Law School Tutors Lecture Series

Sport and the Law

LECTURE SEVEN : LIABILITY FOR SPORTS TORTS

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LIABILITY FOR SPORTS TORTS : OUTLINE

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Vicarious Liability in Sport

Referees : The player on the field may be injured, not directly as a result of the behaviour of the players but the carelessness of the referee, as in **Smolden v Whitworth and Nolan** [1]

Ben Smolden was playing in a colts ruby union match. The referee had allowed a large number of scrums to collapse during the course of the march. During the collapse of a scrum Ben was injured and paralysed as a result. It was shown that the referee had received numerous warnings from the linesmen that people could be hurt unless he took a firm grip of the game. The Court of Appeal held that the referee did owe a duty of care to the players. The defendant should have taken appropriate steps to prevent the repeated collapse of the scrum; thus he was liable for the consequences of that breach of duty.

Referees and Vicarious Liability : The Welsh Rugby Union was recently found liable in very similar circumstances for the injuries of a scrumager injured during a collapse because the referee in a low level amateur match should have stopped the game after another scrumager left the pitch and was replaced by an inexperienced player. In consequence a scrum collapsed and the claimant was injured. An appeal by the WRU to the Court of Appeal is pending, challenging a substantial damages award.

Question: Do you think this case could open the floodgates? What about other sports?

Question: Outline the constituents of vicarious liability.

In a sporting context, an employer is defined as using the usual rules e.g. **Ready Mix Concrete Ltd v Minister of Pensions and National Insurance.**[2] So in a sporting context, a sports person who is contracted to play for a team would be in employment.

In the course of employment, again the usual rules are followed. In a sporting context, a player who makes a bad tackle during the course of a football game would be held to be acting for the benefit of his employer. If, however, the act were unauthorised, then the employer would not be liable. A good example of this is when Eric Cantona lost his temper at a spectator who was verbally abusing him. Launched a kung-fu style kick at the spectator: this was an assault, not authorised by the employer.

Question: How does contributory negligence work?

The ratio of this case makes it clear that the provision of facilities and lack of supervision together with the foreseeable risk of injury is not sufficient to make the defendant liable. There had to be a further aggravating feature to make the local authority liable (in this case the mat being too close to the wall).

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1 **Smolden v Whitworth and Nolan** (1996). The Times, 18 December

2 **Ready Mix Concrete Ltd v Minister of Pensions and National Insurance** [1968] 1 ALL ER 433.

DEFENCES TO TORTS

The usual defences to be raised are:

Consent : Operates as a defence to the tort of trespass against the person. If a person consents, in advance to a range of acts then the other person can not be said to have committed a wrong. In sporting terms, consent will be implied from the player; consent must be full and informed. [3]

Volenti non fit injuria : No harm is done to a person if they have assumed the risk of injury. This overlaps with negligence and consent in sporting situations, which tend to be more appropriate. See **Jones v Northampton Borough Council**,[4] and compare with **Dawson v West Yorkshire Police Authority** .[5]

Self-defence : A victim can use such force as is reasonable in the particular circumstances in order to prevent an attack on themselves or on anther person.

Reliance on the advice of experts : What about situations where the local authority had relied on advice from a third party regarding safety and that advice turns out to be incorrect? See **Harris v Evans.**[6]

Conclusion : This is just a brief overview of the role that two particular torts have come to play within the sporting context. As always, the particular requirements of the sporting context and its consequences have to be considered.

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3 How this defence operates against persons off the field e.g. spectators will be considered in the next lecture, as will that of sports organisers.

4 **Jones v Northampton Borough Council** (1990) The Times 21 May

5 **Dawson v West Yorkshire Police Authority** 1995

6 **Harris v Evans** The Times 5th May 1998

Workshop – Tortious Liability

Examine the decision in **Condon v Basi** – does it provide helpful guidance to the appropriate standard of care in sporting situations? How have subsequent cases interpreted it?

What implications does the case law relating to negligent behaviour on the sports field have for insurance cover of professional sportsmen? Have sporting organisations properly considered this problem in your opinion?

