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Challenges to apportionments on contributory negligence
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The author examines the approach of the courts to the issue of contributory negligence in the context of appeals. She observes that appeal courts are generally disinclined to interfere with findings on contributory negligence made by the court below and will only do so in limited circumstances. Having examined the important guidance provided by the UK Supreme Court in Jackson v Murray *2015 S.C. (U.K.S.C.) 105, the author turns her attention to the recent case of* Bowes v Highland Council *2018 S.L.T. 757 where the Inner House took the view that the Lord Ordinary had gone wrong on the issue of contributory negligence and accordingly was prepared to revisit the matter.*

Introduction

The defence of contributory negligence is often advanced in litigation arising from road traffic accidents where the defender contends that the pursuer's own actions contributed to his loss or injury. That was the assertion made by the defender roads authority in the case of *Bowes v Highland Council* 2018 S.L.T. 757. Although the Lord Ordinary at first instance rejected the defence, the Inner House, on a reclaiming motion by the council, was prepared to revisit the matter. It is rare for decisions on contributory negligence to be disturbed on appeal but the Inner House was prepared to do so in *Bowes* for the reasons discussed in this article.

Contributory Negligence

At common law, contributory negligence was a complete defence to an action for damages (see *Butterfield v Forrester* (1809) 11 East 60). A pursuer who was adjudged to have been partly to blame for his own injuries was denied compensation. That somewhat harsh approach was changed by the Law Reform (Contributory Negligence) Act 1945, section 1(1) of which provides as follows:

"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other 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 the 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 for the damage."

Accordingly, the modern position is that a pursuer who is partly responsible for his own loss will suffer a reduction in his award of damages, according to what the court considers to be "just and equitable". His claim is no longer completely defeated. What constitutes a "just and equitable" reduction is very much a fact sensitive decision (see *Scott v Warren* [1974] R.T.R. 104).

Appeal courts are notoriously reluctant to interfere with findings on contributory negligence which have been made by the court below. It has been judicially stated that "the apportionment of liability… is one that should stand unless there is a clearly discernible error on the part of the trial judge" (*McCluskey v Wallace* 1998 S.C. 711 at 717 per Lord McCluskey.)(See, also, *McCusker v Saveheat Cavity Wall Insulation Ltd* 1987 S.L.T. 24 and *Porter v Strathclyde Regional Council* 1991 S.L.T. 446.) In

McFarlane v Scottish Borders Council 2005 S.L.T. 359, the Inner House was prepared to vary the apportionment in respect of contributory negligence (from 75% to 50%) having regard to all the circumstances in the proper context, while recognising that "[a]n appeal court would normally be reluctant to disturb the Lord Ordinary's apportionment of liability" (per Temporary Judge Sir David Edward, QC at para.29.) More recently, the matter of variation was explored in detail in *Jackson v Murray* 2015 S.C. (U.K.S.C.) 105; 2015 S.L.T. 151. The factual background of the case was as follows. On a January afternoon in 2004 the pursuer, a thirteen year old schoolgirl who was returning from school, alighted from the near side of the school bus. The bus displayed square yellow and black graphic signs to the front and rear indicating that it was a school bus. Its hazard warning lights and headlights were on. Daylight was fading and there was no street lighting. The pursuer went between the back of the stationary bus and the car behind it. She paused briefly at the offside rear of the bus, took one or two steps into the road and then broke into a run. She was struck by the defender's car, which was travelling in the opposite direction at 50 mph. The defender had a view of the stationary bus for some 200 metres but did not slow down as he approached it, nor did he address his mind to the possibility of someone emerging from behind it and attempting to cross the road. Although the pursuer was within the defender's line of vision for 1.5 seconds, the defender did not see the pursuer until the point of impact. The Lord Ordinary (Lord Tyre) concluded that the defender had failed to drive with reasonable care. His speed was an excessive speed at which to approach the hazard which the bus potentially presented. He ought to have been travelling at no more than 40 mph for at least 100 metres before reaching the bus. Had the defender been travelling at a reasonable speed, the pursuer would have made it safely past the line of the car's travel and the accident would not have occurred. As far as the issue of contributory negligence was concerned, Lord Tyre's view was that the pursuer bore the overwhelming responsibility for the accident -she had, in his Lordship's view, committed an act of "reckless folly." When she emerged from behind the bus, the defender's car was only about 30-40 metres away. Lord Tyre assessed the pursuer's contributory negligence at 90 per cent.

