CONTRIBUTORY NEGLIGENCE - WHO SHOULD PLEAD? [1997] 2 MLJ lxxxi

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CONTRIBUTORY NEGLIGENCE - WHO SHOULD PLEAD?

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The history of the English common law has its attractions, it has invoked tremendous amount of learning, understanding, and one could also equally say that it has passed through some disgraceful episodes. It has always been said that common law was rigid and one had to seek the aid of equity to get justice. Equity therefore prevailed. But, there were certain spheres of law where equity could not intervene and the rigours of common law continued.

In an action based on negligence, the common law proceeded on the basis that there had to be a judgment either for the plaintiff or for the defendant. There was no middle course. The common law made no provision for the apportionment of the loss between the plaintiff and the defendant.

A classic example is *Butterfield v Forrester*,[1] in which case the defendant had placed a pole across the highway. The plaintiff, riding as fast as his horse would go, collided with the pole and was injured. The plaintiff's action failed. Lord Ellenborough CJ, in upholding the judgment, said:

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> A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he does not himself use common and ordinary caution to be in the right One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.

That was the common law position. Contributory negligence had no place at common law.

It has been firmly established that in order for the plaintiff to succeed against a wrongdoer, the former had to prove:

(i) the existence of a duty to take care by the defendant, and which duty is owed to the plaintiff;

(ii) failure to attain that standard of care prescribed by the law; and

(iii) damage suffered by the plaintiff, which is causally connected with the breach of duty to take care.

As has been pointed out earlier, contributory negligence was in essence an absolute defence to defeat the plaintiff's claim. The courts, disturbed by the harshness of this rule, found an escape route to ground liability on the defendant by inquiring as to what the `effective cause', `real cause' or `substantial cause' of the accident was. This led to the development of the `last opportunity rule', which saved the plaintiff's day.

This common law position was altered by the English Law Reform (Contributory Negligence) Act 1945, s 1 of which provided that where

> any person suffers damage as the result of his own fault and partly of the fault of any person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility of the damage.

The passing of the Act of 1945 was the death knell of contributory negligence as a complete defence to the plaintiff's claim. Section 12(1) of our Civil Law Act 1956 is identical with the English provision just referred to.

An accident victim was provided with a chance of recovering something unless he was hopelessly and solely at fault for the accident. The courts were relieved of the dilemma of having to devise artificial means to provide the accident victim with something. Slowly, but steadily, case law developed on this subject. What is contributory negligence? Is it a cause of action or is it a shield? These were troubling questions and all those who dealt with it were at sea. Could someone claim that he has been wronged and, at the same time, say that he might have also contributed to the damage he has suffered?

In *Drinkwater & Anor v Kimber*,[2] the plaintiff, a passenger in a motor van driven by her husband, was involved in a collision with a motor car driven by the defendant. The plaintiff claimed damages for personal injuries and her husband claimed for loss and expenses. By his defence and counterclaim, the defendant denied negligence, alleged that the matters complained of were caused solely by the negligence of the plaintiff's husband, or, in the alternative, that the plaintiff's husband was guilty of contributory negligence. The defendant then went on to plead: if, contrary to the defendant's contention, the defendant is held to have been guilty of negligence contributing towards the happening of the matter complained of, so that he is adjudged to pay damages to the plaintiff, the defendant will contend that he had suffered damages within the meaning of s 1 of the Law Reform (Contributory Negligence) Act 1945, caused partly by his own fault and partly by the fault of the plaintiff's husband.

Devlin J found the plaintiff one-third and the defendant two-thirds to blame for the collision, and assessed the plaintiff's damages at £405.

The defendant contended that the plaintiff's husband, as a joint tortfeasor being in part responsible, should be ordered to contribute £135, being one-third of the damages of £405. Devlin J held that the defendant could not recover on his counterclaim.

Singleton LJ, referring to s 1 of the English Act of 1945, held that `that section does not create a right of action, it removes an obstacle'.

So, if a statutory provision, ie contributory negligence does not create a right of action, then, what is it? The answer seems to be, since contributory negligence is no longer a defence to defeat a plaintiff's claim altogether, a plea of such nature seeks the reduction of the damages to

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such extent as the court thinks just and equitable, having regard to the claimant's share in the responsibility for the damage.[3]

Lord Simon has indeed referred to `contributory negligence' as a `defence'.[4]

> [When] contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.

It could therefore safely be said that, even though the plea of contributory negligence does not defeat the plaintiff's claim, it does, if the defendant succeeds in establishing contributory negligence on the part of the plaintiff, affect the measure of damages.

Section 12(6) of the 1956 Act defines `fault' to mean negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or which would, apart from this Act, give rise to a defence of contributory negligence.

The plea of contributory negligence, therefore, is to a greater extent to the advantage of the defendant and to a lesser extent, a potent shield to the plaintiff in that his position will not be that of Lord Ellenborough's era.