Closely examine the ratio of the **Smolden Case** and the comments made by Moore pp60, 61,62 and be prepared to discuss these in class.

Workshop Activity

Trenton High School took a group of 15 year olds on an adventure holiday at Hightrees Activity Centre. This was owned by the brother of the Head Master of the School, Mr Adams. The children were not happy: their accommodation was basic and the food awful. They felt that the instructors were impatient with them and did not seem to appreciate the needs of young people.

On the third morning of their stay, they were taken off on a day lay long trek across local moorland. They had only a slice of toast and a boiled egg for breakfast. By 1.30 that afternoon they were extremely hungry, but Alex, their instructor would not allow them to stop in order to eat their sandwiches, telling them they were a bunch of "moaning wingers". At 1.45, Katy, an insulin dependent diabetic collapsed and became unconscious. Alex did not realise she was a diabetic and had real idea how to bring her around. He tried to feel her sugar but she just vomited. Andrew, Katy's friend, volunteered to go back to base camp to seek help. Alex said that was a good idea. Unfortunately, Andrew (only aged 15 himself) slipped down a slippery path and knocked himself unconscious.

The alarm was not raised until another student, Annie, got back to base at 4.00pm. By then Alex had come round but suffered from concussion and spent a night in hospital. Katy was seriously ill in hospital and became traumatized, by her experiences. She now cannot sleep at night, is frightened to leave the house and overly cautious about maintaining good diabetic control.

Katy and Alex wish to take legal action for the above events.

In groups of five, please consider the following issues:

Task One : What preliminary questions do you need to ask about the above events?

Task Two : Which areas of law would you seek to recover under? Against whom would you claim?

Task Three : Could there be issues of criminal liability for these events?

CONSENT & CONTRIBUTORY NEGLIGENCE.

By Brian Dowrick

So far we have considered the 'ingredients' of legal actions in both negligence and trespass to the person. Consent (or volenti non fit injuria) are applicable to negligence as defences but they have different effects. In relation to trespass to the person, consent is a live issue but the effects of contributory negligence, though relevant, are rare.

Consent in negligence.

You should bear in mind that in negligence, use of the word consent does not have the same meaning as consent in the context of trespass to the person. I will limit its use here to consent to the risk of injury - for the purposes of trespass to the person it will be used to denote that the force threatened or applied was consented to and this has the effect of rendering the force lawful. For example, a patient may consent to invasive surgery - without which the surgeon would commit a very serious battery. However, this does not mean that the patient can be said to be consenting to such surgery being conducted carelessly.

It should be noted at the outset that a finding that the plaintiff consented to the relevant conduct/risk of injury would lead to the plaintiff receiving no compensation. Mindful of this, the courts' have limited the effects of volenti to very narrow circumstances, but before we look at the issues let us take an obvious example:

> "Bill is drinking alcohol with his friend Ted. Ted becomes very drunk. Ted takes a car without the owner's permission because he cannot afford a taxi and he offers Bill a ride home - Bill agrees. Due to Ted's intoxicated state he crashes the car and both are seriously injured. Bill sues Ted for his injuries."

Volenti or consent would be relevant here because it could be said that Bill had, by agreeing to ride in a car driven by his drunken friend has undeniably agreed to the very risk of injury associated with such circumstances.

For our purposes consent requires the plaintiff to voluntarily agree to the relevant risks of injury from the defendants unreasonable behaviour.

The relevance of consent in a sporting context must be negligible for it would be wrong to suggest that if a man knows that participating in a sport has associated risks of injury, and suffers injury, it would be open for the defendant to say that he consented to the very risks in question - ordinary pedestrians know that there are risks associated with crossing the road because some drivers are careless but to suggest that an injured pedestrian is then volens to the unreasonable driving and without a remedy is absurd.

In **WOOLDRIDGE v SUMNER,**[7] Sellers LJ said: "... a competitor or player cannot, at least, in the normal case of a competition or game, rely on the maxim volenti non fit injuria in answer to [the plaintiff's] claim." Diplock LJ also considered the application of the volenti maxim to be irrelevant in this context. Though WOOLDRIDGE involved injury to a spectator it has found application to competitors (though on other points).

