HOLMAN WEBB LAWYERS

Webinar: July 6 2021
Apportionment and Contribution in Insurance

TOPICS COVERED:

1. Contributory negligence.
2. Failing to keep a proper lookout.
3. Intoxication.
4. Contributory negligence can defeat a claim by being determined at 100%.
5. Contributory negligence in contract.
6. Joint tortfeasor, where judgment entered for a defendant.
7. Proportionate liability.
8. Where the plaintiff is unable to recover from the concurrent wrongdoer.
9. Liability of an employer for a hire worker.

1. CONTRIBUTORY NEGLIGENCE

What is it? The defence of contributory negligence is based on the proposition that each person is responsible for his/her own safety, to a certain degree, and that when his/her conduct falls below the required standard he/she is legally liable for contributing to a situation in which he/ she was injured.

Contributory negligence must be specifically pleaded as a defence to a claim and, since it is raised by way of defence, the onus is on the defendant to prove that the plaintiff failed to use reasonable care, that had reasonable care been taken the plaintiff's damage would have been diminished, and the extent of that diminution.

Contributory negligence in tort was originally a total defence to a plaintiff's claim.

In *Butterfield v Forrester (1809), 103 ER 926* the plaintiff was thrown from his horse and injured after striking a pole. The pole had been placed partly across the road by the defendant while he was doing repairs to his house. If the plaintiff had 'not been riding very hard' he might have observed and avoided the pole.

The court held that a plaintiff cannot recover damages for hitting an obstruction caused by the defendant if a plaintiff using common and ordinary care would have avoided the obstruction; one person's fault will not dispense with the plaintiff's duty to use ordinary care.

This was explained as the 'last clear chance' doctrine – the plaintiff had the last clear chance to avoid injury. The defendant was negligent, but there would not have been an accident had the plaintiff exercised ordinary care.

In Australia, the Law Reform (Miscellaneous Provisions) Act 1965 created apportionment of liability in cases of contributory negligence, and the "*the damages recoverable in respect of the wrong are to 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".*

THE CIVIL LIABILITY ACT

Division 8 of Part 1A of the Civil Liability Act 2002 deals with contributory negligence.

The negligence of the person (plaintiff) is an objective test – section 5R(2) "*the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person*" but is based on "*what that person knew or ought to have known at the time*".

FRANK PODREBERSEK v. AUSTRALIAN IRON AND STEEL PTY. LIMITED 29 May 1985

> *494. The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, i.e. of the degree of departure from the standard of care of the reasonable man ... and of the relative importance of the acts of the parties in causing the damage.*

Watt V Bretag (1982) 56 ALJR 760

762 *The speed and size and weight of the vehicles in contributing to the severity of the damage should be taken into account, not merely those factors which contributed to the collision. ... For example, where the collision is between a semi-trailer or other juggernaut vehicle and a pedal bicycle, even if the driver and the plaintiff rider each made an equal contribution to causing the collision, it would generally be just and equitable to reduce the plaintiff's damages not by half, but by much less. Similarly, excessive speed may greatly increase the damage, even though the fault of the other driver was the major cause of the collision.*

2. FAILING TO KEEP A PROPER LOOKOUT

Jackson v McDonald's Australia Ltd [2014] NSWCA 162

The plaintiff's claim failed, but (if the plaintiff had succeeded), the Court would have found the plaintiff's contributory negligence to be 70%. The plaintiff slipped after walking through a clearly signposted wet floor and did not hold onto any handrails. McDonalds would have had 30% of the liability for its failure to mop up the spill immediately. However this was somewhat of an irrelevant point as causation was not established.

Whilst the majority accepted that the defendants (McDonalds and Holistic cleaning) had breached their duty of care, the plaintiff bore the onus to prove that, but for the defendants' negligence he would not have slipped. He had to establish that there was water on the soles of his shoes when he fell and the presence of the water caused him to fall.

He failed to discharge the onus. The Court found that the plaintiff "merely surmised" his soles were wet. Even if there was water on his soles, it did not follow as a matter of "common experience" that he slipped by reason of wetness.

