# SEAT BELTS AND CONTRIBUTORY NEGLIGENCE IN WESTERN AUSTRALIA

The recent decision of the Supreme Court of Western Australia in *Taggart v Rose*[1] is a further addition to the lately experienced spate of cases in which the negligent driver of a motor vehicle is sued by his passenger or another motorist and alleges in his defence that the plaintiff is guilty of contributory negligence in omitting to wear a seat belt. A like defence has also been raised in the case of a motor cyclist injured while riding his motor cycle without a crash helmet. Hitherto, it has not normally been found necessary in contributory negligence cases to distinguish between conduct contributing to an event causing damage and conduct contributing to the damage itself. That it *is* necessary to make this distinction and to deal with the problems that arise from it in seat belt cases helps explain their sudden rise to prominence in the law reports.

Before considering any special difficulties engendered by these cases it is necessary first to consider the nature of contributory negligence as a defence to an action in tort. A well known judgment dealing with the matter is that of Denning LJ (as he then was) in *Jones v Livox Quarries*.[2]

'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.'

In order to decide whether the negligence is 'contributory', it must be causally relevant to the injury suffered by the plaintiff. Ordinary principles of causation are applied in determining whether the conduct constitutes what the law regards as a 'substantial' or 'effective' factor in producing the harm. Lord Denning recognized in *Jones'*

1 [1975] WAR 41.
2 [1952] 2 QB 608 at 613.

case that this will depend on the facts of each case and that it is 'a matter of common sense more than anything else'.[3]

The application of these principles to the case where the plaintiff fails to make use of a seat belt or other protective device has been the source of dispute in many recent decisions. Some have accepted such conduct as a defence[4] and others, for a variety of reasons, have denied it.[5] Yet the efficacy of seat belts is, of course, simply a matter to be scientifically resolved by expert study and investigation. All information gained in this way can thereafter be used by the courts in deciding whether a plaintiff, as a reasonably prudent man, ought to have made use of one and whether a failure to do so contributed to his injuries. The recent judgment of Lord Denning MR in the decision of the Court of Appeal in *Froom v Butcher*[6] would appear to amount to a definitive statement of the law and finally to resolve, at least in England, the acute conflicts between the cases preceding it. It is therefore necessary to look at this decision in some detail.

Lord Denning was clearly of the opinion that it was highly desirable to wear seat belts when travelling by car. He referred to much material which had been put before the court showing quite plainly the value of wearing them. He pointed out that the Highway Code contained the advice that they should always be used, and that although it was not actually compulsory to do so in England, unlike in Australia, it was nevertheless 'the sensible practice for all drivers and passengers in front seats to wear seat belts whenever going by car'.[7]

Lord Denning thereupon proceeded to dispose of arguments to the contrary. He recognized that many people think that they would be less likely to be injured if they were thrown clear than if they were

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3 Ibid at 616.

4 O'Connell v Jackson [1971] 3 All ER 129 (failure to wear a crash helmet); Pasternack v Poulton [1973] 2 All ER 74; Lertora v Finzi [1973] RTR 161; McGee v Francis Shaw & Co Ltd [1973] RTR 409; Parnell v Shields [1973] RTR 414; Toperoff v Mar [1973] RTR 419; Drage v Smith [1975] RTR 1; Eagles x Orth [1975] Qd R 197; Heppell v Irving Oil Co Ltd (1974) 40 DLR (3d) 476; Haley v Richardson (1976) 60 DLR (3d) 480.

5 Hilder v Associated Portland Cement Manufacturers Ltd [1961] 3 All ER 709 (failure to wear a crash helmet); MacDonnell v Kaiser (1968) 68 DLR (2d) 104; Geier v Kujawa [1970] 1 Lloyds Rep 364; Challenor v Williams [1974] RTR 221; Smith v Blackburn [1974] RTR 533; Rust v Needham (1974) 9 SASR 510; Chapman v Ward [1975] RTR 7; Freeborn v Thomas [1975] RTR 16; James v Parsons [1975] RTR 20; Hancock v Commercial Union Assurance Co of Australia (1975) 10 SASR 185; Grantham v South Australia (1975) 12 SASR 74; Kernaghan v MacGillivray [1974] QD R 39.

6 [1975] 3 WLR 379.

