

CONTRIBUTORY NEGLIGENCE

Michael Libby

June 2007



DOLDEN WALLACE FOLICK LLP

DOLDEN WALLACE FOLICK LLP INSURANCE LAWYERS
TENTH FLOOR – 888 DUNSMUIR STREET
VANCOUVER, B.C. V6C 3K4
Tel: 604.689.3222 Fax: 604.689.3777
WWW.DOLDEN.COM



TABLE OF CONTENTS

Introduction – The Nature of Contributory Negligence	3
Contributory Negligence Contrasted with Failure to Mitigate.....	3
<i>Duty to Mitigate</i>	3
<i>Volenti Non Fit Injuria</i>	4
The Test for Contributory Negligence	4
The Practical Effect of Contributory Negligence.....	5
<i>Ontario</i>	5
<i>British Columbia</i>	6
Examples of Reductions in Damages for Contributory Negligence.....	8
<i>Motor Vehicle</i>	8
<i>Aviation</i>	9
<i>Marine</i>	9



INTRODUCTION - THE NATURE OF CONTRIBUTORY NEGLIGENCE

Even though a plaintiff may have suffered damage or loss attributable to another's negligence, the plaintiff's claim to damages may be reduced or eliminated if the plaintiff has failed to take reasonable care for his or her own safety, and his or her own negligence has contributed to that loss. In other words, where the plaintiff's own negligence contributes to his or her injury, his or her right to fully recover is for that loss may be correspondingly affected.

The definition of contributory negligence was re-stated by the Supreme Court of Canada in *Bow Valley Jusky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 where the Court held:

...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 plaintiffs 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.

Contributory Negligence Contrasted with Failure to Mitigate

In order to better understand contributory negligence, it is useful to compare and contrast it with two similar but distinct legal principles which may also serve to defeat or reduce a plaintiff's claim based on his or her own conduct: (1) a plaintiff's duty to mitigate loss; and (2) the doctrine of *volenti non fit injuria*.¹

Duty to Mitigate

A plaintiff's duty to mitigate is derived from the general proposition that a plaintiff cannot recover from the defendant damages which he himself could have avoided by taking reasonable steps.² A plaintiff's duty to mitigate is therefore, rooted in the law of damages, and is principally concerned with the reasonableness of the plaintiff's conduct

¹ It is not within the scope of this paper to examine these principles in any detail. Rather, they will be addressed in a summary fashion simply to highlight the differences between them and the defence of contributory negligence.

² See *Janiak v. Ippolito* (1985), 16 D.L.R. (4th) 1 (S.C.C.).



after the event causing the loss. If a plaintiff does not take reasonable steps to mitigate his or her losses following that event, the amount of damages to which he or she would otherwise be entitled will be reduced by the amount attributable to that failure. In contrast, the defence of contributory negligence is concerned with the role of the plaintiff in the events *leading up to and causing* the loss so as to determine whether the plaintiff must bear some responsibility for the loss. Therefore, the principal distinction between contributory negligence and a failure to mitigate is that the former presents a question of relative responsibility for a loss, while the latter is concerned with the manner in which a plaintiff has managed and limited his or her loss.

Volenti Non Fit Injuria

The doctrine of *volenti non fit injuria*, which is applicable only in limited situations, provides that a plaintiff may not recover for any loss for which he or she has voluntarily assumed the risk of injury. While the defences of both contributory negligence and *volenti* are based on the plaintiff's conduct, in the former, the plaintiff must be negligent and thereby contribute to his or her injury. The latter provides a complete defence; the plaintiff is barred from recovery on the basis that he or she voluntarily and knowingly accepted the risk of being injured by the defendant's conduct.

The Test for Contributory Negligence

In *Bow Valley, supra*, the Supreme Court of Canada adopted the test for contributory negligence that was set out by Denning L.J. in *Jones v. Livox Quarries*, [1952] 2 Q.B. 608 (Eng. C.A.) as follows:

Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless.

