Contributory Negligence on Appeal

James Goudkamp & Donal Nolan examine contributory negligence in the Court of Appeal

Contributory negligence is a private law doctrine of considerable practical importance, and trial court decisions applying the doctrine are frequently the subject of appeals. In this article, we report the key findings of an empirical study of the operation of the contributory negligence doctrine in the Court of Appeal. A fuller report of the results of our study can be found in James Goudkamp and Donal Nolan, 'Contributory Negligence in the Court of Appeal: An Empirical Study' (2017) 37 *Legal Studies* (forthcoming). This study builds upon an earlier exploration of the handling of the contributory negligence doctrine at first instance: James Goudkamp and Donal Nolan, "Contributory Negligence in the Twenty-First Century: An Empirical Study of First Instance Decisions" (2016) 79 *Modern Law Review* 575.

The basics

We looked at all Court of Appeal decisions on contributory negligence handed down between 2000 and 2015 that were accessible online. Of the 112 claims in our dataset, 42% concerned appeals from the High Court and 58% appeals from a county court. The vast majority of the claims (92%) were for personal injury, with 7% being for property damage, and only 1% being for pure economic loss.

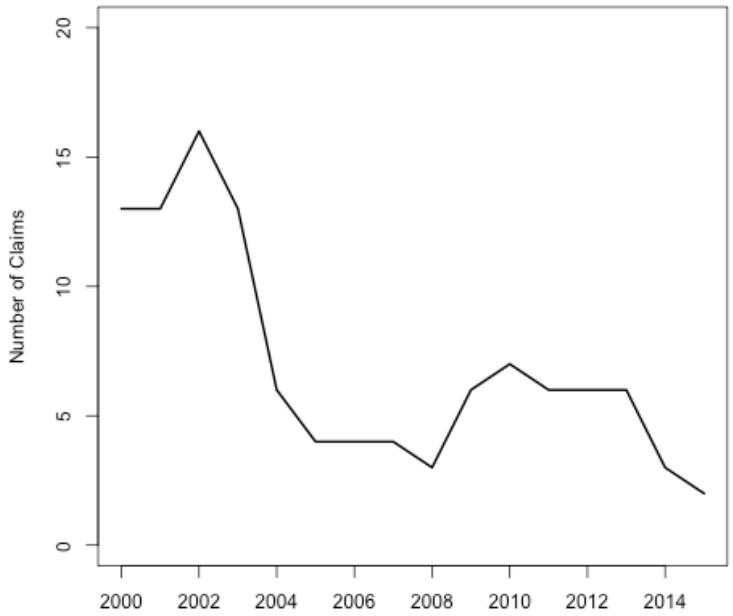
Road accident claims were by far the most common type of claim (45%), followed by employers' liability claims (28%) and occupiers' liability claims (12%). The 17 claims in other contextual areas (public liability, professional negligence and other) amounted to only 15% of the dataset. The prevalence of road accident and employers' liability claims (which together account for almost three-quarters of the decisions in the dataset) was predictable, as these are contexts where liability insurance is compulsory.

There were more appeals on the appropriate discount (56%) than on whether the claimant was guilty of contributory negligence (46%). This finding is noteworthy because the judicial guidance in this context emphasises that apportionment in cases of contributory negligence is a highly discretionary exercise and that appellate courts should be particularly slow to intervene on this issue. We might therefore have expected to see fewer appeals on discount than on guilt, but in our study the reverse was true.

Number of claims by year

There was a marked falling off in the number of claims in the dataset after 2003 (Figure 1). For the period 2000–2003, the average number of claims in the dataset per year rounds up to 14. For the remainder of the study period, the average number of claims per year rounds up to five. The falling off in the number of claims after 2003 may be attributable to a number of factors, including changes to the civil litigation funding arrangements, adjustments to the law governing permission to appeal, the clamping down on second appeals and increased emphasis on the need to divert cases from the judicial system to mediation.

Figure 1: Number of claims by year



Who appeals? Who wins appeals?

Claimants brought 41% of the appeals, and defendants 59%. Breaking this down by appeal type, 38% of the appeals on guilt were brought by claimants, and 62% were brought by defendants, while claimants brought 43% of the appeals on discount, and defendants 57%.