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The evidentiary burden of proving contributory negligence is on the defendant. The plaintiff need not disprove it. All that the plaintiff has to do is to make out that the defendant whom he complains of was in the wrong. The burden of proof, said Lord Wensleydale,[5]

> is clearly upon him, and he must show that the loss is to be attributed to the negligence of the opposite party. If at the end he leaves the case in even scales, and does not satisfy the court it was occasioned by the negligence or default of the other party, he cannot succeed.

It is not part of the plaintiff's case to negative contributory negligence in his statement of claim, although he is required to show a prima facie case of negligence on the part of the defendant. The burden of proving contributory negligence is on the defendant.

If the defendant's negligence or breach of duty is established, `the onus is on the defendant to establish that the plaintiff's contributory negligence was a substantial or material co-operating cause'.[6]

Du Parcq LJ explained:

> In order to establish the defence of contributory negligence, the defendant must prove, first, that the plaintiff failed to take `ordinary care of himself' or, in other words, such care as a reasonable man would take for his own safety, and secondly, that his failure to take care was a contributory cause of the accident.[7]

It is therefore perfectly clear that since the plea of contributory negligence is for the benefit of the defendant, only he can raise it. It cannot be and has never been, part of the plaintiff's case.

However, in *Ch'ng Chong Shong v Lok Chen Chong & Yong Ah Jun*[8] Mohamed Dzaiddin J held that as the plaintiff had not only failed to plead contributory negligence, but had not even brought up the issue during the trial, the action failed.

The learned judge said (at p 518):

> The remaining question to consider is whether or not the defendant was in any way guilty of contributory negligence? On this point, Mr Kumaraendran for the defendant submitted that the defendant could not be liable for any contribution because this was never pleaded in the plaintiff's statement of claim. Counsel relied on the decision of Vohrah J in *Anuar bin Mat Amin v Abdullah bin Mohd Zain* [1989] 3 MLJ 313 which held that since contributory negligence was not pleaded nor brought up as an issue during the course of the trial, the court should not take into account any question of contributory negligence. The above decision followed the English Court of Appeal case in *Fookes v Slaytor* [1979] 1 All ER 137. It is also an elementary rule of civil practice that every pleading must contain the necessary particulars of any claim, defence or other matter pleaded (O 18 r 12 RHC). In the present case, the plaintiff had not only failed to plead contributory negligence, but did not even bring up the issue during the trial. In fact, there was no suggestion made to the defendant, under cross-examination, that he was in any way guilty of contributory negligence. However, when confronted with this issue during the submissions of counsel, learned counsel then applied to me for leave to amend the plaintiff's statement of claim to include a plea of contributory negligence, I had, in the circumstances of the case, to reject the application.

The decision of the learned judge seems to suggest that it is part of the plaintiff's case to negative contributory negligence or that the defendant has in some way contributed to the accident. It is respectfully submitted that this is against the weight of authorities.

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For the proposition that the plaintiff should have pleaded contributory negligence, the learned judge relied on two cases: *Fookes v Slaytor*[9] and *Anuar bin Mat Amin v Abdullah bin Mohd Zain*.[10]

In *Fookes v Slaytor* (supra), there was an accident involving two motor vehicles. The plaintiff, the driver of one of the vehicles, had suffered personal injuries. He claimed damages and the county court judge awarded damages in the sum of £398.66 with appropriate costs. The county court judge found that the full amount to which the plaintiff was entitled was £598, but found that the plaintiff had contributed to the accident and therefore reduced the damages by one-third. The plaintiff appealed, contending that the trial judge had no jurisdiction to make the reduction in the damages.

Sir David Cairns pointed out that there was no direct authority on the question whether in the absence of a plea of contributory negligence, the court has jurisdiction to make a finding that there was such negligence on the part of the plaintiff. He was referred to a Scottish decision in *Taylor v Simon Carves Ltd*[11] and quoted from that decision, which is as follows:

> Alternatively the defenders' counsel argued that in terms of s 1(1) of the Law Reform (Contributory Negligence) Act 1945, the court was entitled if not, indeed bound to propone a question or questions relating to joint fault and to direct the jury with regard to apportionment of liability. Section 1(1) provides that `Where any person suffers damage as the result partly of his own fault and partly of any other person, a claim in respect of that damage' is not defeated `but the damages recoverable in respect thereof shall' be apportioned. It was contended that the subsection was peremptory and meant that if in any case it

was found that a person suffered damage as the result of joint fault the damages recoverable must be apportioned and that the section covered the peculiar circumstances of this case. It was said that in an action of damages tried by a jury in the court of session the presiding judge had allowed contributory negligence to go to the jury although not pleaded. No report of such a case was referred to and the circumstances in which this was done were not explained. I had to decide the point on a reading of the subsection as applied to the peculiar circumstances of this case. In my view the defenders' contention is not well founded. The primary purpose of the Act was to alter the law whereby a claim was defeated if contributory negligence was established and to substitute, in such cases, an apportionment of liability. But if contributory negligence is not in issue between the parties then, in my opinion, the Act cannot apply. The `claim' is not a claim in respect of damages resulting from joint fault.

