2015

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James Goudkamp

*University of Wollongong, jamesg@uow.edu.au*

Publication Details

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Abstract
In most of the common-law world, legislation provides for damages to be apportioned where the claimant is guilty of contributory negligence. This legislation gives judges considerable latitude to determine the extent to which damages should be diminished for contributory negligence. It imposes what will be called a system of 'discretionary apportionment'. This paper draws attention to the fact that, although most common-law jurisdictions are, by virtue of their apportionment legislation, in the thrall of the paradigm of discretionary apportionment, there are many, varied departures from this paradigm. This paper classifies these departures (which will be called 'fixed apportionment rules'), emphasises that they conflict with the apportionment legislation and considers how the conflicts ought to be resolved. An important conclusion reached is that it can plausibly be argued that the landmark decision in Froom v Butcher, at least as it has been understood in subsequent cases, was decided per incuriam. Froom sits uncomfortably with the apportionment legislation. Attention is then turned to the arguments for and against a discretionary system of apportionment as opposed to a system that incorporates more fixed apportionment rules. It is contended that much stands to be gained from introducing more fixed apportionment rules.

Keywords
damages, contributory, approach, apportionment, discretionary, negligence, fixed

Disciplines
Arts and Humanities | Law

Publication Details

This journal article is available at Research Online: http://ro.uow.edu.au/lhpapers/2505
APPORTIONMENT OF DAMAGES FOR CONTRIBUTORY NEGLIGENCE: A FIXED OR DISCRETIONARY APPROACH?

James Goudkamp*

In most of the common law world, legislation provides for damages to be apportioned where the claimant is guilty of contributory negligence. This legislation imposes a system of what will be called ‘discretionary apportionment’. It gives judges considerable latitude to determine the extent to which damages should be diminished for contributory negligence. This article draws attention to the fact that many, varied departures from this system of discretionary apportionment have infiltrated the law. This article classifies these departures (which will be called ‘fixed apportionment rules’), emphasises that they conflict with the apportionment legislation and considers how the conflicts ought to be resolved. An important conclusion reached is that the landmark decision in Froom v Butcher was decided per incuriam. This is because it laid down fixed apportionment rules, and such rules conflict with the apportionment legislation. Attention is then turned to the arguments for and against a discretionary system of apportionment and a system that incorporates more fixed apportionment rules. It contends that much stands to be gained from introducing more fixed apportionment rules.

1. Introduction

The defence of contributory negligence is one of the most important parts of the law of torts. Few other rules are in issue in tort litigation with such regularity. It is undoubtedly the queen of the defences known to tort law in terms of its practical impact. For one reason or another, however, it has attracted little scholarly interest, and certainly much less than it deserves. Given this lack of academic attention, it is perhaps unsurprising that some striking features of the law that governs the defence have gone essentially unnoticed. This article begins by noting two such features. The first feature is that the rules that control the defence have in many jurisdictions remained essentially frozen following the passage of apportionment legislation. In Britain, the relevant law has hardly changed at all since the Law Reform (Contributory Negligence) Act 1945 was enacted. Parliament has scarcely touched this Act

* Fellow, Keble College, Oxford; Associate Professor, Oxford Law Faculty. I am grateful to John Murphy, Donal Nolan and Prince Saprai for their helpful comments on early drafts of this article. I am also indebted to participants in the University of Sydney Forum on Apportionment and the Attribution of Liability (especially to Peter Cane), the Moral Values and Private Law III workshop at King’s College London (particularly to Andrew Dyson, John Goldberg, Ajay Ratan, Victor Tadros and Benjamin Zipursky) and the tort strand of the Society of Legal Scholars’ Annual Conference 2014 (especially to Jenny Steele and Stephen Todd). I am grateful to Ellen Bublick for reviewing my use of US sources and also to Eleanor Mitchell for her research assistance.

1 “Contributory negligence” … is raised very frequently, and has a great impact on the operation of the law”: Tony Weir, An Introduction to Tort Law (2nd ed, 2006) 123; ‘Contributory negligence is a core element in tort law in England (and other common law countries)’: WVH Rogers, ‘Contributory Negligence under English Law’ in U Magnus and M Martín-Casals (eds), Unification of Tort Law: Contributory Negligence (2004) 57, 57.

2 Most of the Act extends to Scotland. It does not extend to Northern Ireland, which has its own legislation: Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1948.
since passing it, and the courts have made relatively few (and certainly no radical) changes to the law in this area. Generally speaking, the description of the law regarding contributory negligence offered by Glanville Williams in 1951 in his magisterial treatise Joint Torts and Contributory Negligence is as accurate today as when it was written. The law in Canada has similarly remained largely stationary since the introduction of apportionment legislation, which occurred in most of Canada during the 1920s and 1930s. The situation in Australia has been more fluid. Several Australian legislatures have enacted statutes that, among other things, erect presumptions of contributory negligence where the claimant engages in specified behaviour and compel the courts to reduce damages by a minimum or fixed percentage in certain situations. However, these changes to the defence of contributory negligence in Australia are hardly revolutionary. In summary, since the coming of apportionment, the law governing the defence of contributory negligence has generally been extremely stable throughout the common-law world.

The second striking feature of the law regarding the defence of contributory negligence that has passed largely unnoticed is that inter-jurisdictional differences in the law between common law systems are minimal. For example, the core rules that govern the defence in Australia, Britain and Canada are essentially identical. These rules, stated very simply, are as follows: (1) a claimant is guilty of contributory negligence if he fails to take reasonable care of his own safety and that failure is causally related to his damage; (2) if the claimant is guilty of contributory negligence, his action will not be defeated on account of that contributory negligence, but his damages must be reduced; and (3) the reduction must be ‘just and equitable’ and this is determined by having regard to the relative blameworthiness of the parties and the causal potency of their acts. The situation in the United States disrupts this harmonious picture. Some jurisdictions in the United States embrace ‘pure comparative responsibility’ regimes, which consist of rules that are materially identical to those that have just been described. However, a majority of jurisdictions have ‘modified comparative responsibility’ systems, in which contributory negligence by the claimant is fatal to his action.

3 Tweaks were made to the Act by the National Insurance (Industries Injuries) Act 1946, the Carriage by Air Act 1961, the Fatal Accidents Act 1976, the Civil Liability (Contribution) Act 1978, the Consumer Protection Act 1987 and the Environmental Protection Act 1990.


5 ‘Glanville Williams[’s]... text on contributory negligence... remains, arguably, the best analysis available today’ of the law in this area: Chae v Min [2001] ABQB 1071, [14]; ‘Although now over 50 years old, G. Williams, Joint Torts and Contributory Negligence (1950) is still the leading treatment’: Rogers (n 1) 57, fn 1.

6 See, e.g., Motor Accidents Compensation Act 1999 (NSW), s 138(2); Civil Liability Act 2002 (NSW), s 50(3).

7 See the text accompanying nn 72–76.

8 See the text accompanying nn 65–66, 71.

9 ‘In order to establish the defence of contributory negligence, the defendant must prove, first, that the plaintiff failed to take “ordinary care for himself,” or, in other words, such care as a reasonable man would take for his own safety, and secondly, that his failure to take care was a contributory cause of the accident’: Lewis v Denye [1939] 1 KB 540 (CA) 554 (Du Parcq LJ).

10 If the plaintiff is guilty of contributory negligence, the courts have no discretion not to reduce damages: Boothman v British Northrop Ltd [1972] 13 KIR 112 (CA) 121–122; Bagder v Ministry of Defence [2005] EWHC 2941 (QB); [2006] 3 All ER 173, [15].

if his share of the responsibility for his damage reaches a certain level (usually 51%).

Accordingly, rule (2), above, is not fully implemented in the United States. However, notwithstanding the diversity of approaches in the United States, it is generally true to say that, in most of the common-law world, there is a high degree of uniformity in the law regarding contributory negligence.

