Contributory Negligence in Practice

From a lecture by **Dr James Goudkamp** and **Professor Donal Nolan** on 18 January 2016

The doctrine of contributory negligence reduces the compensation which the victim of a wrong receives where the victim was partly to blame for his or her own damage. The doctrine is one of the most important rules in English private law. It is frequently relied on by defendants both in litigation and in negotiating settlements, and damages are regularly discounted for contributory negligence by substantial amounts (often as much as 50 per cent). Despite the doctrine's significance, there has never been a comprehensive empirical analysis of it in England and Wales (or elsewhere). Accordingly, in an effort to improve understanding of this important part of private law, we carried out two empirical studies of it. The first study explores how the doctrine is applied at first instance. The second examines the operation of the doctrine on appeal. In this article we offer an overview of both studies.

Contributory negligence at first instance

For this study, we reviewed every electronically accessible contributory negligence case decided at first instance in England and Wales between 1 January 2000 and 31 December 2014. Our sample comprised 368 cases. Most of these cases (223) were decisions of the High Court, because decisions of that Court tend to be published online more regularly than decisions of the County Courts. However, we were able to access a significant number (145) of County Court decisions too, including indirectly by way of information about such decisions found in judgments of the Court of Appeal. The two central questions in which we were interested were: (1) how often does the plea of contributory negligence succeed when pleaded; and (2) by what percentage are damages discounted when a claimant is found guilty of contributory negligence. We also 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; the contextual setting of the claim; and the year of the decision.

We should give some basic information about our sample. 86 per cent of the claims in the sample were personal injury claims. Pure economic loss claims comprised 10 per cent of the sample, while only 4 per cent of the sample was constituted by property damage claims. One plausible explanation for the small number of property damage claims in our sample is the fact that many property damage claims are likely to be relatively low value. This is significant because claimants may be less inclined to commence proceedings in respect of lower value claims, and defendants may be more inclined to settle such claims when proceedings are brought. Furthermore, lower value claims are determined in the County Courts and, as we observed above, County Court decisions, because of their relative inaccessibility, are under-represented in our study. As for the contextual setting of the claims, claims arising out of road accidents were by far the most common type of claim (39 per cent), followed by employer's liability claims (23 per cent), professional negligence claims (11 per cent) and occupiers' liability claims (10 per cent). The 63 claims in the three remaining categories (public liability, sports injury and other) amounted to only 17 per cent of the sample.

Out of the 368 claims in our sample, the plea of contributory negligence succeeded in 221 claims (60 per cent) and failed in 147 claims (40 per cent). As shown in Figure 1, the success rate of the plea of contributory negligence was almost identical in personal injury claims and property damage claims (64 per cent in both instances), but markedly lower in pure economic loss claims (22 per cent).

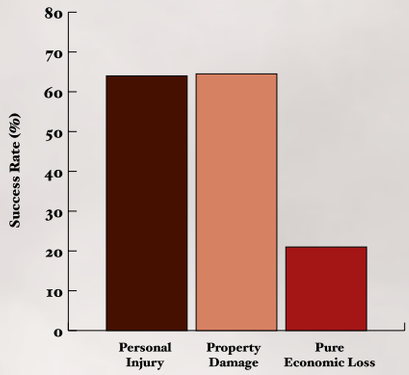


Figure 1 – Success rate of plea by damage type

A possible explanation for the difference in the success rate of the plea of contributory negligence between personal injury and property damages claims on the one hand, and pure economic loss claims on the other hand, emerges when the success rate of the plea is broken down by type of claim (Figure 2). This reveals that the plea of contributory negligence has a very low success rate in professional negligence claims (29 per cent). This success rate is roughly half that of the success rate of the plea across all types of claim in our study. The reason for the close association between the success rate in pure economic loss claims and in professional negligence claims is not hard to find. Of the 37 pure economic loss claims, the vast majority (33 claims) fell into the professional negligence category; similarly, of the 41 professional negligence claims, the preponderance (33 claims) were for pure economic loss.

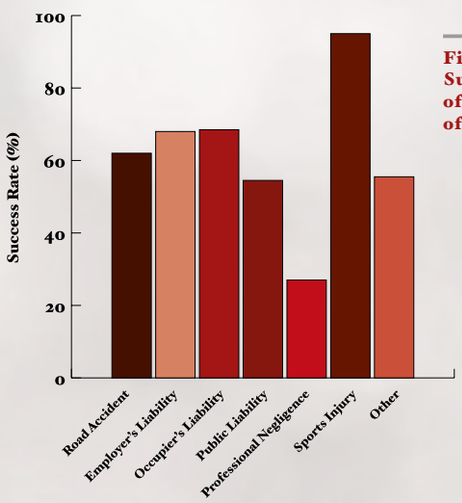


Figure 2 – Success rate of plea by type of claim

Where the claimant was found guilty of contributory negligence, the average amount by which damages were reduced was 40.5 per cent. Figure 3 shows the average discount by damage type. As the graph indicates, the average discounts in both property damage claims and pure economic loss claims (48 per cent in each case) were somewhat higher than the average discount in personal injury claims (40 per cent).