The pursuer reclaimed. The Inner House modified the Lord Ordinary's apportionment of the pursuer's responsibility from 90 per cent to 70 per cent. Four main reasons were provided for that substituted apportionment. First, insufficient regard had been had to the pursuer's circumstances, including her age. While a thirteen year old was old enough to understand the dangers of traffic, she would not necessarily possess the same level of judgment and self control as an adult. In addition, in assessing whether it was safe to cross, the pursuer was required to take account of the defender's car approaching at a fair speed, in very poor light conditions with its headlights on. Second, the Lord Ordinary had placed insufficient stress on the actions of the defender. The defender had been culpable to a substantial degree. He had been driving at excessive speed and did not modify his speed in view of the potential danger presented by the bus. On approaching the bus, the defender did not address his mind to the risk that a person might emerge from behind it and attempt to cross the road. Third, although the pursuer's conduct was clearly negligent, it was wrong to characterize it as "reckless folly". Fourth, it was observed (2013 S.L.T. 153 at para.28 per Lord Drummond Young) that "in apportioning responsibility account must be taken not only of the relative blameworthiness of the parties but also the causative potency of their acts…[A] car is potentially a dangerous weapon, and

accordingly the attribution of causative potency to the driver must be greater than that to the pedestrian…[T]he Lord Ordinary held that the pursuer would have escaped the accident had she had an additional 1.12 seconds available. That suggests that the defender's excessive speed was causally significant." The Inner House concluded that, taken together, these factors were supportive of an apportionment that was more favourable to the pursuer than that made by the Lord Ordinary. The major share of responsibility must however remain with the pursuer, because her negligence was both "seriously blameworthy and of major causative significance" (at para.28). The Inner House concluded that the pursuer should bear 70 per cent of the responsibility.

The pursuer appealed to the Supreme Court, inviting it to reduce further the assessment of 70 per cent at which the Inner House had arrived. In the Supreme Court, Lord Reed, delivering the majority opinion, acknowledged that no court can arrive at an apportionment which is demonstrably correct. In relation to the matter of *review* of apportionment, Lord Reed stated (2015 S.C. (U.K.S.C.) 105 at para.27): "The problem is not merely that the factors which the court is required to consider are incapable of precise measurement. More fundamentally, the blameworthiness of the pursuer and the defender are incommensurable. The defender has acted in breach of a duty…which was owed to the pursuer; the pursuer, on the other hand, has acted with a want of regard for her own interests. The word 'fault' in s.1(1), as applied to 'the person suffering the damage' on the one hand, and the 'other person or persons' on the other hand, is therefore being used in two different senses. The court is not comparing like with like." It followed that the apportionment of responsibility was a somewhat "rough and ready exercise" (a fact reflected in the judicial preference for round figures). His Lordship also stated (at para.28) that "[s]ince different judges may legitimately take different views of what would be just and equitable in particular circumstances, it follows that those differing views should be respected, within the limits of reasonable disagreement." Having reviewed various authorities from both north and south of the border, Lord Reed set out the governing principle as follows (at para.35):

"The question, therefore, is whether the court below went wrong. In the absence of an identifiable error, such as an error of law, or the taking into account of an irrelevant matter, or the failure to take account of a relevant matter, it is only a difference of view as to the apportionment of responsibility which exceeds the ambit of reasonable disagreement that warrants the conclusion that the court below has gone wrong. In other words, in the absence of an identifiable error, the appellate court must be satisfied that the apportionment made by the court below was not one which was reasonably open to it."

Apportionments, Lord Reed observed, are not disturbed by appellate courts simply because of disagreement as to the *precise* figure. Turning to the present case, Lord Reed observed that the Extra Division had given only a very brief explanation of its apportionment of 70 per cent of the responsibility to the pursuer. In view of the Division's assertions (2013 S.L.T. 153 at paras 27-28) that "the defender's behaviour was culpable to a substantial degree," that "the defender's excessive speed was causally significant" and that "the attribution of causative potency to the driver must be greater than that to the pedestrian," Lord Reed questioned (2015 S.C. (U.K.S.C.) 105 at para.39) why the Division had concluded that "the major share of

responsibility must be attributed to the pursuer".