These two features of the law governing the defence of contributory negligence – minimal evolution in the law subsequent to the introduction of apportionment legislation and a high degree of uniformity among common law jurisdictions – might be thought to suggest that there is widespread satisfaction with law in this connection. This perception is arguably reinforced by the fact that, in most of the common-law world, academic engagement with the defence is virtually non-existent. This is particularly true in Australia, Canada and the United Kingdom, where descriptions of the defence offered by textbooks writers are uniformly bland and prosaic, and the defence is usually mentioned only in passing in academic journals. Difficult questions are simply not being asked in relation to it. This article tackles one such question: to what extent should the apportionment of damages for contributory negligence be left to judicial discretion? In other words, should judges have essentially free rein to determine the appropriate discount or should what will be called ‘fixed apportionment’ rules which stipulate the discount to be applied ex-ante be adopted? This question appears not to have been previously considered, at least not directly. Certainly, no mention of it is made of it by Glanville Williams in his work on contributory negligence, which remains the most comprehensive treatment of the subject by far.

This article unfolds as follows. Section 2 explains what the concepts of discretionary apportionment and fixed apportionment entail. In Section 3, it is noted that the British apportionment provision (which has served as a model in many other jurisdictions), embraces discretionary apportionment. Section 4 notes that, despite the acceptance of discretionary apportionment, many fixed apportionment rules have infiltrated the law in all of the major common law jurisdictions. Section 5 stresses the incompatibility of discretionary apportionment rules and fixed apportionment rules and Section 6 discusses how conflicts between such rules should be resolved. Section 7 examines the case for and against discretionary and fixed apportionment and concludes that it would be better if the law was tilted more in favour of fixed apportionment than it is at present. Section 8 considers how, precisely, the law should be shifted more in the direction of fixed apportionment. Section 9 addresses some possible objections to the recommendations made in Section 8. Section 10 addresses some implications of the analysis in relation to the law concerning contribution. The main conclusions are summarised in Section 11.

2. The Concepts Distinguished

In a legal system that provides for damages to be apportioned for contributory negligence, a distinction can be drawn between two general approaches to apportioning damages based on how free judges are to determine the appropriate discount in damages. These approaches to apportionment will be called ‘discretionary apportionment’ and ‘fixed apportionment’. Under

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12 Regarding the jurisdictions that accept pure and modified comparative responsibility, and the small number of jurisdictions that withhold apportionment altogether, see Restatement (Third) Torts: Apportionment of Liability §7 cmt a.

13 In 1974 one writer justifiably complained that ‘In England most standard textbooks have little or nothing to say about contributory negligence: JC Hicks, ‘Seat Belts and Crash Helmets’ (1974) 37 MLR 308, 313. This complaint remains valid today.


15 Williams (n 4).
discretionary apportionment, judges enjoy essentially absolute freedom to decide the discount in view of the salient features of the case before them. They can have regard to whatever facts that they feel are important. In a system of discretionary apportionment, a given act of contributory negligence might attract a particular discount in one case and a rather different discount in another. This possibility exists because, as has been noted, trial judges have essentially free rein to determine the amount by which the damages should be discounted in the light of the circumstances of the case. Different judges will naturally reach different conclusions concerning the size of the discount that is appropriate.

By contrast, fixed apportionment entails apportioning damages in some ex-ante way. Judicial freedom to determine the discount for contributory negligence is restricted. Under a fixed apportionment regime, categories of case are identified and cases that fall within a given category are handled in the same fashion, at least to a certain degree. Thus, fixed apportionment can result in cases that fall within a given category being handled in a like way irrespective of the fact that two cases that fall within the category concerned might be rather dissimilar. The most obvious way of isolating a category to which a fixed apportionment rule may be applied is by reference to particular acts of contributory negligence, such as failing to wear a seat belt or use a safety-helmet.

The distinction between discretionary apportionment and fixed apportionment should not be overstated. The difference between these concepts is not as stark as it may initially seem. For one thing, under a system of discretionary apportionment, judges do not have total freedom to impose a given discount, hence why it was stated in the first paragraph of this section that the freedom enjoyed by judges in a discretionary apportionment regime is only essentially absolute. The freedom given to judges in a discretionary apportionment system can plainly never be total because judges, by virtue of their office, are subject to certain constraints.\(^\text{16}\) Judges must act judicially, and this includes an obligation to produce outcomes that are at least roughly consistent with other cases which factually similar. In other words, judges, in a system of discretionary apportionment, cannot ‘indulge fancy or mere whim’.\(^\text{17}\) They cannot pluck figures out of the air.

A second reason why the contrast between discretionary apportionment and fixed apportionment is less extreme than it might at first glance appear is that, under a fixed apportionment system, judges will still enjoy some discretion. They will, at the very least, have discretion to decide whether the instant case is one to which a fixed apportionment rule applies. For example, if a statute provides that damages must be reduced by, say, 50%, if the claimant was injured while relying on an intoxicated defendant,\(^\text{18}\) the judge will have some leeway to decide what the words ‘relying’ and ‘intoxicated’ mean (unless he is constrained by a prior interpretation of those words by a court the decision of which he is bound) and whether the words are applicable to the facts of the case given the meanings that he ascribes to them.

A third and final reason why the gulf between discretionary apportionment and fixed apportionment is not as vast as one might initially think is because they represent poles on a spectrum rather than digital choice. A legislature, for example, might provide for a fixed apportionment rule (say, a provision that stipulates that a given act of contributory negligence will attract a fixed discount of 25%), but incorporate a safety valve that allows judges to

\(^{16}\) As HLA Hart observed in his ‘lost’ essay on discretion (HLA Hart, ‘Discretion’ (2013) 127 Harvard Law Review 652 at 657): ‘When we are considering the use of discretion in the Law we are considering its use by officials who are holding a responsible public office. It is therefore understood that if what officials are to do is not rigidly determined by specific rules but a choice is left to them, they will choose responsibly having regard to their office and not indulge in fancy or mere whim…’.

\(^{17}\) ibid, 657.

\(^{18}\) See, e.g., the Australian statutes mentioned in nn 71, 74.
depart from the rule if they consider that applying it would produce injustice or if the case is exceptional. Such a rule would lie somewhere near the middle of the postulated spectrum. The same would be true of a rule that limited the permissible reductions in damages to a reduction falling within a particular range, say, between 25% and 75%.

Despite these three reasons for concluding that the contrast between discretionary apportionment and fixed apportionment is not black and white, it plainly remains possible to draw at least a rough line between, on the one hand, a system of discretionary apportionment and, on the other hand, a system of fixed apportionment. A legal system can be identified, at least in a rough and ready way as accepting either discretionary apportionment or fixed apportionment. This article proceeds on the basis of this understanding.

3. The Embrace of Discretionary Apportionment

The British apportionment provision is contained in section 1 of the Law Reform (Contributory Negligence) Act 1945. This provision, which has been widely replicated elsewhere,\(^{19}\) relevantly states that where the claimant is guilty of contributory negligence the ‘damages recoverable … 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’. This provision plainly opts for a system of discretionary apportionment.\(^{20}\) It does not, for example, specify ex-ante reductions in damages that are to be applied to certain types of cases. Furthermore, the words ‘just and equitable’ give the courts significant leeway to determine the appropriate apportionment.\(^{21}\) They afford the judge the opportunity to look at all of the circumstances of the case at hand. Consistently with the fact that the provision opts for discretionary apportionment, it has often stressed that it requires each case to be decided on its own facts\(^{22}\) and that appellate courts will rarely disturb a trial judge’s determination as to the appropriate reduction in damages.\(^{23}\)

While the British apportionment provision clearly gives trial judges great freedom, so that it can properly be said to opt for a system of discretionary apportionment, it fetters the discretion that it affords in at least two ways. First, the discretion must be exercised having regard to ‘the claimant’s share in the responsibility for the damage’.\(^{24}\) This excludes certain facts from consideration. For example, it would be wrong, given this statutory language, for the court to take into account in determining the appropriate discount the fact that the claimant risked the defendant’s safety or the safety of third parties. Such facts do not relate to the claimant’s responsibility for the damage, which means, of course, the damage suffered by

