

Contributory Negligence in the Court of Appeal:

An Empirical Study

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In this article we report the results of an empirical study of 112 appellate decisions on the contributory negligence doctrine in England and Wales between 2000 and 2015. It is the first study of its kind in any common law jurisdiction, and builds on earlier research in which we looked at the doctrine's operation in first instance courts. Our dataset comprised every appellate decision in which contributory negligence was an issue that was handed down during the study period and which we were able to access electronically. The most important findings include the fact that appeals succeed more frequently in relation to the existence of contributory negligence than with respect to apportionment; that the overall prospect of winning an appeal on contributory negligence does not depend on whether the first instance court is a county court or the High Court; that claimants are nearly twice as likely to win an appeal regarding the existence of contributory negligence as defendants; and that by far most common discount imposed following an appeal is 50 per cent.

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INTRODUCTION

In this article we report the results of an empirical study of the operation of the doctrine of contributory negligence in the appellate courts of England and Wales.¹ This study builds on earlier research in which we looked at the doctrine's operation in first instance courts.² Our primary motivation for carrying out the current study was the same as our motivation for embarking on the first instance study: the fact that, despite the immense practical importance of the law of contributory negligence, very little is known about the way in which it is applied in the courts. Our earlier study helped to fill this gap by analysing 368 first instance decisions in England and Wales decided between 2000 and 2014. In this study, we focus on 112 appellate decisions handed down between 2000 and 2015. Our dataset comprised every appellate decision in which contributory negligence was an issue that was handed down during the study period and which we were able to access electronically. This article reports and discusses our findings.

As in our first instance study, the two central questions at which we looked were: how often a defendant's plea of contributory negligence was successful; and the

¹ We are unconcerned in the present article with the justifiability of the law of contributory negligence, with whether the scope of the doctrine is appropriate, or with the desirability of appellate intervention in the contributory negligence context generally or in specific cases. These issues, while important, are not matters with which we are concerned. Instead, the present study simply addresses the manner in which appellate courts (or, rather, the Court of Appeal) wield the doctrine of contributory negligence.

² J Goudkamp and D Nolan, 'Contributory Negligence in the Twenty-First Century: An Empirical Study of First Instance Decisions' (2016) 79 MLR 575.

quantum by which a claimant's damages were reduced when a finding of contributory negligence was made. And we again considered the extent to which the answers to these questions depended on the following variables: the claimant's age; the claimant's gender; the type of damage suffered by the claimant (personal injury, property damage or pure economic loss); the contextual setting of the claim; and the year of the decision.

However, this time, we also asked three further questions, namely: (1) how often did appellate courts overturn decisions of trial judges regarding either the existence of contributory negligence or, in cases where a finding of contributory negligence had been made, the amount by which damages were discounted; (2) to what extent did appellate courts vary the discount in cases where they overturned a first instance decision on apportionment; and (3) how often did claimants and defendants respectively succeed in appeals on contributory negligence. Furthermore, we also factored into our analysis whether the first instance ruling was a decision of the High Court or a county court.

We are unaware of any previous sustained studies of the operation of the contributory negligence doctrine at the appellate level in this or any other common law jurisdiction.³ Furthermore, all but one of the decisions in our study were

³ There is only a very sketchy and now dated discussion of the question in the classic English study of contributory negligence, GL Williams, *Joint Torts and Contributory Negligence: A Study of Concurrent Fault in Great Britain, Ireland and the Common-Law Dominions* (London: Stevens & Sons, 1951) pp 480-484. For brief surveys of appellate review in comparative fault cases in the United States, see H Woods and B Deere, *Comparative Fault* (Deerfield, IL: Clark

decisions of the Court of Appeal,⁴ and it has been pointed out that that court has been the subject of relatively little academic investigation more generally.⁵ This study thus addresses largely unexplored issues. More concretely, we hope that this article will be of value in the following respects. First, we believe that by providing reliable information about appellate decisions on contributory negligence our study will facilitate the settlement of disputes by giving litigants and their advisers a clearer picture of the likely outcome of a possible appeal on the issue. Second, by revealing when and how appellate courts have intervened on the apportionment issue, this article should help trial judges to decide what discount to impose following a finding of contributory negligence. Third, this article, read together with our first instance study, will enable comparisons to be drawn between the operation of the contributory negligence doctrine at first instance and on appeal (and indeed we make some such comparisons in this article).

Boardman Callaghan, 3rd edn, 1996) ch 21; and Victor Schwartz, *Comparative Negligence* (New Providence, NJ: LexisNexis, 5th edn, 2010) pp 415-422.

⁴ The exception is *Nixon v Thames Water Utilities Ltd* [2006] CLY 2913, a decision of Romford County Court in the exercise of its appellate jurisdiction. The only decisions of the House of Lords or Supreme Court on contributory negligence in the relevant time period were two Scottish appeals, *Robb v Salamis (McI) Ltd* [2006] UKHL 56, [2007] 2 All ER 97 and *Jackson v Murray* [2015] UKSC 5, [2015] 2 All ER 805, which were not included because our study was limited to decisions from England and Wales.

⁵ See G Drewry, L Blom-Cooper and C Blake, *The Court of Appeal* (Oxford: Hart Publishing, 2007) p 2. This book is itself the most notable exception to the more general academic neglect that its authors highlight, though see also BM Atkins, 'Interventions and Power in Judicial Hierarchies: Appellate Courts in England and the United States' (1990) 24 Law & Soc'y Rev 71; BM Atkins, 'Party Capability Theory as an Explanation for Intervention Behavior in the English Court of Appeal (1991) 35 Am J Polit Sci 881.

THE RELEVANT LAW IN OUTLINE

We begin by outlining the central features of the relevant law. There are four main matters that need to be addressed, all of which we return to throughout the analysis that follows. These are (1) the doctrine of contributory negligence itself, including the principles governing apportionment; (2) the requirement that litigants obtain permission to appeal; (3) the principles that govern the determination of appeals generally; and (4) the principles that apply to appeals relating to the contributory negligence doctrine specifically. We will briefly consider each of these questions in turn.

The doctrine of contributory negligence involves a two-stage analysis. At the first stage, the court considers whether the claimant was guilty of contributory negligence, in other words whether the damage that the claimant suffered was partly the result of the claimant's failure to take reasonable care with respect to his or her own interests. If the court concludes that it was, then the court proceeds to the second stage of the analysis, and considers to what extent the claimant's damages should be reduced for the contributory negligence. The governing legislation states that the court should reduce the claimant's damages to such extent as it thinks 'just and equitable, having regard to the claimant's share in the responsibility for the damage'.⁶ The decision as to apportionment is to be

⁶ Law Reform (Contributory Negligence) Act 1945, s 1(1).

approached in a ‘broad, jury-like and commonsense way’,⁷ with consideration being given to the relative blameworthiness of the parties and the causal potency of their respective conduct.⁸

As with appeals generally, a litigant who wishes to challenge a first instance decision regarding contributory negligence must normally obtain permission to appeal.⁹ Such permission can be sought either from the judge who made the original decision or from the appellate court.¹⁰ Permission to appeal will be granted only where the appeal would have ‘a real prospect of success’ or where ‘there is some other compelling reason why the appeal should be heard.’¹¹ In practice, the first limb of this test is by far the more important. An appeal will have ‘a real prospect of success’ when the prospect is realistic as opposed to fanciful.¹²

The vast majority of appeals involve a ‘review’ of the lower court’s decision.¹³ Such appeals will be allowed only where the decision of the lower court is found to be either (1) ‘wrong’ or (2) unjust because tainted by a serious procedural irregularity.¹⁴ It is only the first of these situations that is relevant for present purposes. The circumstances in which a lower court decision will be found to be

⁷ *Badger v The Ministry of Defence* [2005] EWHC 2941 (QB), [2006] 3 All ER 173 [16] (Stanley Burnton J).

⁸ *Stapley v Gypsum Mines Ltd* [1953] AC 663, 682 (Lord Reid).

⁹ CPR 52.3(1).

¹⁰ CPR 52.3(2).

¹¹ CPR 52.3(6).

¹² *Tanfern Ltd v Cameron-MacDonald* [2000] 1 WLR 1311 [21] (Brooke LJ).

¹³ CPR 52.11(1).

¹⁴ CPR 52.11(3).

‘wrong’ depend on the nature of the decision,¹⁵ with more discretionary decisions being more resistant to having that label applied to them, but in all cases it is impermissible for the appellate court ‘to interfere merely because left to its own devices it would have reached a different conclusion.’¹⁶ Appropriate respect must be afforded to the decision of the lower court.¹⁷

The decision as to whether a claimant is guilty of contributory negligence is one of fact.¹⁸ It has been said that ‘normally an appellate court is properly reluctant to disturb’ a determination of a trial court judge on the issue,¹⁹ and that intervention is warranted only if the trial judge’s decision in this regard ‘was manifestly wrong’.²⁰ Disturbance of apportionment decisions is particularly discouraged. According to Lord Reed in a recent Supreme Court decision, *Jackson v Murray*,²¹ apportionment ‘is inevitably a somewhat rough and ready exercise’, and since ‘different judges may legitimately take different views of what would be just and equitable in particular circumstances, it follows that those differing views should be respected, within the limits of reasonable disagreement.’²² Hence, he said, in the absence of an identifiable error (such as an ‘error of law, the taking into account of an irrelevant matter, or the failure to take account of a relevant matter’²³), an appellate court

¹⁵ ‘[T]here is no single standard which is appropriate to every case’: *South Cone v Bessant* [2002] EWCA Civ 763 [26] (Robert Walker LJ).

¹⁶ Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (London: Sweet & Maxwell, 3rd edn, 2013) para 24-197.

¹⁷ *EI Du Pont de Nemours & Co v ST Dupont (Note)* [2003] EWCA Civ 1368, [2006] 1 WLR 2793 [94] (May LJ).

¹⁸ *Grant v Sun Shipping Co Ltd* [1948] 2 All ER 238, 242 (Lord Porter), 246 (Lord du Parcq).

¹⁹ *Ibid*, 246 (Lord du Parcq).

²⁰ *Kerley v Downes* [1973] RTR 188, 193 (Edmund Davies LJ).

²¹ See n 4 above.

²² *Jackson* [28].

²³ *Ibid*, [35].

should intervene with respect to an apportionment decision only where it is ‘satisfied that the apportionment made by the court below was not one which was reasonably open to it’.²⁴

1. METHODOLOGY

In this section, we outline the methodology of our study, so that readers of the article can evaluate the methods that we used and draw their own conclusions regarding the results. Most of the data collection and coding for this study was done by research assistants who had legal backgrounds and a sound understanding of tort law generally and the law of contributory negligence specifically. We defined the parameters of the process, supervised it closely to ensure that the work was being done properly, and resolved issues that the research assistants brought to our attention (we actively encouraged them to raise any doubts they had with us, and they did so frequently).

(a) The scope of the study

Our study focused on appellate decisions on contributory negligence in England and Wales handed down between 1 January 2000 and 31 December 2015. There were three main reasons why we chose to look at this period: (1) we were

²⁴ Ibid.

interested in the contemporary operation of the contributory negligence doctrine in the appellate courts; (2) a sixteen-year period produced a sufficiently large number of cases to enable us to make meaningful claims about the operation of the doctrine; and (3) since 2000, it seems likely that most relevant appellate decisions have been available online.²⁵ The availability of online decisions made the data collection process much easier than it would otherwise have been.