Barrett JA stated: "*People wearing dry shoes walk on wet stairs every day and do not slip. People wearing wet shoes walk on dry stairs every day and do not slip. People wearing dry shoes slip on dry stairs every day*..." (at [119]).

Fitzsimmons v Coles Supermarkets Australia Pty Ltd [2013] NSWCA 273

The Court found the plaintiff 50% contributorily negligent for failing to heed the bright yellow 'wet floor' signs positioned around the puddle of water on which the plaintiff slipped. Coles bore 50% of the liability because its signs were low lying and outside the normal field of vision of customers and it failed to station an employee around the spill to warn customers.

Another interesting take away from this case:

The fact that the Plaintiff was wearing thongs on the day of the incident, carrying a baby on her hip, and distracted by the items on the shelves, did not make her contributorily negligent. Basten JA commented that there was no evidence that the soles of thongs were inherently more slippery than those of regular footwear. His Honour also remarked that customers at supermarkets or other retail premises are entitled to be distracted by the items displayed. In other words, it was common for customers to be looking at the shelves and not the floor.

Hamilton v Duncan [2010] NSWDC 90

The Court found the plaintiff 30% contributorily negligent for not maintaining a proper lookout for a hole despite being aware of the hole in which he tripped and even warning a witness of its presence minutes prior to the accident. The occupiers bore the remaining liability for its failure to inspect the area and fill in the hole(s) in a timely fashion.

3. INTOXICATION

S 50 Civil Liability Act – No recovery where person intoxicated.

50(3) –If the court is satisfied that the death, injury or damage to property (or some other injury or damage to property) is likely to have occurred even if the person had not been intoxicated, it is to be presumed that the person was contributorily negligent unless the court is satisfied that the person's intoxication did not contribute in any way to the cause of the death, injury or damage.

50(4) When there is a presumption of contributory negligence, the court must assess damages on the basis that the damages to which the person would be entitled in the absence of contributory negligence are to be reduced on account of contributory negligence by 25% or a greater percentage determined by the court to be appropriate in the circumstances of the case.

Craig William JACKSON v LITHGOW CITY COUNCIL [2008] NSWCA 312

The plaintiff, while moderately intoxicated, had taken his dogs for a walk at 3.30am. While he had no recollection of the accident, he alleged that he had fallen over a low wall into a concrete drain.

The trial judge while dismissing the claim as she was not satisfied that the plaintiff had fallen over the wall) had found:

> *[43] I am satisfied that the wall, by reason of it being low to the ground, that its edge was partially obscured by plants growing on the ground against it, that it was within the contour of the slope and the lighting in the park as observed by Mr Burn, created a hazard for people walking across the park at night. The wall would not readily be seen*

by a sober person taking care for his or her own safety. A drop of about 1.5 metres from the wall would be totally unexpected to someone coming on it at night.

[44] I find that that accident was likely to have happened even had the plaintiff not been intoxicated.

The Court of Appeal considered that the plaintiff was intoxicated, so section 50(4) of the Civil Liability Act applied (the mandatory reduction of 25% for contributory negligence) as "*The appellant went for a walk at night with his dogs when intoxicated. I do not think that requires a court to conclude that a greater contribution than 25% reduction of damages was necessary, especially as he fell over a 1.5 metre wall above a concrete drain which was unlikely to have been seen even by a sober person*."

4. CONTRIBUTORY NEGLIGENCE CAN DEFEAT A CLAIM BY BEING DETERMINED AT 100%

Section 5S of the Civil Liability Act provides for a finding of contributory negligence of 100% with the result that no damages are to be awarded.

The final report with the recommendations that lead to the Civil Liability Act commented (paragraph 8.25 and 8.23):

Our view is that while the cases in which it will be appropriate to reduce the damages payable to a contributorily negligent plaintiff by more than 90 per cent will be very rare, there may be cases in which such an outcome would be appropriate in terms of the statutory instruction to reduce the damages to such an extent as the court considers 'just and equitable'. The sort of case we have in mind is where the risk created by the defendant is patently obvious and could have been avoided by the exercise of reasonable care on the part of the plaintiff.

