
Book Review

Contributory Negligence: Principles and Practice

James Goudkamp and Donal Nolan
Oxford University Press
2018
ISBN 9780198814238

Contributory negligence is a doctrine of considerable practical importance, particularly in cases involving personal injury. Indeed, matters of contributory negligence are regularly in issue before the courts and nowadays seem to be pleaded in defences to claims in negligence almost as a matter of course.

The doctrine is especially significant in that, as was famously pointed out by the late Patrick Atiyah in *The Damages Lottery*,¹ those found guilty of contributory negligence are just about the only class of negligent actors who pay for their negligence *personally*. In particular, whereas negligent defendants are almost universally indemnified for their negligence by insurers (as, absent a valid insurance policy, the claim probably would not have been brought in the first place), contributorily negligent claimants bear the cost of their negligence themselves, in that they do not obtain compensation for part of the damage they have suffered and would otherwise be entitled to. So, for example, if a defendant negligently causes a claimant to suffer a £100,000 loss, but the claimant is deemed to be 25 per cent responsible, whereas the defendant's insurer will pick up the tab for

the defendant's £75,000 share of the loss, the other £25,000 of the loss will have to be borne by the claimant personally.

Despite its undeniable importance in practice, the law of contributory negligence has rarely been the subject of any in-depth academic analysis. Indeed, notwithstanding the occasional journal article and book chapter, prior to *Contributory Negligence: Principles and Practice* the last major work on the topic was Glanville Williams' 1951 treatise, *Joint Torts and Contributory Negligence*.² The dearth of literature on contributory negligence can be starkly contrasted with the enormous volume of literature on other aspects of the negligence enquiry; causation and duty of care, for example, despite being in issue before the courts only relatively rarely, have been the subject of immense academic interest and countless books and articles. *Contributory Negligence: Principles and Practice*, the first of two books on the doctrine by James Goudkamp and Donal Nolan,³ aims to remedy the clear deficiency in the literature. In particular, it aims to provide the reader with a 'one-stop-shop' (p vii) where they are able to find, first, a concise and accurate statement of the legal principles governing contributory negligence and, secondly, an empirically informed analysis of the way the doctrine operates in various recurrent scenarios (p vii).

The book is made up of three parts and consists of 19 chapters in total. Part I of the book is a short one-chapter

1 P S Atiyah, *The Damages Lottery* (Hart, 1997) at pp 110–111. The point is also made in Peter Cane and James Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th edn, Cambridge University Press, 2019) at pp 223–24.

2 Glanville Williams, *Joint Torts and Contributory Negligence: A Study of Concurrent Fault in Great Britain, Ireland and the Common-Law Dominions* (Stevens & Sons, 1951).

3 The other being James Goudkamp and Donal Nolan, *Contributory Negligence in the Twenty-First Century* (Oxford University Press, 2019).

introduction, outlining the scope and structure of the book. It also elaborates on its stated aims, explaining that by making the doctrine more accessible it is hoped that it will promote consistency in findings of contributory negligence, such that like cases will be treated alike (or at least *more* alike).

Part II of the book is made up of five chapters. It sets out the principles and rules that comprise the contributory negligence doctrine as well as making some general observations about how the doctrine operates in practice. Ultimately, it is much what one would expect to find in a tort law text, albeit with additional details on the more practical aspects of the doctrine. Chapter 2, the first chapter in Part II, focuses on the scope of the doctrine and the circumstances in which it will be enlivened; it is explained that this will be when, first, the claimant has failed to take reasonable care of him or herself, and, second, when that failure to take care is causally relevant to the damage suffered. The two criteria are discussed in detail, including that the test for reasonableness is objective (except in the case of children), and that the claimant's fault need only be related to the damage suffered, even if not the event that caused it.⁴ Chapter 3 moves on to the matter of apportionment of responsibility; that is, once it has been determined that there *has* been contributory negligence, how the courts are to apportion responsibility as between the claimant and defendant. The chapter explains that the apportionment exercise is a discretionary one that depends on the 'relative blameworthiness' of each party as well as the so-called 'causal potency' of their conduct. Chapter 4 explores how

the doctrine of contributory negligence interacts with and differs from related rules, including where the claimant's conduct was illegal, amounts to an intervening act, or could be said to be a voluntary assumption of the risk that materialised. Chapter 5 provides a brief discussion of the procedural aspects of pursuing an allegation of contributory negligence, including the burden of pleading, the burden of proof, and how allegations affect track allocation and jurisdictional limits. Chapter 6, the final chapter in Part II, discusses appealing against findings of contributory negligence. It explains that, outside of 'exceptional circumstances', appeal courts maintain an ostensible reluctance to interfere with trial judges' findings of contributory negligence, given the highly discretionary nature of the exercise and the fact that the trial judge is usually in a better position to evaluate the totality of the evidence.

