A PRIMER REGARDING CONTRIBUTORY NEGLIGENCE

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Introduction

We all deal with allegations of contributory negligence in response to the claims of a plaintiff on a frequent basis, and we thought it might be helpful to take a close look at the basic principles regarding this partial defence, in the nature of a primer.

A finding of contributory negligence recognizes the failure of the plaintiff to take care for his or her own safety without releasing the defendant from all responsibility. Where a finding of contributory negligence is made, it will reduce the defendant's liability in proportion to the plaintiff's degree of responsibility.[2]

As explained in *Roper* v. *Gosling:*[3]

> "Contributory negligence is a plaintiff's failure to meet the standard of care to which he is required to conform for his own protection and which is a legally contributing cause, together with the defendant's default, in bringing about his injury. ..."[4]

In brief terms, where the defence of contributory negligence is made out – that is, where the defendant successfully proves that the plaintiff was negligent and that the plaintiff's negligence was a material cause of his injuries – then liability for the injuries will be apportioned among those found to be at fault. The authorities suggest that such apportionment will require the court to examine all the circumstances of the parties' misconduct to determine their relative negligence under the "comparative blameworthiness approach."[5]

General Principles

The legislative framework within which questions of contributory negligence will be decided is found in sections 1 and 2 of Alberta's *Contributory Negligence Act*, R.S.A. 2000, c. C-27. Those sections provide as follows:

> "1(1) When by 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 in which each person was at fault but if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.
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> (2) Nothing in this section operates to render a person liable for damage or loss to which the person's fault has not contributed.
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> 2(1) When damage or loss has been caused by the fault of 2 or more persons, the court shall determine the degree in which each person was at fault.
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> (2) When 2 or more persons are found at fault, they are jointly and severally liable to the person suffering the damage or loss, but as between themselves, in the absence of a contract express or implied, they are liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault."

Broadly speaking, the defence of contributory negligence is based on the principle that one has a duty not only to take reasonable care to prevent injuries to others, but to oneself as well. Contributory negligence can, therefore, be defined as unreasonable conduct on the part of a victim which, along with the negligence of others, has in law contributed to the victim's own injuries. When a victim is found to have been contributorily negligent, the defendant's liability is reduced according to that victim's degree of fault.[6]

In his text *Tort Law*, Klar puts the matter this way:

> "For contributory negligence to be a relevant defence, the defendant must prove that the plaintiff was negligent and that this negligence caused or contributed to

> the injuries which were sustained. The contributory fault must, of course, relate to the same injuries as those caused by the other wrongdoers. Once this is shown, the fact-finder must apportion the liability for those injuries among those found at fault. ..."[7]

As highlighted by the court in *Vanaalst* v. *510 Fifth Street Properties Inc.*[8], in *Roper* v. *Gosling* the Alberta Court of Appeal set out a two-stage analysis to be undertaken by a court to determine the issue of contributory negligence. For the *Roper* court, Berger J.A. stated as follows:

> "**It is a pre-condition to a finding of contributory negligence that the acts or omissions of two or more persons each be operative causes of the damage or loss for which compensation is claimed. That issue is the first inquiry.** If the conduct alleged to be contributorily negligent is not a cause of the loss or damage for which compensation is claimed, the apportionment provisions of the act are not engaged. Unless there is a causal relationship, the impugned acts or omissions are too remote. **If the threshold requirement is met, the second inquiry concerns apportionment. The concept of fault relevant to apportionment requires a broader and more general inquiry into the acts or omissions of the parties which operated as concurrent causes of the damage or loss.**"[9] (emphasis added)

Justice Berger continued:

> "Klar also points out that one way of thinking about whether a party's conduct was reasonable or not is to think in terms of reasonable and unreasonable risks of injury. Accordingly, it is only when the plaintiff has decided to undertake a risk which the reasonable person would not have undertaken because it was unreasonable, that the plaintiff can be considered to have been contributorily negligent. The following factors are considered:
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> 1. Likelihood of injury.
> 2. The gravity of the injury which might occur.
> 3. Costs of avoidance.
> 4. Whether a sudden emergency arose which was not of the plaintiff's making.
> 5. When applicable, the general practice of those engaged in a similar activity.

