided. I find myself unable to distinguish between the two parties when considering blameworthiness; it seems to me that neither side could or should be heavily criticised. Accordingly, I find myself driven to conclude that they should share responsibility equally. I would hold the [defendant] respondent liable to the [claimant] in 50% of the damages.”

Anderson v Lyotier [2008] EWHC 2790 (QB)

A ski instructor negligently asked C to ski down a slope which was beyond his ability. C felt he had no option but to comply, even though he believed the slope was too difficult. His failure to voice his concerns was contributory negligence. Damages reduced by 33%

Collins-Williamson v Silverlink Trains Ltd [2009] EWCA Civ 850

C was drunk when he got off a train, behaved “idiotically” on the platform and then into the gap between the platform and the train. He suffered severe injuries when the train pulled off when the guard had negligently failed to see him. D was vicariously liable for the guard’s negligence. Damages were reduced by 50%. The fact that C was not directly liable and only vicariously liable did not alter the share of the blame to be borne by C.

Stanton v Collinson [2009] EWHC 342 (QB) (Cox J)

Failure to wear a seatbelt. But no evidence that it would have prevented or reduced the injuries. No reduction.

Tibbatts v British Airways plc [2009] EWHC 815 (QB)

C injured shoulder as a result of lifting overweight bag as a baggage handler. C liable for breach of Manual Handling Operations Regulations 1992. Deduction of 33% because C knew that the bag was one which should have been handled by two people.

Harvey v Plymouth City Council (2009) unrep QBD 13/11/2009 (Leighton Williams QC) Lawtel

Whilst C was drunk and running away from a taxi driver he fell over an obscured drop at the end of D’s land which D did not know it owed (and therefore had not made safe). D’s ignorance was no defence. It was liable for its failure to take reasonable care, but C’s behaviour merited a 75% reduction.

Spencer v Wincanton Holdings Ltd [2009] EWCA Civ 1404

C was injured in a minor accident at work as a result of D’s negligence. However as a result of complications in the healing of the injury, C’s leg was amputated above the knee 3 years later. Another 8 months later C sustained serious injuries whilst attempting to fill his car up with petrol without using his prosthesis, a stick or requesting any help. Whilst his conduct was contributory negligence, it was not so unreasonable as to break the chain of causation as per McKew v Holland & Hannen & Cubitts (Scotland) Ltd [1969] 3 All ER 1621 (HL).

Some statutory duties imposed upon employees

Health and Safety at Work etc Act 1974

Section 7 General duties of employees at work

It shall be the duty of every employee while at work —

- (a) to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work; and
- (b) as regards any duty or requirement imposed on his employer or any other person by or under any of the relevant statutory provisions, to co-operate with him so far as is necessary to enable that duty or requirement to be performed or complied with

Management of Health & Safety at Work Regulations 1999

Reg 14 Employees' duties

- (1) Every employee shall use any machinery, equipment, dangerous substance, transport equipment, means of production or safety device provided to him by his employer in accordance both with any training in the use of the equipment concerned which has been received by him and the instructions respecting that use which have been provided to him by the said employer in compliance with the requirements and prohibitions imposed upon that employer by or under the relevant statutory provisions.
- (2) Every employee shall inform his employer or any other employee of that employer with specific responsibility for the health and safety of his fellow employees —
 - (a) of any work situation which a person with the first-mentioned employee's training and instruction would reasonably consider represented a serious and immediate danger to health and safety; and
 - (b) of any matter which a person with the first-mentioned employee's training and instruction would reasonably consider represented a shortcoming in the employer's protection arrangements for health and safety,in so far as that situation or matter either affects the health and safety of that first mentioned employee or arises out of or in connection with his own activities at work, and has not previously been reported to his employer or to any other employee of that employer in accordance with this paragraph.

The Manual Handling Operations Regulations 1992

Reg 10 Duty of employees

Each employee shall make full and proper use of any system of work provided for his use by his employer in compliance with regulation 4(1)(b)(ii) of these Regulations.

Personal Protective Equipment at Work Regulations 1992

Reg 10 Use of personal protective equipment

- (2) Every employee shall use any personal protective equipment provided to him by virtue of these Regulations in accordance both with any training in the use of the personal protective equipment concerned which has been received by him and the instructions respecting that use which have been provided to him by virtue of regulation 9.
- (3) Every self-employed person shall make full and proper use of any personal protective equipment provided to him by virtue of regulation 4(2).
- (4) Every employee and self-employed person who has been provided with personal protective equipment by virtue of regulation 4 shall take all reasonable steps to ensure that it is returned to the accommodation provided for it after use.

Control of Substances Hazardous to Health Regulations 2002

Reg 8 Use of control measures etc

- (2) Every employee shall make full and proper use of any control measure, other thing or facility provided in accordance with these Regulations and, where relevant, shall -
 - (a) take all reasonable steps to ensure it is returned after use to any accommodation provided for

- it; and
- (b) if he discovers a defect therein, report it forthwith to his employer

Work at Height Regulations 2005

Reg 14 Duties of persons at work

- (1) Every person shall, where working under the control of another person, report to that person any activity or defect relating to work at height which he knows is likely to endanger the safety of himself or another person.
- (2) Every person shall use any work equipment or safety device provided to him for work at height by his employer, or by a person under whose control he works, in accordance with --
 - (a) any training in the use of the work equipment or device concerned which have been received by him; and
 - (b) the instructions respecting that use which have been provided to him by that employer or person in compliance with the requirements and prohibitions imposed upon that employer or person by or under the relevant statutory provisions.

Construction (Health, Safety and Welfare) Regulations 1996

Reg 4 Persons upon whom duties are imposed by these Regulations

- (3) Subject to paragraph (5), it shall be the duty of every employee carrying out construction work to comply with the requirements of these Regulations insofar as they relate to the performance of or the refraining from an act by him.
- (4) It shall be the duty of every person at work -
 - (a) as regards any duty or requirement imposed on any other person under these Regulations, to co-operate with that person so far as is necessary to enable that duty or requirement to be performed or complied with; and
 - (b) where working under the control of another person, to report to that person any defect which he is aware may endanger the health or safety of himself or another person.
- (5) This regulation shall not apply to regulations 22 and 29(2), which expressly say on whom the duties are imposed

Construction (Design and Management Regulations 2007

Reg 25 Application of Regulations 26 to 44

- (3) Every person at work on construction work under the control of another person shall report to that person any defect which he is aware may endanger the health and safety of himself or another person.