(b) Finding the cases

In order to locate the relevant cases, the phrase ‘contributory negligence’ was entered as a search term into LexisNexis, and the results were then ordered by date. The full text dialogue box was used (that is to say, we did not enter these search terms merely into, for example, the catchword dialogue box). Searches were also run using the phrases ‘apportionment’ and ‘Law Reform (Contributory Negligence) Act 1945’ to ensure that no relevant cases were omitted. A cross-check was then run with Westlaw and Lawtel, and additional cases added to the dataset as necessary. All the search results were then filtered so that the only cases left were those in which the appellate court made a formal determination as to whether or not the claimant was guilty of contributory negligence, or as to the appropriate discount for contributory negligence.

²⁵ In 1999, the copyright entitlement over the republication of reserved judgments of the High Court and Court of Appeal previously held by court shorthand writers came to an end, and thereafter it would appear that most such judgments were uploaded onto the relevant online systems: see M Zander, *The Law-Making Process* (Oxford: Hart Publishing, 7th edn, 2015) p 302. While reserved judgments of the Court of Appeal are supposed to be uploaded onto these systems (ibid, p 273), the same is not true of ex tempore judgments. During the study period, it appears that between one-half and two-thirds of judgments of the Civil Division of the Court of Appeal were reserved (ibid).

Where an appeal involved multiple claimants or multiple defendants²⁶ we created separate entries for each individual claim in which contributory negligence was an issue.²⁷ We did this because in such cases claims that are technically distinct from each other are joined together in the same set of proceedings merely for reasons of convenience. Accordingly, from this point onwards we use the language of ‘claims’ rather than ‘cases’. By contrast, where a claim involved both an appeal and a cross-appeal on contributory negligence, we did not create separate entries, but simply noted the fact in our dataset.²⁸

The following categories of claim were excluded from the study:

(1) *Claims where the appellate court discussed the issue of contributory negligence, but did not make a formal determination in relation to it.* Examples include a discussion of contributory negligence in an appeal in respect of an application for an interim remedy,²⁹ and cases where the appellate court discussed contributory negligence

²⁶ We did not treat actions brought against an employee and his or her employer as involving multiple defendants since, in reality, the employer is the only defendant in such cases. Nor, in the case of *Sykes v Harry* [2001] EWCA Civ 169, [2001] QB 1014, did we treat an action against a defendant and his trustee in bankruptcy as involving multiple defendants, as again there is in effect only one defendant in such a case.

²⁷ There were two cases involving multiple claimants, namely *Goddard v Greenwood* [2002] EWCA Civ 1590, [2003] RTR 10 (two claimants) and *Minh Lac v Clayton* [2009] EWCA Civ 106 (three claimants). There were four cases involving two defendants, namely *Slack v Glenie* 2000 WL 544172; *Cook v Thorne* [2001] EWCA Civ 81; *Buyukardicli v Hammerson UK Properties Plc* [2002] EWCA Civ 683; and *Wells v Mutchmeats Ltd* [2006] EWCA Civ 963.

²⁸ There were eight such claims, namely *Slack v Glenie* 2000 WL 544172 (two claims); *Watson v Skuse* [2001] EWCA Civ 1158; *Anderson v Newham College for Further Education* [2002] EWCA Civ 505, [2003] ICR 212; *Lunt v Khelifa* [2002] EWCA Civ 801; *Home Office v Lowles* [2004] EWCA Civ 985; *West Sussex CC v Russell* [2010] EWCA Civ 71, [2010] RTR 19; and *Phethean-Hubble v Coles* [2012] EWCA Civ 349, [2012] RTR 31. The existence of cross-appeals was also made apparent by records for variables S-V in our dataset (see text to n 42 below for descriptions of these variables).

²⁹ See, eg, *Smith v Bailey* [2014] EWHC 2569 (QB), [2015] RTR 6 (where the High Court was exercising its appellate jurisdiction to review interim orders made by a Master of the Queen’s Bench Division).

but did not make a formal determination on the issue because the defendant was absolved of liability altogether.³⁰

(2) *Claims in which the only determination pertaining to contributory negligence was whether the doctrine applied to the cause of action for which the claimant was suing.* Appeal courts have periodically had to decide whether the doctrine of contributory negligence applies to a particular cause of action, such as battery³¹ and deceit.³² Where a decision of this kind was the only determination pertaining to contributory negligence in a case, we did not include the case in our study. This was because the study is concerned with the operation of the contributory negligence doctrine in claims to which it applies.

(3) *Claims in which the contributory negligence question was governed by foreign law.* Claims in which an English court was required to consider the doctrine of contributory negligence as it applied in a foreign jurisdiction were excluded from our study.³³ This was because our interest lay in the doctrine of contributory negligence as recognised in English law.

³⁰ See, eg, *Goose v Wilson Sandford (No 2)* [2001] Lloyd's Rep PN 189; *Horner v Norman* [2015] EWCA 1055; *Rollinson v Dudley MBC* [2015] EWHC 3330 (QB).

³¹ See, eg, *Co-operative Group (CW'S) Ltd v Pritchard* [2011] EWCA Civ 329, [2012] QB 320.

³² See, eg, *Standard Chartered Bank v Pakistan National Shipping Corp'n (Nos 2 and 4)* [2002] UKHL 43, [2003] 1 AC 959.

³³ See, eg, *Vann v Ocidental-Companhia De Seguros SA* [2015] EWCA Civ 572 (Portuguese law).

(c) Coding the claims

The research assistants scrutinised the decisions, abstracted relevant information from the judgments and populated the dataset accordingly.

Before we describe the coding that the research assistants used, we should say something about two recurrent scenarios that we encountered and how we dealt with them. In the first, the trial court absolved the defendant of primary liability, but went on to consider whether a finding of contributory negligence would have been made had the defendant been found liable. The appellate court then reversed the first instance court on the primary liability question, and went on to make a real finding on the contributory negligence issue.³⁴ The research assistants were instructed that when populating the dataset in such a case they should treat the trial judge's contingent findings regarding contributory negligence (both as to guilt and apportionment) as 'determinations' on the issue. They were also instructed to treat a challenge by one of the parties to either form of 'determination' as an 'appeal' by that party on the issue.

In the second recurrent scenario, the first instance court again absolved the defendant of primary liability, but this time *did not* go on to consider whether a finding of contributory negligence would have been made if the defendant had

³⁴ See, eg, *Sykes v Harry* [2001] EWCA Civ 167, [2001] QB 1014.

been found liable.³⁵ As in the first scenario, the appellate court then reversed the first instance court on the primary liability question, and went on to make a determination regarding the contributory negligence issue, which had been raised for the first time on appeal. This time, the dataset was populated on the basis that there had been no determination on contributory negligence by the first instance court (and hence no possibility of the appellate court ‘overturning’ any such determination) and no ‘appeal’ on contributory negligence by either party. We included claims of this kind in our study because our interest lay in the operation of the contributory negligence doctrine in appellate courts, and not only in the narrower question of appeals in relation to contributory negligence.

The variables in the dataset were as follows:

A: *The name of the case.*

B: *The citation of the case.*

C: *The date of the first instance decision.*

D: *The date of the appellate decision.*

E: *The name of the first instance court.*

F: *The name of the appellate court.*

G: *The type of claim.* The categories of claim were: (1) road accident; (2) employers’ liability;³⁶ (3) occupiers’ liability;³⁷ (4) public liability;³⁸

³⁵ See, eg, *Tasci v Pekalp of London Ltd* [2001] ICR 633.

³⁶ Defined as claims in which the defendant was sued in their capacity as the claimant’s employer. This was extended to relationships akin to employment: see, eg, *Mullaney v Chief Constable of the West Midlands* [2001] EWCA Civ 700, [2001] Pol LR 150 (police officer suing Chief Constable).

(5) professional negligence; and (6) other. If a claim was capable of being classified in more than one category, we made a judgment as to the most appropriate classification.³⁹

H: *The nature of the damage suffered by the claimant.* The categories of damage were: (1) personal injury (including psychiatric injury claims); (2) property damage; and (3) pure economic loss.⁴⁰

I: *Whether a finding of contributory negligence had been made at first instance.* If it appeared that no determination had been made, ‘N/A’ was entered.

J: *Where a finding of contributory negligence had been made at first instance, the percentage by which the claimant’s damages were discounted.* If no finding of contributory negligence had been made, ‘N/A’ was entered. ‘Unknown’ was entered where it was clear that a finding had been made but, because the text of the first instance decision was unavailable, and because the discount was not reported by the appellate court, the quantum of the discount was unascertainable.⁴¹

K: *The claimant’s gender.* Where the claimant was a corporate entity, or where it was not possible to discern the claimant’s gender, the cell was left blank.

L: *The claimant’s age at the time that the damage was suffered.* If the precise age of the claimant was unknown, then either ‘Child’ or ‘Adult’ was entered where it was clear

³⁷ Defined as claims in which the defendant was sued in their capacity as the occupier of premises.

³⁸ Defined as claims in which the defendant was sued in their capacity as a public authority.

³⁹ If an employer, occupier or public authority was sued in that capacity, the claim was always classified as a type (2), (3) or (4) claim respectively, even if (for example) the claim also involved a road accident. This decision was made because our sense from reading the decisions in the (relatively uncommon) claims concerned was that the capacity in which the defendant was sued was the best and most straightforward guide as to how the claim in question should be categorised.

⁴⁰ There were no claims in the dataset where the claimant was suing for more than one type of damage.

⁴¹ *Robinson v Midland Bank plc* (CA, 27 October 2000) was the only decision in the dataset in which this occurred.

that the claimant had been under or over 18 years of age at the relevant time. In some instances where the claimant's age was not apparent from the court's judgment, it was possible to obtain it from another source, such as a contemporary news report. The age thus obtained was entered, and the source of the information recorded in the notes column (column X). Where the claimant was a corporate entity, or where it was not clear even whether a human claimant was an adult or child at the relevant time, the cell was left blank.

M: *A brief description of the act or (where contributory negligence was not found) alleged act of contributory negligence.* Examples include 'Failing to keep a proper lookout', 'Stepping into the road without looking', 'Cycling on the wrong side of the road', and 'Carelessly undertaking patient lifting'. Where multiple acts of contributory negligence were found or alleged, only the most significant such acts were entered. Where the appellate court held that the claimant had been guilty of contributory negligence, only those acts which that court found amounted to contributory negligence were entered.

N: *A brief description of the wrongful conduct of the defendant.* Where the first instance court and the appellate court came to different conclusions on this issue, a description of the wrongful conduct as found by the appellate court was entered.

O: *Whether the appellate court acceded to a request to overturn the determination of the first instance court regarding the existence of contributory negligence.* If the existence of contributory negligence had not been considered at first instance, or if the appellate court had not been asked to disturb the first instance determination on

the issue, 'N/A' was entered. 'N' was therefore entered only in cases where the appellate court was specifically asked to disturb the first instance court's determination of the issue, and declined to do so.

P: *Whether the appellate court acceded to a request to overturn the determination of the first instance court regarding apportionment.* If apportionment had not been considered at first instance, or if the appellate court had not been asked to disturb the first instance determination on the issue, 'N/A' was entered. 'N' was therefore entered only in cases where the appellate court was specifically asked to disturb the first instance court's determination of the issue, and declined to do so.