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19 See, e.g., Law Reform (Miscellaneous Provisions) Act 1965 (NSW), s 9; Contributory Negligence Act 1947 (NZ), s 3.
20 It is a classic example of what Hart called ‘expressed or avowed use of discretion’: Hart (n 16) 655–656.
21 ‘It is clear that the Act intends to give a very wide discretion to the judge or jury entrusted with the … task of making the apportionment. Much latitude must be allowed to the … tribunal in arriving at a judgment as to what is just and equitable’: Pennington v Norris (1956) 96 CLR 10, 15–16 (HCA). See also Stanton v Collinson [2010] EWCA Civ 81; [2010] RTR 26, [26]. However, in Smith v Chief Constable of Nottinghamshire Police [2012] EWCA Civ 161; [2012] RTR 23, [36] the court seemed to doubt whether the apportionment legislation affords trial judges an ‘unfettered discretion’.
22 ‘The significance of the various elements involved in [the determination of the appropriate apportionment] will vary from cars to case’: Podrebersek v Australian Iron & Steel Pty Ltd (1885) 59 ALJR 492 (HCA) 494; ‘[T]he degree of contributory negligence depends on the particular circumstances of the individual case’: Finlayson v Lanarkshire Health Board (1996) Rep LR 119 (OH) …; ‘[I]t is important to remember that every case depends upon its own facts’: Phethean-Hubble v Coles [2012] EWCA Civ 349; [2012] RTR 31, [80]; ‘Each case … must be decided on its own facts’: Currie v Clamp’s Executor 2002 SLT 196 (OH) [22].
23 Phethean-Hubble v Coles [2012] EWCA Civ 349, [86]. Even the approximate frequency with which appellate courts actually intervene is unknown. No data are available in this connection.
24 Law Reform (Contributory Negligence) Act 1945, s 1(1).
the claimant. As Glanville Williams put it, ‘fault not contributing to the damage cannot be taken into account’. The fact that the discretion must be exercised having regard to ‘the claimant’s share in the responsibility for the damage’ also means that certain things must be considered. For example, the court must take into account the defendant’s share in the responsibility for the damage since, as Hale LJ noted in Eagle v Chambers, ‘[i]t is … impossible to consider the claimant's “share” without also considering that of the defendant.’

A second way in which the apportionment legislation limits the discretion that it affords judges is on account of the fact that it stipulates that reductions in damages for contributory negligence must be ‘just and equitable’. The courts have endeavoured to discover what Parliament intended by these words. As mentioned earlier, it has been held, at least in Australia and Britain, that these words require judges to have regard to the parties’ relative moral blameworthiness and the ‘causative potency’ of their careless conduct. The fact that judges must take account of these considerations into account (and perhaps only these considerations) limits their discretion. Of course, these factors are extremely general and it has never been explained in any detail what they mean, so their adoption does little to curtail the discretion that judges enjoy in apportioning damages.

4. Fixed Apportionment Rules

The British apportionment provision and the apportionment provisions in other Commonwealth jurisdictions give the impression that discretionary apportionment reigns supreme. However, the true situation is rather different and significantly more complex. Jurisdictions that prima facie accept discretionary apportionment as a consequence of their apportionment legislation often recognise rules that provide for fixed apportionment to a limited extent. At least three types of fixed apportionment rules can be identified: (1) rules that provide for fixed reductions in damages; (2) rules that provide for minimum reductions in damages; (3) rules that place a ceiling on permissible reductions in damages. These rules will be discussed seriatim. The goal here is, in addition to drawing attention to their existence, to determine their scope. These are not the only types of fixed apportionment rules that could exist. There are at least two further types of fixed apportionment rules that could be created: (4) rules that establish a floor on permissible reductions in damages; and (5) rules that limit the permissible discount to a particular range of discounts. Although no clear example of such rules can be found in any Commonwealth jurisdiction, a few words will also be said about these additional types of fixed apportionment rules.

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25 This is clear from the opening words of s 1(1): ‘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…’.
26 Williams (n 4) 390.
28 See further the text accompanying n 100.
29 See the sources cited in n 11.
30 The issue of whether or not these factors are exhaustive of the consideration to which the courts are permitted to refer does not seem to have ever been addressed in a reported case decided in a Commonwealth jurisdiction.
(a) Fixed Reductions in Damages

(i) The Froom Rules

A leading decision regarding the defence of contributory negligence is *Froom v Butcher*. This was a run-of-the-mill seat belt case. The claimant passenger suffered more serious injuries in an accident that was caused by the defendant driver's negligence than he would have suffered had he used a seat belt. The trial judge held that the failure to wear a seat belt did not constitute contributory negligence. Lord Denning MR (with whom Lawton and Scarman LJ agreed) reversed this holding. In the course of doing so, his Lordship laid down several rules to determine how damages should be apportioned where the claimant negligently failed to wear a seat belt. He wrote:

Sometimes the evidence will show that the failure made no difference. The damage would have been the same, even if a seat belt had been worn. In such case the damages should not be reduced at all. At other times the evidence will show that the failure made all the difference. The damage would have been prevented altogether if a seat belt had been worn. In such cases I would suggest that the damages should be reduced by 25 per cent. But often enough the evidence will only show that the failure made a considerable difference. Some injuries to the head, for instance, would have been a good deal less severe if a seat belt had been worn, but there would still have been some injury to the head. In such case I would suggest that the damages attributable to the failure to wear a seat belt should be reduced by 15 per cent.

An often overlooked fact about *Froom* is that Lord Denning MR did not adhere strictly to these rules (the *Froom rules*) in disposing of the appeal. Since the evidence was that some of the claimant’s injuries would have been completely avoided had the claimant used a seat belt while other injuries would have been incurred regardless of whether the claimant had worn a seat belt, Lord Denning MR decided to reduce the damages by 20%. 20% was the figure by which the trial judge said he would have reduced damages had he found the claimant guilty of contributory negligence. Possibly also important in Lord Denning MR’s decision to impose a discount of 20% was the fact that the claimant did not suggest that this discount was inappropriate.

Lord Denning MR did not change the law in remarking that damages should not be apportioned if the claimant’s negligent failure to wear a seat belt would not have made any difference to the damage. Causally irrelevant contributory negligence by the claimant has never been sufficient to enliven the defence of contributory negligence. Such contributory

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32 The plaintiff suffered injuries to his head, chest and one of his fingers. The head and chest injuries would have been avoided if the plaintiff had worn a seat belt. The plaintiff’s finger would have been injured regardless of whether he had used a seat belt: *Froom v Butcher* [1976] QB 286 (CA) 296.

33 *Froom v Butcher* [1974] 1 WLR 1297 (QBD).

34 Lord Denning MR also established several rules concerning the circumstances in a plaintiff should be found guilty of contributory negligence. For instance, his Lordship also laid down the principle that the plaintiff can be guilty of contributory negligence provided that his carelessness contributes merely to the damage as opposed to the accident: at 292–293. These other rules created by Lord Denning MR are not presently relevant and nothing further will be said about them.


36 See n 32.

37 In *Caswell v Powell Duffryn Associate Collieries Ltd* [1940] AC 152 (HL) 165 Lord Atkin said ‘[i]f the plaintiff were negligent but his negligence was not a cause operating to produce the damage there would be
has always been immaterial, both before and after the enactment of the apportionment legislation. However, the situation is otherwise with respect to Lord Denning MR’s suggestion that damages should be reduced by 25% reduction if the damage suffered would have been completely avoided had the claimant worn a seat belt, and by 15% if the damage would have been less severe. By these remarks, Lord Denning MR isolated two categories of case and suggested that cases falling into those categories should be subject to fixed discounts. In other words, he created fixed reduction rules.