Contributory negligence and the tort of negligence

The marginalisation of the volenti defence is in part due to the application of the defence of contributory negligence. The defence has a statutory basis. It is enshrined in **s 4 LAW REFORM (CONTRIBUTORY NEGLIGENCE) ACT 1945.**

This does not defeat the action but allows the court to assess the extent to which the plaintiff may be said to have contributed to his/her own injuries. The Act applies to many torts and not simply negligence actions (see below on application to trespass to the person).

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[7] **WOOLDRIDGE v SUMNER** [1962]

In our scenario above, the extent to which Bill contributed to his own injuries could be assessed and his damages reduced in similar proportions - i.e. 50% to blame, damages reduced by 50%.

The applicability of contributory negligence to sports scenarios is obvious - thus jumping into a tackle from which one receives injuries could (for the purposes of negligence) lead to a finding that one was to such and such extent, also to blame.

Consent and trespass to the person

We have seen that an element of this tort is that such force (apprehended or applied) be 'unlawful'. Where consent (that is the voluntary agreement to the force) is evident this removes the element of unlawful force because the consent is enough without more (with some exceptions) to render such force lawful. Thus, consenting to surgery renders the infliction of force 'lawful'. This has obvious relevance for sport - contact (i.e. those sports where legitimate contact is part of the game), quasi-contact (where certain contact is inevitable) and non-contact (where though no contact is permitted contact may arise through 'inevitability'). Consent need not, in our sports context be express - implied consent being enough say through participation. A sportsman does not however consent to force, which could not reasonably be expected to happen in the course of a game involving heavy physical contact.[8] Thus off the ball incidents would undoubtedly fall into this category and it is not enough to infer consent to all forms of contact merely by participation.

However, the distinction between legitimate force as part of the game and illegitimate force is at times difficult to draw. Also, the extent to which one may consent to certain types of force, which result in at least some bodily injury, is a moot point as we will see from criminal law where consent is also a live issue. In **R v Brown** the House of Lords suggested that consent to injury that resulted in at least actual bodily harm committed recklessly was impermissible. This has obvious connotations for many contact sports - but we will look at this through the medium of criminal law.

Contributory Negligence & Trespass - assault & battery.

There is some debate as to whether contributory negligence can apply to assaults and batteries with some cases suggesting 'no', others suggesting 'yes'. The better view is that con neg can apply on appropriate facts but there is clearly the issue of proportionality between the plaintiff's and defendant's behaviour.

WORKSHOP : Consent & Contributory Negligence.

Reading:

Sports Law pp 486 – 490

Law Reform (Contributory Negligence) Act 1945.

Jones 7th Ed –(or 6th section 14.5)

The Legality of Boxing (1995) Legal Studies 181 (concentrate on the issue of consent)

1. Explain the nature of the defences of consent & contributory negligence.
2. What is the difference between consent & contributory negligence?
3. Is consent ever applicable to criminal and civil law actions?
4. How is consent relevant to sports activities?
5. Explain the difference between express and implied consent.
6. Is there a limit to the amount of force/type of injury that one can be said to consent to?
7. What is the effect of a finding that a person was/is contributory negligent?
8. Is there a limit to the extent to which a person can be said to be contributory negligent? E.G 100%?
9. If a judge finds that a person is say, 80% contributory negligent, what does this really say about who is to blame?

[8] see **R v Billinghurst** [1978] Crim LR 553.

VICARIOUS LIABILITY IN THE LAW OF TORT

C.H.Spurin

Introduction and Definition : Vicarious liability is that situation where one party is liable for the tortious act of another because there is a particular relationship between the parties and the tort is in some way connected to that relationship. The relationship which best illustrates this is that of employer and employee. In this situation the generally accepted view of the basis of liability is that if all the elements of the tort are proved against the employee then the employer is answerable for it if it was committed in the course of the employee's employment. It can be said therefore that an employer is responsible for any tort, which is committed by the employee in the course of his employment.