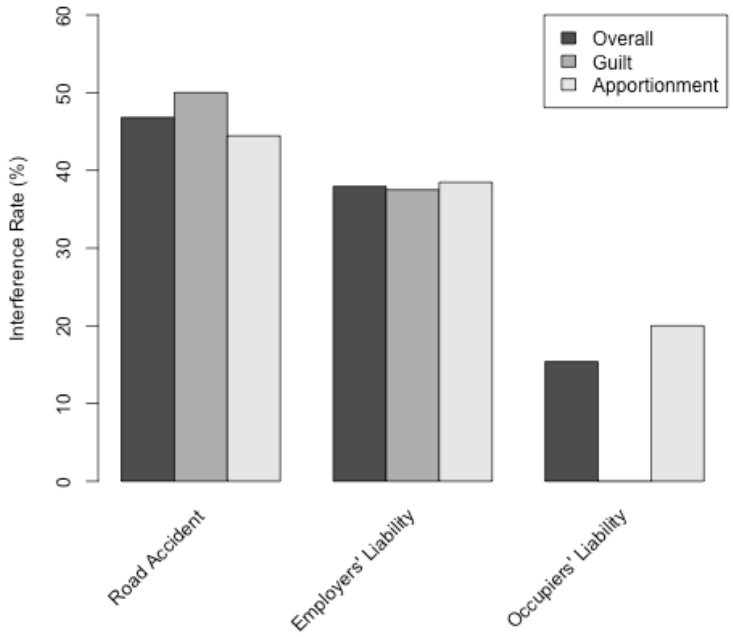
Claimants succeeded in 41% of appeals overall, with a success rate of 58% in appeals on guilt and 30% in appeals on discount. By contrast, defendants won only 31% of their appeals overall, with the success rates in appeals on guilt (32%) and on discount (31%) being very similar. Hence, while the chances of a successful appeal on apportionment were similar for claimants and defendants, claimants were almost twice as likely to win appeals on guilt as defendants.

Interference rate by claim type

The Court of Appeal overturned the determination of the first instance court regarding guilt in 42% of cases, and the determination of the first instance court in respect of discount in 34% of cases. This disparity is consistent with the principle that appellate courts should be particularly slow to interfere with apportionment decisions. The overall level of interference by the Court of Appeal was 38%.

It is important to bear in mind when looking at these figures that by the time a case reaches the Court of Appeal it has passed through a preliminary filter in the form of the permission to appeal process, and that this process has not been not captured by our study (because the relevant data are not publicly available). The proportion of first instance decisions on both the existence of contributory negligence and apportionment that are challenged successfully is therefore bound to be considerably lower than these figures would indicate. For a breakdown of the Court of Appeal's interference rate by claim type, see Figure 2.

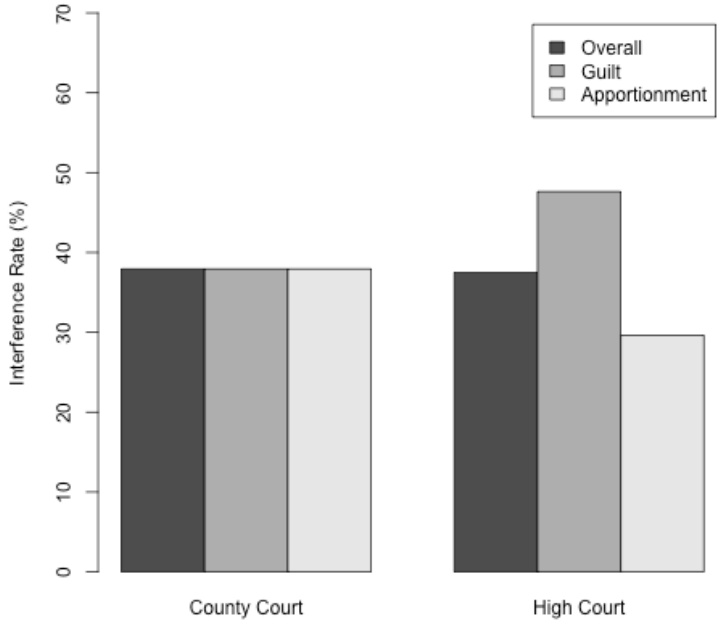
Figure 2: Appellate interference rate by claim type



Interference rate by trial court

Figure 3 shows the appellate interference rate broken down by first instance court. The overall interference rate in appeals from a county court was 38%, and in such cases the interference rates were the same for guilt and discount. The overall interference rate in appeals from the High Court was also 38%, but this time the appellate court was more likely to interfere on guilt (48%) than on discount (30%). Hence, while overall the chances of having a High Court decision on contributory negligence overturned on appeal were very similar to the chances of having a county court decision overturned, appellate interference on guilt was more likely where the first instance court was the High Court, while appellate interference on discount was more likely where the first instance court was a county court.

