Guildhall Chambers Personal Injuries Claimant Seminar
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CONTRIBUTORY NEGLIGENCE PRINCIPLES APPLICATION WORKSHOP ANSWERS

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Answers to Case Study One

What is the appropriate apportionment in Ivor Nobelt's Case?

1. Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 is the starting point for any case on contributory negligence

   "When any person suffers damage partly as the result of his own fault and partly as the result of the fault of any other person … the damages recoverable … 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."

2. Causative potency and blameworthiness are the guiding factors:

   - See *Davies v Swan Motors* [1949] 2 KB 291 @ 326 (Employee stood on a dust cart contrary to instructions. The dust cart came into collision with a bus. 20% contributory negligence.)

   - *"The application of Section 1(1) involves a consideration not only of the causative potency of a particular factor, but also its blameworthiness. The fact of standing on the steps of a dust cart is just as potent a factor in causing damage, whether the person standing there be a servant acting negligently in the course of his employment or a boy in play or a youth doing it for a lark: but the degree of blameworthiness may be very different".*

3. *Froom v Butcher* 3 W.L.R [1975] 379 @ 387 was the first Court of Appeal decision touching on the appropriate apportionment in seatbelt cases. Lord Denning gave this reasoning for his 0/15/25 formula:

"Whenever there is an accident, the negligent driver must bear by far the greater share of responsibility. It was his negligence which caused the accident. It was also a prime cause of the whole damage. But insofar as the damage might have been avoided or lessened by wearing a seat belt the injured person must bear some share. … Sometimes the evidence will show that the failure made no difference. The damage would have been the same even if the seatbelt had been worn. In such case the damages should not be reduced at all. At other times the evidence will show that the failure made all the difference. The damage would have been prevented altogether if the seatbelt had been worn. In such cases I suggest that damages should be reduced by 25%. But often enough the evidence will only show that the failure made a considerable difference … In such case I would suggest that the damages attributable to the failure to wear a seatbelt should be reduced by 15%.

4. Over recent years the 0/12/25 formula has been criticised by Defendants as being too Claimant friendly.

5. Ivor Nobelt's case is based upon the case of *William Stanton v Lynn Collington (personal representative of the estate of Matthew Collington (Deceased))* [2009] EWHC 342

   Here the Defendant's sought to argue:

   a. that the *Froom v Butcher* guidelines needed revisiting and
   b. even if the guidelines applied the specific facts (encouraging someone to drive too fast and having someone sat on his knee) warranted departure from the guidelines.

6. In respect of the first argument *Froom v Butcher* was upheld. The judgment in *Gawler v Raetig* [2007] was referred to. It was noted that it was "*striking how alert the court was as early as 1975 to the vital importance of wearing seatbelts."* The Guidelines, therefore, did not need updating.

7. *Ceri James v Wilkins* [2001] was also referred to. It was noted that the Court of Appeal in *Froom v Butcher* did **not** intend:

"the figure of 25 per cent contribution as an absolute and immutable ceiling in every single case. But [the court] clearly did wish to give guidance which would apply in the vast majority of cases, so that one could avoid … 'an expensive inquiry into the degree of blameworthiness on either side, which would be hotly disputed'. It follows that, while in principle there could be exceptional cases which fall outside the range suggested, one would expect such cases to be rare."

8. What might these rare cases be? Is Ivor Nobelt's case one of them?

- There is no reported case in which the 0/15/25 formula has been departed from

- *Ceri James v Wilkins*, [2001] PIQR 12 (CA) - *"…perhaps … where an adult was deliberately carrying someone on his or her lap in the front seat of a vehicle with no seat belt or other fitted restraint being applied to the person, particularly if that person was a child." (but "factual expert evidence would be required to establish that there was greater vulnerability".)*

- *Gawler v Raetig* [2007] EWHC 373 (QB) - *"I can see that a case where a claimant who in the true sense decides to defy the law and takes a conscious decision not to belt up, despite having been told to do so by the driver of a police officer, might qualify as rare and exceptional."*

9. In the index case it was held that

- D could not prove C encouraged D to drive faster. Besides even if he did encourage him it wouldn't have made a difference because D always went fast.