Lord Reed pointed out that there were two aspects to apportionment: the respective causative potency of the parties' acts and their respective blameworthiness. Lord Reed continued (at para.40):

"In the present case, the causation of the injury depended upon the combination of the pursuer's attempting to cross the road when she did, and the defender's driving at an excessive speed and without keeping a proper look-out. If the pursuer had waited until the defender had passed, he would not have collided with her. Equally, if he had slowed to a reasonable speed in the circumstances and had kept a proper look-out, he would have avoided her."

Given the Extra Division's conclusion that the causative potency of the defender's conduct was greater than that of the pursuer's conduct, its conclusion that the pursuer should bear the greater share of responsibility for the damage could only be explained on the basis that the Division considered the pursuer far more blameworthy. Lord Reed found that difficult to understand, given the factors which the Division had identified, namely the pursuer's age and the difficulty of assessing the defender's speed in poor light conditions. The Extra Division had considered that the defender's behaviour was "culpable to a substantial degree". Overall, the Extra Division's reasoning did not provide a satisfactory explanation of its conclusion that the pursuer should bear the major share of responsibility. Lord Reed expressed the majority view of the Supreme Court (at para.43) that "the defender's conduct played at least an equal role to that of the pursuer in causing the damage and was at least equally blameworthy" before concluding (at para.44): "The view that parties are equally responsible for the damage suffered by the pursuer is substantially different from the view that one party is much more responsible than the other. Such a wide difference of view exceeds the ambit of reasonable disagreement, and warrants the conclusion that the court below has gone wrong. I would accordingly allow the appeal and award 50 per cent of the agreed damages to the pursuer."

The *Jackson* judgment is significant because of its articulation - at the highest judicial level - of the circumstances in which it is legitimate for an appeal court to interfere with a contributory negligence apportionment made by a lower court. Those principles would subsequently be applied by the Inner House in *Bowes v Highland Council* 2018 S.L.T. 757. The facts of that case were as follows. On a February morning in 2010, Mr Bowes' was driving his pick up truck on the Kyle of Tongue bridge when it swerved and struck a parapet. The parapet did not operate as it ought to have done. It did not contain Mr Bowes' vehicle but instead "unzipped", whereupon the truck fell into the water below, and Mr Bowes was drowned. The bridge was owned and maintained by the Highland Council. In an action of negligence raised by various members of the deceased's family, the Council was held liable on the basis that it had failed to take reasonable care for the deceased's safety while crossing the bridge. An engineer's inspection report some years earlier had disclosed defects in the bridge and severe defects in the parapet. Later reports disclosed further defects and non compliance with current standards for restraint. Although a monitoring system was introduced, it was subsequently discontinued. The Lord Ordinary found that the council knew that the parapet was defective, that it was not compliant with current standards, that its containment capacity was

compromised to an unknown extent and that it would not operate as intended. Had the parapet been operating as designed, it would have contained the vehicle on the bridge carriageway and Mr Bowes would not have lost his life. The council had breached its duty in failing to deal with the hazard by way of implementing interim measures (e.g. temporary barriers, single lane carriage controlled by traffic lights, speed reduction) until such time as the parapets were replaced.
The defender sought to rely on the defence of contributory negligence. There was no evidence that the deceased's loss of control was caused by mechanical failure or by any medical condition nor was there any evidence that the carriageway surface was responsible. The Lord Ordinary concluded that the deceased lost control of his vehicle and it gradually, at a shallow angle, veered across the carriageway without any discernible attempts to correct the loss of control, mounted the pavement and collided with the parapet. This occurred on a long straight stretch of road. As there was no non-negligent explanation for the loss of control, the Lord Ordinary held that it resulted from the fault of the deceased and not from any failure of the defender (para.11). Notwithstanding that finding, the Lord Ordinary came to the following conclusion (at para.34):
"As the deceased did not contribute in any way to the defective parapet and would not have lost his life had the parapet been operating as designed, in fact he would only have sustained minor injuries or none at all, I do not regard the deceased's negligent driving as having contributed in any significant way to causing the harm. I am consequently of the opinion that there is no basis for any finding of contributory negligence on the part of the deceased."
The Lord Ordinary accordingly refused to make any deduction in the award of damages. He found the defenders to be wholly liable. The council reclaimed.

