Contribution and Apportionment Claims

The Art of Blaming Other People for your Mistakes

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Introduction

- What is covered
  - The law in relation to suing multiple defenders.
  - Legal principles and pitfalls in relation to apportionment of liability under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.
  - Apportionment in practice.
- What is not covered
  - Contributory negligence.
  - Contractual indemnities and other contractual alternatives for apportionment.
  - Material contribution as a causation concept.
  - Warning: much of this talk is inapplicable to cases that apply the material contribution threshold and/or divisible disease claims generally.

Want to hear more about material contribution? Coming up later…

Suing Multiple Defenders

- In a case where two or more defenders are jointly and severally liable for a delict, a pursuer can obtain 100% of the value of his damages from any one of them.
- No obligation on a pursuer to convene all potentially liable parties to an action.
- If a pursuer does only sue one of several defenders, they can then pursue the others.
- *National Coal Board v Thomson* 1959 SC 353 at 362
  - *'In a quasi-delict like negligence, while it is just that the victim should get his money where he can, it is clearly inequitable that the payer, where there are others involved, should carry the whole burden.'*

Suing Multiple Defenders

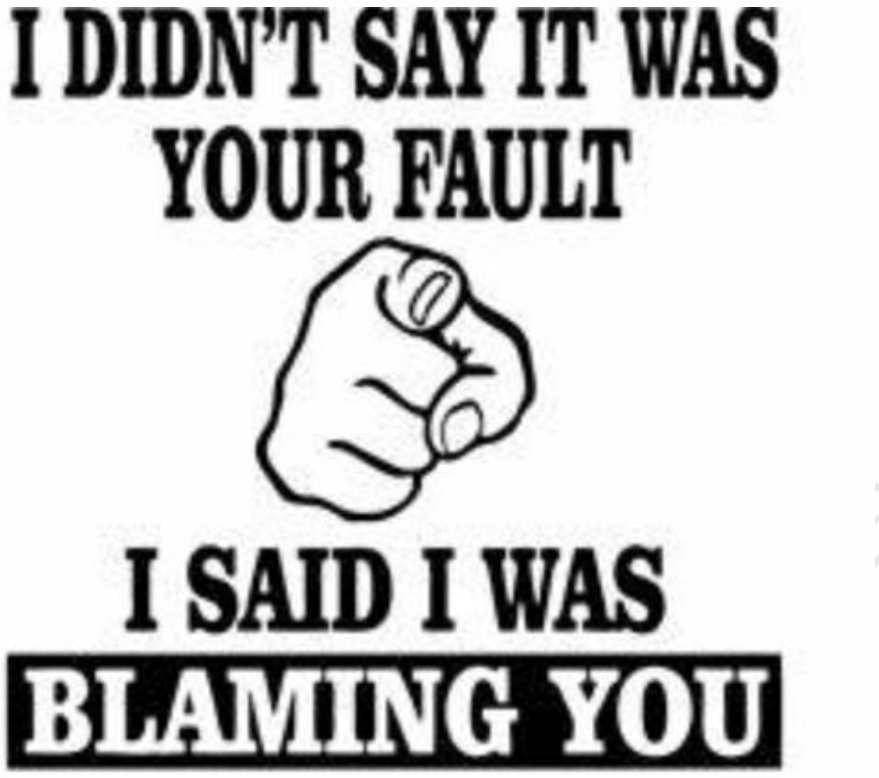
- If you blame multiple defenders for the same event, to what extent can you continue to litigate against further defenders?
- Two alternative legal tests set by the House of Lords
- *Jameson v Central Electricity Generating Board (No. 1)* [2000] 1 AC 455
  - Whether the settlement of the original action was intended to be full satisfaction of the wrong done to him so as to preclude any further proceedings.
- *Heaton v AXA Equity and Law Life Assurance Society plc* [2002] 2 AC 329
  - Whether the settlement of the original action, when viewed in its surrounding circumstances, indicated the pursuer had accepted settlement in full and final satisfaction of all claims against the defenders in the original action and the subsequent action.