Who is an employee ? It is important to distinguish an employee from an independent contractor not only because an employer is not generally liable for the acts of an independent contractor but also for purposes of industrial safety legislation and national insurance payments. It is generally said that an employee works under a contract of service whereas a contractor works under a contract for services. While the description of the contract by the parties may be evidence it is not conclusive - **Ferguson v John Dawson.**[9]

At one time, the test for the relationship was thought to be one of control - that is to say a contract of services was one where the employer could not only order what should be done, but also, how it was to be done - **Collins v Hertfordshire** C.C.[10]

However, it has now been recognised that the absence of such control is not conclusive proof against the existence of a contract of services and attempts to find a more suitable test have been made. One of the better known tests to ascertain whether a contract is one of service or of services is that laid down in **Short v Henderson**.[11] Lord Thankerton said that a contract of service has the following characteristics : i) A master's power to select his servant : ii) Payment of remuneration : iii) Master's right to control the method of work and iv) Master's right to suspend or dismiss.

One of the most helpful comments was that of Lord Denning in Stevenson, **Jordan & Harrison v Macdonald & Evans.**[12] He said that one feature, which seems to run through a contract of services is that a man is employed as part of a business, and his work is done as part of the business whereas under a contract for services the work is not integrated into his business but only accessory to it. [13]

It can be said nowadays that control is no longer the sole determining factor; other factors may be of importance, such as provision of own tools, power of hiring, and financial risk later.

A particular problem may arise in respect of borrowed employees as distinct from the employees of independent contractors. This is the situation where A is the general employer of B, but C, by agreement with A (which may or may not be a contractual agreement) is making temporary use of B's services and B, in the course of employment commits a tort against X, a third party. **Mersey Docks v Coggins.**[14]

Course of Employment. For the employer to be vicariously liable, the employee's act must have been in the course of his employment. The act will be within the course of employment if it is expressly or impliedly authorised by the employer, or is an unauthorised manner of carrying out an authorised act, or is necessarily incidental to something, which the employee is employed to do. In deciding whether an employee's act is within the scope of his employment it is best to c6nsider the differing kinds of acts which may occur.

Careless acts of an employee. By far the commonest kind of wrong is one due to the unlawful carelessness of the employee. Such an act may still be in the course of employment even if the employee is not acting strictly in the performance of his duty. **Century Insurance Co v N.I.R.T.B**.[15] A petrol tanker driver smoked whilst delivering petrol to a garage even though he had been forbidden from doing so. An explosion destroyed the garage.

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9 **Ferguson v John Dawson** (1976) 3 All.E.R. 8817.
10 **Collins v Hertfordshire** C.C (1947) KB 598.
11 **Short v Henderson** (1946) 62 TLR 427
12 **Jordan & Harrison v Macdonald & Evans** (1952) 1 TLR 10.
13 see also **Ready Mixed Concrete** v **MoP** (1968) 1 All.E.R. 433.
14 **Mersey Docks v Coggins** (1947) AC 1
15 **Century Insurance Co v N.I.R.T.B**. (1942) AC 509.

However, if the courts consider that there has been to great a deviation from employment, then the employer won't be liable. **Storey v Ashton.**[16] A driver had been sent to deliver wine and collect empty bottles. 0n the return trip he obliged a friend by driving off in another direction. Held : He was outside the scope of his employment; "every step he drove was away from his duty".

Mistakes by an employee. Bayley v Manchester Railway.[17] A porter mistakenly pulled the claimant, a passenger) from a train, believing it was going in the wrong direction and P was injured. Held : The railway company was liable as his employer. The porter was doing, albeit in a blundering manner, his normal job of seeing that passengers got on the right train.

Another application of this idea of a mistaken act by an employee is an act done to protect the employer's property. An employee has implied authority to take steps which are reasonable in all the circumstances, to protect it, and it is a question of degree as to whether or not there had been an excess of this implied authority which, would take the act outside the course of the employee's employment. **Abrahams v Deakin.**[18] An employee suspected a person of having attempted to steal from the employee's employer. After the supposed attempt had ceased the employee then, mistakenly tried to arrest the suspect. Held : The employers were not vicariously liable, since the arrest after the supposed theft had ceased wasn't made to protect the employer's property but out of vindictiveness. Compare this with **Polland v Parr & Sons.**[19] A carter reasonably but mistakenly believed that a boy had been stealing sugar from the carter's cart. He struck the boy who fell, and a cart-wheel went over his foot. Held : The act was within the carter's course of employment and thus the employers were vicariously liable. The blow, although somewhat excessive, was not sufficient to render it outside the scope of employment.