- The seating of 2 passengers in the front seat was *"an unusual feature"* but did *not "render it a rare and exceptional case, such as to justify a departure from the guidance in Froom".* In any event causation was not made out because there was no evidence of increased risk to the primary occupant.

- C's negligence warranted the application of the Froom formula.

10. Where does Ivor Nobelt fall within the Froom formula? 0%, 15% or 25%

- Can C argue that he would have been worse off without a seatbelt so D should count his lucky stars and pay up?

- No! *"What the court must do is examine the injuries which were actually suffered and for which the plaintiff is receiving compensation. It makes a deduction depending on the extent to which those injuries were caused or contributed to by the failure to wear a seatbelt … But one cannot reduce the appropriate percentage of contributory negligence by investigating what injuries might have been, but were not, caused in circumstances which did not arise. That is pure speculation. One simply does not know what they might have been." (Patience v Andrews* 1983 RTR 447 approved in *Sophie Palmer v Christopher Kitley* (2008) EWCA 2819 (QB))

- Arguably the outcome could be different if there was very clear causation evidence but it is almost impossible to imagine any case

where the proposed alternative injuries will be anything other than speculation.

What is the appropriate apportionment in Si Clyst's Case?

1. This case study is based on *Robert Smith v Michael Finch,* [2009] EWCH 53 Q

2. Highway Code – Rule 59 states

You should wear:

- a cycle helmet which conforms to current regulations, is the correct size and securely fastened
- appropriate clothes for cycling. Avoid clothes which may get tangled in the chain, or in a wheel or may obscure your lights
- light-coloured or fluorescent clothing which helps other road users to see you in daylight and poor light
- reflective clothing and/or accessories (belt, arm or ankle bands) in the dark

2. Mr Justice Griffith Williams in *Smith v Finch*

"as it is accepted that the wearing of a helmets may afford some protection in some circumstances, it must follow that a cyclist of ordinary prudence would wear one, no matter whether on a long or short trip or whether on quiet suburban roads or a busy main road."

3. But what about causation?

- In Si Clyst's case causation appears to have been established. The Froom formula would give a deduction of 15%.

- In *Smith v Finch,* however, causation was not established and the evidence given was to the effect that the helmet would only give good protection if certain parts of the head struck the ground at less than 12 mph. One, therefore, suspects that the circumstances in which the helmet would make a difference will be relatively few and far between.

Practice Points

- The 0/15/25 formula stands and will only be departed from in the rarest of cases.

- Causation is vital. It is for the Defendant to prove that the contributory negligence would have made a difference.

Answers to Case Study Two

1. The purpose of this exercise was to examine two cases where the accident was similar but the apportionment very different.

2. The court considered the following factors when deciding the appropriate apportionment:

   a. Was the employee wholly to blame?
   b. The mere inattention argument
   c. The policy considerations in breach of statutory duty cases
   d. The skill of the worker and what can be expected of him
   e. The apportionment of responsibility

The Employee Altogether To Blame

3. *Ginty vBelmont Building Ltd* 1959 1 All ER 414

4. Here the employee fell through asbestos roof because he did not use a crawling board. The employee knew he should use crawling boards and crawling boards were provided. The cause of the accident was his decision not to use the crawling board. The employer had discharged their duty and C was 100% to blame

5. The question asked was, *"Whose fault was it? … If the answer to that question is in substance and in reality the accident was solely due to the fault of the plaintiff, so that he was the sole author of his own wrong, he is disentitled to recover. But that had to be applied to the particular case and it is not necessarily conclusive for the employer to show that it was a wrongful act of the employee plaintiff which caused the accident. It might also appear from the evidence that something was done or omitted by the employer which caused or contributed to the accident… Therefore, if one finds the immediate and direct cause of the accident was some wrongful act of the man that is not decisive. One has to inquire whether the fault of the employer under the statutory regulations consists of and is coextensive with the wrongful act of the employee. If there is some fault on the part of the employer which goes beyond or is independent of the wrongful act of the employee, and was a cause of the accident, the employer has some liability."*

The Mere Inattention Argument

6. *John Summers & Sons Ltd v Frost* [1955] AC 749

7. C was using an unfenced electric grindstone. He placed his fingers too close to grindstone. Had C have exercised "just a little more care" the accident would have been avoided. This did not amount to contributory negligence.