Q: *Whether the claimant was found guilty of contributory negligence following the appeal.*

R: *Where the claimant was found guilty of contributory negligence following the appeal, the percentage by which the claimant's damages were discounted.* If the claimant was not found guilty of contributory negligence following the appeal, 'N/A' was entered.

S: *The size of any difference in the discount made for contributory negligence by the first instance court and by the appellate court.* The figure entered in this column represented the direction of the difference from first instance to appellate decision. For example, if the discount at first instance was 20 per cent and the discount imposed by the appellate court was 40 per cent, '20' was entered. Negative values were entered where the appellate court had reduced the discount. Where the appellate court did not overturn the first instance court on apportionment, 'N/A' was entered.

T: *Whether the claimant had succeeded in an appeal on the existence of contributory negligence.* If there had been no such appeal, 'N/A' was entered.

U: *Whether the claimant had succeeded in an appeal on apportionment.* If there had been no such appeal, 'N/A' was entered. 'N/A' was also entered in one case in which the claimant appealed on both the existence of contributory negligence and apportionment, and where the appellate court did not have to deal with apportionment because it allowed the appeal on the former issue.⁴²

V: *Whether the defendant had succeeded in an appeal on the existence of contributory negligence.* If there had been no such appeal, 'N/A' was entered.

W: *Whether the defendant had succeeded in an appeal on apportionment.* If there had been no such appeal, 'N/A' was entered.

X: *Notes.* Any interesting features of the claim were entered in this cell, and also such matters as the fact that the age of the claimant had been gleaned from a news report, and that there had been both an appeal and a cross-appeal on the contributory negligence issue.

(d) Checking the data

The data were collected and coded by research assistants. In order to confirm that the research assistants were not incorrectly excluding claims from the study, we instructed the assistants to send us a list of the claims that contained at least one of the relevant search terms but which they thought should be excluded from the study on the ground that they did not meet the criteria for inclusion. We checked a

⁴² *CTO Gesellschaft Fur Containertransport MBH and Co v Dziennik* [2006] EWCA Civ 1456.

random sample of 15 of these claims to determine whether they had been properly excluded. We were satisfied that the research assistants had proceeded correctly in respect of all of the claims.

Following the initial coding of the first group of 20 claims, we checked the results against the texts of the relevant judgments. This process led to the identification of some errors (which were corrected) and also to clarification of some of the coding instructions. Following this, the research assistants coded the remainder of the claims. All of the dataset entries were checked against the relevant judgments by a second research assistant or by one of us. Possible errors identified by this process were discussed by us, and we then decided whether an error had been made, and, if so, modified the dataset accordingly. As the foregoing reveals, all the entries in the dataset were double-checked by two different people. Indeed, a significant number were triple-checked, usually by three different people.

(e) Statistical analysis

The data were analysed by a trained statistician. The statistician used a statistical programme known as 'R' to perform the tests and to produce the graphs. She ran Pearson's chi-square tests to test independence between categorical variables (such as the frequency with which appellate courts intervened with respect to first instance decisions on contributory negligence) and Welch two-sample t-tests or

analysis of variance (ANOVA) as appropriate to measure the significance of observed disparities in the values of continuous variables (such as the size of post-appeal discounts for contributory negligence) across different categories of data (such as adult and child claimants). Wilcoxon rank sum tests with continuity correction were run as a cross-check of the t-test results. Linear and logistic regression analyses were conducted in order to control for confounding variables.

2. RESULTS

In this section of the article, we present the results of our study. Our main aim is simply to describe our findings, though we do make some observations about them as well. Further discussion of certain key findings can be found in the next section of the article.

We note that we distinguish in this section between *claims* and *appeals*. By a ‘claim’, we mean an action by a particular claimant against a particular defendant.⁴³ By an ‘appeal’, we mean each and every challenge mounted in the appellate proceedings to a determination of the first instance court on either the existence of contributory negligence or the appropriate discount. (Suppose, for example, that the trial judge had found the claimant guilty of contributory negligence and imposed a discount of 50 per cent. And suppose that in the appellate proceedings

⁴³ See text to nn 26-28 above.

the claimant challenged both the finding of contributory negligence and the size of the discount, and that the defendant had cross-appealed on the basis that the discount should have been higher than 50 per cent. This would be treated as three appeals in total: two by the claimant, and one by the defendant.) The number of claims and appeals differ in this study.⁴⁴ This is because in some of the claims (as in our example) there was more than one appeal, while in others contributory negligence was considered for the first time on appeal, so that there was no appeal by either party on the issue.

(a) General information

Our dataset contained entries for 112 claims in which an appellate court dealt with contributory negligence. 47 of the entries (42 per cent) concerned appeals from the High Court and 65 (58 per cent) related to appeals from a county court. There were no second appeals in our study, nor any appeals to the House of Lords or Supreme Court.⁴⁵ 103 claims (92 per cent) were for personal injury, with eight of the remaining claims (7 per cent) being for property damage, and only one (1 per cent) being for pure economic loss. Because there were so few cases in our dataset that were not personal injury cases, the results of the study relating to type of damage will not be reported.

⁴⁴ As can be seen, for example, by comparing the numbers of *claims* in the various contextual categories (Figure 1, below) with the overall number of *appeals* in those categories (Figure 3, below).

⁴⁵ See n 4 above, regarding the exclusion from the study of appeals to the ultimate appellate level from Scotland.

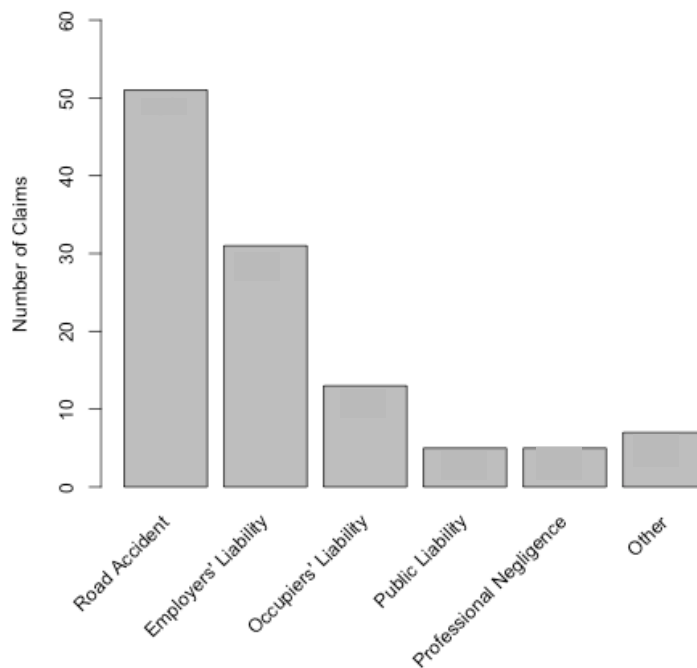


Figure 1 Number of claims by claim type

There was a more even spread of the claims across our six categories of claim type (or contextual setting), as seen in Figure 1. Road accident claims were by far the most common type of claim (45 per cent of claims), followed by employers' liability claims (28 per cent), and occupiers' liability claims (12 per cent). The 17 claims in the three remaining categories (public liability, professional negligence and other) amount to only 15 per cent of the claims in the dataset. The small number of claims in these categories should be kept in mind when assessing the relevant results. The claims in the 'other' category included claims arising out of

collisions at sea⁴⁶ and accidents on trains⁴⁷ and in a prison,⁴⁸ as well as a case concerning vandals letting off fire extinguishers in a church.⁴⁹ The prevalence of road accident and employers' liability claims (which together account for almost three-quarters of the claims in the dataset) was predictable, as these are contexts where liability insurance is compulsory.

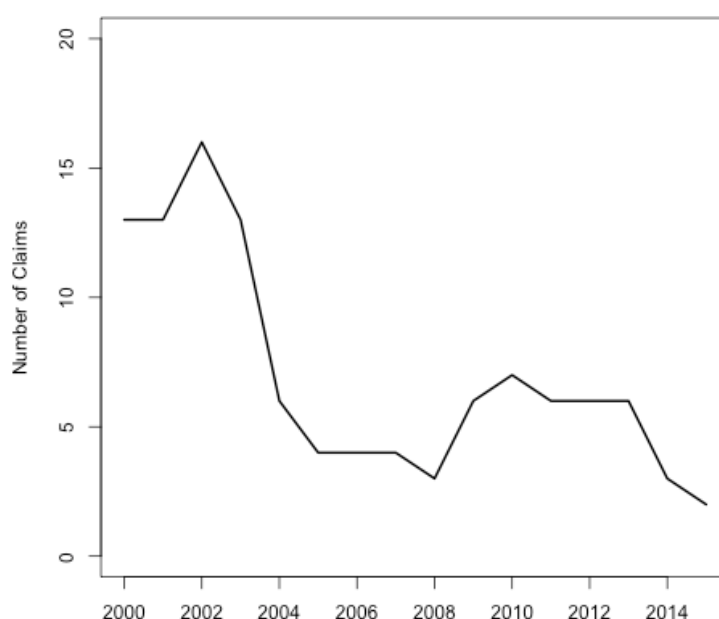


Figure 2 Number of claims by year

Figure 2 shows the number of claims in the dataset by year. The falling off in claims after 2003 is very marked. 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

⁴⁶ *Owners of the Selat Arjuna v Owners of the Contship Success* [2000] 1 All ER (Comm) 905.

⁴⁷ *Collins-Williamson v Silverlink Train Services Ltd* [2009] EWCA Civ 850.

⁴⁸ *St George v Home Office* [2008] EWCA Civ 1068, [2009] 1 WLR 1670.

⁴⁹ *Chubb Fire Ltd v Vicar of Spalding* [2010] EWCA Civ 981, [2010] 2 CLC 277.

period, the average number of claims per year rounds up to five. We consider possible explanations for this decline below.⁵⁰

Switching from the number of claims to the number of appeals,⁵¹ there were a total of 113 appeals in the dataset, of which 50 (44 per cent) were against determinations as to the existence of contributory negligence, and 63 (56 per cent) were against determinations as to the appropriate discount. The fact that more appeals concerned apportionment than guilt is noteworthy. This is because, as discussed above, the judicial guidance on appeals in this context emphasises that apportionment is a highly discretionary exercise and that appellate courts should therefore be particularly slow to intervene on this issue.⁵² In the light of this, one might expect to see fewer appeals on apportionment than on guilt, but in our study the reverse was true.

Claimants brought 46 (41 per cent) of the appeals, and defendants 67 (59 per cent). Breaking this down by appeal type, of the appeals on guilt, 19 (38 per cent) were brought by claimants, and 31 (62 per cent) by defendants. In relation to appeals on apportionment, 27 (43 per cent) were brought by claimants, and 36 (57 per cent) were brought by defendants.

⁵⁰ See text at nn 97-**Error! Bookmark not defined.** below.

⁵¹ Regarding this distinction between claims and appeals, see the text to nn 43-44 above.

⁵² See the text to nn 21-**Error! Bookmark not defined.** above.