> Accordingly, for purposes of contributory negligence, negligence law requires the plaintiff to display that degree of care exhibited by the reasonable person in like circumstances, the standard varying according to the risk and gravity of the injury weighed against the costs necessary to avoid such a risk. It is, accordingly, a concept "which inherently recognizes that there will be degrees of care." Klar, *supra*, at p. 271.
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> Once the trier of fact has evaluated the totality of circumstances and has concluded that the plaintiff has breached a standard of care that contributed to the injury, apportionment of liability as between plaintiff and defendant follows. The statute commands an assessment of "the degree in which each person was at fault." The liability to make good the damage or loss flows from that assessment." [10]

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In his recent judgment in *Yurchi* v. *Johnston*[11], Justice Germain explained this approach in the following passage:

> "Apportionment of liability under the *Contributory Negligence Act* is to be assessed under the comparative blameworthiness approach: *Heller v. Martens*. There the Court of Appeal held that an assessment of the fault of the plaintiff and the defendant (or defendants) required assessment of the amount that each causative negligent action fell short of the standard of care required in all the circumstances (at para. 31). In that regard, the Court held that apportionment is affected by the weight of the fault attributable to each, not the weight of causation (at para. 32). Factors that may be considered in assessing the degree of departure from the standard of care include:
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> 1. The nature of the duty owed by the tortfeasor to the injured person: *Aynsley v. Toronto General Hospital* (1967), [1968] 1 O.R. 425 (Ont. H.C.), at 444-45, aff'd (1971), [1972] S.C.R. 435 (S.C.C.); *Arnold v. Teno*, [1978] 2 S.C.R. 287 (S.C.C.).

2. The number of acts of fault or negligence committed by a person at fault: *Bruce (County) v. McIntyre*, [1954] 2 D.L.R. 799 (Ont. C.A.), aff'd [1955] S.C.R. 251 (S.C.C.).

3. The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as a result of the initial fault: *Aynsley*, supra.

4. The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy: *Chamberland v. Fleming* (1984), 12 D.L.R. (4th) 688 (Alta. Q.B.) (where the driver of a motor boat sped by a canoe causing it to tip, and the canoeist to drown). Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis: see John G. Fleming, *The Law of Torts*, 8th ed. (Sydney: Law Book Company, 1992) at 273-74.

5. The extent to which the conduct breaches statutory requirements: *Heller v. Martens* at para. 34"

END

ENDNOTES

[1] With thanks to Andrea Manning-Kroon of Bottom Line Research & Communications, who is the primary author of this article.

[2] Reference: Lewis Klar, *Tort Law*, 3rd Edit., (Toronto: Thompson Carswell, 2003), at p. 455; Philip H. Osborne, *The Law of Torts*, 2nd Edit. – online, (2003), Chpt. 2 – Negligence, G. Defences, QL, at p. 1 of 9; *Contributory Negligence Act*, R.S.A. 2000, c. C-27, ss. 1, 2

[3] (2002), 100 Alta. L.R. (3d) 231 (C.A.)

[4] at p. 236

[5] Reference: *Roper v. Gosling*, *supra*; *Yurchi v. Johnston* (2006), 56 Alta. L.R. (4th) 43 (Q.B.)

[6] Reference: Lewis Klar, *Tort Law*, 3rd Edit., (Toronto: Thompson Carswell, 2003), at p. 455; Philip H. Osborne, *The*

Law of Torts, 2nd Edit. – online, (2003), Chpt. 2 – Negligence, G. Defences, QL, at p. 1 of 9

[7] at pp. 466-467

[8] [2006] A.J. No. 401 (Q.B.)

[9] at p. 236

[10] at pp. 237-238

[11] (2006), 56 Alta. L.R. (4th) 43 (Q.B.)