Intentional wrongs of an employee. Here two rules are settled.

Rule One : The act done may still be within the course of employment even, if it is expressly forbidden by the employer. The prohibition of an act, or a class of acts will only prevent the employer being liable if it actually restricts what the servant is employed to do. If the prohibition merely forbids a particular mode of doing an act, then it will not prevent the employer being liable. which kind of a prohibition it actually is will be a question of fact in each case.

Limpus v L.G.O.C.[20] A driver of the defendant's bus had printed instructions not to race with or obstruct other busses. He disobeyed this, and obstructed the claimant's busses causing a collision. Held : D was liable since what the driver did was merely to carry out in an improper manner that which he was in fact employed to do i.e. promote his employer's passenger service business.

A particular problem, as regards prohibitions by employers, is the situation where an employee gives a lift to an unauthorised person and cases in this area show conflicting views. **Twine v Bean's Express.**[21] A van driver had been forbidden to give lifts to unauthorised persons and there was a notice to this effect on the dashboard. Due to the driver's negligence, his unauthorised passenger was killed. Held : The employer was not liable since at the time of the accident the employee was not acting in the course of his employment. Similarly in **Conway v Wimpey**,[22] an employee despite a prohibition, gave a lift to a employee of another firm, on a dumper truck on a building site, who was injured by his negligent driving. Held. The employer was not liable since the servant was not acting in the course of his employment. Contrast this with the following case.

In **Rose v Plenty**,[23] a milkman, despite a prohibition by his employer engaged a thirteen year-old boy to help him. The boy was injured by the milkman's negligent driving while he was a passenger on the float. Held : The employer was liable. The milkman was, by engaging the boy, acting in the course of his employment since his job was to deliver mild and engaging the boy helped him to do this.

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16 **Storey v Ashton** LR 4 QB 476.
17 **Bayley v Manchester Railway** (1873) LR 8 CP 148
18 **Abrahams v Deakin** (1891) 1 Q.B. 516.
19 **Polland v Parr & Sons** (1927) 1 KB 236.
20 **Limpus v L.G.O.C** (1862) 1 H+C 526
21 **Twine v Bean's Express (**1946) 62 TLR 458 :
22 **Conway v Wimpey** (1951) 2 KB 206,
23 **Rose v Plenty** (1976) 1 W.L.R. 141 :

Rule Two : The servant is not necessarily acting outside the scope of his employment merely because he intends to benefit himself and not his employers - if the dishonesty occurs whilst the employee is carrying out the type of task which he is employed for; and where an employer by his own negligence, whether this lies in his choice of employees or in the manner in which he supervises them, induces or facilitates the theft by his employees of goods entrusted to them, he may be liable.

Lloyd v Grace. Smith & Co.[24] the defendant, a firm of solicitors, employed a managing clerk who conducted their conveyancing business without supervision. The claimant, a widow, owned some cottages. She wanted to increase her income on them. She went to see the defendant for advice, and the clerk tricked her into transferring ownership of the cottages to him, which he promptly sold keeping the profit to himself. Held : The defendant was liable.

Morris v Martin,[25] the claimant sent her fur coat to be cleaned and the cleaners, with her permission, sent it on to the defendant's who were specialist cleaners. Martin, the defendant's employee, who was given the job of cleaning it, stole the coat. Held the defendant clearners was liable.

The position of the negligent employee : The injured party can choose to sue either the employer or the employee. Usually it is the employer who is sued since the employee is unlikely to be able to pay substantial damages. The fact that an employer is found vicariously liable for the acts of his employee in no way relieves the employee of his own liability to his employer who may sue to recover the damages paid out to the injured party. The employers rights are to be found under the Civil Liability (Contribution) Act 1978 and at common law. **Lister v Romford Ice & Cold Storage Co.**[26] An employer or his insurance company, suing in subrogation, can sue the employee for breach of an implied term in the contract of employment that he will indemnify his employer against any loss resulting from his wrongful act.