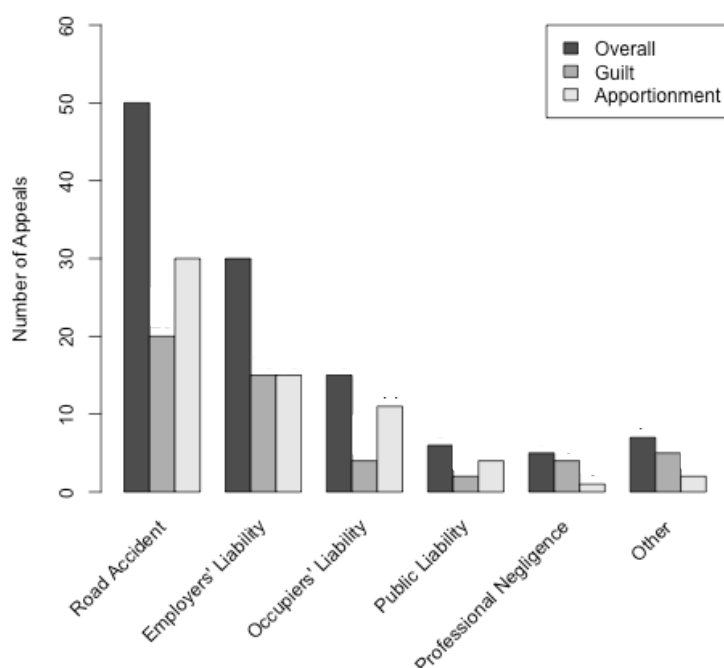


Figure 3 Number of appeals by claim type

Figure 3 shows the number of appeals by type of case.

(b) Appellate intervention

The appellate court overturned the determination of the first instance court regarding guilt in 42 per cent of cases, and the determination of the first instance court in respect of apportionment in 34 per cent of cases.⁵³ The overall level of appellate intervention was 38 per cent. When looking at these figures, readers

⁵³ We should be clear about what we mean by these statements. When we say, for example, that the appellate court overturned the determination of the first instance court regarding guilt in x per cent of cases, we mean that the appellate court acceded to a request to overturn the determination of the first instance court regarding guilt in x per cent of the cases *in which it was asked to do so*. See further the descriptions of variables O and P of our dataset (text near n **Error! Bookmark not defined.** above), from which results on intervention rates were generated.

should bear in mind 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.

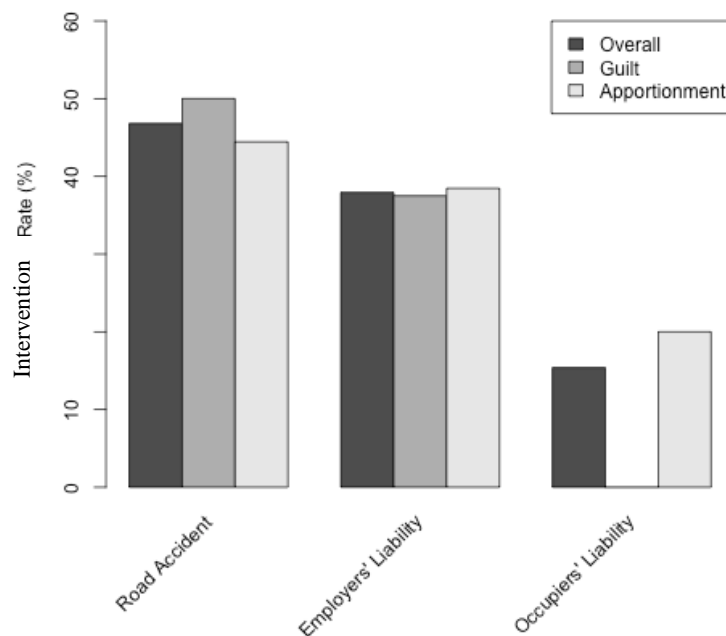


Figure 4 Appellate intervention rate by claim type⁵⁴

⁵⁴ The intervention rate on guilt in occupiers' liability cases was zero, which explains the presence of a line rather than a bar in the relevant section of Figure 4.

Figure 4 shows appellate intervention rates by claim type for the three claim types with the most claims (and where, therefore, the results carry more weight). As the graph shows, the overall appellate intervention rate was considerably lower in employers' liability claims (38 per cent) than in road accident claims (47 per cent).⁵⁵ However, statistical analysis suggests that this disparity may well be down to chance.⁵⁶ As for occupiers' liability claims, although the figures are relatively low, the results are nonetheless striking, in that in claims of this type, an appellate court intervened with respect to a first instance decision on guilt or apportionment on only two of the 13 occasions on which it was asked to do so, giving a very low overall intervention rate in that category of 15 per cent. Furthermore, statistical analysis suggests that the low rate of intervention in occupiers' liability cases as compared with road accident cases is unlikely to be attributable to chance.⁵⁷

⁵⁵ While intervention regarding guilt was more likely than intervention in connection with apportionment in road accident claims (50 per cent and 44 per cent, respectively), this was not true in employers' liability claims (rounding up to 38 per cent in both cases).

⁵⁶ Logistic regression analysis showed that when employers' liability claims were compared with road accident claims, the odds of appellate intervention were lower in the former, but not significantly so ($p = 0.449$). More generally, a Pearson's chi-square test on the null hypothesis that the appellate intervention rate is the same across all types of claim returned a relatively high p-value of 0.299 (suggesting no strong association between intervention rate and claim type at a general level). A p-value is the probability of obtaining an effect at least as extreme as the one in the sample data, assuming the truth of the null hypothesis. Hence, the lower the p-value, the more likely it is that the null hypothesis is false. The p-value in this instance is quite high, which suggests that the disparity in the interference rate in issue may well be attributable to chance (in the form of the sample of claims we happened to survey).

⁵⁷ Logistic regression analysis showed that when occupiers' liability claims were compared with road accident claims, the odds of appellate intervention were substantially lower in the former ($p = 0.055$).

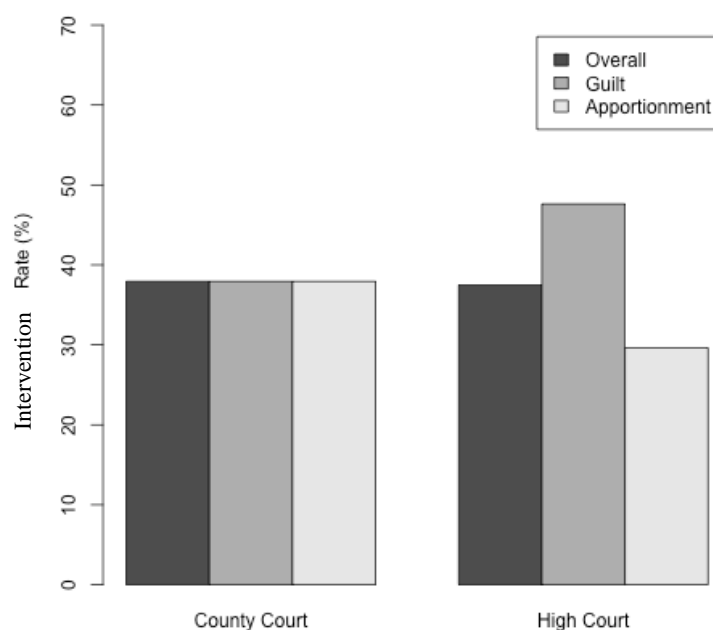


Figure 5 Appellate intervention rate by trial court

In Figure 5, the data on appellate intervention are broken down by the court of first instance. The overall intervention rate in claims on appeal from a county court is 38 per cent, and, as the graph shows, in such cases the intervention rates are the same for guilt and apportionment. The overall intervention rate in claims on appeals from the High Court is also 38 per cent, but this time the intervention rate regarding guilt (48 per cent) is considerably higher than the intervention rate with respect to apportionment (30 per cent). Hence, in our dataset, 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,⁵⁸ appellate intervention in relation to guilt was more likely where the first instance court was the High Court, while appellate intervention with respect to apportionment was more likely where the first instance court was a county court. However, statistical analysis suggests that these disparities may well be down to chance.⁵⁹

(c) Who wins appeals?

Turning to the question of who wins appeals on contributory negligence, Figure 6 shows that claimants are more likely to win than defendants, and that appeals by claimants regarding the existence of contributory negligence have a particularly high success rate. To put some flesh on these bones, in the claims in our dataset, claimants succeeded in 41 per cent of appeals overall, with a success rate of 58 per cent in appeals on guilt and 30 per cent in appeals on apportionment. By contrast, defendants won only 31 per cent of their appeals overall, with the success rates in appeals on guilt (32 per cent) and on apportionment (31 per cent) being very similar. Thus, in our dataset, while the chances of a successful appeal on apportionment were similar for claimants and defendants, claimants were almost twice as likely to succeed in appeals on guilt as defendants. It should be borne in mind here that defendants brought considerably more appeals in our dataset than

⁵⁸ Another investigator obtained a similar result in the context of a study of all decisions of the Court of Appeal handed down between 1983 and 1985: Atkins (1991), above n 5, p 894.

⁵⁹ A Pearson's chi-square test on the null hypothesis that the appellate intervention rate with regard to guilt is the same for both types of first instance court returned a p-value of 0.493. Running the same test with regard to appellate intervention with apportionment also yielded a high p-value ($p = 0.512$).

claimants.⁶⁰ It might therefore be that claimants are more selective in deciding whether to appeal. If so, that might explain why claimants are more likely to win appeals.

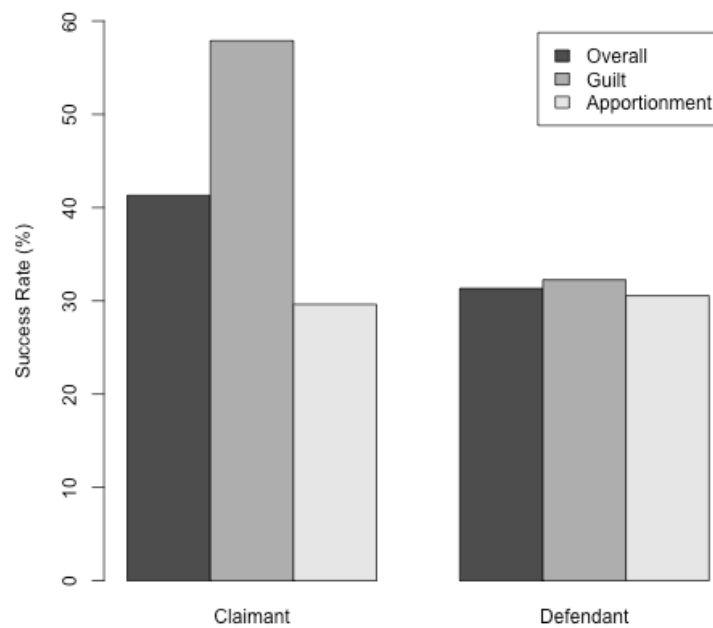


Figure 6 Success rate of appeal by party

Turning to the success rate of appeal by trial court and party (as shown in Figure 7), the chances of a claimant appeal from a county court succeeding (42 per cent) and the chances of a claimant appeal from the High Court succeeding (41 per cent) are very similar, and the same is true of defendant appeals (32 per cent and 30 per cent respectively).

⁶⁰ See the text near n 53 above.