What is the status of the Froom rules? It is arguable that they are merely obiter dicta given that Lord Denning MR did not apply them. One might also fairly contend that Lord Denning MR meant only for them to be guidelines (he spoke in permissive language). However, this is not how they have been understood by the courts. Judges seem to adhere strictly to them (although no one has carried out the empirical work that is necessary to confirm whether this is so). The rules do not, of course, determine the outcome of cases where a negligent failure to use a seat belt is combined with another act of contributory negligence (as will often be the case), such a accepting a lift from an intoxicated driver, travelling in a car knowing that its brakes were defective, or travelling in the boot of a car. In such cases, discounts greater than those enunciated in Froom are often applied. However, where the only act of contributory negligence is a negligent failure to wear a seat belt it seems that the courts rarely depart from the Froom rules. They have been applied countless times and attempts to modify them have repeatedly been rebuffed. The courts have made it crystal clear that they have little or no appetite for reconsidering them. Indeed, the courts have extended them to related contexts, such as a failure of motorcyclists and bicyclists to wear crash helmets.

Of course, despite the foregoing, is difficult to be certain regarding the extent to which the Froom rules are determinative in practice. This is partly because most of the cases to which they will have been relevant will have been decided by courts that are situated lower in the judicial hierarchy than the High Court, and decisions of such courts are rarely reported or otherwise made publically available. It is also because litigants are also free to reach an agreement on the issue of apportionment. Litigants are obviously not forced to accept the Froom rules. There is some evidence that litigants, oddly, sometimes agree to discounts that differ wildly from those established in Froom even though Froom would clearly apply were the case litigated.  

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38 See the text accompanying n 35.
39 See, e.g., Sloan v Triplett 1985 SLT 294 (OH) (33.3%); Hill v Chivers 1987 SLT 323 (OH) (33.3%).
40 See, e.g., Gregory v Kelly [1978] RTR 426 (QBD) (40%).
41 See, e.g., Gleeson v Court [2007] EWHC 2397 (QB); [2008] RTR 10 (30%).
44 This message is made particularly clear in Stanton v Collinson [2010] EWCA Civ 81, [27].
It is true that the Froom rules are not wholly inflexible (recall that they were not applied in Froom itself\(^\text{49}\)). Judges have a discretion to depart from them. However, the courts have said firmly and repeatedly that they will be departed from only in ‘rare or exceptional’\(^\text{50}\) cases. It has been declared that it ‘is of the greatest importance that they should be generally be kept to’\(^\text{51}\) and that they are not ‘mere suggestion or guidance’.\(^\text{52}\) Only a handful of cases can be found in which they were not applied where they were prima facie applicable.\(^\text{53}\) Where the defendant contends that the discount for contributory negligence should be increased above 25\% it seems that only conscious risk taking by the claimant will render a case sufficiently exceptional to escape from the grip of the Froom rules.\(^\text{54}\) It seems that there is no reported case or case the decision in which is electronically available in which this condition has been satisfied.\(^\text{55}\)

The Froom rules have not been swallowed hook, line and sinker by the courts in any other jurisdiction.\(^\text{56}\) However, they are not infrequently referred to by courts in Australia\(^\text{57}\) and Canada\(^\text{58}\) and are plainly influential in those countries. Nevertheless, in both of these jurisdictions it seems that judges have greater discretion to impose the discount that they think is warranted. For example, in Snushall v Fulsang Juriansz JA wrote: ‘Canadian courts generally ... have not expressed approval of the three-level framework Lord Denning suggested.’\(^\text{59}\) In Heller v Martens, Fruman JA observed: ‘It is obvious that in English seat belt cases apportionment is based on a fixed qualification that is considerably less discretionary than a typical Alberta analysis.’\(^\text{60}\)

(ii) Other Fixed Reduction Rules

No other fixed reduction rules appear to have been developed by the courts in any jurisdiction. Tugendhat J recently claimed in Best v Smyth that ‘since Owens v Brimmell [1977] QB 859 the figure of 20\% is commonly regarded as an appropriate reduction for a claimant who has got into a vehicle when he must have known that the driver had had too much to drink.’\(^\text{61}\) Although it is true that cases in which the claimant accepted a ride from a drunken defendant can be found in which a 20\% reduction was applied,\(^\text{62}\) it is doubtful that

\(^{49}\) See the text accompanying n 36.

\(^{50}\) Gawler v Raettig [2007] EWHC 373 (QB), [26]. See also Jones v Wilkins [2001] RTR 19 (CA) [18].


\(^{54}\) Jones v Wilkins [2001] RTR 19 (CA) [19]; Gawler v Raettig [2007] EWHC 373 (QB), [31].

\(^{55}\) In Jones v Wilkins [2001] RTR 19 (CA) [15] Keene LJ remarked that ‘there has been no reported case of which counsel are aware where a passenger’s failure to wear a seat belt has resulted in a finding of more than 25 per cent contributory negligence.’

\(^{56}\) Including Scotland: see, e.g., Smith v Donald McLaren Ltd 1977 SLT (Notes) 51 (OH) (20%); Sloan v Tipllett 1985 SLT 294 (OH) 297 (20%).

\(^{57}\) See, e.g., Hallowell v The Nominal Defendant (Queensland) [1983] 2 Qd R 266, 268 (Full Ct); Ferrett v Worsley (1993) 61 SASR 234 (Full Ct) 242; Richard v Mills [2003] WASCA 97, [26].

\(^{58}\) ‘Froom v Butcher ... has been widely accepted and approved in Canada and has acquired a settled place in our jurisprudence’: Fowler v Schneider National Carries Ltd [2001] NSCA 55; (2001) 193 NSR (2d) 206, [52]; ‘Many Canadian courts have relied on Lord Denning’s 1975 decision in Froom v Butcher’: Chae v Min [2001] ABQB 1071, [24]; ‘Lord Denning’s judgment in Froom has been cited consistently in Canadian cases’: Snushall v Fulsang (2005) 258 DLR (4th) 425 (CA) [36].

\(^{59}\) (2005) 258 DLR (4th) 425 (CA) [36].

\(^{60}\) [2002] ABCA 122; (2002) 4 Alta LR (4th) 51, [38].

\(^{61}\) [2010] EWHC 1541 (QB), [12].

\(^{62}\) See, e.g., ...
any such fixed reduction rule exists. The judge in Owens, Watkins J, did nothing to indicate that he was doing anything other than making a decision solely for the purpose of the proceedings before him. (Certainly, he did not offer remarks analogous to those made by Lord Denning MR in Froom.) Some judges have denied that Owens sets the figure of 20% in stone.63 A welter of relevant cases can be found in which a different discount was applied.64

Statutory fixed reduction rules exist in some jurisdictions. For example, in the Northern Territory,65 South Australia,66 New Brunswick67 and Newfoundland68 legislation provides that damages must be reduced by 25%.69 In South Australia, if the claimant is guilty of contributory negligence because he relied on an intoxicated defendant, statute stipulates that damages must be cut back by 25%. This discount is increased to 50% if the defendant was intoxicated to a sufficient degree.70 None of these statutory fixed reduction rules gives the court the power not to apply the prescribed discount.

(b) Minimum Reductions in Damages

The second type of fixed apportionment rules that will be addressed are minimum reduction rules. Such rules require damages to be reduced by at least a specified percentage (such as 25%) where the claimant is guilty of contributory negligence. Whereas fixed reduction rules result in damages being reduced in all cases that fall within a given category by a set amount (and by no more and no less), minimum reductions rules demand that all cases that fall within a given category have the award cut back by at least a prescribed figure. Greater reductions in damages are permitted. Minimum reduction rules and fixed reduction rules are fundamentally different from each other. Fixed reduction rules eliminate completely the discretion of the trial judge, save for the discretion that the judge has as to the issue of whether the rule applies in the first place. By contrast, minimum reduction rules merely eliminate certain discounts from consideration (such as discounts of less than 25%). The judge is left free to reduce the claimant’s damages by more than the prescribed minimum. Minimum reductions rules still depart, of course, from the notion of discretionary apportionment. This is because, even if, in the circumstances of the case, the court would, if it had the choice, apply a discount less than the minimum prescribed percentage, the court is compelled to reduce damages by at least that percentage.