Voluntary assumption of risk is a complete defence in the sense that it provides the basis for denying the plaintiff any damages at all.

Courts prefer the defence of contributory negligence because it enables them to apportion damages between the parties, thus allowing the plaintiff to recover something, even in cases where the plaintiff bears a very significant share of responsibility for the harm suffered.

Watson v Meyer [2012] NSWDC 36

The plaintiff was injured when she was bitten by the defendant (her boyfriend's) horse. The plaintiff and her boyfriend were riding stallions (Freckles and Wrangler). The plaintiff's other horse, a mare (Aletist) was 'in season' and had been placed by the plaintiff in another paddock.

The defendant's horse became excited, threw the defendant to the ground and then bit the plaintiff.

The allegations of contributory negligence included:

- the plaintiff failed to inform the defendant that 'Aletist' was in season.
- the plaintiff failed to avoid riding her horse 'Freckles' in the company of 'Wrangler' in the direction of, or near, or in the vicinity of 'Aletist' which was in season.

- the plaintiff failed to advise or warn the defendant not to ride 'Wrangler' in the direction of, or near, or in the vicinity of 'Aletist'.

The plaintiff failed to establish liability against the defendant, but regardless Judge Gibson considered contributory negligence, finding that the plaintiff's contributory negligence was 100% and decided:

> 254 "*The plaintiff was wholly responsible for the decision to put the two mares in the arena paddock in which she and the defendant had been regularly riding for the past eight months. She was the owner of the property, she was responsible for the transfer of these mares, which were her property, and she formed the decision to put them in this paddock without consulting the defendant*."
>
> 255 "*the defendant was absent from the property and would have had no way of knowing that either of the horses was in season unless he was told by the plaintiff*."

The Court of Appeal considered the appeal and referred it back to the District Court because of the judge's failure to give reasons and contradictory reasons in relation to conversations between the plaintiff and the defendant (accepting the defendant's version of the conversations). It seems that:

- the plaintiff knew the mare was in season but did not know the risk of the stallions being excited,
- the defendant knew of the risks of stallions being excited near a mare in season, but did not know that the mare was in season.

Richardson v Mt Druitt Workers Club [2011] NSWSC 31

The plaintiff slipped and fell while climbing over a locked gate at the club, rather than returning to the club to collect the key.

The basis of the plaintiff's claim against the club included:

- this was the first time the plaintiff had found the gate closed and locked;
- the main entrance to the club premises was closed and the only open entrance was on the other side of the building, which was signed 'No pedestrian access'; but it is not alleged that there was any physical impediment to its use;
- the defendant knew that patrons would expect to use the rear entrance;
- steel bollards were in place close to the gate that allowed the plaintiff to climb onto the gate when otherwise it might not have been possible and the gate was slippery because it was constructed of metal and was wet;
- the defendant failed to ensure that the gate was not locked before closing time and to provide an open pedestrian rear access for the use of club patrons, when it encouraged the plaintiff and other patrons to walk to and from their homes at the rear of the premises;
- the defendant placed "the plaintiff in a position where the only means of egress available to him was to climb the fence";
- there was no intercom at the gate to enable persons such as the plaintiff to call for assistance to unlock the gate when the defendant knew that it was remote from the club and was, at the time, the only authorised pedestrian access from the club;
- the defendant failed to warn the plaintiff, by announcement of the club's public address system that the gate had been locked.

The court found for the defendant/ club, but also considered contributory negligence that:

> 26 *I should mention the terms of s 5S, providing that a court may determine contributory negligence at 100% and thus the claim be defeated. In this case, the plaintiff's injuries must be regarded as entirely resulting from his own foolish decision to climb the gate, an action which would have been obviously dangerous even in daylight but which must have been even more obvious at night and in the rain.*

In both case, the plaintiffs' cases failed and the findings of contributory negligence were unnecessary. If a plaintiff is 100% negligent for their own loss, then any negligence by the defendant has not caused the loss. So, it would be unlikely for a finding of 100% contributory negligence to be made as the plaintiff's claim should fail anyway.