7 Ibid at 386.

strapped in. Indeed Nield J at first instance in the case under appeal felt that the courts should not hold it to be negligence to act upon an opinion firmly and honestly held and shared by many other sensible people. Lord Denning pointed out that such views were misconceived as the chances of injury were four times as great. He said that everyone should exercise all the precaution that would be observed by a man of ordinary prudence, and he would undoubtedly wear a seat belt. The argument that the risk of an accident was so remote that it was not necessary to wear a seat belt on all occasions was likewise discounted. His Lordship considered that the ever-present possibility of an accident every time a car went out onto the road was something which a prudent man should and would guard against. Lastly he felt that the case for wearing seat belts was so strong that he did not think that the law could admit mere forgetfulness as an excuse.

Lord Denning conceded that there might be exceptional cases where a strap across the abdomen might do more harm than good to the wearer, giving an unduly fat man or a pregnant woman as examples. Otherwise, the above principles should prevail.[8]

*Taggart v Rose* concerned an accident which occurred in 1969 when it was not compulsory to wear a belt, and the case was decided before *Froom v Butcher*. These two points help explain the finding of Virtue ACJ that the falure to wear a belt did not amount to contributory negligence. His Honour referred to controversy as to their value on the basis that they may help avoid head and spinal injuries, but actually cause abdominal injuries and furthermore prevent ready escape from a vehicle in cases of fire or immersion in water.[9] The strength of this argument should perhaps be assessed in the light of the statistic given by Lord Denning that the chances of injury when a belt is not worn are four times as high. His Honour may have been justified in finding no contributory negligence in the instant case in that the state of knowledge regarding the use of seat belts was more limited in 1969 but it would be hard to support such a finding for the future. His Honour did indeed recognize that the fact that it is now compulsory to wear one when travelling in a vehicle in Western Australia[10] might lead to a different conclusion in a subsequent case.[11]

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8 Ibid at 386-7.

9 Op cit at 42-3.

10 Road Traffic Code 1975 (WA) reg 1621. It is also compulsory to wear a crash helmet when riding a motor cycle: see reg 1607.

11 Regulation 1621 (6) excepts a person from wearing a belt if that person (a) is travelling in a car going backwards; (b) is medically unfit to do so; (c) is engaged in work requiring him frequently to stop and start and

If it is assumed that a failure to wear a seat belt (or crash helmet) would now be regarded by the Western Australian courts as amounting to contributory negligence, it is necessary to turn to the apportionment legislation and consider its effect on such a finding. It is immediately apparent that the language of the English and the Western Australian statutes differs to a marked degree. The basis of apportionment under *S 1(1) Law Reform (Contributory Negligence) Act 1945 (UK)* is the plaintiff's share in the responsibility for the *damage suffered.* It provides:

> Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons . . . 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.

In *Froom v Butcher* Lord Denning MR pointed out that the question to be answered was not what was the cause of the *accident* but rather what was the cause of the *damage.*[12]

'In most accidents on the road the bad driving, which causes the accident, also causes the ensuing damage. But in seat belt cases the cause of the accident is one thing. The cause of the damage is another. The *accident* is caused by the bad driving. The *damage* is caused in part by the bad driving of the defendant, and in part by the failure of the plaintiff to wear a seat belt. If the plaintiff was to blame in not wearing a seat belt, the damage is in part the result of his own fault. He must bear some share in the responsibility for the damage: and his damages fall to be reduced to such extent as the court thinks just and equitable.'[13]

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does not drive at over 25 kilometres per hour while doing so; (d) is under the age of 8; (e) is travelling as a passenger and is over the age of 70. The exceptions mentioned by Lord Denning in Froom v Butcher only concerned persons who might suffer injury from wearing a belt, as in category (b), although were not expressed to be exhaustive. How the English courts would deal with persons in the other categories, notably tradesmen in category (c) who simply find use of a belt inconvenient, is uncertain. The Western Australian courts would be most unlikely to find such persons guilty of contributory negligence, although mere exemption from a penal regulation does not carry the automatic consequence that persons taking advantage of it are therefore not negligent in looking after themselves.