Minimum reduction rules have long existed in Australia, although they only became widespread at the start of the 21st Century. Today, all of Australia’s minimum reduction rules are all concerned with intoxication cases.72 They provide that damages must be reduced by at

63 Stinton v Stinton [1993] PIQR P135 (QBD) 140; Currie v Clamp’s Executor 2002 SLT 196 (OH) [22].
64 See, e.g., Meah v McCrearmer [1985] 1 All ER 367 (QBD) (25%); Stinton v Stinton [1993] PIQR P135 (QBD) (33.3%); Donelan v Donelan [1993] PIQR P205 (QBD) (75%) (however, it was said that ‘the fact of this case [were] wholly exceptional’ (at 210)); Currie v Clamp’s Executor 2002 SLT 196 (OH) [22] (33.3%).
65 Motor Accidents (Compensation) Act (NT), s 11(1).
66 Civil Liability Act 1936 (SA), s 49(3).
67 Insurance Act, RSNB 1973, c I-12, s 265.2(1).
69 There is a fixed reduction of 15% for failing to wear a seat belt in Tasmania: Motor Accidents (Liabilities and Compensation) Act 1973 (Tas), s 22(4).
70 The Northern Territory and South Australian legislation extends to a failure to wear a safety helmet. The legislation in South Australia applies also if the claimant travelled in a compartment of a vehicle other than a passenger compartment.
71 Civil Liability Act 1936 (SA), s 47(3) and (6).
72 The only exception is s 22 of the Motor Accidents (Liabilities and Compensation) Act 1973 (Tas), which provides for a minimum reduction of 15% for failing to wear a seat belt.
least 25% where the claimant is intoxicated or where he negligently ‘relied’ on an intoxicated defendant. In some States, this minimum discount is increased to 50% where the claimant’s contributory negligence is thought to be aggravated, such as where the claimant was a driver, or where the person on whom the claimant relied was a driver. Minimum reduction rules also exist in Canada. Legislation in New Brunswick, Newfoundland and Nova Scotia provides that where the claimant fails to wear a seat belt and contributes to his damage by some additional act of contributory negligence his damages shall be reduced by not less than 25%.

(c) Ceilings on Reductions in Damages

A maximum permitted reduction in damages is a ceiling on the size of the discount that a court can apply for contributory negligence (for example, 25%). Ceilings are the inverse of rules that provide for minimum reductions in damages. They depart from the concept of discretionary apportionment because they restrict the discount for contributory negligence to a given level even if the court would, but for the limit, have assigned a greater share of responsibility for the damage to the claimant. It is arguable that there is a judicially created ceiling in seat belt cases in at least some Canadian Provinces. In Snushall v Fulsang Juriansz JA, speaking for the Ontario Court of Appeal, opined that a discount greater than 25% in seat belt cases would be ‘unreasonable’. In a striking departure from the ‘never say never’ ethos that is generally embraced by judges, his Honour wrote: “In my view, there is no reason to leave open the possibility that a greater apportionment might be appropriate in a rare case.” In Vigoren v Nystuen Richards JA, with whom the other members of the Court of Appeal of Saskatchewan agreed, said ‘the 25% figure should apply as a firm cap’.

Legislatures in several jurisdictions in the United States have capped the maximum discount in seat belt cases. For example, in Michigan, a court cannot reduce damages by more than 5% in such cases. What about jurisdictions that embrace modified comparative responsibility? As explained earlier, under modified comparative responsibility, as soon as the discount reaches a particular threshold (usually 51%), the claimant’s action will fail completely. Are such schemes illustrations of fixed apportionment rules? Such systems are probably better understood as not involving fixed apportionment rules. Rather, under modified comparative responsibility, apportionment is simply not available once the claimant’s share of responsibility for the damage becomes sufficient large. Instead of damages being apportioned, the claim is denied in toto for contributory negligence.

73 Civil Liability Act 2002 (NSW), s 50; Civil Liability Act 2003 (Qld), s 47; Civil Liability Act 1936 (SA), s 46.
74 Civil Liability Act 2003 (Qld), s 48(4); Civil Liability Act 1936 (SA), s 47(5).
75 Civil Liability Act 2003 (Qld) s 47(5); Civil Liability Act 1936 (SA), s 46(4).
76 Civil Liability Act 2003 (Qld), ss 48–49; Civil Liability Act 1936 (SA), s 47.
77 Insurance Act, RSNB 1973, c I-12, s 265.2(2).
79 Automobile Insurance Contract Mandatory Conditions Regulations, NS Reg 181/2003, s 10(1).
80 Snushall v Fulsang (2005) 258 DLR (4th) 425 (CA) [44].
81 ‘Never say never’ is often an appropriate catchphrase for a judge to have in mind: Al Rawi v Security Service [2010] EWCA Civ 482, [69].
82 Snushall v Fulsang (2005) 258 DLR (4th) 425 (CA) [44].
83 [2006] SKCA 47, [102].
84 MCL 257.710e(6). A 5% ceiling applies also in Iowa (Iowa Code Ann, § 321.445(4)), Nebraska (Neb Rev Stat, § 60–6,273) and Oregon (Or Rev Stat Ann, § 31.760). In Missouri, the ceiling is 1% (Mo Ann Stat, § 307.178(4)) while in Wisconsin it is 15% (Wisconsin Stat, § 347.48(2m)(g)).
85 See the text accompanying n 12.
In Britain, despite some earlier doubts, it seems that the courts cannot reduce damages by 100% on account of the claimant’s contributory negligence.\(^{86}\) It might be thought that the rule that damages can only be reduced for contributory negligence by less than 100% is a ceiling (although the precise height of the ceiling is unclear (is it, for example, 95%, or 99%?)). The better view, however, is that the reason why damages cannot be reduced by 100% is not because there is a ceiling on the maximum discount but because the defence of contributory negligence will not be engaged in the first place where a court would, if the rule applied, be minded to reduce damages by 100%. A court that concludes that a 100% discount is warranted is stating that the claimant is solely responsible for the damage about which he complains. But if the claimant is solely responsible for his damage, no tort will have been committed, and if no tort is committed the question of contributory negligence will not even arise for consideration.\(^{87}\) It follows that the principle that 100% discounts are not permitted is not in fact a ceiling on the size of permissible discount, but a rule about the circumstances in which the defence of contributory negligence applies.

\(^{(d)}\) **Floor on Reductions in Damages**

A floor on the permissible reduction in damages for contributory negligence would be a fixed apportionment rule. An example of such a rule would be a rule that stipulated that damages cannot be reduced by less than 5% for a given act of contributory negligence. Such a rule would restrict in a modest way the discretion available to the courts to reduce damages. It does not seem that there are any floors in Commonwealth jurisdictions. Reductions of less than 10% are unusual, but not unheard of.\(^{88}\) However, because a floor is a type of fixed apportionment rule it is mentioned for completeness.

\(^{(e)}\) **Range of Permissible Discounts in Damages**

A fifth type of fixed apportionment rule is a rule that restricts the courts to a discount that falls between two percentages. For example, a legislature might enact a provision that states that a given act of contributory negligence can attract discounts between 40% and 60% only. Such a rule (which combines a ceiling with a floor) would obviously limit the courts’ discretion to determine the appropriate discount. Do rules that confine the courts to discounts within a particular range exist any common law jurisdictions? Arguably, Canada recognises such a rule in seat belt cases. In *Galaske v O’Donnell* Cory J remarked: ‘The courts in this country have consistently deducted from 5 to 25 percent from claims for damages for personal injury on the grounds that the victims were contributorily negligent for not wearing seat belts.’\(^{89}\) It is not clear, however, whether there is any formal rule that restricts the courts’ discretion in this regard, or whether Cory J was merely observing that most discounts in seat belt cases tend to fall within this range.