5. CONTRIBUTORY NEGLIGENCE IN CONTRACT

Until and including the decision *Astley v Austrust Limited (A65-1997) [1999] HCA 6*, contributory negligence did not apply to a claim in contract, but only because the statutory scheme, at that time, did not allow a reduction for contributory negligence in contract claims.

> 47 *An implied term of reasonable care in a contract of professional services arises by operation of law. It is one of those terms that the law attaches as an incident of contracts of that class. It is part of the consideration that the promisor pays in return for the express or implied agreement of the promise to pay for the services of the person giving the promise. Unlike the duty of care arising under the law of tort, the promise in contract always gives consideration for the implied term. And it is a term that the parties can, and often do, bargain away or limit as they choose.*

The South Australian legislation did not allow a reduction of a claim in contract for contributory negligence. In New South, section 9 of the *Law Reform (Miscellaneous Provisions) Act 1965* was then amended to allow contributory negligence in contracts.

Contributory negligence might allow a reduction where the claim is based on a breach of a contract term - where a contract claim looks like a claim in tort; but will not affect a claim based on a contractual right, for example a contractual indemnity - unless the indemnity allows a reduction to the extent of the claimant's contribution to the loss.

6. JOINT TORTFEASOR , WHERE JUDGMENT ENTERED FOR A DEFENDANT

Section 5 of the *Law Reform (Miscellaneous Provisions) Act 1946* created the right of contribution between joint tortfeasors, which is now relied on in most cross claims for contribution.

James Hardie & Coy Pty Limited v Seltsam Pty Limited (S64/1998) [1998] HCA 78

The plaintiff, in an asbestos case, sued 3 defendants and entered consent judgment in favour of the third defendant. The first defendant attempted to claim contribution against the 3rd defendant.

Paragraph 5(1)(a) of the Act is a "*judgment recovered against any tort-feasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tort-feasor in respect of the same damage*".

In the Court of Appeal, Mason P. had held (16 of the HCA judgment):

> *The plaintiff and the respondent were the parties to the judgment which, albeit by consent, determined conclusively as between those parties that the respondent was not liable. This event alone put an end to the appellant's right of contribution simply because it had the effect of taking the respondent out of the class of persons against whom an order for contribution under the statute could be made.*

The High Court agreed (40) "*the order dismissing the plaintiff's action against the respondent was a final order which brought that action to an end*" and "*The plaintiff's cause of action against the respondent merged in the judgment, thereby destroying its independent existence*."

The first defendant would have had standing to oppose the entering of judgment for the third defendant.

Rule 36.1A(1) of the UCPR provides "*The court may, if satisfied that all relevant parties have been notified, give judgment, or order that judgment be entered, in the terms of an agreement between parties in relation to proceedings between them*."

Rule 36.15 "*A judgment or order of the court in any proceedings may, on sufficient cause being shown, be set aside by order of the court if the judgment was given or entered, or the order was made, irregularly, illegally or against good faith*."

If a plaintiff entered judgment for a defendant, then the defendant is not liable and cannot be a joint tortfeasor.

7. PROPORTIONATE LIABILITY

Proportionate liability allows for the sharing of liability among a number of wrongdoers. Each wrongdoer is only liable to the plaintiff for their proportionate share of the plaintiff's loss. Therefore to fully recover their loss, the plaintiff must sue and obtain judgment against all concurrent wrongdoers. This means that the plaintiff accepts the risk that one or more of the defendants may be insolvent or that he/ she may not recover his judgment against that defendant.

