Sharing the blame

Three recent RTA cases show that the law of contributory negligence continues to raise difficult and challenging questions about personal responsibility. Azmina Gulamhusein reports

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In the famous case of Froom v Butcher [1976] QB 286 CA, Lord Denning defined contributory negligence as "a man's carelessness in looking after his own safety" and commented that this issue can create a "remarkable conflict of opinion".

When deciding whether a claimant must share the responsibility for damage suffered and have his compensation reduced to an extent that is "just and equitable" under the Law Reform (Contributory Negligence) Act 1945, the court must perform a delicate balancing exercise. This may involve weighing up multiple factors, such as safety developments, shifting attitudes to risk-taking, expert evidence on the causation of injury and public policy arguments.

Three recent road traffic accident cases show that the law of contributory negligence continues to raise difficult and challenging questions about personal responsibility.

Pedestrian safety
Important issues about pedestrian safety are highlighted in Osei-Antwi v South East London & Kent Bus Company Ltd [2010] EWCA Civ 132. This case involved a claimant who was hit by a bus when travelling to work on 15 June 2005.

While the claimant waited to cross over the road at the junction of the main road and a bus depot, the bus driver attempted to execute a sharp left-hand turn into the depot.

During this manoeuvre, the rear of the vehicle mounted the pavement and struck the claimant. She was crushed against some safety railings and suffered both a broken ankle and a damaged knee.

Although the trial judge accepted that the claimant had been standing on the pavement rather than the road, he ruled that some criticism could be made of her position very close to the kerb.

The defendant bus company was held liable in negligence, but the claimant was found one-third to blame for failing to keep a proper lookout and take evasive action when the bus came round the corner. She appealed against this finding of contributory negligence.

The Court of Appeal allowed the appeal and quashed the finding of contributory negligence in its entirety, finding that the claimant had been standing on a studded area of the pavement that was designated for pedestrians. The defendant admitted that buses did not normally cross the pedestrian area, and that the bus must have missed the claimant by a safe margin at the beginning and in the middle of its turn because only the rear of the vehicle hit her.

In the circumstances, it was not clear what the claimant had done wrong that caused or contributed to the accident. She knew that the bus was about to turn the corner, but this did not make her obliged to move further back from the road because the area was intended to be vehicle-free.

As the claimant had not been standing in an inherently dangerous position and her only fault was "failing to realise until the very last minute that the driver had got
the angle wrong," it appears to have been a logical decision to overturn the finding of contributory negligence. However, Lord Justice Hallett did not reach a fixed conclusion about whether there is any legal principle that prevents a pedestrian who is struck on the pavement from ever being held to blame.

"As the Court of Appeal decided that a pedestrian on the pavement will not necessarily escape being found partially liable, this leaves the door open for defendants to argue for an element of contributory negligence," explained John Roberts, a solicitor at national law firm Berryman Lace Mawer LLP.

"Whether to do so would have to be a subjective decision based upon the facts of the individual claim. Factors to consider would include the position and movement of the bus, the pedestrian's location on the pavement and the reasonableness of the pedestrian's reaction, if any."

**Failure to wear a seat belt**

Lord Denning set out the following general guidelines in *Froom v Butcher* for apportioning liability where a claimant has failed to wear a seat belt:

- If the claimant's injuries would have been prevented altogether by wearing a seat belt, the damages should be reduced by 25 per cent.
- If the injuries would have still occurred but been less severe, the reduction should be 15 per cent.

Over the years, defendants have made unsuccessful attempts to argue that higher reductions for contributory negligence should apply. A further challenge to the guidelines was recently made in *Stanton v Collison* ([2010] EWCA Civ 81), which involved a catastrophic road traffic accident.

On the night of 17 May 2003, the defendant gave a lift in his car to four teenagers who were returning from a bar. Nobody in the vehicle was wearing a seat belt and the defendant drove at more than double the 30 mph speed limit before colliding violently with an oncoming vehicle.

During the collision, the defendant was killed instantly and primary liability for the accident was admitted on his behalf. The 16-year old claimant, who had been sitting in the front passenger seat with a girl on his lap, suffered serious frontal lobe brain damage.