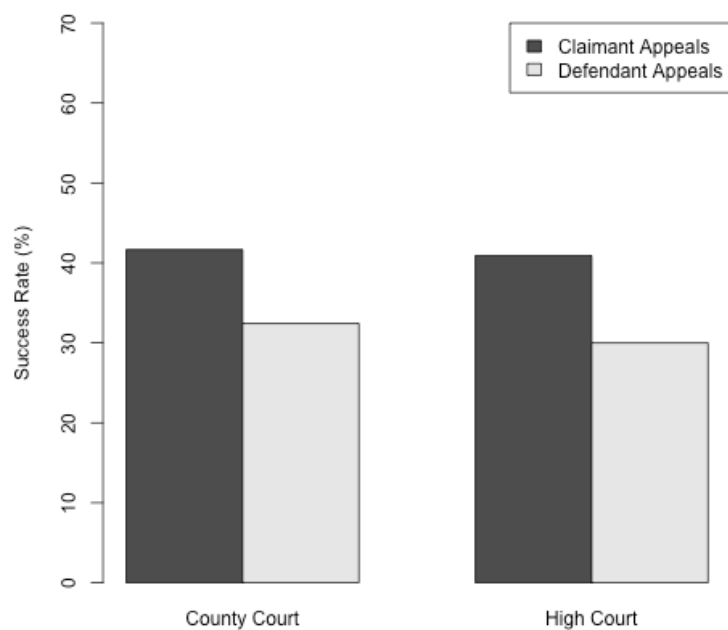


Figure 7 Success rate of appeal by trial court and party

(d) Extent of appellate intervention with respect to the discount

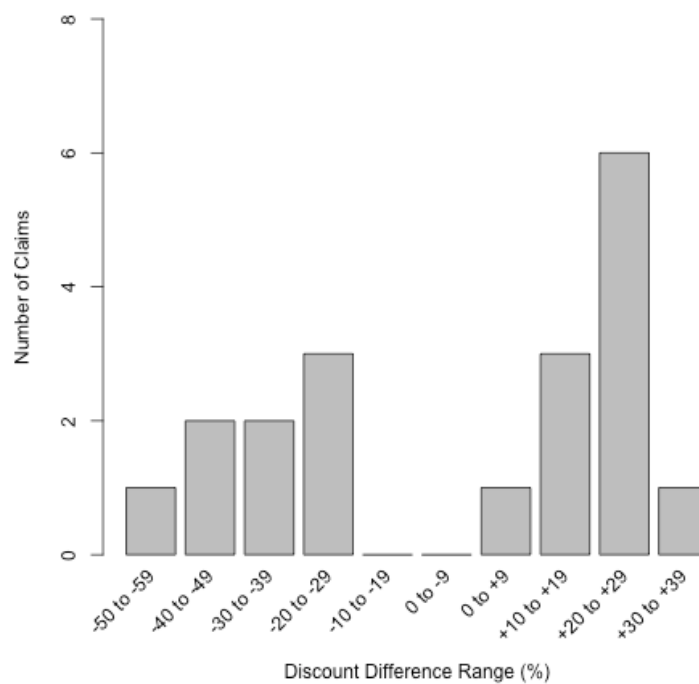


Figure 8 Difference in discount following appeal

There were 19 claims in our dataset where the appellate court intervened in relation to a first instance decision on apportionment. In eight of these cases, the discount was reduced, and in 11 it was increased. Figure 8 shows the extent to which the appellate court differed from the first instance court in these cases. The average reduction in the discount (31 per cent) was considerably larger than the average increase in the discount (20 per cent), and similarly both the smallest reduction (20 per cent) and the largest reduction (50 per cent) were greater than the equivalent figures for increases in the discount (8.3 per cent and 30 per cent respectively). Furthermore, statistical analysis suggests that the disparity between the average increase and the average reduction is unlikely to be down to chance.⁶¹ Hence it would appear to be the case that when appellate courts *reduce* the discount, they tend to do so by larger amounts than when they *increase* the discount.⁶² Set alongside Figure 6, these results suggest that appellate courts tend to look favourably upon claimants in contributory negligence cases. Finally, we can see from the way that the heights of the bars dip in the middle of Figure 8 (a bimodal distribution) that appellate courts rarely change the discount in either direction by a small amount. Indeed, there is only one claim in which the discount difference was

⁶¹ A Welch two-sample t-test comparing the average increase in discount with the average reduction in discount returned a p-value of 0.032. This result was broadly consistent with the result of a Wilcoxon rank sum test with continuity correction ($p = 0.04$).

⁶² In one employers' liability case, *Toole v Bolton MBC* [2002] EWCA Civ 588, the Court of Appeal found that there had been no contributory negligence at all, when at first instance a 75 per cent discount had been imposed for contributory fault.

less than 10 per cent,⁶³ and only four claims in which it was less than 20 per cent. Figure 9 presents the same data in a boxplot, which may assist understanding of the variability observed. The thick black line in the boxplot represents the median (i.e., most frequently occurring) discount difference, the box gives the first and third quartiles of the discount difference values,⁶⁴ and the dotted lines extend out to 1.5 times the interquartile range (i.e., the range between the value at the first quartile and the third quartile).

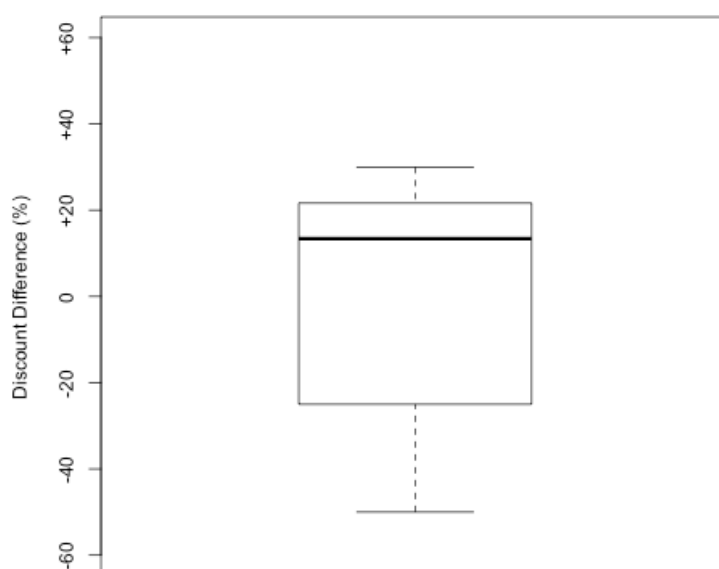


Figure 9 Boxplot of difference in discount following appeal

(e) Success of the plea and discount imposed following appeal

⁶³ *Eyres v Atkinsons Kitchens & Bedrooms Ltd* [2007] EWCA Civ 365, 151 SJLB 576 (where the Court of Appeal increased the discount from one-quarter to one-third).

⁶⁴ It is common for investigators to organise data into four equally sized bands according to their distribution. A 'quartile' is one of those four bands.

Our study also produced interesting data on the post-appeal success rate of the plea of contributory negligence and the post-appeal discounts imposed, which tended to reinforce some of the conclusions of our study of first instance decisions. Out of the 112 claims in our dataset, the plea of contributory negligence succeeded following the appeal in 80 claims (71 per cent), and failed in 32 claims (29 per cent).

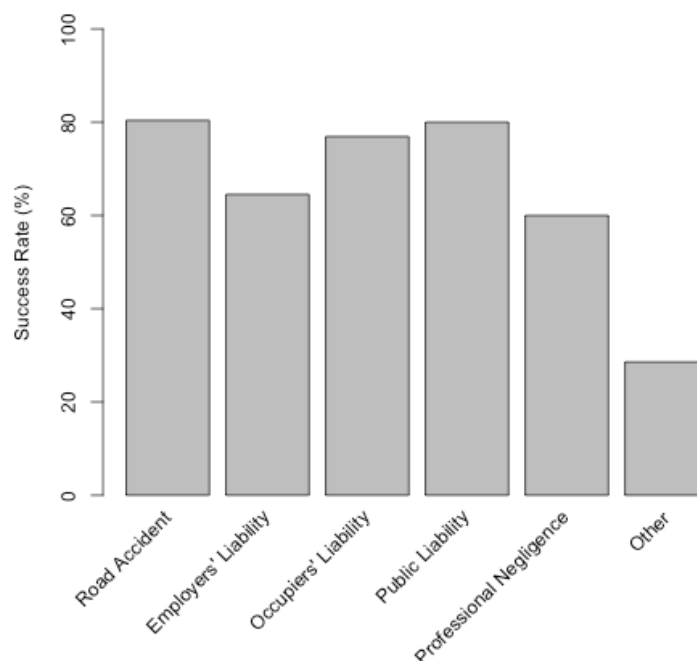


Figure 10 Post-appeal success rate of plea by claim type

Figure 10 shows the post-appeal success rate of the plea of contributory negligence by type of claim. Statistical analysis suggests that these variables might well be associated.⁶⁵ As can be seen from the graph, the post-appeal success rate of the

⁶⁵ A Pearson's chi-square test on the null hypothesis that the post-appeal success rate of the plea of contributory negligence is the same across all types of claim returned a p-value of 0.083.

plea is fairly similar across the three categories of road accident (80 per cent), occupiers' liability (77 per cent) and public liability (80 per cent). However, the post-appeal success rate is substantially lower than this in the three other categories: employers' liability (65 per cent); professional negligence (60 per cent) and other (29 per cent). The small number of relevant claims means that the low success rate in the final two categories should be treated with caution. Nevertheless, statistical analysis suggests that the very low post-appeal success rate of the plea in claims in the 'other' category is unlikely to be attributable to chance.⁶⁶

As for the low post-appeal success rate of the plea in the professional negligence category, while statistical analysis suggests that this might well be attributable to chance,⁶⁷ it does tally with a key finding of our earlier study, namely that at first instance the plea of contributory negligence is significantly less likely to succeed in claims of this type than in other types of claim.⁶⁸ Turning to the relatively low post-appeal success rate of the plea in employers' liability claims, the substantial number of claims in this category allows us to attach greater significance to this result, and statistical analysis provides some evidence of an association between this type of case and the post-appeal success rate of the plea.⁶⁹

⁶⁶ Logistic regression analysis showed that when claims in the 'other' category were compared with road accident claims (the largest category of claim), the odds of the plea of contributory negligence succeeding post-appeal were significantly lower in 'other' claims ($p = 0.01$).

⁶⁷ Logistic regression analysis revealed that when professional negligence claims were compared with road accident claims, the odds of the plea of contributory negligence succeeding post-appeal were lower in professional negligence claims, but not significantly so ($p = 0.304$).

⁶⁸ See Goudkamp and Nolan, above n 2, p 593.

⁶⁹ Logistic regression analysis revealed that when employers' liability claims were compared with road accident claims, the odds of the plea of contributory negligence succeeding post-appeal were lower in employers' liability claims ($p = 0.114$).

Any explanations offered for the relatively low post-appeal success rate of the plea in the ‘other’ and employers’ liability categories are inevitably speculative. However, it is perhaps noteworthy that in *all* the claims in the employers’ liability category in which the appellate court intervened with respect to a finding as to guilt at first instance it did so in favour of the claimant, whereas across the entire dataset the equivalent figure was 48 per cent. Hence, while our first instance study concluded that there was no evidence that trial judges were particularly lenient towards employees when it came to the existence of contributory negligence,⁷⁰ this study suggests that appellate courts may well be.