Suing Multiple Defenders

- *Kidd v Lime Rock Management LLP* 2021 SLT 1499
- Pursuer had previously settled an action against P&W for £19 million in relation to negligent advice relating to sales of his shares in a company.
- Lord Ordinary applied *Jameson* approach and held that precluded his further claim against Lime Rock and LC.
- The Inner House preferred the *Heaton* approach and allowed the appeal.
- *'Our law does not set its face against the notion of pursuing a claim after settlement with one co-delinquent, though plainly any sum recovered must be accounted for.'* [para. 45]

Practice Points re suing Multiple Defenders

- Except in cases of divisible disease, a pursuer can take 100% of value of his claim from any one defender.
- No barrier to suing another defender after settling with a first, other than whether on balance claim has been fully satisfied.
- Minute of full satisfaction can be lodged to take that point as a defender – *Ward v ADR Network* 2023 SLT (SAC) 114



Section 3 of the 1940 Act

‘3. Contribution among joint wrongdoers

(1) Where in any action of damages in respect of loss or damage arising from any wrongful acts or negligent acts or omissions two or more persons are, in pursuance of the verdict of a jury or the judgment of a court found jointly and severally liable in damages or expenses, they shall be liable *inter se* to contribute to such damages or expenses in such proportions as the jury or the court, as the case may be, may deem just:…

(2) Where any person has paid any damages or expenses in which he has been found liable in any such action as aforesaid, he shall be entitled to recover from any other person who, if sued, might also have been held liable in respect of the loss or damage on which the action was founded, such contribution, if any, as the court may deem just.’

Section 3 of the 1940 Act

- Section 3 (1) applies in cases where multiple defenders are both convened to the original pursuer's action and the pursuer's claim remains unresolved.
- Section 3 (2) applies in cases where a defender has settled or been found liable to the original pursuer already.
- Procedural requirement for decree to pass against original defender to allow them to make contribution claims in terms of Section 3 (2).
  - *Loretto Housing Association Ltd v Cruden Building & Renewals Ltd* 2022 SLT 241
  - Maintains a degree of certainty as to whether claims are allowed.
  - Puts contribution claims under the 1940 Act on the same footing as contribution claims made under common law, which require *pro rata* apportionment.

Farstad Supply AS v Enviroco Ltd 2010 SC (UKSC) 87

- Fire damage to an oil service supply vessel.
- The shipowner (Farstad) sued the charterer's (ASCO) contractor, Enviroco, for negligently starting the fire.
- Enviroco argued they were entitled to a contribution from ASCO. For reasons related to contractual indemnities, Farstad argued the case in ASCO's shoes.
- 'It follows that the question under sec 3 (2) is whether, if ASCO had been sued by the owner, it would have been liable to the owner. The answer to that question is thus the same as it would have been if the owner had sued both Enviroco and ASCO and the case had fallen within subsec (1) and not subsec (2).' [para. 15]

Glasgow City Council v First Glasgow (No 1) Ltd 2020 SLT 75

- Action arose from the Glasgow Bin Lorry crash.
- Pursuer sought a contribution from the defender to the damages they had paid in settlement of one of the fatal actions.
- Action was to the effect that the defender ought to have disclosed a reference addressing what they knew about the lorry driver's health issues when he previously worked for them.
- Defender sought dismissal at debate on the grounds the pursuer's pleadings disclosed no duty of care to the deceased.

Glasgow City Council v First Glasgow (No 1) Ltd 2020 SLT 75

- 'The purpose of s.3 is to apportion liability between joint wrongdoers so that each wrongdoer pays a share of the damages…This is apparent from the wording of s.3 (2) which states that "he shall be entitled to recover from any other person who, if sued, *might also have been held liable* in respect of the loss or damage *on which the action was founded*"…Such wording makes it clear that the action referred to is one where two or more persons are jointly and severally liable. Such wording can apply only where both wrongdoers are liable to the same injured parties. If only A is liable to C, but B is liable to A, then it cannot be said that A and B are jointly and severally liable…' [para. 21]

Recent Examples of Apportionment in Practice

- *Widdowson's Executrix v Liberty Insurance Ltd* 2021 SLT 539
- *A-R v Eljamel* 2022 SLT 881
- *Gulliford v Andrew Gray & Co (Fuels) Ltd* 2023 SC EDIN 17
- *Reid v MCM Building and Civil Engineering Construction Ltd* 2026 CSOH 34

Widdowson's Executrix v Liberty Insurance Ltd 2021 SLT 540

- Fatal claim arising from serious RTA.
- Action raised against defender insurer and two health boards that treated the deceased post-accident.
- Liability for RTA was admitted by the insurer and breach of duty in respect of clinical negligence was admitted by the second and third defenders.
- Proof on apportionment with quantum agreed.
- With some caution, Lady Wise adopted the concept of 'relative blameworthiness and causative potency' used for contributory negligence per *Jackson v Murray* 2015 SC (UKSC) 112.
- Detailed analysis of those factors in apportionment at paras. 45-61.
- Result: 70% on insurer, 15% each on the Health Boards.