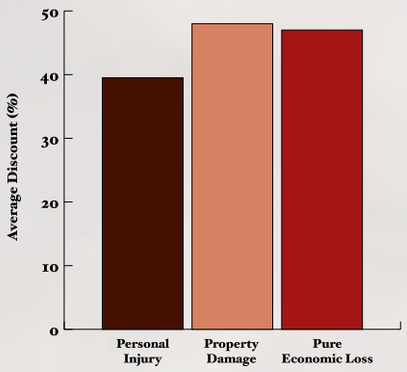


Figure 3 – Average discount by damage type

The average discount by type of claim is shown in Figure 4. Several features of this graph are noteworthy. One is that the highest average discount (58 per cent) was found in professional negligence claims. A possible explanation for this result is that given that (as we have seen) the courts are comparatively slow to find contributory negligence in professional negligence claims, a claimant who is found guilty of contributory negligence in such a case will generally have borne the bulk of the responsibility for the damage. A second noteworthy finding is that the average discount in employers' liability claims was relatively low (31 per cent). It would seem that on the whole, employees who are found guilty of contributory negligence are treated more leniently than road users and those suing occupiers. A third important finding concerns the relatively high average discount in occupiers' liability claims (51 per cent).

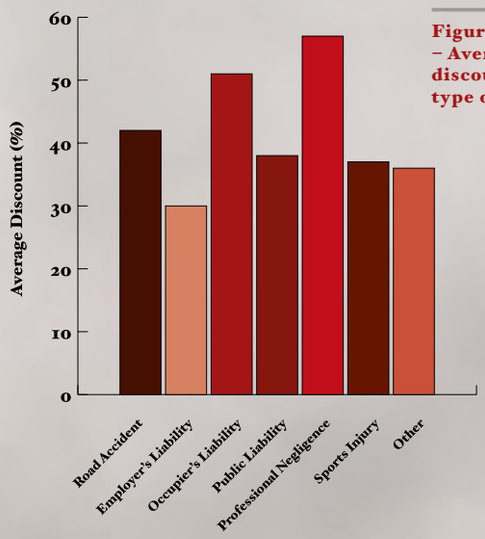


Figure 4 – Average discount by type of claim

Other key findings to emerge from our study of first instance decisions include:

1. The most popular discounts were fractions that are commonly used in everyday life, namely, one-half, one-third and one-quarter. Although judges use essentially the full spectrum of discounts, discounts at the higher end of the spectrum are relatively infrequent.
2. Children aged over 10 are more likely to be found guilty of contributory negligence than adults, and when they are found guilty the discount is likely to be higher as well. These results cast doubt on the accuracy of the commonly expressed perception that courts treat children more leniently than adults when it comes to the application of the contributory negligence doctrine. There was only one claim in our sample in which a child under 10 was found guilty of contributory negligence, although contributory negligence was pleaded against five children under 10, one as young as six.
3. We found no compelling evidence of a gender difference in relation to either the frequency with which contributory negligence is found or in terms of the size of the discount.
4. In personal injury claims, both the success rate of the plea of contributory negligence and the size of the discounts imposed remained fairly constant during the study period. We had expected that these variables might have been influenced by debate regarding the supposed 'compensation culture', which came to public prominence during the study period. However, there is no evidence that this debate had an impact on decisions regarding the contributory negligence doctrine.

Contributory negligence on appeal

The appellate study encompassed all electronically accessible decisions of the Court of Appeal of England and Wales in relation to contributory negligence between 1 January 2000 and 31 December 2015. The sample comprised 112 cases. 35 per cent of cases were appeals from the High Court. The rest were appeals from County Courts. As with the first instance study, the preponderance of cases in the appellate sample were road accident cases (46 per cent), with the next most common type of case being employers' liability cases (28 per cent).

As Figure 5 shows, important differences exist between the appellate success rates depending on the identity of the appellant. Claimants were considerably more likely to win an appeal overall than defendants, although it seems that most of this difference is attributable to a greater success rate by claimants in appeals on the existence of contributory negligence rather than in relation to the discount imposed.

Figure 5 – Success rate of appeal by party

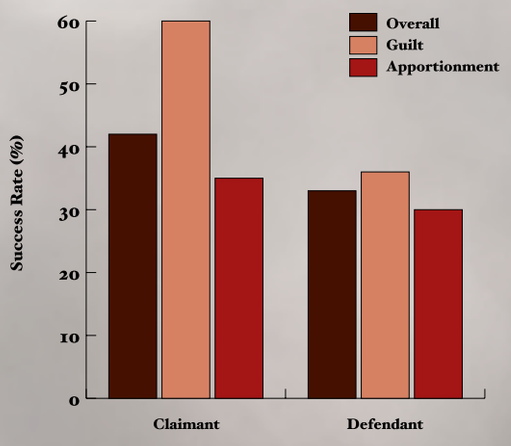


Figure 6 indicates the rate of interference depending on the court whose decision was the subject of the appeal. The difference in the overall success rate of appeals depending on the court from which the appeal came was negligible. However, the Court of Appeal was more willing to interfere with a holding regarding the existence of contributory negligence when the first instance court was the High Court, and more ready to disturb a holding regarding the discount when the first instance court was a County Court.