Turning to the discount imposed for contributory negligence following an appeal, the average post-appeal discount across the dataset was 50 per cent, so substantially higher than the average discount in our first instance study, which was 40.5 per cent.⁷¹ This disparity – which statistical analysis suggests is extremely unlikely to be down to chance⁷² – is doubtless connected to the fact that it seems that decisions regarding contributory negligence are more likely to be the subject of an appeal if a relatively large discount has been imposed at first instance.⁷³ This may be because in these cases there is a perception that more is at stake when it

⁷⁰ Goudkamp and Nolan, above n 1, pp 593-594. Leniency towards employees was, however, manifested at the apportionment stage: *ibid*, p 597.

⁷¹ *Ibid*, p 594.

⁷² A Welch two-sample t-test of the difference between the average discount in the first instance study and the average post-appeal discount in the current study gave a very low value ($p < 0.001$). This result was consistent with the result of a Wilcoxon rank sum test with continuity correction ($p < 0.001$).

⁷³ In the claims in the appellate study dataset, the average discount at first instance was 52 per cent, which is (again) considerably higher than the average discount in our first instance study of 40.5 per cent.

comes to contributory negligence, and hence that an appeal on the issue is more worthwhile.

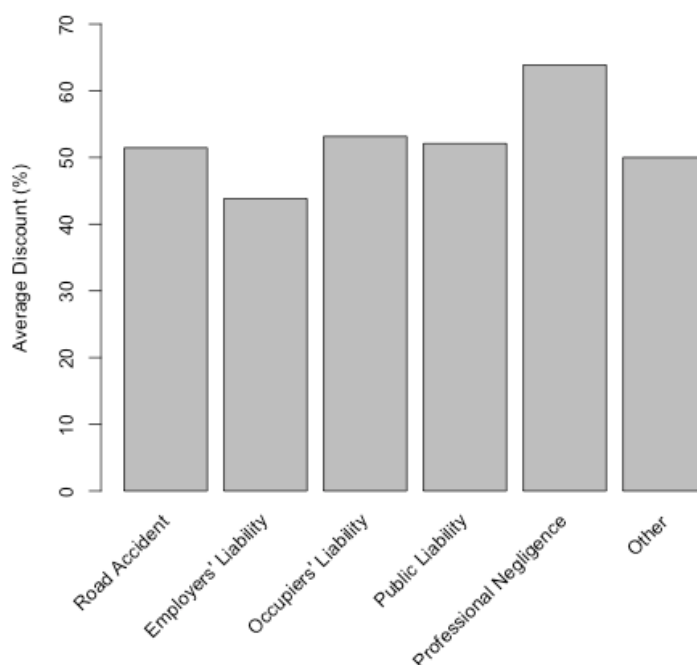


Figure 11 Average post-appeal discount by claim type

Figure 11 shows the average post-appeal discount by claim type. It reveals that the average post-appeal discounts for four of the categories of claim were fairly tightly clustered on or just above the overall average figure of 50 per cent, namely road accidents (51 per cent); occupiers' liability (53 per cent); public liability (52 per cent); and 'other' (50 per cent). By contrast, the average post-appeal discount in employers' liability cases was quite a bit lower than the average (44 per cent), while in professional negligence cases it was quite a bit higher (64 per cent). Statistical analysis suggests that the lower average discount in employers' liability cases is

unlikely to be down to chance, but that the higher average discount in professional negligence cases could well be.⁷⁴ These results can usefully be compared with the corresponding findings of our first instance study.⁷⁵ That study provided compelling evidence that at the trial court level, discounts for contributory negligence tended to be low in employers' liability claims and high in professional negligence claims, tendencies which this study suggests may well carry through into appellate decisions. On the other hand, there is no echo in the appellate study of a third finding of our first instance study, which was that the discounts imposed in occupiers' liability claims tended to be on the high side.⁷⁶

Figure 12 gives more detail on the interaction between post-appeal discount and claim type.

⁷⁴ A Welch two-sample t-test comparing the average post-appeal discounts in road accident and employers' liability claims returned a p-value of 0.051, although the p-value rose to 0.135 when we ran a Wilcoxon rank sum test with continuity correction. The p-values for the same tests comparing the average post-appeal discounts in employers' liability and professional negligence claims were 0.099 and 0.033 respectively. However, when the average post-appeal discounts in road accident and professional negligence claims were compared using the same tests, the p-values were considerably higher (0.225 and 0.278 respectively).

⁷⁵ See Goudkamp and Nolan, above n 2, pp 595-598.

⁷⁶ The average discount in such cases at first instance (51 per cent) was some 10.5 per cent higher than the overall average discount of 40.5 per cent (ibid, p 597). By contrast, in the current study the disparity was a mere 3 per cent (53 per cent as against 50 per cent).

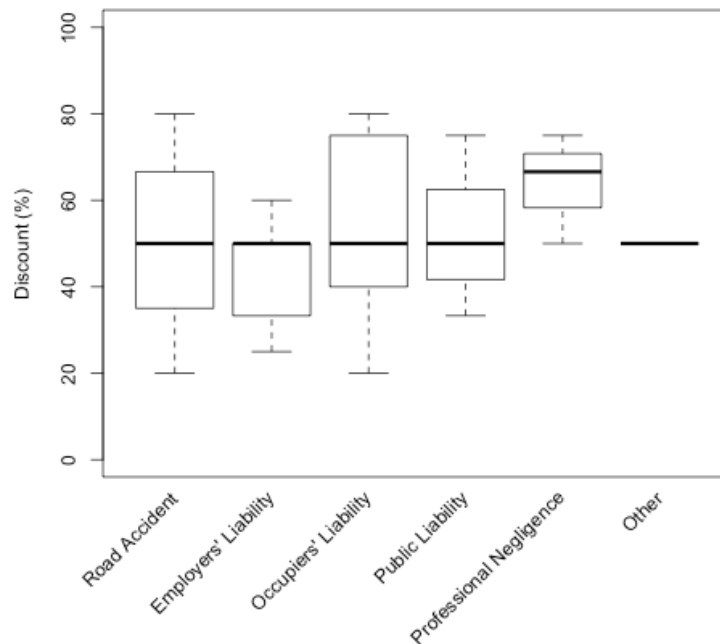


Figure 12 Post-appeal discount by claim type

As Figure 12 shows, the lowest post-appeal discount imposed in the dataset was 20 per cent (three claims), while the highest was 80 per cent (six claims). As in our first instance study,⁷⁷ by far the most popular discount was 50 per cent (27 claims), which was three times more common than the next most popular discount, 33.3 per cent (8 claims). Table 1 sets out the all the discounts imposed following appeal in the dataset.

⁷⁷ See Goudkamp and Nolan, above n 2, p 599.

Number of claims	Discount (%)
27	50
8	33.3
7	60
7	75
6	25
6	40
6	80
4	66.6
3	20
3	30
1	35
1	65
1	70

Table 1 Discounts imposed following appeal

(f) Contributory negligence on appeal and claimant age

Of the 112 claims in our dataset, 17 were brought by corporate entities or human claimants whose age was left too unclear by the court for it to be determined whether they were children or adults. Of the remaining 95 claims, 11 (12 per cent) were brought by children and 84 (88 per cent) were brought by adults. We were able to discern the age of the claimant with precision in 43 claims. The youngest claimants were aged 13,⁷⁸ while the oldest was 79.⁷⁹ The distribution of these 43 claims by claimant age range is shown in Figure 13.

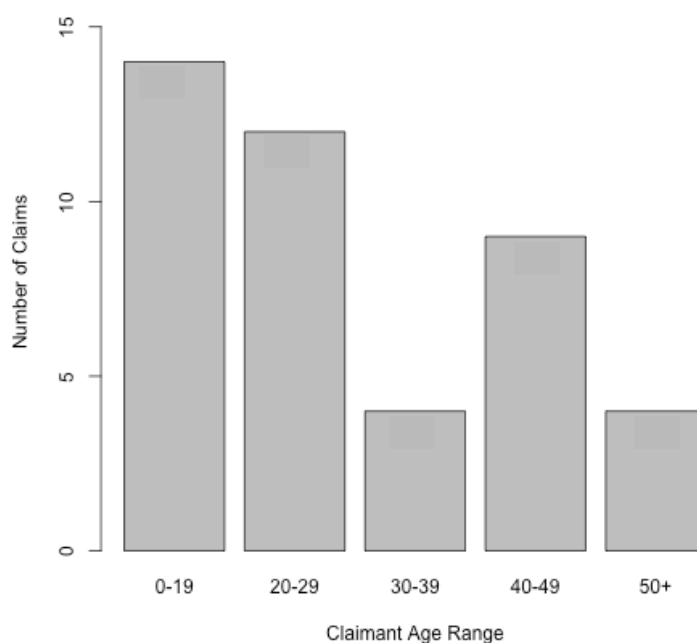


Figure 13 Number of claims by claimant age range

⁷⁸ *C (a child) v Imperial Design Ltd* [2001] Env LR 33; *Paramasivan v Wicks* [2013] EWCA Civ 262.

⁷⁹ *Palfrey v WM Morrisons Supermarkets Plc* [2012] EWCA Civ 1917.

When looking at this graph, it should be borne in mind that in 52 claims in the dataset it was clear that the claimant was an adult but we could not discern the age of the claimant more precisely. These claims are not included in Figure 13, which therefore significantly over-represents the proportion of claimants in the dataset who were under 18 (as in all the claims where we knew that the claimant was a child it was possible to discern the claimant's age more precisely). Furthermore, there were eight additional claims in the dataset where it was unclear whether a human claimant was a child or an adult, and we might reasonably suppose that these claims in fact involved adults, since it seems most unlikely that a judge would fail to mention the age of a claimant who was under 18 (not least because this might affect the analysis of the contributory negligence issue⁸⁰). It is inevitable, therefore, that had we been able to obtain age data for all of the human claimants in our dataset, the number of claims in all the age ranges from 20-29 years upwards would be higher, and probably substantially so.

Moving on to the results of our study regarding contributory negligence in appellate courts and claimant age, by far the most noteworthy is the fact that in the claims in our dataset appellate courts were much more likely to intervene with respect to a first instance decision regarding apportionment where the claimant was a child. The relevant figures are striking. In cases involving child claimants, the

⁸⁰ Judges have often emphasised that the fact that the claimant is a child is a particularly relevant consideration in the contributory negligence context: see, eg, *Gough v Thorne* [1966] 1 WLR 1387.

appellate court intervened in relation to apportionment in 78 per cent of cases, whereas in cases involving adult claimants, it did so in only 28 per cent of cases. Furthermore, statistical analysis showed that this disparity was very unlikely to be attributable to chance.⁸¹ Where the appellate court did intervene in relation to apportionment, there was a marginal preference for increasing the discount rather than decreasing it in both child and adult claimant cases (the discount was increased in 57 per cent and 55 per cent of cases respectively). It would appear, then, that while appellate courts are much more likely to differ from first instance courts on the appropriate discount where the claimant is a child, this does not translate into any clear tendency on their part 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.⁸²

The post-appeal success rate of the plea of contributory negligence was 82 per cent where the claimant was a child, and 73 per cent where the claimant was an adult. However, statistical analysis showed that this disparity was probably down to chance.⁸³ When we broke down the post-appeal success rate of the plea by age

⁸¹ Pearson's chi-square test with Yates's continuity correction, $p = 0.017$.