Widdowson's Executrix v Liberty Insurance Ltd 2021 SLT 540

Relative Blameworthiness

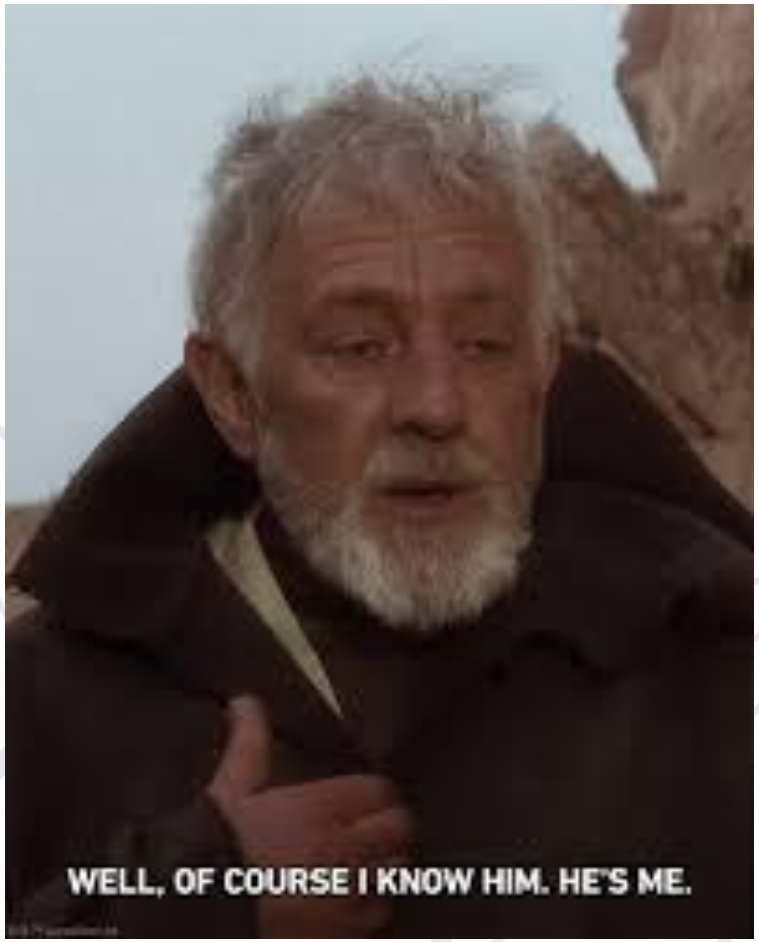
- Cars are a potentially dangerous weapon in the hands of irresponsible drivers (*Lunt v Khelifa, Eagle v Chambers*)
- Acts of the driver were more blameworthy than the omissions of under pressure clinicians (*ZZZ v Yeovil District Hospital NHS Foundation Trust; Poole BC v GN)*

Causative Potency

- Evidence was to the effect that, while the RTA caused Mr Widdowson serious injuries, he would have survived them but for D2 and D3's negligence (*Webb v Barclays Bank plc*).
- Interestingly, re *Webb*, there is opinion in England to the effect gross clinical negligence can be a *novus actus*. Untested in Scotland.

A-R v Eljamel 2022 SLT 881

- Pursuer was a patient of Mr Eljamel, who had been treated by him both in his private practice and on the NHS, negligently in both cases.
- Apportionment was between Eljamel as an individual and NHS Tayside as a defender vicariously liable for him.
- At first instance, Lord Ordinary found him 100% liable as an individual.



A-R v Eljamel 2022 SLT 881

- Eljamel performed negligent private surgery.
- When the pursuer developed complications, she presented to Ninewells, and was reviewed by a nurse practitioner who took advice from Eljamel not to admit her.
- Appropriate NHS intervention would have saved her from much of the symptoms but not all of them.
- At first instance, Eljamel as an individual 100% to blame.
- On appeal, submitted by private insurer that apportionment ought to have been 50/50.
- NHS submitted there was no error given the comparative negligence was failing to prioritise carrying out a scan vs infliction of harm during an operation.

A-R v Eljamel 2022 SLT 881

- Inner House satisfied there had been no error of fact or law by Lord Ordinary.
- Can be misread as holding Eljamel liable as an individual for his negligence as an NHS doctor but that was not done [para. 29]
- Obvious basis for finding Eljamel as an individual re his private practice wholly responsible in the facts of the case.

