Contributory Negligence in Road Traffic Accidents: Seatbelts and Drunk Drivers

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Findings of contributory negligence against passengers who fail to wear a seatbelt and those who voluntarily get into a car with a driver under the influence of alcohol or drugs are commonplace. This blog aims to set out the underlying principles for quantifying the appropriate deduction to make in either case and to consider the approach to quantification where a passenger is guilty of both.

Seatbelts

Prior to the decision of the Court of Appeal in *Froom v Butcher* [1976] QB 286, judicial opinion was divided on whether contributory negligence should arise where a claimant had failed to wear a seatbelt and, if so, to what extent. Lord Denning set out a number of principles that are now second nature to regular practitioners in RTA-related Personal Injury claims:

- Although not wearing a seatbelt may not be causative in the accident, it may be causative in the damage
- The evidence is clear that everyone should wear a seatbelt (of course, wearing a seatbelt is now mandatory)
- The obligation to wear a seatbelt is on each individual adult car user and not on the driver to insist
- Whenever there is an accident, the negligent driver must bear by far the greater share of responsibility
- The question of what it is just and equitable to deduct should be approached practically and that in the vast majority of cases:
  - 25% should be deducted where the wearing of a seatbelt would have prevented all injury
  - 15% should be deducted where injuries would have been reduced by the wearing of a seatbelt

The Court of Appeal in *Stanton v Collinson* [2010] EWCA Civ 81 confirmed the approach of Lord Denning in *Froom v Butcher* and stated that there would need to be something exceptional to justify departing from it; "*there is powerful public interest in there being no such enquiry into fine degrees of contributory negligence*" per Hughes LJ at [26]. It was also confirmed that the burden of proving that the claimants' injuries would have been significantly lessened or eliminated was on the defendant at [22].

Drunk Drivers

The question of the claimant's contributory negligence when getting into a car with a drunk driver was considered by Watkins J in *Owens v Brimmell* [1977] QB 859. The, again now familiar, outcome was:

- A claimant is contributorily negligent if they get into a car with a person who they know is likely to have their ability to drive impaired by alcohol
- The driver must bear by far the greater responsibility
- The claimant's fault was to be 20%

The deduction for contributory negligence in drink driver cases is less consistent than in seatbelt cases. In *Meah v McCreamer* [1985] 1 All ER 367 Woolf J, as he then was, stated that the facts were comparable to *Owens v Brimmell*, but made a deduction of 25%. In *Thomas v Fuller* (7 February 1977), Cantley J deducted 25% where he considered it a "*bad case of its type*"; the parties had drunk particularly heavily and decided to drive to Scotland up the M1, where the accident happened.

A particular outlier is identified in the case of *Donelan v General Accident Fire and Life Assurance* [1993] PIQR P205 where HHJ Astill, as he then was, sitting as a judge of the High Court considered the claimant to be 75% contributorily negligent. The circumstances justifying such a finding were that both parties had drunk heavily and the claimant, who was dominant in the relationship with the defendant and twice her age, insisted that the defendant drive them both in his powerful automatic car, which she had never before driven.

Donelan is clearly an extreme example but it serves as a reminder that practitioners need not slavishly follow the 'usual' 20% and that in the right circumstances arguments can be made for a different deduction to be made.

A further important point in relation to drink driver cases, which may sometimes be overlooked, is the necessity to consider the claimant's assessment of the defendant's ability to drive. The assessment is that of a 'reasonable person', from which it follows that the claimant cannot rely on an unrealistic assessment and neither can they rely on their own drunkenness to excuse their poor, or absent, assessment (see, for example, HHJ Robinson sitting as a judge of the High Court in *Campbell v Advantage Insurance Company Ltd* [2020] EWHC 2210 (QB) at [74]).

A claimant can successfully argue that the defendant's ability to drive did not appear impaired even when the defendant was well above the legal limit (*Traynor v Donovan* [1978] CLY 2612 – over twice legal limit; *Brignall v Kelly* (CA, 17 May 1994) – over twice the legal limit; *Booth v White* [2003] EWCA Civ 1708 – just under twice the legal limit).

In all of the cases just cited, the claimant knew that the defendant had consumed alcohol, but they did not know how much. It is perhaps surprising that a claimant's duty to assess the driver in the interests of their own safety apparently does not extend to asking someone who they know has been drinking how much they have had to drink (see for example McCowan LJ in *Brignall v Kelly*).

Should the claimant's case be that they did not realise that the defendant's ability to drive was impaired, careful consideration should be given to how that case can be bolstered; in all of these cases the claimant was supported by either lay or expert evidence.

Twice the Negligence, Twice the Deduction?

What if a claimant gets into a car with a drunk driver and fails to wear his seatbelt? Should the deductions be aggregated? Should they overlap?

In *Gleeson v Court* [2007] EWHC 2397 (QB) there were six people in a Ford Fiesta and the claimant had therefore decided to travel in the boot under the parcel shelf. Everyone in the car had been drinking to some degree and the defendant was nearly twice the legal limit. The defendant lost control of the car and the claimant suffered injuries.

HHJ Foster QC considered that travelling in the boot was foolhardier than merely failing to wear a seatbelt but considered that the defendant should share some responsibility for permitting him to do so. It was not made clear why the defendant should bear some responsibility for this, which may seem out of step with Lord Denning's assertion in *Froom* that a driver should not share responsibility for ensuring that their passengers wear a seatbelt, although perhaps parallels can be drawn with the criminal law under which only the (adult) individual failing to wear a seatbelt commits an offence, whereas the driver of a vehicle '*causing or likely to cause danger by reason of load or passengers*', such as by carrying passengers in the boot, is capable of committing an offence. HHJ Foster QC concluded that given the shared responsibility a deduction of 25% was appropriate, the same as not wearing a seatbelt. The figure of 20% for getting into the car with a drunk driver was also appropriate.

The judge then dealt with the question of aggregation and said "*I do not think it is permissible to aggregate the two figures… a 45 per cent reduction would make little distinction between the parties' relative blameworthiness. I have already said that [the Defendant's] fault was the cause of the accident and the predominant cause of the injuries*."

Best v Smyth [2010] EWHC 1541 (QB) also raised the same question. The reported case relates to an application for an interim payment only, but in considering the application, Tugendhat J accepted the submission of the claimant that a deduction of 30% was the maximum deduction. It was considered that the deduction of 50% contended for by the defendant had "*no support in any authority*" and was "*ambitious*" to suggest that a passenger should have responsibility equal to that of the driver.

An outlier is perhaps found in the case of *Akers v Motor Insurers' Bureau* (8 March 2002) in which HHJ Bishop did aggregate the failure to wear a seatbelt and responsibility for getting into a car with a drunk driver and made a finding of contributory negligence of 45%. As a County Court decision that was not appealed on this particular finding, and which occurred prior to the two High Court cases cited above, this approach is unlikely to be followed in the future.

Conclusion

In deciding the amount which is just and equitable to deduct, a court will have regard to the claimant's share in the responsibility, which inevitably involves a comparison exercise with that of the defendant. A consistent message coming out of the case law is that the driver carries the main responsibility when an accident occurs. Where a claimant is contributorily negligent in more than one respect, the court is likely to make a finding of contributory negligence greater than justified by either of the individual factors alone, but not to the full aggregate amount of both. Nevertheless, exceptional cases do exist and where there is clear justification for doing so, as it did in *Donelan*, the court still has a discretion to make a finding reflective of the circumstances.