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\(^{86}\) *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 (HL) 372, 387; *Anderson v Newham College of Further Education* [2002] EWCA Civ 505; [2003] ICR 212; *Buyukardicli v Hammerson UK Properties plc* [2002] EWCA Civ 683, [7].

\(^{87}\) ‘[O]ne does not get to the question of contributory negligence until liability is established’: *Sharpe v Addison* [2003] EWCA Civ 1189, [2007] Lloyd’s Rep PN 12, [32].

\(^{88}\) Consider *Pasternack v Poulton* [1973] 1 WLR 476 (QBD) 483 (5%); *Pring v Hooper* (unreported, NSWSC, McInerney J, 10 March 1993) (1%); *Snushall v Fulsang* (2006) 258 DLR (4th) 425 (Ont CA) (5%); *Nominal Defendant v Rooskov* [2012] NSWCA 43; (2012) 60 MVR 350 (5%). In *Stapley v Gypsum Mines Ltd* [1953] AC 663 (HL) 677 Lord Porter said that had he found the defendant liable, he would have attributed to the defendant an ‘infinitesimal’ percentage of responsibility for the loss. It is not clear whether by this Lord Porter would have discounted damages at all even if he had concluded that the defendant was liable.\(^{89}\) [1994] 1 SCR 670 (SCC) 682.
(f) Summary

Although the apportionment provisions in all of the major common law jurisdictions adopt discretionary apportionment, fixed apportionment rules have crept into the law in these jurisdictions as a result of both judicial and statutory invention (although the Froom rules are the only illustration of a judicially created fixed apportionment rule). At least three different types of fixed apportionment rules exist: (1) rules that provide for fixed reductions in damages (e.g., reduction by exactly 25%), (2) rules that require the courts to reduce damages by a minimum amount (e.g. reduction of at least 25%), and (3) rules that place a ceiling on the maximum discount (e.g., reduction of not more than 25%). Theoretically, additional types of fixed apportionment rules could be created including (4) floors on the permissible reductions in damages (e.g., reduction not less than 25%), and (5) provisions that restrict discounts to a particular range (e.g., reduction greater than 25% and less than 50%). Some fixed apportionment rules restrict the judge’s discretion to a much greater degree than others. By far the most restrictive type of fixed apportionment rule is a fixed reduction in damages. The only discretion that these rules leave to the trial judge is the discretion to decide whether the fixed reduction rule applies in the first place.

5. The Conflict between Discretionary Apportionment and Fixed Apportionment

Discretionary apportionment and fixed apportionment are incompatible approaches to apportionment. Discretionary apportionment leaves the judge essentially free to determine the discount that he thinks is appropriate given the unique circumstances of each case. By contrast, fixed apportionment fixes the discount in some predetermined way. It is important to note that, although the two approaches to apportionment may result in the same discount in a given case, they can lead to different outcomes. Suppose that a claimant passenger is injured in a car accident due to the negligence of the driver of the vehicle in whose car he was travelling. The claimant was not wearing a seat belt. Had the claimant used a seat belt, he would have escaped injury. In Britain, the claimant’s damages will, pursuant to Froom, be reduced by 25%, unless the case is considered to be exceptional.90 Now consider the same scenario with the following modifications made to it. Suppose that the driver of the vehicle in which the claimant was travelling was intoxicated (in circumstances where the claimant did not know and could not reasonably have discovered this fact). Suppose also that the driver is an adult whereas the passenger is a teenager. In the modified scenario, most people would think, it is suggested, that the driver carries a significantly greater proportion of responsibility for the claimant’s damage than in the original scenario. Yet, by virtue of Froom, damages will still be reduced by 25% unless, again, the case is considered to be exceptional. Recall that British courts are extremely reluctant to conclude that a case is exceptional.91 Conversely, were the issue of apportionment determined by a discretionary apportionment rule, the damages would be discounted by a greater percentage in the original scenario than in the modified scenario.

6. Resolving the Conflict

It has been explained that the apportionment provisions in at least all of the major common law jurisdictions are committed to discretionary apportionment.92 It has also been shown that

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90 See the text above accompanying nn 50–53.
91 See the text accompanying nn 50–53.
92 See above Section 3.
many fixed apportionment rules exist.\footnote{See above Section 4.} All of the fixed apportionment rules are statutory in nature, save for the \textit{Froom} rules. Finally, it has been demonstrated that discretionary apportionment and fixed apportionment are incompatible approaches to apportioning damages.\footnote{See above Section 5.} They can, as has been explained, yield different outcomes. We are dealing, therefore, with a situation of inconsistent laws. How should this conflict be resolved? For reasons that will be given in a moment, this question needs to be approached differently depending on whether a given fixed apportionment rule is statute-based or developed by the courts.

\begin{enumerate}[label=(\alph*)]
\item \textbf{Statutory Fixed Apportionment Rules}

Where a statute provides for a fixed apportionment rule, it is clear that the fixed apportionment rule concerned must prevail over the discretionary apportionment rule laid down by the apportionment legislation. This is for the simple reason that they will invariably be more specific than the rule in the apportionment legislation: \textit{generalia specialibus non derogant}. Fixed apportionment rules are confined to particular contexts, such as motor vehicle accidents or to particular acts of contributory negligence, such as being intoxicated. Conversely, the apportionment provisions are, of course, extremely general. Although they do not apply to proceedings for all torts,\footnote{In Britain, for example, the apportionment legislation does not apply to proceedings in trespass to the person (\textit{Co-Operative Group} (CWS) Ltd v Pritchard [2011] EWCA Civ 329; [2011] 3 WLR 1272), trespass to goods or conversion (\textit{Torts (Interference with Goods) Act 1977}, s 11(1) or deceit (\textit{Standard Chartered Bank v Pakistan National Shipping Corp} (Nos 2 and 4) [2002] UKHL 43; [2003] 1 AC 959).} they do in principle apply to all factual situations that might be presented by actions to which they extend. For example, in the context of the action in negligence, the apportionment provisions apply to all conceivable types of negligent and contributorily negligent behaviour. Unsurprisingly, when judges have considered statutory fixed reduction rules they invariably simply apply them without even mentioning the fact that they collide with the apportionment legislation.\footnote{See, e.g., \textit{Robbins v Skouaboudis} [2013] QSC 101, [52]; \textit{Hawira v Connolly} [2008] QSC 4, [53].}

\item \textbf{Common Law Fixed Apportionment Rules}

The \textit{Froom} rules are the only well-established judge-made fixed apportionment rules. Because these rules fetter the discretion that the apportionment legislation gives to judges, it is strongly arguably \textit{Froom} (and many decisions that apply the \textit{Froom} rules\footnote{See above Section 4(\textit{a})(\textit{i}).}) was decided \textit{per incuriam}.\footnote{\textit{John Spencer seemed to hint at this in a note in \textit{Froom}. Referring to 'the way in which the Court of Appeal tried to prescribe in advance the percentage by which a plaintiff’s damage should be reduced', Spencer wrote ‘As the apportionment of damages for contributory negligence is usually treated as a matter for the discretion of the court in question, it is possible to raise academic objections to this’: Spencer (n 31) 45. Robert Stevens is explicit. He contends that the fixed reduction rules laid down in \textit{Froom} ‘flagrantly ignor[e] the statutory language’; R Stevens, ‘Should Contributory Fault be Analogue or Digital?’ in A Dyson, J Goudkamp and F Wilmot-Smith (eds), \textit{Defences in Tort} (Hart Publishing, Oxford, 2014) (forthcoming). Cf \textit{Stanton v Collinson} [2010] EWCA Civ 81; [2010] RTR 26, [26] where Hughes LJ, speaking for the Court of Appeal, contended that the fact that the apportionment legislation gives great discretion to judges ‘permits an approach such as adopted in \textit{Froom v Butcher.’}} This, admittedly, is a radical suggestion. However, this conclusion follows inexorably from the fact that fixed apportionment rules are inconsistent with the discretionary approach to apportionment laid down by the apportionment legislation. It might be replied that \textit{Froom} is compatible with the apportionment legislation on the ground that
\end{enumerate}
Lord Denning MR in that case was merely endeavouring to interpret the words ‘just and equitable’ in the apportionment legislation. His Lordship was not, on this way of looking at things, creating new rules that clashed with that legislation. So understood, Lord Denning MR did not exceed his judicial function but, rather, simply sought to discern what Parliament meant by the words ‘just and equitable’. To put this counterpoint in the factual context in *Froom*, the *Froom* rules do nothing more than explain what a ‘just and equitable’ reduction in damages is in seat belt cases.