Figure 3: Appellate interference rate by trial court



Extent of interference with discount

The Court of Appeal interfered with a first instance decision on discount in 19 of the claims in our dataset. In eight of these cases, the discount was reduced; in the other 11, it was increased. The average reduction in the discount (31%) was considerably larger than the average increase in the discount (20%). Similarly both the smallest reduction (20%) and the largest reduction (50%) were greater than the equivalent figures for increases in the discount (8.3% and 30% respectively). Hence, it seems that when the Court of Appeal *reduces* the discount, it tends to do so by larger amounts than when it *increases* the discount. This suggests that the Court of Appeal tends to look favourably upon claimants in contributory negligence cases.

The Court of Appeal rarely changed the discount in either direction by a small amount. In only one claim was the change in the discount less than 10%, and in only four claims was it less than 20%. These results are consistent with the principle that appellate interference on discount is justified only where the appellate court concludes that the first instance court's decision was manifestly wrong.

The position following an appeal

The plea of contributory negligence succeeded following the appeal in 71% of the claims, and failed in 29%. The average discount imposed following an appeal was 50%. The lowest post-appeal discount imposed was 20% (three claims), while the highest was 80% (six claims).

By far the most popular discount following appeal was 50% (27 claims), which was three times more common than the next most popular discount, 33.3% (eight claims). That the Court of Appeal tends in discounting damages to use fractions that are routinely encountered in everyday life (one-half, one-third, etc) is no surprise. The preference for round figures coheres with the fact that apportionment is not an exact science.

Claimant age

Children brought 12% of the claims where it was possible to tell whether a human claimant was an adult or child, and adults brought 88%. The youngest claimants were aged 13, while the oldest was 79.

The most noteworthy finding of our study regarding claimant age was that the Court of Appeal was much more likely to interfere with a first instance decision on discount where the claimant was a child. The relevant figures are striking. In cases involving child claimants, the Court of Appeal interfered on discount in 78% of cases, whereas in cases involving adult claimants, it did so only 28% of the time. However, where the Court of Appeal did interfere on discount, there was a marginal preference for increasing the discount in both child and adult claimant cases (57% and 55% of cases respectively).

It would appear, then, that while the Court of Appeal is much more likely to differ from a first instance court on the appropriate discount where the claimant is a child, this does not translate into any clear tendency to lean either in favour of or against child claimants on the apportionment question. Furthermore, we discerned no similar disparity when it came to the existence of contributory negligence, albeit that there were only three claims in the dataset involving child claimants in which an appellate court was asked to overturn a first instance decision on this question.

Gender

Of the claims brought by human claimants, 69% were brought by men, and 31% were brought by women. The Court of Appeal was much more likely to interfere with a first instance decision regarding the existence of contributory negligence where the claimant was female (75% interference rate) than where the claimant was male (32%). When the Court of Appeal interfered on guilt, it found for the claimant on the issue in 56% of the claims involving female claimants, and in precisely half the claims involving male claimants.

Hence, while the Court of Appeal is more likely to differ from a first instance court on the guilt issue where the claimant is female, this does not translate into any preference either in favour or against female claimants on this question. Furthermore, when it came to apportionment, the trend was reversed, though less marked: in claims involving female claimants, the Court of Appeal interfered on discount only 22% of the time, whereas in claims involving male claimants, the interference rate was 42%.

Conclusion

To summarise, perhaps the most important of our findings are as follows:

- 44% of the appeals were on the existence of contributory negligence, while 56% were on discount.
- Claimants brought 41% of the appeals, and defendants 59%.
- The overall appellate interference rate was 38%, with interference being more likely on guilt than on discount.
- High Court decisions on contributory negligence were as likely to be overturned on appeal as county court decisions.
- The chances of a successful appeal on discount were similar for claimants and defendants, but claimants were almost twice as likely to succeed in appeals on guilt as defendants.
- When the Court of Appeal reduces discounts in contributory negligence cases, it tends to do so by larger amounts than when it increases discounts.

- The Court of Appeal rarely changes the discount in either direction by a small amount.
- The average discount following an appeal was 50%, and 50% was also by far the most popular post-appeal discount.
- The Court of Appeal was much more likely to interfere with respect to discount where the claimant was a child, and much more likely to interfere in relation to the existence of contributory negligence where the claimant was female.

James Goudkamp & Donal Nolan, University of Oxford (*james.goudkamp@law.ox.ac.uk; donal.nolan@law.ox.ac.uk*)