<u>Word on Eljamel Cases Generally</u>

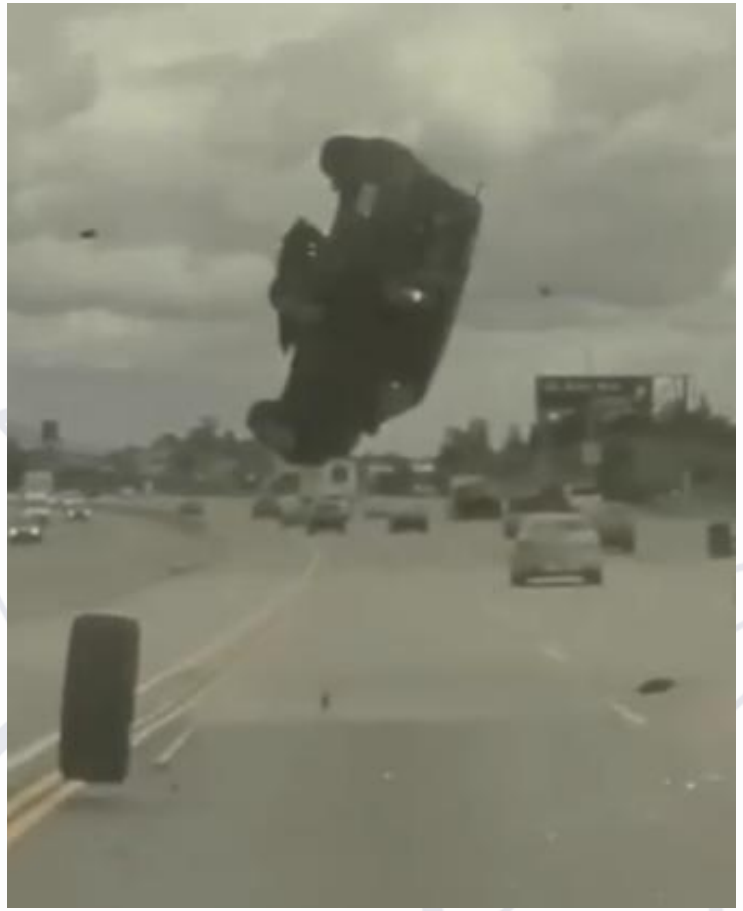
- NHS Tayside has made a corporate decision to waive relying on limitation as a defence in relation to Eljamel's negligence.
- Open offer for 3 years to 27/02/29.
- Will not apply to cases involving his private practice unless MDDUS makes same point.
- Consider whether cases might relate to his negligence even if he is not named in records.

Gulliford v Andrew Gray & Co (Fuels) Ltd 2023 SC EDIN 17

- Original pursuer was injured while driving a fuel tanker when the rear wheel fell off.
- The defender, as owner of truck and employer of the pursuer, sued a third party, their mechanical contractors, for a contribution to settlement.

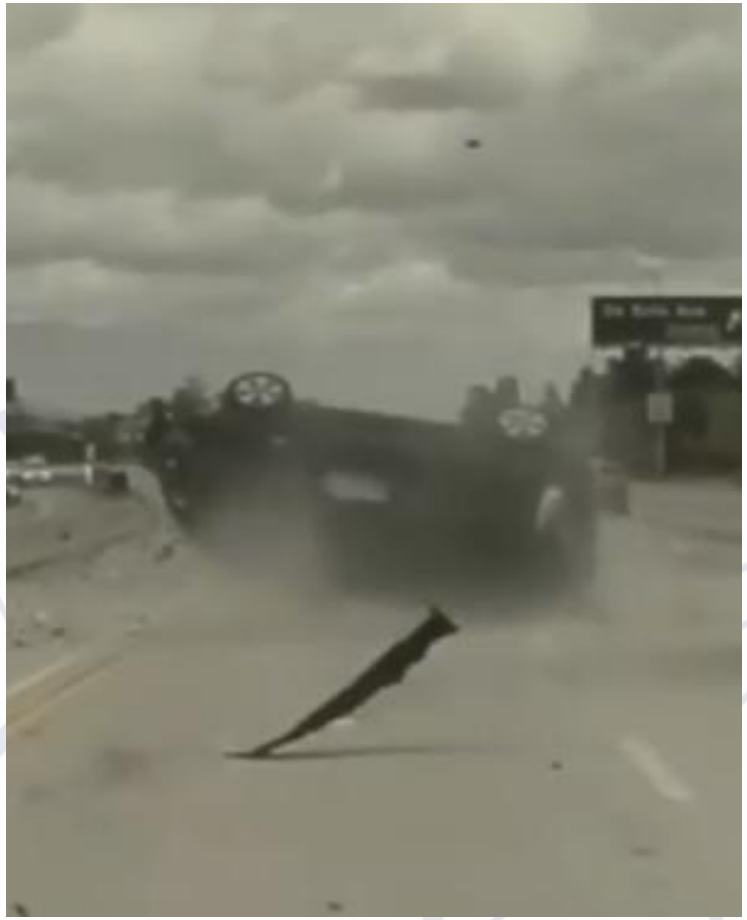
Gulliford v Andrew Gray & Co (Fuels) Ltd 2023 SC EDIN 17