Before the Second Division, (comprising the Lord Justice Clerk, (Lady Dorrian), Lord Menzies and Lord Drummond Young) the reclaimers submitted that, in view of the Lord Ordinary's conclusion that the deceased was negligent, a finding that his death was not caused to any extent by his own fault defied common sense. The reclaimers submitted that the primary cause of the accident was the deceased's negligent loss of control and moved the Division to make a finding of 75 per cent contributory negligence. The respondents submitted that the Lord Ordinary's conclusion in respect of contributory negligence had been correct, and in any event, within the bounds of reasonable disagreement as to the apportionment of responsibility. The relevant apportionment was as to responsibility for "the damage", i.e. the death of the deceased, rather than the accident as such. The loss of control of the deceased's vehicle, leading to collision with the parapet, was simply a *causa sine qua non:* had the parapet not been defective, the vehicle would have been retained and deflected and the deceased would have suffered, at most, minor injury. The cause of the deceased's death (the damage) was the defective nature of the parapet. In the event that the court considered any apportionment to be appropriate, however, the causative potency and blameworthiness of the reclaimers' conduct in failing to manage the bridge was much greater than any unexplained failures on the part of the deceased, and so only a very modest reduction would be appropriate.
The opinion of the Second Division was delivered by Lady Dorrian. As far as the assessment of contributory negligence was concerned, the Division was satisfied that the Lord Ordinary had erred. The Lord Ordinary (at para.11 of his opinion) had found it to be "an inescapable inference that the loss of control was due to the negligence of the driver." Having observed (at para.56) that "the assessment of

contributory negligence requires to be made on a broad basis, weighing up the blameworthiness and causative effect of the acts of each party," Lady Dorrian stated that the deceased had driven out of his lane, across the opposing lane, onto the kerb and into the bridge, on a straight stretch of road and with no other vehicles in the vicinity. She concluded (at para.56): "We cannot accept the Lord Ordinary's conclusion that these acts must be taken as having no causative effect."

In relation to the proper construction of section 1(1) of the 1945 Act, the Division had regard to the comprehensive guidance set out in *Jackson v Murray.* The Supreme Court had pointed out there the relevant distinction between the apportionment of "responsibility for the damage" as opposed to responsibility for the accident (Lord Reed at para.20). Under reference to *Jackson*, Lady Dorrian stated (at para.57) that "[u]ltimately, the question for this court is whether the Lord Ordinary "went wrong." It will be remembered that "going wrong" may be evidenced either by an error or by a difference of view as to the apportionment of responsibility which exceeds the ambit of reasonable disagreement (namely the apportionment made by the court below was not one which was reasonably open to it.) Lady Dorrian continued (at para.58):

"In the present case, it may be said that there is an identifiable error, insofar as the Lord Ordinary failed to take account of the deceased's negligence. That, of itself, is sufficient to justify interference by this court... Equally, however, it may be said that the Lord Ordinary's apportionment was not one which was reasonably open to him, insofar as he failed to make any apportionment at all, or at least absolved the deceased of responsibility entirely, notwithstanding the deceased's negligence, such that the question of apportionment is a matter at large for this court."

Lady Dorrian observed that *both* the defective nature of the parapet and the negligent nature of the deceased's driving had causative effect in the deceased leaving the road and dying –one element could not be isolated from the other in arriving at a just and equitable outcome. The "damage" was caused by a tragic co-incidence of factors. It will be remembered that section 1(1) of the 1945 Act provides for a reduction in damages "[w]here any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons…." Section 4 of the Act provides that *"damage"* includes loss of life and personal injury. Lady Dorrian continued (at para.60):

"Whilst it is correct that the proper focus is the deceased's death, as the relevant damage, the deceased must share in the responsibility for that damage where the accident leading to his death would not have occurred in the absence of his negligent driving. The Lord Ordinary is, of course, quite correct that the deceased "did not contribute in any way to the defective parapet" but it does not follow that the deceased's negligent driving did not contribute in any significant way to causing the harm…Plainly the cause of the harm was not solely the defective parapet, which would have presented no danger to the deceased had his negligent driving not led him to collide with it. Had the collision been caused by a non-negligent event, then a different analysis would follow and the question of contribution would not arise. However, to treat the present case in the same way as one in which there was a non-negligent explanation for the impact, thereby ignoring the fact of negligence, would not amount to properly having regard to the claimant's share in the responsibility for the damage. On any reasonable view, the deceased's negligent driving in the present case properly forms the basis for a finding of contributory negligence."