12 Op cit at 384.

13 Lord Denning felt that the 'just and equitable' reduction in these cases should be 25 per cent for those injuries which would have been prevented by wearing a seat belt and 15 per cent for those injuries which would have been less severe. There should be no reduction if the injuries would have been the same if a belt had been worn. In the event, the figure reached here

Now despite his finding in *Taggart v Rose* of no contributory negligence, Virtue ACJ nevertheless proceeded to consider the legal effect of a contrary decision. He therefore examined *S 4 Law Reform (Contributory Negligence and Tortfeasors Contribution) Act 1947 (WA)*, which provides as follows:

> Whenever in any claim for damages founded on an allegation of negligence the Court is satisfied that the defendant was guilty of an act of negligence conducing to the happening of the event which caused the damage, then notwithstanding that the plaintiff had the last opportunity of avoiding or could by the exercise of reasonable care have avoided the consequences of the defendant's act, or might otherwise be held guilty of contributory negligence, the defendant shall not for that reason be entitled to judgment but the court shall reduce the damages which would be recoverable by the plaintiff if the happening of the event which caused the damage had been solely due to the negligence of the defendant to such an extent as the court thinks just in accordance with the degree of negligence attributable to the plaintiff.

The interpretation afforded to this provision by Virtue ACJ can be sharply contrasted with the decision in *Froom v Butcher*. His Honour was clearly of opinion that there should be no apportionment in this kind of case.[14]

'This section [S 4] seems to make it apparent that the test of whether there is to be an apportionment is whether the happening of the event which caused the damage was the responsibility of the plaintiff or the defendant. It would appear, therefore, that the fact that the failure by the plaintiff to take precautions to avoid damage resulting from the negligence of a defendant would not justify an apportionment because the default of the plaintiff would in no way have been responsible for the "happening" of the event which caused the damage'.

Now this conclusion does not appear to follow ineluctably from the language of the statute. It can be argued that the relevant 'event' in this type of case is not the initial collision but the impact between the plaintiff's body and the windscreen, steering wheel or other part of the vehicle which would have been avoided by the wearing of a belt. The default of the plaintiff can then be said to be partially responsible for the happening of this particular event so enabling the damage to be apportioned in the usual way. The reason why it might be thought to be desirable that the courts adopt this interpretation is

was 20 per cent as some injuries would have been prevented by using a belt and others not.

14 Op cit at 43.

that the conclusion reached by Virtue ACJ on the basis that the statute was inapplicable—*that the plaintiff should therefore suffer no reduction in damages*—is incorrect. If the apportionment legislation does not apply to a given situation it is necessary to revert to common law principles, and it is clear that the common law did not countenance apportionment. The old case of *Butterfield v Forrester*[15] makes it clear that contributory negligence was a complete defence at common law. It is true that the position was mitigated in practice by juries apportioning behind a verdict for the plaintiff and awarding him lesser damages. Moreover, the courts themselves made great efforts to avoid the rigours of the principle by resorting to the so-called 'last opportunity rule' which allowed a contributorily negligent plaintiff to succeed if the defendant had the 'last opportunity' of avoiding the consequences of his negligence.[16] Yet if a plaintiff guilty of contributory negligence was unable to rely on this defence—and it was of its very nature of markedly uncertain application—he failed altogether, whether his responsibility for the damage was great or small. Furthermore, contributory negligence was held to be not only a complete defence to claims founded in negligence: it qualified any claim for injury whether formulated in negligence simpliciter,[17] nuisance,[18] breach of statutory duty,[19] trespass[20] or a tort of strict liability[21] although it was held not to extend to intentional torts.[22]

The importance of the common law position is that the apportionment legislation in Western Australia has only limited application. It was observed above that the UK statute uses the 'fault' of both plaintiff and defendant as the criterion for apportionment, and 'fault' is there defined as 'negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from

15 (1809) 11 East 60.

16 Davies v Mann (1842) 10 M & W 546. The hair-splitting occasioned by this rule is well illustrated in British Columbia Electric Railway v Loach [1916] 1 AC 719.

17 Davies v Mann supra.

18 Butterfield v Forrester supra. Tree v Crenin (1913) 15 WALR 47.

19 Piro v Foster (1943) 68 CLR 313.

20 Cotterill v Starkey (1839) 8 C & P 691.

21 The defence is usually described in this context as the plaintiff's own default. See eg Dunn v Birmingham Canal Co (1872) LR 7 QB 244 (a Rylands v Fletcher action); Forbes v M'Donald (1874) 7 ALT 62 (dangerous animals); Ricketts v East and West India Docks Railway Co 12 CB 160 (cattle trespass).