- Sheriff rejected the defender's submission that *res ipsa loquitur* applied, i.e., he rejected the wheel coming loose inferred negligence on the part of the third party.
- He also accepted the third party's witness' evidence that he took reasonable care as credible and reliable, and considered there were other possible explanations for the wheel coming loose.



Gulliford v Andrew Gray & Co (Fuels) Ltd 2023 SC EDIN 17

- Case failed both on breach of contract and in terms of the 1940 Act.
- Balance of probability also weighed against the defender because the vehicle had not been under sole management and control of the third party [see paras. 45-46 on *res ipsa*].
- No award made to defender under 1940 Act.



Reid v MCM Building & Civil Engineering Construction Ltd [2026] CSOH 34

- Something of a perfect storm causing the run to proof.
- Mesothelioma claim – so pursuer entitled to rely on Compensation Act 2006 to take 100% off one defender.
- D1 had miniscule amount of exposure but an easier case to win on liability.
- D2 was the reverse – much more exposure relatively but the harder case on liability.
- Very young mesothelioma victim (53 at proof) so unusually large loss of support and loss of services claims in background.
- Both defenders were precluded from making a *de minimis* exposure argument – D1 because an attempt to lodge an occupational hygienist report late was refused.
- Proof purely on whether each Defender had exposed pursuer to asbestos.

Reid v MCM Building & Civil Engineering Construction Ltd [2026] CSOH 34

- Pursuer able to rely on *Fairchild* exception – material increase in risk.
- Dealing with exposure into the 90s so very high standards relating to dealing with asbestos.
- D1's submission on operation of 2006 Act in relation to apportionment largely accepted.
- S. 3 (4) 2006 Act
- Three options for apportionment:
- Relative lengths of period of exposure.
- Agreed apportionment amongst defenders on some other basis.
- If the court thinks that another basis for determining contributions is more appropriate in the circumstances.

Reid v MCM Building & Civil Engineering Construction Ltd [2026] CSOH 34

- D1 submission on Section 3 (4).
- Court free to depart from relative lengths of periods of exposure.
- D1 submitted that cumulative lifetime exposure expressed in fibres/ml years was more appropriate.
- On counsel for D1's calculation, that reduced D1's liability from 0.2% to 0.055%.
- D2 argued there was no credible and reliable evidence to support the exposure by D2. On that basis, D2's apportionment should be nil.
- Submitted nil was competent based on *Eljamel* case.
- Pursuer was ultimately accepted as credible and reliable, as was one of two witnesses called by pursuer who had previously worked for D2.

Reid v MCM Building & Civil Engineering Construction Ltd [2026] CSOH 34

- Lord Harrower accepted that both defenders had exposed the pursuer to asbestos.
- Para. 71-77 deals with his calculations and conclusions on apportionment.
- Factors limiting D1's apportionment:
  - 1 ½ days of work for 7 hours/day total.
  - Removal of chrysotile asbestos cement with 10-15% asbestos content.
- Exposure with D1 was:
  - less potent asbestos content –
  - chrysotile rather than amosite or crocidolite.
  - Around 1 fibres/ml.
- Exposure with D2 was:
  - to materials with higher asbestos content – 16-40%
  - It contained more amosite as well as chrysotile.
  - Around 15 fibres/ml over a much longer period.

Reid v MCM Building & Civil Engineering Construction Ltd [2026] CSOH 34

- Departure from S. 3 (4) 2006 Act default position (see para. 75).
- Division by cumulative lifetime exposure preferred.
- ‘default rule effectively assumes an equal level of exposure with each defender across quite different tasks, which would be contrary to the evidence.’

- Final Decision on Apportionment:
- 0.092% to First Defender.
- 99.908% to Second Defender.
- Important factors to consider:
  - Length of employment.
  - Duration of time spent on work with asbestos products.
  - Proximity to them.
  - Type and percentage of asbestos contained in those products.
  - Whether any protective measures were taken.

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