Despite the fact that contributory negligence does not require a duty of care, proving contributory negligence against a plaintiff is much like establishing negligence against a defendant. The standard of care which the plaintiff must meet is no different than that of a reasonable person acting to protect his or her own safety or property.³

Furthermore, a plaintiff's contributory negligence must be causally related to the plaintiff's loss, and the defendant must prove that the plaintiff's negligence caused or

³ *Alberta Wheat Pool v. Northwest Pile Driving Ltd.*, 2000 BCCA 505, at para. 21.



contributed to that loss. If the plaintiff's injury is outside the scope of the foreseeable risk to which he or she is exposed by his or her actions, the plaintiff's conduct will not be considered the proximate cause of the loss.

The Practical Effect of Contributory Negligence

Historically, contributory negligence was a complete defence to a plaintiff's claim. Once the defendant was able to establish that the plaintiff contributed to his or her own loss, the plaintiff would be denied any means of recovery. That traditional contributory negligence bar has been replaced by provincial legislation which apportions liability between negligent defendants and contributorily negligent plaintiffs.⁴ While the provincial statutes have many similarities, some differ significantly as to whether defendants will be jointly and severally liable, as opposed to severally liable, where a plaintiff is contributorily negligent. A good example of the similarities and differences between the provincial statutes can be seen from a comparison of relevant sections of the Ontario and British Columbia legislation.

Ontario

Sections 1, 3, and 4 of the Ontario *Negligence Act* read as follows:

1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.
3. In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.
4. If it is not practicable to determine the respective degree of fault or negligence as between any parties to an action, such parties shall be deemed to be equally at fault or negligent

This legislation provides that when there are two or more tortfeasors, and a plaintiff has also been found negligent, the proper approach to apportionment is to first reduce the

⁴ For examples, see the *Contributory Negligence Act*, R.S.A. 2000, c. C-27; *Negligence Act*, R.S.B.C. 1996, c. 333; *Tortfeasors and Contributory Negligence Act*, R.S.M. 1987, c. T90, C.C.S.M., c. T90; *Negligence Act*, R.S.O. 1990, c. N.1; *Contributory Negligence Act*, R.S.S. 1978, c. C-31.



extent of the recoverable damages in proportion with the plaintiff's negligence, and then to apportion the remaining damages between the defendants, in accordance with their fault. Despite any contributory negligence on the part of the plaintiff, the defendants will be jointly and severally liable for the damages awarded to the plaintiff.⁵

British Columbia

Sections 1, 2(c), and 4 of the British Columbia *Negligence Act* read as follows:

1 (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.

(2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.

(3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.

2 The awarding of damage or loss in every action to which section 1 applies is governed by the following rules:...

(c) as between each person who has sustained damage or loss and each other person who is liable to make good the damage or loss, the person sustaining the damage or loss is entitled to recover from that other person the percentage of the damage or loss sustained that corresponds to the degree of fault of that other person;

4 (1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.

(2) Except as provided in section 5 if 2 or more persons are found at fault

(a) they are jointly and severally liable to the person suffering the damage or loss, and

(b) as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.

The effect of these sections was explained by the British Columbia Court of Appeal in *Leischner et al v. West Kootenay Power and Light Company, et al.* (1986), 70 B.C.L.R. 145, as follows:

Sections 1 and 4 apply to different situations; s. 4 applies to cases where two or more persons cause damage to the plaintiff; s. 1 applies where the plaintiff himself is one of the persons found to have caused his damage or loss; s. 2(c) provides that in a s. 1 case the plaintiff shall recover from a defendant only the proportion of the loss that corresponds to that defendant's fault...

In the result where a plaintiff is blameless, he obtains joint and several judgment against any number of defendants responsible for his loss; where a plaintiff shares in the blame,

⁵ *Ingles v. Tutkaluk Construction Ltd.*, 2000 SCC 12



then by ss.1 and 2(c) he obtains several judgments against the defendants liable for his loss.