The learned judge was referred to two English authorities, the first of which was *Dann v Hamilton*[12] in which Asquith J (as he then was) said:

As a matter of strict pleading, it seems that the plea of volenti is a denial of any duty at all and, therefore, of any breach of duty, and an admission of negligence cannot strictly be combined with the plea. The plea of volenti differs in this respect from the plea of contributory negligence, which is not raised in this case.

The learned judge went on to say:

There was some discussion in academic circles as to the correctness of that decision and the matter was alluded to in *Slater v Clay Cross Co Ltd* [1956] 2 All ER 625; [1956] 2 QB 264. It was again a case where what was being discussed was the defence of volenti non fit injuria. It becomes relevant in a rather curious way, because Denning LJ giving the first judgment, referred to a note which Lord Asquith had written for the Law Quarterly Review in which he referred to criticisms that had been made of his judgment in *Dann v Hamilton* and said:

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`The criticisms were to the effect that even if the volenti doctrine did not apply, there was here a cast iron defence on the ground of contributory negligence. I have since had the pleadings and my notes exhumed, and they very clearly confirm my recollection that contributory negligence was not pleaded. Not merely so, but my notes show that I encouraged counsel for the defence to ask for leave to amend by adding this plea, but he would not be drawn: why, I have no idea. As the case has been a good deal canvassed on the opposite assumption, I hope you will not grudge the space for this not unimportant corrigendum.'

Denning LJ went on to say, having decided that the doctrine of volenti did not apply: `In so far as he suggested that the plea of contributory negligence might have been available, I agree with him.' I think by implication Denning LJ was saying in effect there that the plea of contributory negligence would be available if, and only if, it was pleaded.

On the question of the plea of contributory negligence, the learned judge went on to say:

It appears to me that, with all respect to Judge McDonnell, it was not right in this case to treat the matter as if there were a plea of contributory negligence before the court. That seems to me to be the rule in relation to procedure. The opposite view would mean that a plaintiff in any case where contributory negligence might possibly arise, even though it was not pleaded, would have to come to court armed with evidence that might be available to him to rebut any allegation of contributory negligence raised at the trial. It is true that in the ordinary case it would not be likely to involve anything beyond the evidence he would be giving to establish negligence on the part of the defendant, but circumstances are reasonably conceivable in which it might be.

In my view, this appeal should succeed and the judgment should be amended by increasing the amount of damages to £598 with the appropriate costs.

Orr LJ and Stamp LJ concurred.

The second is a local case: *Anuar bin Mat Amin v Abdullah bin Mohd Zain*.[13] The plaintiff in this case brought an action against the defendant, alleging that as a result of the defendant's negligence, he had suffered injuries. The session court judge found that the plaintiff had contributed to the accident and held him 70% liable. The defendant did not plead contributory negligence. The plaintiff appealed. KC Vohrah J, following the decision in *Fookes v Slaytor* (supra), held that in the absence of a plea of contributory negligence, the session court judge should not have apportioned liability in the way she did. The appeal was allowed.

In view of the authorities discussed here, and looking at s 12(1) of the Civil Law Act 1956, it is respectfully suggested that the decision in *Ch'ng Chong Shong v Lok Chen Choong* (supra) is unsupported by the authorities and the statutory provisions. In fact, s 12(1) of the Act of 1956 was not referred to in *Ch'ng Chong Shong* (supra). The effect of that decision would appear to impose on the plaintiff the burden of negativing contributory negligence when the law strictly requires the defendant to negative negligence on his part and to call in aid, in the alternative, the plea of contribu-tory negligence on the part of the plaintiff so that the damages could be reduced. It is elementary law that a plaintiff's claim has to fail if he cannot prove negligence on the part of the defendant. Equally, it is established law that if the plaintiff cannot establish a prima facie case the defendant ought to succeed. However, there may be cases, and it can fairly safely be said that in almost all accident cases, the element of contributory negligence plays a prominent part. The defendant, while pleading a general denial, will always, to be on the safe side, plead the alternative plea of contributory negligence. The burden of proving that fact remains with the defendant and does not shift. We can only hope that the decision in *Ch'ng Chong Shong* (supra) will not be followed and the Supreme Court will, once and for all, put the issue to rest.

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[1] (1809) 11 East 60.

[2] [1952] 2 QB 281.

[3] Civil Law Act 1956 s 12(1).

[4] *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601 at p 611.

[5] *Morgan v Sim* (1857) 11 Moo PC 307 at p 312.

[6] Per Lord Wright in *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at p 172.

[7] *Lewis v Denye* [1939] 1 KB 540 at p 554.

[8] [1991] 1 CLJ 515.

[9] [1979] 1 All ER 137.

[10] [1989] 3 MLJ 313.

[11] [1958] SLT (Sh Ct) 23.

[12] [1939] 1 All ER 59; [1939] 1 KB 509.

[13] [1989] 3 MLJ 313.