There has since been an agreement between employers/insurers and trade unions that the rights will not be exercised : usually such actions would be bad for industrial relations and could lead to damaging strikes - but an impecunious underwriter or a trustee in bankruptcy may not feel constrained to follow this practice. To be binding an actual agreement with consideration on both sides would be needed.

Principal and agent : Unless they are in the relationship of employer/employee, there is no general liability on a principal for the tortious acts of his agent. The law does however impose such liability in two specific instances.

i) Statements If an agent, in carrying out his function of bringing his principal into contractual relations with a third party makes a false statement then the principal will be liable.

This liability it seems will cover fraudulent statements, **Mullens v Miller**[27] and also negligent statements statements, **Gosling v Anderson**.[28]

ii) Vehicles. An owner of a motor vehicle is vicariously liable for the negligence of anyone who is driving it with his consent and on his behalf : **Morgans v Launchbury.**[29]

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24 **Lloyd v Grace. Smith & Co** (1912) AC 716

25 **Morris v Martin** (1966) 1 QB 716

26 **Lister v Romford Ice & Cold Storage Co** (1957) 1 All.E.R. 125

27 **Mullens v Miller** (1882) 22 Ch.D 194

28 **Gosling v Anderson** (1972) 223 E.G. 1743.

29 **Morgans v Launchbury** (1973) AC 127.

Independent Contractors. As a general rule a person who engages an independent contractor is not liable for the torts committed by the contractor or the contractor's employees, provided he has not authorised the acts (expressly or impliedly) and he has taken reasonable care to select a competent contractor and given adequate supervision and instruction. However there are exceptions to the general rule.

In certain situations, the person who engages the contractor to carry out the work remains liable so that whilst he delegates the work to the contractor he is not legally permitted to delegate the duty and responsibility to the contractor.

a) **Non delegable duties.** The majority of statutory duties such as for example the duties under the Factories Act 1961 are non delegable. **Gray v Pullens.**[30]

If a person has a statutory power to do something which would otherwise be unlawful then if he delegates the exercise of this power to a contractor he may still be liable for the acts of the contractor. **Darling v A.G.**[31]

b) **Withdrawal of support.** In general, landowners have a right to have their land or buildings supported by those of his neighbour. If the neighbour employs an independent contractor, who, by his actions activates withdrawal of that support, the neighbour will be liable. **Bower v Peate** .[32]

c) **Operations on the highway.** Where work is done by an independent contractor 0 or under the highway, the employer is liable if the contractor negligently causes damage to a highway user or to an occupier of premises adjoining the highway.

Hardaker v Idle D.C.[33] The claimant's house was damaged by independent contractors, employed by the council, who negligently repaired a fractured gas pipe : Held : The council was liable.

d) **Strict liability** In situations where the law imposes strict liability irrespective of fault a person may be held responsible for the acts of his independent contractors. the most important illustration of this being the Rule in **Rylands v Fletcher** : other examples are escape of fire & damage caused by animals.

e) **Extremely Hazardous Acts :** The person engaging an independent contractor to perform an extra-hazardous act may be liable for the contractor's acts. **Honeywill & Stein v Larkin**[34] and **Matania v N.P.B**.[35]

f) **Other cases :** Where the person engaging an independent contractor remains liable for the contractor's acts include

i) the duty of a contractual bailee to safeguard his bailor's goods.

ii) an employer's duty to ensure the safety of his employees.

iii) a hospital's duty of care towards patients.

It should be noted that a person engaging a contractor is not vicariously liable for merely collateral negligence. For the person to be liable the tortious act by the independent contractor must be one he was engaged to do and not merely an act connected with what he was engaged to do : **Padbury v Holloway.**[36]

30 **Gray v Pullens** (1864) 5 B+S 970.
31 **Darling v A.G** (1950) 2 All.E.R. 793
32 **Bower v Peate** (1876) 1 QB 321.
33 **Hardaker v Idle D.C**. (1896) 1 QB 335 :
34 **Honeywill & Stein v Larkin** (1934) 1 KB 191
35 **Matania v N.P.B**. (1936) 2 All.E.R. 633.
36 **Padbury v Holloway** (1912) 28 T.L.R. 494.