⁸² In those three claims, the appellate court intervened with respect to guilt in one claim (*Osei-Antwi v South East London & Kent Bus Co* [2010] EWCA Civ 132), and refused to do so in the other two (*Stanton v Collinson* [2010] EWCA Civ 81, [2010] RTR 26; *Phetbean-Hubble v Coles* [2012] EWCA Civ 349, [2012] RTR 31). The equivalent figures in claims brought by adults were 18 and 23 respectively.

⁸³ Pearson's chi-square test with Yates's continuity correction, $p = 0.774$. Logistic regression (controlling for claim type and gender) returned a p -value of 0.767.

range, no discernible trend was observable⁸⁴ and statistical analysis suggests that there is no association between claimant age range and the post-appeal success rate of the plea.⁸⁵

The average post-appeal discounts for children and adults were 53 per cent and 48 per cent respectively. However, statistical analysis suggests that this disparity could well be attributable either to chance, or to other factors, such as the prevalence of child claimants in claim types where higher discounts tend to be made.⁸⁶ Figure 14 shows the average post-appeal discount by claimant age range. No strong trend is discernible, although the highest average post-appeal discounts are found in the two youngest age ranges (0-19 years, 56 per cent; 20-29 years, 50 per cent), and the average post-appeal discounts in the other three age ranges are somewhat lower (30-39 years, 42 per cent; 40-49 years, 48 per cent; 50+ years, 36 per cent). A similar trend was observable in our first instance study, where we noted that a possible explanation for it was that the age of an adult claimant was more likely to be identifiable in types of claim where a lower discount tends to be made, in particular employers' liability claims.⁸⁷ Statistical analysis of the results in this study initially suggested an association between age and post-appeal discount (with the

⁸⁴ The results were as follows: 10-19 years, 79 per cent post-appeal success rate; 20-29 years, 83 per cent; 30-39 years, 75 per cent; 40-49 years, 78 per cent; 50+ years, 75 per cent.

⁸⁵ Logistic regression analysis comparing the odds of a finding of contributory negligence post-appeal where the claimant was in the 10-19 age range with the odds of such a finding in the two other age ranges in which there were substantial numbers of claimants returned very high p-values (20-29 years: $p = 0.759$; 40-49 years: $p = 0.964$).

⁸⁶ A Welch two-sample t-test of the difference between the average post-appeal discounts in child claimant and adult claimant claims returned a p-value of 0.298. This result was broadly consistent with the result of a Wilcoxon rank sum test with continuity correction ($p = 0.342$). Linear regression analysis (controlling for case type and gender) returned a p-value of 0.468.

⁸⁷ See Goudkamp and Nolan, above n 2, pp 603-604.

discount tending to decrease as claimant age increases),⁸⁸ but when we controlled for type of claim this association weakened.⁸⁹ These results are therefore not inconsistent with our tentative conclusion in the first instance study that the size of the discount is probably more strongly associated with type of claim than with age.⁹⁰

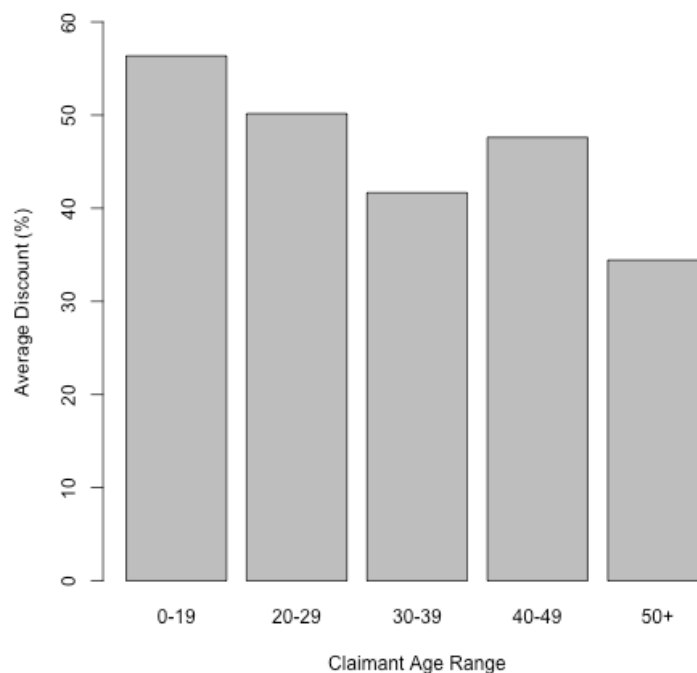


Figure 14 Average post-appeal discount by claimant age range

Further detail regarding the relationship between post-appeal discount and claimant age range is shown in Figure 15. As this boxplot reveals, there was no

⁸⁸ Linear regression analysis of the change in the discount with age as a continuous variable returned a p-value of 0.05.

⁸⁹ Linear regression analysis of the change in the discount with age as a continuous variable (controlling for case type) returned a p-value of 0.114.

⁹⁰ Goudkamp and Nolan, above n 2, p 604.

claim in the dataset brought by a claimant who was under 30 years of age in which the post-appeal discount was less than 33.3 per cent.

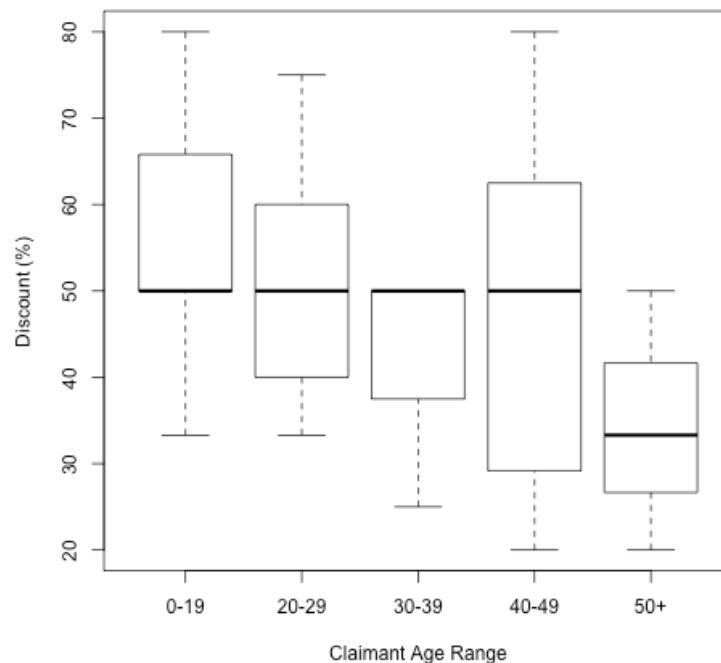


Figure 15 Post-appeal discount by claimant age range

(g) Contributory negligence on appeal and claimant gender

Of the 112 claims in our dataset, nine were brought by a corporate entity. Of the remainder, 71 (69 per cent) were brought by men, and 32 (31 per cent) were brought by women. A very similar gender balance was observed in our first instance study. We speculated that it might be attributable to the fact that men bring more personal injury claims than women and/or that women are generally

more risk-averse than men, and so less likely to act in such a way as to expose them to a plausible plea of contributory fault.⁹¹

In any case, perhaps the most noteworthy result of this study regarding claimant gender is that in our dataset appellate courts were much more likely to intervene with respect to a first instance decision regarding the existence of contributory negligence where the claimant was female. The relevant figures are striking. In claims involving female claimants, the appellate court intervened with regard to guilt 75 per cent of the time, whereas the corresponding figure for male claimants was only 32 per cent. Furthermore, statistical analysis showed that this disparity was very unlikely to be attributable to chance.⁹² Where the appellate court did intervene with regard to guilt, it found for the claimant on the point in just over half (56 per cent) of the claims involving female claimants, and in precisely half the claims involving male claimants. It would appear, then, that although appellate courts are considerably more likely to differ from first instance courts on the guilt issue where the claimant is female, this does not translate into any tendency on their part to lean 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 appellate court intervened with

⁹¹ See Goudkamp and Nolan, above n 2, p 604. The results of a study of over 150 published articles regarding gender differences in the propensity to run risks gave 'clear support' to the conclusion that male participants were more likely to take risks than female participants: JP Byrnes, DC Miller and WD Schafer, 'Gender Differences in Risk Taking: A Meta-analysis' (1999) 125 Psychol Bull 367, 377.

⁹² Pearson's chi-square test with Yates's continuity correction, $p = 0.029$.⁹³ However, statistical analysis suggests that this disparity may well be attributable to chance: Pearson's chi-square test with Yates's continuity correction, $p = 0.268$.

regard to apportionment only 22 per cent of the time, whereas in claims involving male claimants, the interference rate was 42 per cent.⁹³

Finally, the post-appeal success rate of the plea of contributory negligence was 72 per cent where the claimant was male, and 78 per cent where the claimant was female, and average post-appeal discounts for male and female claimants were 50 per cent and 49 per cent respectively. In both cases, statistical analysis suggests that the disparities are probably attributable to chance.⁹⁴

3. DISCUSSION

In this section, we highlight what we consider to be some of the most interesting findings of our study and discuss those findings in the light of the relevant case law and academic literature.

⁹³ However, statistical analysis suggests that this disparity may well be attributable to chance: Pearson's chi-square test with Yates's continuity correction, $p = 0.268$.

⁹⁴ Success rate of the plea post-appeal and claimant gender: Pearson's chi-square test with Yates's continuity correction, $p = 0.667$. Average discount post-appeal and claimant gender: Welch two-sample t-test, $p = 0.718$.⁹⁵ It would have been interesting to know whether the decline in the number of appeals was specific to contributory negligence appeals or was true of appeals generally. However, while data are available on the number of appeals determined by the Court of Appeal (Ministry of Justice, *The Royal Courts of Justice Annual Tables: Supplementary Data for Additional Courts* (London: Ministry of Justice, 2015) Table 3.9 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/527027/rcj-tables.xlsx, accessed 31 July 2016), unfortunately these only date back to 2003.

(a) The decline in the number of appellate decisions concerning contributory negligence after 2003

We have seen (in Figure 2) that there was a marked falling off in the number of appellate decisions concerning contributory negligence after 2003.⁹⁵ Two explanations for this decline initially struck us as plausible, but neither is entirely convincing.⁹⁶ The first potential explanation relates to permission to appeal.⁹⁷ Since 2 May 2000, as we noted above, it has generally been necessary for prospective appellants to obtain permission to appeal. Before that date, when permission to appeal was required, a less demanding test for permission prevailed.⁹⁸ However, while – if we bear in mind the time lag between first instance and appellate decisions⁹⁹ – this might explain why there was a relatively high number of appellate decisions regarding contributory negligence in 2000, and possibly even in 2001, it is difficult to see how this can explain a decline in such decisions more than three years after the changes to the permission to appeal requirement came into force.

⁹⁵ It would have been interesting to know whether the decline in the number of appeals was specific to contributory negligence appeals or was true of appeals generally. However, while data are available on the number of appeals determined by the Court of Appeal (Ministry of Justice, *The Royal Courts of Justice Annual Tables: Supplementary Data for Additional Courts* (London: Ministry of Justice, 2015) Table 3.9 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/527027/rcj-tables.xlsx, accessed 31 July 2016), unfortunately these only date back to 2003.

⁹⁶ We are grateful to Adrian Zuckerman and Andrew Higgins for sharing their thoughts with us on these points.