Turning to the "more difficult question" of the extent of the deceased's

responsibility, Lady Dorrian observed that account must be taken of both the blameworthiness of the parties and the causative potency of their acts. In the present case the causation of the injury depended upon a combination of the deceased's negligent driving and the council's breach of duty. Her Ladyship stated (at para.61): "If the deceased had not driven negligently, albeit in a manner not precisely identified, he would not have collided with the parapet. Equally, if the parapet had not been defective, albeit to an extent not precisely known, it would have contained the colliding vehicle. The blameworthiness of the parties is, in these circumstances, difficult to assess."

Lady Dorrian continued (at para.62):

"The negligent explanation for the deceased's loss of control of his vehicle is simply not known, therefore any assessment of the level of blame that ought to be attributed to his conduct is rather speculative. According to the Lord Ordinary's findings, the deceased was not speeding, and was generally a careful driver. The most that might be said is that he made a mistake … however, it may be assumed that the mistake was not so significant that it would have caused the deceased's vehicle to overcome the containment capacity of the non-defective parapet. To that extent, it may be said that the deceased was driving to the road conditions at least to the extent that (all else being equal) he would have been entitled to assume that such a mistake would be sufficiently mitigated by the parapet as to avoid his serious injury. The risk of the severe consequences that ultimately transpired could not reasonably have been contemplated by him, the defective state of the parapet being known only to the reclaimers."

Lady Dorrian pointed out that the council, by contrast, had been put on notice as to the potentially severe consequences of the unsafe condition of the parapet and was bound to assume that not all drivers could be expected to be model drivers. There was no rational explanation for the council's failure and delay in taking steps to continue monitoring, implement appropriate interim safeguarding measures, and thereafter rectify the defective condition of the bridge.

Her Ladyship concluded (at para.64):

"Whilst it may be difficult to determine the relative causative potency of the parties' actions, the combined effect of which was to cause the accident, and the death of the deceased, the blameworthiness of the reclaimers' is demonstrably far greater than that attributable to the deceased upon the known facts. That disparity in blameworthiness is sufficient to justify the reclaimers bearing substantial responsibility for the deceased's death. Nonetheless, we consider that a contribution of 30% is appropriate in recognition of the deceased's conceded negligence."

Therefore, insofar as it related to the issue of contributory negligence, the reclaiming motion was allowed.

Conclusion

It is only in limited circumstances that an appeal court will interfere with an apportionment made by the court below in respect of contributory negligence. It has been repeatedly asserted that the manner in which responsibility should be apportioned is primarily a matter for the court of trial and that an appellate court should not lightly interfere. It should only do so when the court below has gone wrong. That guiding principle was reasserted in *Jackson v Murray* where the Supreme Court said that apportionments should not be disturbed by appellate courts simply because of disagreement as to the *precise* figure. *Jackson* set out the limited

circumstances in which review of a contributory negligence apportionment was permissible. It must be demonstrated that the court below has gone wrong. This may be done in one of two ways. It may be possible to point to an identifiable error on the part of the lower court. Alternatively, a wide difference of view which falls outwith the ambit of reasonable disagreement is also sufficient to justify the conclusion that the court below has gone wrong. *Bowes* provides a useful illustration of the application of the circumstances (expounded in *Jackson*) in which it is legitimate for an appeal court to interfere with a contributory negligence apportionment made by a lower court. Both cases provide useful and important guidance to litigants who are considering a challenge to an apportionment of liability in respect of contributory negligence. They must be able to demonstrate that the court below has gone wrong and, unless they are able to do so, any such challenge is likely to fail.