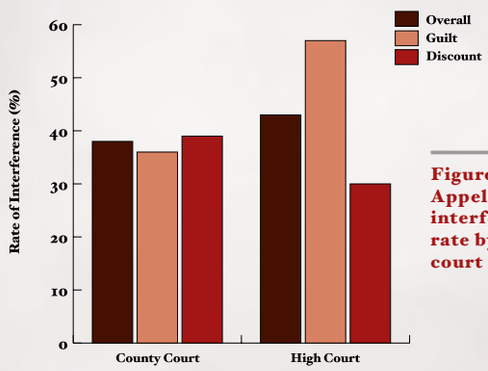


Figure 6 – Appellate interference rate by trial court

One interesting result to emerge from the appellate study concerns the manner in which the Court of Appeal varied the discount where an appeal in respect of the discount succeeded. The results in this regard are indicated in Figure 7. The two peaks in this figure are noteworthy. They indicate that when the Court of Appeal varied the discount, it tended to make substantial adjustments, most frequently by 20–29 per cent. It is not surprising that the Court of Appeal tended not to vary the discount by minor amounts. Simplifying matters somewhat, it is a well-established principle that appellate intervention is warranted only when the trial judge has exceeded the ambit of legitimate disagreement when deciding on a discount. As Lord Reed explained in *Jackson v Murray, "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."* Accordingly, a minor variation in the discount would suggest that appellate intervention was unwarranted.

"One striking finding to emerge from our study is that the number of appeals regarding contributory negligence fell dramatically over the study period"

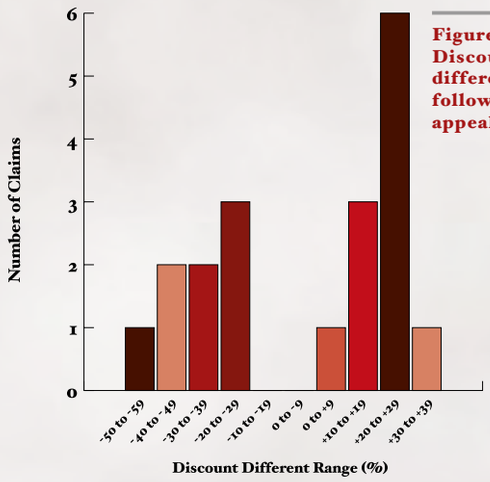


Figure 7 – Discount difference following appeal

One striking finding to emerge from our study is that the number of appeals regarding contributory negligence fell dramatically over the study period (Figure 8). There are various possible explanations for this decline, one of which concerns the introduction of conditional fee agreements subsequent to the reforms implemented in the wake of the Woolf Report. The idea here is that lawyers, subsequent to the shift to conditional fee agreements, were less likely to launch an appeal (all other things being equal) as failure in the appeal would mean that the lawyer would go unpaid. Another potential explanation is that the workload of the Court of Appeal increased during the study period with the result that less time was available to hear appeals in relation to contributory negligence.

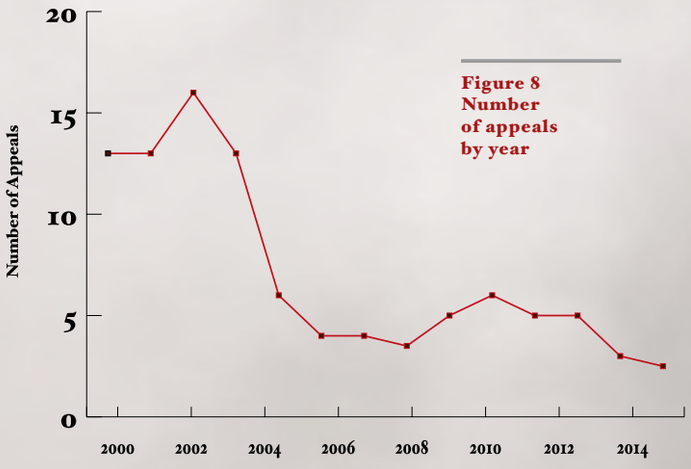


Figure 8 Number of appeals by year

Conclusion

Despite its immense importance in practice, the contributory negligence doctrine is woefully under-examined, especially empirically. These first instance and appellate studies go some way to filling the gap, and should be useful to judges and practitioners when confronted with contributory negligence issues. We intend to supplement these studies with further treatments of contributory negligence in the road accident and employers' liability contexts specifically.

James Goudkamp, Associate Professor
Oxford Law Faculty
Donal Nolan, Professor of Private Law,
University of Oxford

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.