Part 4 of the Civil Liability Act 2002 introduced proportionate liability for claims for property damage and economic loss, but not personal injury claims. From the 1990 NSW Law Reform Commission report:

> *The position of plaintiffs in personal injury negligence actions is distinguishable from the position of plaintiffs in other negligence actions. The economic loss for which damages are sought in personal injury actions goes to the plaintiff's ability to pursue his/her livelihood in the physical sense and to the expenses incurred as a direct result of the accident. In cases of serious injury the unavailability of damages for economic loss will mean that a plaintiff cannot obtain appropriate medical help and care and must rely on the social welfare system for basic living expenses.*
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> *Damages for economic loss in non-personal injury cases go to a plaintiff's direct financial loss. There is no interference with a plaintiff's physical ability to work and earn money and therefore no compensation for the loss of this capacity. The plaintiff will not be forced to rely on the social welfare system and will not require on-going medical and other care.*

A 'concurrent wrongdoer' is defined (section 34(2) of the Act) as "*a person who is one of two or more persons whose acts of omissions (or actor omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim*".

Section 34(4) of the Act says "*For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died*".

8. WHERE THE PLAINTIFF IS UNABLE TO RECOVER FROM THE CONCURRENT WRONGDOER

Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd [2013] HCA 10

> 17. *The purpose of Pt 4 is achieved by the limitation on a defendant's liability, effected by s 35(1)(b), which requires that the court award a plaintiff only the sum which represents the defendant's proportionate liability as determined by the court. For that purpose, it is not necessary that orders are able to be made against the other wrongdoers in the proceedings. Section 34(4) provides that it does not matter, for the purposes of Pt 4, that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died. Thus under Pt 4 the risk of a failure to recover the whole of the claim is shifted to the plaintiff*.
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> 18 "*There is no express limitation on the nature of the claim which might have been brought by the plaintiff against a concurrent wrongdoer* …"

Woodhouse v Fitzgerald [2021] NSWCA 54

The plaintiff and defendant were rural neighbours. The Rural Fire Service conducted a controlled burning on the defendant's property. A week later the fire reignited in a hollow tree and spread damaging the plaintiff's property.

At hearing, the court found that the damage to the plaintiff's property would not have occurred but for the negligence of the Rural Fire Service. The Rural Fire Service was protected from liability (section 128 of the Rural Fires Act 1997).

The plaintiff contended that "*the RFS, being statutorily immune from liability for the damage caused by the fire, could not be a "concurrent wrongdoer*".

The court of appeal considered the decision in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*, but concluded that liability was an essential characteristic of concurrent wrongdoers. In that case, the High Court had decided that the wrongdoers were not liable for the same loss, rather than a finding on concurrent wrongdoers.

The Court of Appeal relied on the High Court judgment that "*To answer the description of 'a person ... whose acts or omissions (or act or omission) caused' that damage or loss or harm, C (in common with B) must be (or have been) legally liable to A for the damage or loss that is the subject of the claim. The reference in the definition to 'acts or omissions (or act or omission)' is to one or more legally actionable acts or omissions*."

If the alleged concurrent wrongdoer would not be liable to the plaintiff (for example a statutory immunity), then they are not considered a concurrent wrongdoer and their wrongdoing is not apportionable.

9. LIABILITY OF AN EMPLOYER FOR A HIRE WORKER

Where there is a claim against a third party, involving an injury to a hire worker, the employer usually has a non-delegable duty to its employee and has some liability. Based on the decision of *TNT v Christie*, the employers liability is 25%.

TNT AUSTRALIA PTY LIMITED v CHRISTIE & 2 ORS; CROWN EQUIPMENT PTY LIMITED v CHRISTIE & 2 ORS; MANPOWER SERVICES (AUST) PTY LIMITED v CHRISTIE & 2 ORS [2003] NSWCA 47

In the District Court, Delaney DCJ found that Manpower (the employer) owed a non-delegable duty of care, which it had breached by "*failing to adequately instruct and provide proper assistance to the plaintiff in the performance of his duties and failing to properly inspect, maintain and provide appropriate equipment for the plaintiff to undertake this [sic] task*."

Manpower had the non-delegable duty of care and attended the premises on a weekly basis, but there was no specific evidence other than that given by the plaintiff about what Manpower actually did when it went to those premises other than speak to the managers.