At trial, the main issue was whether the claimant's damages should be reduced for contributory negligence due to (among other matters) his failure to wear a seat belt. It was submitted on behalf of the defendant that *Froom v Butcher* should be revisited due to subsequent developments, such as the introduction of compulsory seat belt use, improvements in design and increased public awareness.

Engineering experts agreed that the claimant's head injury would probably have been less severe if he had worn a seat belt, but complete prevention of serious injury would have been unlikely. However, no medical evidence was produced to show that seat belt use would have resulted in less severe cognitive deficits.

The trial judge therefore decided that the defendant had not discharged the burden of proving that a seat belt would have made a considerable difference to the claimant's injuries. She declined to reduce his damages for contributory negligence or depart from the guidance in *Froom v Butcher*, which had been made in anticipation of future safety developments. The defendant's personal representatives appealed.

The Court of Appeal dismissed the defendant's appeal. Although the decision about whether a seat belt would have made a considerable difference to the claimant's injuries was not clear-cut, the trial judge had heard the evidence as a whole. She had therefore been entitled to conclude that medical opinion was required to resolve the uncertainties because the brain is a vulnerable and extremely complex organ. It does not follow that medical evidence is necessary in every seat belt case and the case-management process should identify well in advance of trial whether the causation aspect of contributory negligence is an issue.

The guidelines in *Froom v Butcher* remain binding because they provide a well-understood formula and avoid an expensive, time-consuming inquiry into fine degrees of contributory negligence.

Frank Burton QC, who practises at 12 King's Bench Walk and acted for the claimant, said: "The Court of Appeal in *Stanton* has reaffirmed two principles on the law of contributory negligence concerning the wearing of seat belts.

"The first is that it is the defendant who must plead and prove, with appropriate evidence, that the failure to wear a seat belt probably made a considerable difference to the injuries sustained. In some cases this may require medical as well as engineering evidence to confirm that the belted injuries would have been avoided or would have been less severe."
Secondly, the Court emphasised that the scale of reduction laid down in *Froom v Butcher* (1976) QB 286 CA of 15–25 per cent should continue to apply and any further attempts to extend the level of deduction are unlikely to succeed.

**The Good Samaritan**

In *Tolley (David) v Carr (Claire) & Ors* (2010) EWHC 2191 (QB), the High Court gave a landmark ruling about the contributory negligence of rescuers. During his morning journey to work on 21 November 2006, the claimant travelled southbound along the M53 motorway through turbulent weather conditions. He stopped to assist the driver of a vehicle that overtook him and spun out of control. At this point, the claimant noticed that another driver had lost control of her vehicle and was blocking the outside lane of the northbound carriageway.

As the female driver was in immediate danger, the claimant crossed the central reservation and helped her out of the car safely. When he tried to move her car, which posed a great danger to other road users, it was hit by one vehicle rapidly followed by another and the claimant was thrown 35 feet down the road. He sustained devastating spinal cord and other injuries and was left with permanent paralysis of the lower limbs.

The defendants argued that the claimant’s damages should be discounted by between 25–33 per cent because he had failed to take reasonable care of his own safety when making a “wholly foolhardy” attempt to remove the car from the carriageway.

The High Court dismissed the defendants’ allegation that the claimant was guilty of any contributory negligence. Although it is possible for rescuers to be negligent if they act with “wanton disregard” for their own safety, Mr Justice Hickinbottom emphasised that “the law is slow and cautious in finding negligence in those who imperil themselves to save persons from risks caused by the negligence of others.”

Given that the claimant had acted under the pressures of the moment to reduce a substantial hazard to other motorists and had checked whether he could see any traffic approaching in the outside lane, surely his conduct fell within the category of the brave and commendable rather than the foolhardy and unreasonable.

In his October 2010 report entitled *Common Sense, Common Safety*, Lord Young recommended that “good Samaritans” and professional rescuers should not be held liable if they have put themselves at risk while helping others. However, *Tolley* illustrates that the common law already takes a generous and pragmatic approach to those who risk their own safety to save other persons from harm.

As with the other road traffic accident cases that have been discussed, the issue of contributory negligence was strongly contested in *Tolley*. The court was therefore once again required to assess competing factors and strike the balance of fairness.