

COUNTER SCHEDULES: THE PRACTICAL APPLICATION OF POST-ACCIDENT CONTRIBUTORY NEGLIGENCE

Julian Benson, Guildhall Chambers

Introduction

1. We all know that the Defendant has to take a person as they find him, thin skulls and all (*Smith v Leech Brain* [1962] 2 QB 405), and that a second injury is often laid at the door of the original Defendant, because it is “foreseeable that one injury may affect a person’s ability to cope with the vicissitudes of life and thereby cause another injury” (*Wieland v Cyril Lord Carpets*).
2. We also know that there is some conduct “so unreasonable” that it will break the chain of causation (*McKew*, below), which concerns conduct by the injured person.
3. There are other well known examples of difficult issues relating to the chain of causation, concerning foreseeability and remoteness:
 - (a) Medical treatment *Webb v Barclays Bank* [2001] EWCA Civ 1141
(although note apportionment 75:25!)
 - (b) Suicide *Corr v IBC Vehicles* [2008] 1 AC 884
 - (c) Criminal conduct *Meah v McCreamer* [1985] 1 All ER 367
(although note ‘illegality’ not argued)
 - (d) Alcoholism *Dalling v R J Heale* [2011] EWCA Civ 365
(damages reduced by 1/3 contributory negligence for consequences of second accident)
4. These notes are concerned with the more mundane – and much more frequently encountered – situation, in which the Claimant’s conduct falls short of “being so unreasonable” that it breaks the chain of causation, but may nonetheless be sufficient to justify a reduction in some or all of a claim.

An old chestnut

McKew v Holland [1969] 3 All ER 162

5. Mr McKew suffered a liability-admitted knee injury.
6. He knew the knee was thereafter likely to give way suddenly and without warning.
7. Nevertheless, when leaving a property he chose to use a very steep stairway, which did not have a handrail, and to walk close to his child instead of other adult family members (who might have been able to help him if his leg gave way).
8. The knee did give way, and he tried to jump to safety down the last few steps, causing further injuries.
9. The Court decided that Mr McKew’s conduct was so unreasonable that it broke the chain of causation. He failed to recover any losses arising from the fall. (Interestingly, contributory negligence was not pleaded in the alternative in *McKew*).

A new chestnut

Spencer v Wincanton Holdings [2009] EWCA Civ 1404

10. Mr Spencer suffered an amputation as a result of a negligently caused injury. Consequently, he wore a prosthetic leg, and had walking sticks to help him.
11. He found it easier to drive his automatic car when his leg was not attached, and usually placed it on the rear seat behind him.
12. One day, at a petrol station, he left his car without his leg or his sticks. He filled the car, then hopped back towards the driver's door to hoot for the attendant to come and take his payment.
13. As he returned, Mr Spencer tripped on an uneven manhole cover, fell and suffered further injuries which confined him permanently to a wheelchair.
14. The question was whether his trip was a *Wieland* situation (he was essentially just dealing with a daily life 'complicated' by his injury), or a *McKew* situation ("conduct so unreasonable...") or somewhere in between (as in *Dalling*).
15. The trial judge decided that Mr Spencer's actions "*fell far below what could be described as McKew unreasonable. Insofar as the way he went about the task should be taken into account, that is a matter of contributory negligence.*"
16. He therefore reduced the Claimant's damages for the additional injuries (consequent upon the fall at the petrol station) by 33%. The Defendant appealed, relying on *McKew*. Neither party appealed the Judge's apportionment of contributory negligence.
17. The Court of Appeal dismissed the appeal, and discussed the boundaries between *McKew* conduct and lesser instances of 'fault' (paragraph 44: Aitkens LJ – who also quoted the Judge's findings (above) with approval).

Remind me, what is contributory negligence in this context?

18. "*Where any person suffers damage as the result partly of his own fault.....the damages 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."*

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

'Spencer' considerations

19. Keep a watchful eye on the Claimant's behaviour after the accident.
20. Do not pounce on every error or poor decision!
21. What you are looking for, in relation to something the Claimant has done or not done, is something patently unreasonable or ill-advised but falling short of 'McKew'.
22. As regards a worsening medical picture, you are looking for an obvious failing, with predictably significant consequences, which the Claimant could have avoided with relative ease by following unanimous (or near-unanimous) treating and medico-legal opinion.

'Spencer in action'

23. The following is a truncated/anonymised extract of a 'Part 36' letter. Much of it could be adapted into the Counter-Schedule:

Infection

- (a) In his very first post-accident consultation the Claimant failed to tell his GP about the scratches/lacerations to his legs. This seems the unavoidable conclusion from the GP entry immediately after the accident (despite the severity of the 'gash', 'deep scratches', etc described at various times by your client);
- (b) After he returned to work he began having to soak his socks off because of the discharge which stuck them to his feet (Ref....).
- (c) Mr XX was a mature and experienced man. He must have been well aware that the problem with his legs was getting worse, and should be attended to by his doctor. Also, he knew full well of the dangers of infections:
 - (i) He had suffered "infected lesions on legs" requiring strong antibiotic treatment as recently as April 2005: Ref;
 - (ii) he had suffered other infections in the recent past: GP records August 2002: Ref;
- (d) The Defendant's case is that at the latest when any such discharge started, the Claimant was on sufficiently clear notice that he needed medical input that he should have consulted his doctor, and in not doing so, he either broke the chain of causation, or was contributory negligent, in the Spencer sense, as regards the damage which he subsequently suffered.

Misuse of medication

- (e) As his pain and symptoms deteriorated, he unilaterally decided to rely on an old batch of morphine that he had been given for a totally separate complaint (kidney problems) instead of seeing his GP:Ref. We expect the Court to decide that, once again, he made important - unreasonable - decisions which have had serious consequences for his medical condition.

Weight gain/obesity

- (f) Since the accident, the Claimant has failed to take appropriate exercise, has ignored all medical advice relating to weight-control. Indeed:
 - (i) he put on 31kg between xxxxxx and xxxxxx;
 - (ii) in the teeth of unanimous advice from treating and medico-legal advice, he has not dropped below 140kg since the accident;

Smoking

- (g) Mr XX is a longtime (lifelong) smoker* – c25 pre-accident. He was still smoking 20 a day when he saw Dr XX on 29.05.09. This, too, despite sustained advice to stop smoking from his treating clinicians;
- (h) These decisions, or failures to adopt the contrary course, reflect contributory negligence in relation to the Claimant's consequent damage.

Final points

- 24. Contributory negligence in all its forms must be pleaded.

25. When including allegations in a Counter-Schedule, you must judge the tone of criticism with care – avoid humiliating the Claimant - which may well alienate the Court.
26. 'Spencer' arguments are almost always percentage arguments, making it relatively easy (and attractive) for the Court to make an instinctive deduction.

**Julian Benson
Guildhall Chambers
June 2012**