CONTRIBUTORY NEGLIGENCE

C.H.Spurin

Introduction and Definition : Where the plaintiff by his own negligence contributes to the negligent damage that is caused to him by the defendant, the defendant may be allowed to have the damages awarded against him reduced to take into account the fact that the plaintiff has negligently contributed to his own loss.

Points to note about contributory negligence

a). It relates exclusively to the issue between the defendant & the plaintiff. It is not concerned with the issue between co-defendants.

b). It's rules are only applicable where both the plaintiff and the defendant have been at fault and the fault of each was an operative cause of the injury to the plaintiff.

c). Although it is called contributory negligence its operation is not limited to the tort of negligence.

The common law position. The common law was reluctant to permit apportionment of damages. Either the plaintiff would have to bear the entire loss or the defendant would have to compensate the plaintiff for his loss. The result was that if the plaintiff was contributorily negligent his claim would fail.[37]

Conversely if the defendant had the last opportunity to avoid the incident then the defendant would be held to liable for the plaintiff's loss. [38]

In Maritime claims the common law allowed for a 50/50 apportionment of damages. The result was that either P and D met half the cost of the loss each or P or D paid for all of the loss.

The Statutory Position.

sl(1) Maritime Conventions Act 1911. Following an International Convention the UK had already signed, the MC Act provides that

'where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was at fault.'

The result of this was that at least in cases of maritime collisions the common law rules were not applicable. This led to calls for the common law rules to be altered to allow apportionment of loss relative to the fault of each party.

s1(1) The Law Reform (Contributory Negligence) Act 1945. 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 damage 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.

sl(4) L.R.(C.N.) Act 1945 Damage includes loss of life and personal injury.

sl(4) L.R.(C.N.) Act 1945 Fault covers negligence, breach of statutory duty or other act or omission which gives rise to liability in tort, or would apart from this act give rise to a defence of contributory negligence.

sl(2) L.R.(C.N.) Act 1945 Where damages are reduced under the Act, the court shall first find and record the total damages which would have been recovered had the complainant not been at fault.

Before the defendant can establish a case for apportionment of damages under the rules of contributory negligence the defendant must prove

a). That P was at fault. This in turn involves

  i). Discussing the meaning of Fault.

  ii). What standard of care is required of P.

b). That P's negligence was a cause of the damage suffered by P.

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37 **Butterfield v Forrester** [1809].

38 see **Davies v Mann** (1842).

Fault : There is no reciprocal duty of care. In order to plead contributory negligence the defendant need not prove breach of a duty of care owed to him by the plaintiff. What he has to show is that the plaintiff failed to take reasonable care for his own safety in respect of the risk which defendant's negligence exposed him.

Nance v British Columbia Electric Rly [1951] per Simon V *"when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued and all that is necessary ... is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury.'"*

Davies v Swan Motors [1949} : The plaintiff rode on the offside step of a dust cart. The defendant overtook the cart in a bus and a collision ensued whereby the plaintiff was killed. Held : The dustcart driver and the bus driver were both negligent and jointly liable but the plaintiff's damages were reduced because of his contributory negligence in riding on the step knowing it was a dangerous thing to do.

If the defendant cannot show that the plaintiff was at fault then the plaintiff will recover in full. It is possible that the plaintiff's negligence is so great and the defendant's so small that the plaintiff recovers nothing at all.

The Standard of care owed to himself by the plaintiff. The standard of care required of the plaintiff is judged by objective criteria similar to that required of a defendant though it may be less stringent in its application.

Jones v Livox Quarries [1952] : Per Lord Denning *'... 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 be hurt himself; and in his reckonings he must take into account the possibility of others being careless.'*

Froom v Butcher [1975]: The plaintiff was not wearing a seat belt when due to D's negligence his car was in a collision with defendant's. The failure to wear a seatbelt resulted in the plaintiff sustaining greater injuries than he otherwise would have done. Held : The plaintiff's damages were reduced by 20%.