⁹⁷ See the text to nn 9-12 above.

⁹⁸ See *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538, 1538 (Lord Woolf MR), explaining that, at the time, the Court of Appeal could grant leave to appeal even if it was not satisfied that the applicant had a realistic prospect of success. Cf the current test for permission to appeal: text to n 11 above.

⁹⁹ In our dataset, the average number of days that passed between the date of the first instance decision and the date of the appellate decision where both dates were known was 338. The equivalent figure for claims in our first instance study that we knew had been the subject of an appeal was 328 days: Goudkamp and Nolan, above n 1, p 583 n 43.

Another potential explanation lies in civil litigation funding arrangements. Legislation significantly extending the conditional fee agreement ('CFA') regime was passed in 1999.¹⁰⁰ The extended scheme took effect on 1 April 2000. It is certainly possible that lawyers acting for claimants funded by a CFA might be more reluctant to advise their client to appeal, since they would go unpaid in the event that the appeal fails (although set against this is the fact that, all other things being equal, the more difficult the appeal, the greater the lawyer's success fee). One problem with this explanation, however, is that defendant appeals dropped off even more markedly than claimant appeals after 2003.¹⁰¹ And it is hard to see why the number of defendant appeals should be affected by the extension of the CFA regime, when (as is well known) defendants do not generally use CFAs to fund litigation.

Accordingly, we are unable to identify a clear cause of the precipitous decline in the number of appellate decisions regarding contributory negligence after 2003. We suspect that the decline and/or the fact that the number of appellate decisions subsequently remained fairly low are attributable to a combination of factors. Possible influences in this regard additional to those that we have already mentioned include the clamping down on second appeals,¹⁰² a 'recent substantial

¹⁰⁰ Access to Justice Act 1999, s 27.

¹⁰¹ In 2000-2003 there were an average of 5.5 claimant appeals per year in our dataset, and an average of 8.25 defendant appeals. From 2004-2015 there were an average of 1.9 claimant appeals per year, and an average of 2.6 defendant appeals.

¹⁰² See the onerous test in CPR 52.13. This change was described as 'major' in *Tanfern Ltd v Cameron-Macdonald* [2000] 1 WLR 1311 [42] (Brooke LJ).

increase in immigration appeals'¹⁰³ (which leaves less time for the Court of Appeal to decide contributory negligence appeals) and increased emphasis on the need to divert cases from the judicial system to mediation. Further exploration of these matters would take us deep into a jungle of procedural rules and well beyond the scope of this article.

(b) The number of claims in the dataset

Notwithstanding the drop-off in appellate decisions concerning contributory negligence after 2003, the fact that there are 112 claims in our dataset suggests that litigants are not particularly slow to appeal on the issue of contributory negligence. In particular, the claim in a leading textbook that litigants appeal against apportionment decisions 'only rarely'¹⁰⁴ is not borne out by the cases in our dataset, where appeals on apportionment outnumbered appeals on guilt. As Figure 4 shows, this tendency to launch appeals on apportionment was particularly marked in road accident and occupiers' liability cases.

(c) The incidence of appellate intervention

Tony Weir remarked that '[a]lthough the Court of Appeal keeps saying that it is reluctant to interfere with the trial judge's apportionment, in fact it keeps doing

¹⁰³ M Burton (ed), *Civil Appeals* (London: Sweet & Maxwell, 2nd edn, 2013), para 1-300.

¹⁰⁴ S Deakin, A Johnston and B Markesinis, *Markesinis and Deakin's Tort Law* (Oxford: Oxford University Press, 7th edn, 2013) p 756.

so'.¹⁰⁵ Was this a fair criticism? According to our study, the overall level of appellate intervention with respect to first instance decisions on contributory negligence was 38 per cent, which is probably not far short of the percentage of appeals allowed by the Court of Appeal across all cases that come before it.¹⁰⁶ However, we also found that the intervention rate when it came to the existence of contributory negligence (42 per cent) was considerably higher than the intervention rate in relation to apportionment (34 per cent), a disparity that is consistent with the principle that appellate courts should be particularly slow to intervene in relation to apportionment decisions.¹⁰⁷ Nor should it be forgotten that all appeals heard by the Court of Appeal will have passed through the permission to appeal filter. Overall, therefore, while it is certainly true that appellate intervention with respect to apportionment is not uncommon, it would appear that appellate courts are reasonably restrained in this regard.

We had suspected that the Court of Appeal might intervene more readily in connection with decisions of county courts than with decisions of the High Court. This was because the Court of Appeal overturns county courts decisions more frequently across appeals of all types.¹⁰⁸ However, this suspicion was not borne out

¹⁰⁵ T Weir, *A Casebook on Tort* (London: Sweet & Maxwell, 10th edn, 2004) p 247.

¹⁰⁶ According to the Ministry of Justice, 48 per cent of all appeals heard by the Court of Appeal between 2003 and 2015 were allowed (disregarding appeals that were dismissed by consent, struck out or disposed of by other means): Ministry of Justice, above n 95, Table 3.9. In an earlier study, Atkins found that the Court of Appeal intervened on average in 35 per cent of appeals in all types of case decided between 1952 and 1983, with 'a remarkable degree of consistency through' this period: Atkins (1990) above n 5, p 83.

¹⁰⁷ See the text to nn 21-**Error! Bookmark not defined.** above.

¹⁰⁸ According to statistics published by the Ministry of Justice, in the period 2008-2015 the rate of appellate intervention with decisions of the Queen's Bench Division of the High Court was 40 per cent. The corresponding intervention rate for decisions from county courts (excluding appeals in family and admiralty matters) was 47 per

by our data, which showed that the overall intervention rates were similar for the two types of first instance court.¹⁰⁹

(d) The extent of appellate intervention with respect to apportionment

Our study shows that when appellate courts intervene in relation to first instance decisions on apportionment, they rarely change the discount by a small amount, and that a change of 20 per cent or more in either direction is the norm.¹¹⁰ These findings are consistent with the principle that an appellate court should intervene with respect to a decision on apportionment only where it concludes that the first instance court got it badly wrong.¹¹¹ After all, it is implicit in the stringency of the tests that must be satisfied before appellate intervention in relation to apportionment is permissible that when an appellate court does intervene, it should not do so only to a small extent, since a minor adjustment would be inconsistent with the conclusion that the lower court's decision on the point was manifestly flawed. As Lord Reed said in *Jackson v Murray*, '[t]he need for the appellate court to be satisfied, in the absence of an identifiable error, that the apportionment made by the court below was outside the range of reasonable determinations is reflected in the fact that apportionments are not altered by appellate courts merely on the

cent. See Ministry of Justice, above n 95, Table 3.9. Accordingly, while in our study the rate of appellate intervention with respect to High Court decisions was similar to the intervention rate with such decisions generally, the rate of appellate intervention with county court decisions was somewhat lower.

¹⁰⁹ See Figure 5 above.

¹¹⁰ See the text near n 61 above.

¹¹¹ See the text to nn 24-**Error! Bookmark not defined.** above.

basis of a disagreement as to the precise figure'.¹¹² Furthermore, the results of our study are also consistent with the suggestion that appellate intervention with respect to apportionment is more justifiable where the appellate court favours an apportionment of responsibility that is 'qualitatively different' from that favoured by the first instance court, so that (for example) replacing a 60 per cent discount with a 40 per cent discount is more justifiable than replacing a 40 per cent discount with a 20 per cent one.¹¹³ This is because in 15 of the 19 claims in our study in which the appellate court intervened in relation to apportionment, it either changed the apportionment from an unequal division of responsibility to an equal one or vice versa, or it shifted the bulk of the responsibility from one party to the other.

(e) Post-appeal discounts

Several interesting points emerge in relation to the spread of post-appeal discounts. In the study dataset, appellate courts tended to use fractions that are routinely encountered in everyday life, such as one half and one quarter, to express the division of responsibility between the parties,¹¹⁴ This result is unsurprising. The same tendency was visible in the dataset for our first instance study,¹¹⁵ and the preference for round figures coheres with the fact that apportionment is not an

¹¹² *Jackson* [38].

¹¹³ For this suggestion, see *Jackson* [38] (Lord Reed).

¹¹⁴ See Table 1 above.

¹¹⁵ Goudkamp and Nolan, above n 1, p 599.

exact science. Attempts to fine-tune the apportionment would be inconsistent with this reality, and would falsely suggest that degrees of responsibility are amenable to exact specification.

The range of post-appeal discounts in our dataset (20 per cent being the lowest and 80 per cent being the highest) was also similar to that reported in the first instance study.¹¹⁶ That the extremes of the spectrum are avoided is unsurprising. Such discounts suggest that something has gone wrong with other findings. Very low discounts raise the issue of whether the claimant was in fact properly found guilty of contributory negligence,¹¹⁷ while very high discounts suggest that perhaps the defendant should have been absolved of responsibility altogether.¹¹⁸

4. CONCLUSION

This article reports the findings of an empirical study of the handling of the doctrine of contributory negligence by appellate courts in England and Wales in the first 16 years of this century. It is the first study of its kind in any common law jurisdiction. Perhaps the most important of our findings are as follows:

¹¹⁶ Goudkamp and Nolan, above n 1, pp 611-612.

¹¹⁷ See *Butcher v Cornwall CC* [2002] EWCA Civ 1640 [13] (Sedley LJ); *Cooper v Carillion plc* [2003] EWCA Civ 1811 [11] (Keene LJ).

¹¹⁸ See *Toole v Bolton MBC* [2002] EWCA Civ 588 [13] (Buxton LJ).

(1) 44 per cent of the appeals were against determinations as to the existence of contributory negligence, and 56 per cent were appeals against determinations regarding apportionment. Claimants brought 41 per cent of the appeals, and defendants 59 per cent.

(2) Appellate courts overturned determinations as to the existence of contributory negligence in 42 per cent of cases, and determinations in respect of apportionment in 34 per cent of cases. The overall level of appellate intervention was 38 per cent.

(3) The chances of having a High Court decision on contributory negligence overturned on appeal are very similar to the chances of having a county court decision overturned.

(4) While the chances of a successful appeal on apportionment are similar for claimants and defendants, claimants are almost twice as likely to succeed in appeals on guilt as defendants.

(5) When appellate courts reduce discounts in contributory negligence cases, they tend to do so by larger amounts than when they increase discounts. And appellate courts rarely change the discount in either direction by a small amount.

(6) The post-appeal success rate of the plea of contributory negligence is lower in employers' liability cases and cases in the 'other' category than in relation to the rest of the claim types. Furthermore, in all the cases in the employers' liability category in which the appellate court intervened in relation to a finding as to guilt it did so in favour of the claimant.

(7) The average post-appeal discount across all cases was 50 per cent. The average post-appeal discount in employers' liability cases was quite a bit lower (at 44 per cent), while in professional negligence cases it was quite a bit higher (at 64 per cent). The lowest post-appeal discount imposed was 20 per cent, while the highest was 80 per cent. By far the most popular discount was 50 per cent.

(8) Appeal courts are much more likely to differ from first instance courts on apportionment where the claimant is a child, but this does not translate into any clear tendency on their part to lean either in favour of or against child claimants on the apportionment question.

(9) Appeal courts are much more likely to intervene with respect to a first instance decision regarding the existence of contributory negligence where the claimant is female, but, again, are not inclined in favour or against female claimants on this issue.