It is difficult, however, to characterise plausibly what Lord Denning MR did in *Froom* was an exercise in statutory interpretation. Compare, in this regard, the cases that tell us that it is relevant to consider the relative blameworthiness of the parties and the causal potency of their acts in asking what a ‘just and equitable’ allocation of responsibility is. It can plausibly be argued that the identification of these twin factors as relevant to the determination of the amount by which damages ought to be reduced for contributory negligence where no fixed apportionment rule applies are simply attempts to interpret the words ‘just and equitable’, and that the identification of these factors as relevant to apportionment is not an instance of judicial legislation. The laying down of the *Froom* rules is a fundamentally different exercise from the identification of these twin factors. Consider what Lord Denning MR said in *Froom* in an attempt to justify his decision to lay down the 15% and 25% fixed reduction rules in that case. His Lordship wrote: ‘Suffice it to assess a share of responsibility which will be just and equitable in the great majority of cases.’ These words are revealing since they recognise that there will be some cases in which the reduction in damages yielded by the *Froom* rules will not be just and equitable. In this passage Lord Denning MR essentially acknowledged, therefore, that the rules that he established were incompatible with the legislation. The correct conclusion, therefore, is indeed that *Froom* was decided per incuriam.

7. Advantages and Disadvantages

Nothing that has been said so far addresses directly the respective merits and demerits of fixed apportionment. It is to this issue that attention will now be turned. What are their advantages and disadvantages? (a) The Case for Discretionary Apportionment

A case in favour of discretionary apportionment was made in what has become known as the *Ipp Report,* which is an important Australian report that advised the governments of Australia how the tort system should be changed so as to address a perceived ‘insurance crisis’. The authors of this report said:}

99 I am grateful to Andrew Burrows for suggesting this counterargument to me.
100 See the text accompanying nn 11, 28–30.
104 Peter Cane was one of the authors of the *Ipp Report*. For his thoughts on the report, see Peter Cane, ‘Reforming Tort Law in Australia: A Personal Perspective’ (2003) 27 Melbourne University Law Review 649. The report is also discussed in James Goudkamp, ‘The Young Report: An Australian Perspective on the Latest Response to Britain’s “Compensation Culture”’ (2012) 28 Journal of Professional Negligence 4. The Australian legislatures were unpersuaded by the Panel’s recommendations in this connection, and enacted fixed apportionment rules: see the text accompanying nn 66, 71, 73–76.
[C]ontributory negligence come[s] in an infinite variety of forms. From one case to another, the respective culpability of the plaintiff and defendant, and their relative causal contributions to the death or injury may differ widely. It is impossible to fix a minimum, just and equitable apportionment of responsibility to the plaintiff applicable to cases where the plaintiff’s contributory negligence involves a certain type of behaviour. In the opinion of the Panel, any such reduction would be arbitrary and unprincipled, and could work injustice in some cases. The Panel considers that any fettering of judicial discretion to apportion damages for contributory negligence is undesirable.

Two arguments in favour of discretionary apportionment are ravelled together in this passage, and it is important to separate them. The first argument is that discretionary apportionment rules are superior to fixed apportionment rules because the latter rules are arbitrary while the former are more principled. The authors of the Ipp Report were obviously correct to note that the size of discounts mandated by fixed apportionment rules are arbitrarily determined. A rule that requires, for example, damages to be reduced by 25% for a given act of contributory negligence is no more and no less defensible than a rule that imposes a discount of half or double that amount. But discretionary apportionment rules are vulnerable to precisely the same criticism. Apportionments yielded by a system of discretionary apportionment are no less arbitrary than those produced by a fixed apportionment rule. Degrees of contributory negligence simply cannot be measured in the same way that, for example, distance, weight or height can be measured. It has often been pointed out that the decision to select a particular discount instead of another discount is an arbitrary one. For example, Dean Prosser wrote: ‘Obviously any estimate that 40 per cent of the total fault rests with the pedestrian who walks out into the street in the path of an automobile, and 60 per cent with the driver who is not looking and runs him down, represents nothing resembling accuracy based on demonstrable fact.’ Similarly, Richard Epstein observed: ‘there is nothing about the particular pattern of factual information, even if perfectly known, that demands any unique set of percentages in any given case. All allocation of responsibility between the two parties is arbitrary…’. The first argument offered by the authors of the Ipp Report in favour of discretionary apportionment is, for these reasons, unconvincing.

The second argument, at which the authors of the Ipp Report only hint, is based on the fact that the number of combinations of factual circumstances that can be relevant to the determination of the respective shares of responsibility are infinite and infinitely various. If a fixed apportionment rule is laid down, there is a danger that dissimilar cases will be treated in the same way, and that similar cases will be handled differently. For example, if a statute provides that damages must always be reduced by 25% whenever the claimant is guilty of contributory negligence on account of his intoxication, the same discount might be applied to both voluntarily and involuntarily intoxicated claimants, to both slightly and grossly intoxicated claimants, to both teenage and adult defendants and so on. Similarly, if a statute stipulates that such a discount must be applied whenever a claimant motorist is guilty of contributory negligence in driving in excess of the speed limit, the same discount will be

106 As Richards JA observed in Vigoren v Nystuen [2006] SKCA 47, [98]: ‘There is no precise and self-evidently correct amount by which the plaintiff’s claim should be reduced. Lord Denning [in Froom v Butcher] could, no doubt, have chosen a somewhat higher or lower number for his benchmark figure. No one would pretend that [the figure of] 25% [which applies where using a seat belt would have prevented all of the damage] was the only rational choice available.’ Other judges have made similar remarks. See, e.g., Gleeson v Court [2007] EWHC 2397 (QB); [2008] RTR 10, [24].
applied irrespective of whether a given claimant was driving 5 mph or 50 mph above that limit and regardless of the prevailing driving conditions. Intuition suggests that the variations in these two scenarios are morally important and that the law would be unjust were it not sensitive to them.

(b) The Case for Fixed Apportionment

What is the case in favour of fixed apportionment rules? One thing that fixed apportionment rules have going in their favour is that they make the outcome of litigation more certain, especially if they are rarely departed from, as is the case, for example, with the Froom rules. Thus, in the United Kingdom, a claimant who is guilty of contributory negligence on account of failing to wear a seat belt can usually calculate with a high degree of certainty the percentage by which his damages will be discounted on account of contributory negligence. All other things being equal, the more predictable the outcome of litigation the more likely it is that litigants will settle their dispute.

A second advantage of fixed apportionment rules is that they help to keep the cost of litigation in proportion to the value of the underlying claim. A rule that, for example, stipulates that damage must be reduced by 25% on account of a given act of contributory negligence leaves much less room for evidence to be called and for submissions to be made in relation to the issue of apportionment than a rule that states, as the apportionment legislation does, that damages should be reduced to such extent as is ‘just and equitable’. Under the imagined former rule, the only evidence that would be admissible is that which casts light on whether the claimant committed the act of contributory negligence that triggers the rule. Conversely, under the latter rule, a vastly wider range of evidence would be prima facie admissible. Indeed, any evidence that concerns the relative blameworthiness of the parties and the causal potency of their acts would be relevant. Lord Denning MR was mindful of this factor in Froom. He wrote: ‘Th[e] question [of apportionment] should not be prolonged by an expensive inquiry into the degree of blameworthiness on either side, which would be hotly disputed.’ Few would dissent, it is suggested, from the proposition that the cost of litigation should be at least roughly proportionate to the value of what is at stake. Quelling disputes at a cost that is proportionate to the value of the case is part of the ‘overriding objective’ of the Civil Procedure Rules.