O'Connell v Jackson [1971] : The plaintiff contributed to his own injuries by not wearing a crash helmet whist riding his moped.

Alternative Danger : The Rule in The Bywell Castle Case. The plaintiff will not have contributed negligence if, by the defendant's negligence, he was placed in a dilemma, and 'in the agony of the moment' he chose the wrong alternative.

Jones v Boyce [1816] : The coupling joining a stage coach to the train of horses broke and a stage coach careered off out of control. The plaintiff, a passenger on the top of the coach decided to jump off to safety and broke his leg in the process. The coach came safely to rest at the side of the road so in the event the plaintiff would have been safer if he had stayed where he was. Held : The Plaintiff could recover in full.

Clayards v Dethick & Davis [1848] : The defendant obstructed the entrance to P's stables. One of the plaintiff's horses was injured trying to get around the obstruction. Held : The defendant was liable for all the loss.

Adams v **Lancashire & Yorkshire Railway** (1869). The plaintiff must not take disproportionate risks. A passenger fell off a train trying to close a door. There was plenty of room in the carriage and the train had almost reached the station. The plaintiff failed to recover. The risk was unnecessary.

Harrison v B.R. (1981). A guard was injured pulling a passenger (who had attempted to board the train while it was moving and then found himself in difficulties) onto a moving train. The guard's instructions were to put the brakes on not to assist passengers in such situations. Held : The plaintiff was found to be 20% contributorily negligent.

Standard of care required of children. It is possible that there is an age below which a child cannot be held to be contributorily negligent though this is not clear. The courts do seem to have a more lenient attitude towards young children.

Gough v Thorne (1966) : A lorry driver indicated to three children that it was safe for them to cross the road. A bubble car overtook the lorry and seriously injured a 13 year old. Held : The plaintiff was not contributorily negligent.

Per Denning L: *'A very young child cannot be guilty of contributory negligence. An older child may be; but it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as reasonably to be expected to take precautions for his or her own safety: and then he or she is only to be found guilty if blame should be attached to him or her.'*

Yachuk v Oliver Blaise Co (1949) : The defendant sold petrol to a 9 year old child who said it was for his mother. The child played with the petrol and was burnt. Held : The defendant was negligent for supplying the child. The plaintiff was not contributorily negligent for he was too young to know or understand the dangers of playing with petrol.

Oliver v Birmingham & Midland Bus Co (1933) : The plaintiff a 4 year old child was crossing the road holding his grandfather's hand. A bus approached suddenly without warning. The grandfather panicked and let go of the child's hand and the child was injured. Held : The defendant was liable and notwithstanding the grandfather's negligence the plaintiff could recover full damages.

Standard of care and workmen. The policy behind an employer's statutory duty of care under the Factory Acts is to afford protection to employees. The courts are reluctant to impose too high a standard on employees where it would undermine the intention of the Acts to make employers insist on employees acting in their own best interests.

Caswell v Powell Duffryn Collieries (1940) : Per Wright L:

"*what is all important is to adapt the standard of negligence to the facts, and to give due regard to the actual conditions under which the 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.'*

Causation in Contributary Neg1igence. The plaintiff's negligence does not have to contribute to the accident$_1$ merely to the extent of the plaintiff's injuries.

Froom v Butcher : Failure to wear a seatbelt did not cause the accident - but increased the plaintiff's injuries which reduced the plaintiff's award for damages.

Owens v Brimmell [1977] The plaintiff accepted a lift with a driver whom he knew to be drunk. Held : The plaintiff was contributorily negligent.

Stapley v Gypsum Mines [1953] : The plaintiff and his partner were told to bring down the roof of a mine because it was unsafe. The plaintiff and X tried unsuccessfully to collapse the roof and then decided to carry on working as normal. The roof then collapsed on them killing the plaintiff. Was the plaintiff the sole author of his loss or was X (and therefore the defendant, as his employer under the principles of vicarious liability) a contributor to the plaintiff's loss. The plaintiff was found 80% liable for his own loss.