A simple example is helpful in understanding the differences between the two statutory schemes:

A plaintiff is found 30% contributorily negligent for an accident. Defendant A (an insured corporation) is found 20% at fault, and Defendant B (an individual) is found 50% at fault. Under the B.C. statute, the plaintiff can only seek 20% of his judgment from Defendant A, the insured corporation, and must seek the remaining 50% of his judgment from Defendant B, the individual. If Defendant B has no funds from which to pay his 50% of the judgment, the plaintiff is left with no recourse.

Under the Ontario legislation, however, the plaintiff would be free to collect the full 70% of the judgment from defendant A, the insured corporation, even though defendant A was only 20% at fault.

Both legislative schemes provide for contribution and indemnity among defendants in cases of joint and several liability. This permits any defendant that is called upon by the plaintiff to pay more than its proportionate share of the loss to seek reimbursement from the other defendants for their proportionate share.

The Basis for Apportionment of Fault⁶

Apportioning fault for contributory negligence is not as straightforward as allocating responsibility among several parties, all of who have played a role in causing a loss. The court's task is to assess the respective blameworthiness of the parties, rather than the extent to which the loss may be said to have been caused by the conduct of each.

This is because the degree of a defendant's negligence in causing an accident bears no relationship to how much of the damage might have been prevented had the plaintiff not been contributorily negligent. Since the extent to which a defendant and the extent to which a plaintiff "caused" the plaintiff's loss are not related, "causation" cannot be the basis of the allocation of responsibility between them.

A fault or blameworthiness analysis evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care. The question that affects apportionment, therefore, is the weight of

⁶ See generally, *Cempel v. Harrison Hot Springs Hotel Ltd.*, [1998] 6 WWR 233 (B.C.C.A.); *Snushall v. Fulsang* (2005), 78 O.R. (3d) 142 (C.A.); *Alberta Wheat Pool v. Northwest Pile Driving Ltd*, *supra*.



fault that should be attributed to each of the parties, not the weight of causation. As stated by the British Columbia Court of Appeal in *Cempel*:

In the apportionment of fault there must be an assessment of the degree of the risk created by each of the parties, including a consideration of the effect and potential effect of occurrences within the risk, and including any increment in the risk brought about by their conduct after the initial risk was created. The fault should then be apportioned on the basis of the nature and extent of the departure from the respective standards of care of each of the parties.

Examples of Reductions in Damages for Contributory Negligence

As noted above, provincial legislation generally provides that where it is impossible to establish different degrees of fault, liability will be apportioned equally.

Where evidence permits the court to apportion fault, the extent to which, a plaintiff's damages should be reduced for contributory negligence must be determined based upon the evidence. While apportionment will depend on the facts of each particular case, the following overview will give an example of reductions that have been imposed by courts in various types of cases.

Motor Vehicle

- Plaintiffs who are impaired drivers or willing passengers with impaired drivers, and are injured in motor vehicle accidents drivers may be found to be 25% to 45% contributorily negligent.⁷
- Plaintiffs involved in motor vehicle accidents who fail to wear seatbelts may be found to be 15%-25% contributorily negligent (but only where the defendant can prove that proper use of a seatbelt would have prevented or lessened the injury).⁸
- Motorcyclists and bicyclists who fail to wear helmets may be found to be 10%-15% contributorily negligent (where the defendant can prove that proper use of a helmet would have reduced the injury).⁹

⁷ See, for example, *Neufeld v. Foster*, [1999] B.C.J. No. 764 (Q.L.)(S.C.); *Walsh v. Gougeon*, [1989] B.C.J. No. 1446 (Q.L.)(SC); *Nielson v. Brunet Estate* (1994), 95 B.C.L.R. (2d) 303 (C.A.); *Court v. Schwartz*, [1994] B.C.J. No. 2164 (Q.L.)(SC).

⁸ See, for example, *Snushall v. Fulsang*, *supra*.

⁹ See, for example, *Lum v. McLintock* (1997), 45 B.C.L.R. (3d) 303 (S.C.); *Niitamo v. ICBC*, 2003 BCSC 608.