8. The court *" has to take account all of the circumstances of work in a factory and that is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a Plaintiff ought to be held to be guilty of contributory negligence".*

The Policy in Breach of Statutory Duty Cases

9. *Staveley Iron & Chemical Company Ltd v Jones* 1956 AC 672

10. A crane driver was lifting a palette, the contents of which were not balanced. The crane driver should have lifted the palette until chains were tight and stopped to see if the weight was even. C who was helping load the palettes and attaching the chains should also have checked the to see if the palette was even. The crane driver negligent but there was insufficient evidence to show that C was contributory negligent.

11. *"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 consisting contributory negligence so that too strict a standard would defeat the object of the statute,"*

12. *Toole v Bolton Metropolian Borough Council* 2002 EWCA Civ 588.

13. C worked as supervisor in the town hall. The cleaner told C he had seen a hypodermic needle in a toilet brush holder. Employees were not prohibited from touching the syringe but were told to wear heavy duty gloves and dispose of syringe with the assistance of a litter picker into a "sharps" container. The Claimant wore rubber gloves and took a pair of scissors instead of a litter picker with him (no litter picker being available). He put his hand in a bucket to retrieve what he thought was a single syringe but sustained a needle injury from a second syringe. Evidence was that heavy duty gloves would have made no difference. TJ said C was 75% to blame. CA disagreed.

14. *" 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%. If in a statutory duty case the judge finds himself driven in that direction, he should, in my judgment, seriously consider whether he is not in fact finding that there has been no casual connection at all between the breach of statutory duty and the injury."*

<u>The Skilled or Unskilled Employee Argument</u>

15. *Toole* (See Above)

16. *"It is wholly unreasonable ,,, to place that level of criticism upon a man at this level of employment … faced with an unpleasant and potentially medically dangerous situation in the middle of the evening."*

The Apportionment of Responsibility

17. *Reeves v Commissioner of Police for the Metropolis* (2000) 1 AC 360 @ 371.

18. *"What section 1 requires the court to apportion is not merely degrees of carelessness but "responsibility" and … 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 duty. And he may have been careless without being responsible as in the cases of "acts of inattention" by workmen"*

What was the appropriate apportionment in Dai Gitless Case?

19. The Dai Gitless' case is based on *Sherlock v Chester City Council* 2004 EWCA Civ 207 (CA)

20. The 1st instance judge found that C was entirely the author of his own misfortune. The CA disagreed.

21. The employer was at fault. There was a failure to provide proper equipment or a safe system of work. No risk assessment had been carried out and inadequate information had been given.

22. The court referred to Toole and cited the principle that it is unusual for there to be marked findings of contributory negligence in breach of statutory duty cases. The court went on to say, *"There may be some justification for that view in cases of momentary inattention by an employee. But where the risk had been consciously accepted by an employee, it seems that different considerations may arise. That is particularly so where the employee is skilled and the precautions in question are neither esoteric nor one which he*

could not take himself. In the present case he could have made himself a run off bench, or ensured that Mr Webb was there when he cut the relevant facia board. In those circumstances it seems to me that the appellant can properly be required to bear the greater responsibility.

23. Contributory negligence was apportioned 60/40 in the Defendant's favour

What was the appropriate apportionment in Mikey Babb's case?

24. The Mikey Babb case is based on *Sowmez v Kebaberry Wholesale Ltd* (2008) EWHC 3366(QB)

25. The employer was at fault because he failed to provide an effective interlocking device and failed to provide proper instruction or supervision.

26. Mere inadvertence or momentary error of judgment did not justify a reduction in damages recoverable. Nor would an excusable lapse of judgment arising from the circumstances created by the Claimant's employer.

27. This was not the case here. C had some responsibility. He knew the interlock was there to prevent access to moving parts and was able to clean the machine whilst it was stationary. He should have been alive to the possibility that the mixing arm would speed up. A 20% reduction for contributory negligence was made.

Note

28. The accidents which occurred are not that different. The difference seems to be that Mikey Babb was a low level, vulnerable employee where as Dai Gitless was a clever well trained employee.

29. Nonetheless 60% seems like a large reduction and one wonders whether the full flavour of the case comes out from the case report.

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