22 Fontin v Katapodis (1962) 108 CLR 177 (assault); Nocton v Lord Ashburton [1914] AC 932 (deceit); note also Redgrave v Hurd (1881) 20 Ch D 1 (misrepresentation).

this Act, give rise to the defence of contributory negligence'[23] The other Australian States use like wording.[24] In these jurisdictions the common law has, therefore, been abrogated. In Western Australia, however, S 4 of the 1947 Act applies only to claims founded on 'negligence', defined to include breach of statutory duty[25] but no more. It does not extend to cover a cause of action formulated in any of the other torts mentioned above, where common law principles therefore still apply. Indeed, such was recognized by Jackson SPJ in *Przetak v Metropolitan Passenger Transport Trust*[26] where it was specifically decided that contributory negligence remained in Western Australia a complete defence to an action in nuisance.

Precisely the same conclusion must necessarily follow, even in a negligence suit, if, as was decided in *Taggart v Rose,* the special wording of the statute means that the case falls outside it. The court then has to rely on the common law and in consequence a contributorily negligent plaintiff fails completely.

Certain arguments of policy can be advanced against labelling the omission to use a seat belt as contributory negligence. It is pointed out in a recent article on this topic[27] that a negligent defendant hardly ever pays in traffic accidents, because he nearly always must be and is insured. Thus a grossly negligent but uninjured defendant will usually be indemnified while a contributorily negligent plaintiff will personally have to bear a part of his own loss. It is questioned whether the extension of this penal principle in an essentially compensatory system to cover plaintiffs not actually responsible for the accident can be justified. Yet there is no obvious reason for distinguishing in this way between alternative forms of contributory negligence. If amendment to the law be needed, it should consist in the removal of the defence altogether in traffic cases, not a matter for the courts. In opposition to this proposal is the contention that the rules of tort have a deterrent effect. Lord Denning was indeed of the view in *Froom v Butcher* that the law should say that a person who fails to wear a belt should share some responsibility for the damages in order to bring home the importance of wearing them.[28] It is,

23 S 4 Law Reform (Contributory Negligence) Act 1945 (UK).
24 The position is modified slightly in NSW. See Fleming THE LAW OF TORTS 4th ed at 228 n 39.
25 S 3 Law Reform (Contributory Negligence and Tortfeasors Contribution) Act 1947 (WA).
26 [1961] WAR 2.
27 Hicks *'Seat Belts and Contributory Negligence'* (1974) 37 MLR 308 at 314-317.
28 Op cit at 387.

however, unlikely that public consciousness of the law of torts is sufficient for it to have any supposed educative effect.

Notwithstanding possible arguments to the contrary, the decision of the Court of Appeal in *Froom v Butcher* stamping the conduct as negligent would very likely be followed in Western Australia. If it were, the dire consequences for the negligent plaintiff which flow from the wording of S4 of the 1947 Act and the interpretation afforded to it by the Supreme Court are hard indeed to justify. It might conceivably be argued that the existence of regulations requiring the use of seat belts (or crash helmets) means that a plaintiff who fails to comply with them should be disqualified on the basis of the maxim *ex turpi causa non oritur actio*.[29] Such an argument needs only to be raised to be rejected. The purpose of these regulations is to lessen the risk of person suffering injuries in accidents, not to relieve drivers from the consequences of driving improperly.[30] Furthermore, if the argument were accepted it would effectively invert the opinion of Virtue ACJ noted above that the compulsory use of seat belts would tend to fortify a finding of contributory negligence. The law, therefore, is in urgent need of reform. This could be achieved either by the courts distinguishing between the 'event' causing the accident and the 'event' causing the damage, as suggested above, or by legislative intervention. If the latter course were adopted the legislature would do well not simply to clarify the matter in hand but to deal also with the wider issue—the continuing significance in many cases of the refusal of the common law to sanction the apportionment of damages.

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29 See Smith v Jenkins (1970) 119 CLR 397.

30 For the application of the 'purpose' test, see Henwood v Municipal Tramways Trust (1938) 60 CLR 438. Note, also, Matthews v McCullock [1973] 2 NSWLR 331.

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