Part III of the book is made up of 13 chapters and contains a summary of discounts that have been imposed by courts for contributory negligence in frequently recurring situations. Part III starts off with a short chapter explaining where the data have come from and the methodology that was employed to select the cases examined. The next 11 chapters provide detailed overviews of the discounts that have been applied in various types of cases, including intoxicated pedestrians injured by motorists, non-intoxicated pedestrians (both children and adults) injured by motorists, those injured by the failure to wear a seatbelt, those injured whilst speeding, those injured in slips and falls (at work and at private and public places), injuries that occurred whilst using work equipment, injuries that occurred as a result of falls from heights, and injuries to children whilst playing. Each of the 11 chapters details the number of cases in the sample, the average discount applied, the maximum and minimum discount applied, as well as the standard deviation. Illustrations of cases involving high, average

4 So, for example, whilst a passenger's failure to wear a seatbelt is unlikely to have any causal relevance to their car being rear-ended at a red light, it may nevertheless play a significant role in the severity of any injury suffered by that passenger as a result.

and low discounts are provided in most categories, and general observations about the statistics are provided in all categories. The names of the cases that made up the data in each category of case are cited at the end of the chapters. The final chapter provides a brief summary of the remainder of the cases in the study, being those that were not so easily categorised.

Contributory Negligence: Principles and Practice will likely be of considerable interest to those in practice, and especially those who work in personal injury law. As noted above, Part II of the book provides a valuable refresher of the doctrine, including both a detailed black-letter description of the law as well as highlighting the various practical aspects of the doctrine about which practitioners ought to be aware.

The real value of the book, however, and what makes it so useful for practitioners, is the data contained in Part III, being the types of discounts that have been imposed for contributory negligence in frequently recurring situations. Indeed, the data are likely to prove invaluable to those who practise in personal injury law whenever they are required to provide advice or make submissions in court on the appropriate discount that should be imposed for contributory negligence. In particular, practitioners will no longer be forced to estimate an appropriate reduction for contributory negligence based on their 'gut feel' of the case; rather, with the aid of the book, they will be in a position to refer to specific judgments and the range of discounts that have been applied in similar situations – something likely to be of far greater probative value.

A book like *Contributory Negligence: Principles and Practice* is long overdue. Indeed, as the data make clear, there is little consistency among existing decisions, as both similar fact scenarios and ostensibly similarly culpable conduct appear often to attract wildly different findings of contributory negligence. The lack of

consistency is, however, hardly surprising, as prior to *Contributory Negligence: Principles and Practice* there was no simple way for practitioners or courts to find cases that might be of use for comparative purposes. Hopefully, easier access to such cases will go towards achieving the book's aim of promoting greater consistency in deductions for contributory negligence.

At this point one might object that previous findings of contributory negligence are of limited prescriptive value. After all, findings of contributory negligence tend to be highly fact-specific, such that a finding of contributory negligence in one case may not be particularly helpful in determining the appropriate reduction in another. Indeed, this limitation is acknowledged by the authors (pp 33–34). It should not, however, be overstated. In particular, whilst it is true that an *individual* case is likely to be of limited probative value, the same cannot be said of the *range of reductions* applied in existing cases; that is, whilst a court might not be greatly aided by evidence of a single, albeit similar, case resulting in a reduction of 25 per cent, they are likely to be greatly aided by evidence that cases of this type generally result in a reduction of between 20 per cent and 30 per cent. In this way, *Contributory Negligence: Principles and Practice* will be able to assist courts in much the same way that they are assisted by the range of damages provided by the *Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases*, which now seems to be followed almost to the letter unless there is a good reason not to.

Readers might also be disappointed by the book's relatively modest length. *Contributory Negligence: Principles and Practice* comes in at only 130 pages, including appendices and end-matter. As a result, it is therefore perhaps inevitable that it is almost exclusively descriptive in nature (particularly Part III) and only rarely engages in any appraisal or critique of the law as described. The flip

side of the book's brevity, however, is that it is very accessible and easy to navigate. Those seeking additional analysis of the law are also likely to be aided by the book's bulkier companion volume, *Contributory Negligence in the Twenty-First Century*, as well as the many footnotes that are scattered throughout. So, for example, although the book describes the somewhat Delphic 'causal potency' criterion in a relatively uncritical way, the footnotes nevertheless refer to an article co-authored by Goudkamp, which ultimately argues that the criterion serves no purpose and should be abolished.

On a final note, the book also contains much data that will likely be of general interest to readers. So, for example, despite the common belief that children are only rarely found guilty of contributory negligence, the data reveal that, in fact, children are found guilty of contributory negligence *more* often than adults (p 17).

Similarly interesting (to the reviewer, at least) was that, despite the appeal courts' ostensible reluctance to interfere with trial level judges' findings of contributory negligence (see Chapter 6), of the cases surveyed that were the subject of an appeal, in 42 per cent of those cases the trial judge's finding on contributory negligence was overturned, suggesting that that appeal courts are less reluctant to interfere with a trial judge's findings than they might otherwise suggest.⁵

Contributory Negligence: Practice and Principles is a valuable contribution to an important area of law. It is highly accessible and will likely prove to be an essential companion to those who practice in personal injury law.

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5 Admittedly, this figure does not include cases that were not appealed, which might suggest that only extreme findings were appealed in first place.