TNT was in a position analogous to that of an employer as regards to the (non-delegable) duty of care to the plaintiff. TNT exercised day-to-day control over the plaintiff's work activities, treating him the same as its employees as regards work on the factory floor. The plaintiff and TNT placed themselves in a relationship, day in and day out, indistinguishable from that of employee and employer.

Mason J quoting from *Wilsons and Clyde Coal Co v English* [1937] UKHL 2 "*The employer has the exclusive responsibility for the safety of the appliances, the premises and the system of work to which he subjects his employee and the employee has no choice but to accept and rely on the employer's provision and judgment in relation to these matters. The consequence is that in these relevant respects the employee's safety is in the hands of the employer; it is his responsibility.*

The employee can reasonably expect therefore that reasonable care and skill will be taken. In the case of the employer there is no unfairness in imposing on him a non-delegable duty; it is reasonable that he should bear liability for the negligence of his independent contractors in devising a safe system of work. If he requires his employee to work according to an unsafe system he should bear the consequences (Mason 52).

Shoalhaven City Council v Humphries [2013] NSWCA 390

In finding against liability of the council (the host employer), the court held that the council bore the onus of proof, and failed because it had no evidence that there had not been any training by the employer in lifting techniques or that the employer had not taken any steps to enquire if there was a safe system of works. The council had a safe system of work (if the employer had enquired) and liability of the council was a one off failure in detecting the actual weight of the lid.

The council ran the trial on the basis that Mr Humphries was under its direction and control and that it was not negligent; it is unsurprising that it did not, for forensic reasons, advance a case in the alternative that its procedures were so patently defective that the employer was negligent in not seeing that more should have been done.

In the present case his Honour found that it was the casual act of negligence on the part of the respondent's supervisor, Mr Gillard, that caused his injuries. In other words, Mr Gillard did not implement the safe system of work which the Council had put in place. In these circumstances it is difficult to see how that employer could be liable for Mr Gillard's casual act of negligence.

In these circumstances, any breach on the part of the employer in failing to make the relevant inquiry was not causative of the respondent's injury. In other words, it could not be said that the respondent would not have suffered the injury he did but for the failure of the employer to inquire of the Council as to the system of work it had in place for the removal of concrete sewer manhole covers.

Pollard v Baulderstone Hornibrook Engineering Pty Ltd [2008] NSWCA 99

The plaintiff was injured when he slipped and fell on the surface of a wash bay while cleaning the tyres of his truck after making a delivery of concrete.

The finding was a 20% reduction for the employers liability and 10% (overturned on appeal) for the plaintiff's contributory negligence.

The employer, Dependable Personnel Pty Limited must have known that the host employer, "*Pioneer's system of work exposed the appellant to different site conditions throughout the day. In my view it was incumbent upon Dependable, in order to discharge its non-delegable duty of care to the appellant, to ensure that a reasonably safe system of work was devised which ensured that the appellant could carry out work of an ambulatory nature with safety. It was clearly foreseeable that there may be a risk of injury at any of the numerous sites the appellant could be expected to visit on any given day to deliver concrete.*

The fact that the appellant was required to visit so many construction sites and that Dependable could anticipate that there would be a variety of hazards at each site to which the appellant might be sent, underlined the necessity to give him adequate instructions and guidance about what to do if he encountered conditions which exposed him to a risk of injury. In my view to discharge its non-delegable duty of care, Dependable had to adopt measures by way of both warning and/or training to require persons such as the appellant to report dangerous conditions and to seek instruction as to what to do in the circumstances.

I discern no error in the primary judge's inference that in such circumstances the appellant would have been instructed by Dependable or Pioneer not to leave his vehicle for the purpose of washing the wheels or that discussions between Dependable and Pioneer and/or the respondents would have led to an alternative solution being devised (McColl at 58).

Thank you for joining Holman Webb's General Insurance Group for our 6 July 2021 *Apportionment and Contribution in Insurance* webinar. If you have a query relating to any of the above information, or if you would like to speak with someone in Holman Webb's General Insurance Group in relation to a matter of your own – please don't hesitate to get in touch with Peter Bennett.

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