Aviation

- A plaintiff pilot whose airplane hit thin unmarked lighting strike wires in the course of landing was held to be 50% contributorily negligent.¹⁰
- Plaintiffs who boarded the wrong aircraft despite the fact that employees of the defendant airline had inspected their boarding passes without comment, were held to be 50% contributorily negligent for missing their correct flight.¹¹
- The plaintiff lessee of a helicopter that crashed due to a mechanical problem was held to be 40% contributorily negligent for failing to previously address a warning issued by the manufacturer about that mechanical problem.¹²
- A plaintiff was found to be 66 1/3 % contributorily negligent when its helicopter failed to give way to a glider prior to a mid-air collision between the two.¹³
- A plaintiff who had been a passenger in a small airplane and who was injured when he stood before the taxiing airplane in an attempt to help the pilot roll it into the hanger was held to be 30% contributorily negligent.¹⁴

Marine

- A tugboat that was struck by an ocean-going vessel while being overtaken by that vessel was held to be 33% contributorily negligent for failing to keep a proper lookout.¹⁵
- A plaintiff whose pleasure craft collided with a ferry was held to be 33% contributorily negligent for failing to keep a proper lookout in a shipping channel he knew to be navigated by large ferries.¹⁶

¹⁰ *Campbell Estate v. Calgary Power Ltd.* (1988), 62 Alta.L.R. (2d) 253 (C.A.).

¹¹ *Duemler v. Air Canada* (1980), 109 D.L.R. (3d) 402 (Alta.C.A.).

¹² *Can-Arc Helicopters Ltd. v. Textron Inc.*, [1992] 3 W.W.R. 60 (B.C. S.C.).

¹³ *Northern Helicopters Ltd. v. Vancouver Soaring Assn.*, [1972] 6 W.W.R. 342 (B.C.S.C.).

¹⁴ *Effendi v. Beaulieu* (1993), 133 N.B.R. (2d) 146 (Q.B.).

¹⁵ *Egmont Towing & Sorting Ltd. v. "Telendos"* (1982), 43 N.R. 147 (Fed.C.A.).



- A plaintiff whose ship was struck by a second ship that crossed the plaintiff's ship's course was held to be 25% contributorily negligent for failing to keep a proper lookout, and for proceeding on assumptions as to the other ship's movements that were based on scanty information.¹⁷
- The owner of a fishing vessel whose net was damaged by another nearby fishing vessel was held to be 75% contributorily negligent for failing to keep a proper lookout.¹⁸
- The plaintiff cargo carrier was found to be 40% contributorily negligent with respect to damage to its barge caused by improperly stowed cargo because the barge's captain had overseen, and provided some instruction for the stowage of the cargo.¹⁹
- A person who could not swim, and who drowned when the canoe he was operating was swamped by the operation of another vessel, was 25% contributorily negligent for failing to wear a life jacket.²⁰
- A plaintiff whose fishing boat collided with another boat that had been proceeding at an excessive rate of speed without proper lookout, was 25% contributorily negligent because the fishing boat's master had failed to act sufficiently promptly in putting his ship in reverse.²¹

¹⁶ *Kwok v. BC Ferry Corp.* (1987), 20 B.C.L.R. (2d) 318, affirmed 37 B.C.L.R. (2d) 236 (C.A.).

¹⁷ *"Cielo Bianco" (the) v. Algoma Central Railway*, [1987] 2 FC 592 (C.A.).

¹⁸ *North Ridge Fishing Ltd. v. "Prosperity" (The)*, 2000 BCSC 1124.

¹⁹ *Sea-Link Marine Services Ltd. v. Doman Forest Products Ltd.*, 2003 FCT 712.

²⁰ *Chamberland v. Fleming* [1984] Alta D. 3380-01 (Q.B.).

²¹ *Canadian Fishing Co. v. R.*, [1960] Ex. C.R. 303 (Can. Ex. Ct.).