Thirdly, fixed apportionment rules promote consistency in the way that cases are decided. There is a great danger under a system of discretionary apportionment that similar cases will be treated differently and that different cases will be handled in a like manner. The danger of disparate outcomes is particular acute given that the vast majority of cases in which apportionment is in issue are decided in County Courts (and in institutionally equivalent courts in the case of other jurisdictions). This is because the decisions of those Courts are not publically available and so opportunities for judges to refer to each other’s decisions on

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109 See Section 4(a)(i).
110 ‘[T]here is a powerful public interest in there being no [prolonged or intensive enquiry into] fine degrees of contributory negligence, so that the vast majority of cases can be settled according to a well-understood formula and those few which entail trial do not mushroom out of control’: Stanton v Collinson [2010] EWCA Civ 81; [2010] RTR 284, [26]; ‘There is value in having clear guidelines normally applicable, so as to aid parties in arriving at sensible settlements.’: Jones v Wilkins [2001] RTR 19 (CA) [18].
111 ibid, 296.
112 For discussion in this regard, see AAS Zuckerman, Zuckerman on Civil Procedure (3rd ed, Sweet & Maxwell, London 2013) 22.
113 CPR 1.1(1).
114 It is clear that most cases in which apportionment for contributory negligence is in issue are personal injury cases, and the vast majority of such cases are brought in the County Courts: see 22.
apportionment which a view to achieving a degree of consistency are extremely limited. The difficulty with this situation is compounded by an apparent lack of appellate oversight of decisions on apportionment. As mentioned earlier, it is a well-established principle that appellate scrutiny of decisions regarding apportionment will be made available only rarely. Appellate courts will intervene only exceptionally where it is clear that the first-instance decision is flawed. The lack of appellate control means that it is virtually certain that there will be significant diversity in the way in which the issue of apportionment is decided at first-instance. Even if such diversity does not exist, the risk that it will develop is substantial.

Fourthly, and most fundamentally, fixed apportionment rules promote the rule of law. In an ideal world, every conceivable situation would be catered for by a rule that is settled ex ante. The development of a precise set of rules by which we are to be governed has long been recognised as one aspect of the rule of law. Of course, because of ignorance about the way in which the world works, and the lack of precision in our language, it is impossible to comply perfectly with this goal. The use of discretion by judges to deal with disputes the resolution of which cannot be provided for justly in advance is, therefore, inevitable. But it is very doubtful that the current state of affairs in relation to apportionment for contributory negligence is as close to the ideal as can be achieved. Although many fixed apportionment rules exist throughout the common law world, relatively few fixed-apportionment rules exist within a single jurisdiction. In the United Kingdom, for example, the only fixed apportionment rules are those established by Froom. Most jurisdictions are fully under the spell of the apportionment provision which, as has been explained, imposes an apportionment regime that is about as close to a purely discretionary system as is possible to achieve.

8. Reform Recommendations

It was argued in the previous section that, while it is necessary to confer judges with some discretion in the context of apportionment, the current system goes much too far in the direction of discretionary apportionment. More fixed apportionment rules should be introduced. Introducing such rules would promote certainty in the law, reduce the cost of litigation, tend to ensure consistency in outcomes (in circumstances where there is a great risk of inconsistency) and bring this area of law into increased compliance with the rule of law. How, precisely, should the law be shifted in the direction of fixed apportionment?

(a) A Structured Discretion?

One option would be to amend the apportionment legislation so that the discretion that it affords to judges is more structured. The legislation in all major common law jurisdictions currently permits judges to consider or to exclude from consideration almost any facts or factors that they wish. The legislation could be changed so that it requires judges to consider facts or factors that are thought to be relevant. Such facts or factors might include,

115 See the text accompanying n 23.
117 It might be replied to this rule-of-law argument that the rule of law has only a weak or no grip in private law. The rule of law obviously makes the most stringent demands of the criminal law. However, it is mistake to think that it made no demands of private law: for discussion see J Gardner, ‘Some Rule-of-Law Anxieties about Strict Liability in Private law’ in L Austin and D Klimchuk (eds), The Rules of Law and Private Law (Oxford, OUP, 2014) (forthcoming).
118 See above Section 3.
119 Such structured discretions are now extremely popular. See, e.g., s 142(1) of the Criminal Justice Act 2003, which sets out purposes of sentencing that courts must consider in sentencing defendants.
for instance, the respective ages of the parties, the ease with which the parties could have avoided or reduced the risk of damage that materialised, the gravity and magnitude of the risk that the parties’ respective conduct created or increased, whether the parties were subjectively aware of the risk in question and whether a given discount would tend to promote the goals of deterrence or punishment (should those goal be considered relevant). These facts and factors are merely meant, it is stressed, to illustrate considerations that might be incorporated within the apportionment legislation to lend some structure to the discretion that it affords judges.

(b) Fixed Reduction Rules?

Amending the apportionment legislation so that the discretion that it affords judges is more structured would be a very modest reform. It would merely nudge the law in the direction of fixed apportionment. Were it adopted, judges would retain very significant freedom to determine the amount by which damages should be reduced for contributory negligence, and provided that they touch upon factors that are relevant to the case at hand, their decisions would be effectively insulated from appellate interference. So, while implementing this proposed changed might improve the present situation, the improvement would be slight. The system would remain an essentially discretionary one lacking appellate oversight. Therefore, the problems with discretionary apportionment that have been canvassed would not really be addressed. There are any number of other changes that could be made to the apportionment legislation that would result in the law travelling much farther down to the road to fixed apportionment. This is clear from the great diversity of fixed apportionment rules that were discussed earlier.120 The type of fixed apportionment rule that minimises the input from the judiciary to the greatest extent are rules that provide for fixed reductions in damages,121 such as the Froom rules. While the Froom rules leave judges with discretion as to whether to apply the Froom rules,122 once a judge has decided that the Froom rules apply, he has no discretion as to the discount to apply. Because rules that provide for fixed reductions in damages reduce judicial discretion by a much greater amount than the other types of fixed apportionment rules, they are prima facie superior to the other types of fixed apportionment rules,123 at least if the arguments in favour of fixed apportionment that have been set out above are compelling. Thus, the proposal that is being made is that the law on apportionment would be brought into a more satisfactory state were more fixed reduction rules created.

(c) When would it be Justifiable to Introduce Fixed Reduction Rules?

Of course, there are limits to the circumstances in which introducing fixed reduction rules would be justified. In order for a fixed reduction rule to be justified, it would seem that at least four conditions would need to be satisfied. These conditions are as follows: (1) the rule must apply to a group of cases in which there is little relevant factual diversity; (2) cases that fall within the specified group would need to occur sufficiently frequently to make adopting the rule in question worthwhile; (3) it must be possible to define a given category of case reasonably clearly; and (4) as with the Froom rules, judges should be permitted to depart from the fixed reduction rule in exceptional circumstances. A few words need to be said about each of these conditions. Condition (1) refers to the need to isolate sets of cases that are relatively homogenous in terms of the facts that are thought to be relevant to the issue of apportionment. Lord Denning MR isolated such a set of cases – seat belt cases – in Froom.

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120 See Section 4.
121 See Section 4(a).
122 See the text accompanying nn 49–55.
123 See Section 4(f).
Generally speaking, most seat belt cases present no issues relevant to the apportionment of damages except those of whether the claimant failed to use a seat belt and whether that failure made a difference in terms of the damage suffered. It would not make sense for one seeking to establish more fixed apportionment rules to define a set of cases that drags within its net cases that vary wildly in terms of their salient characteristics. For example, an inappropriate category of case to which to apply a fixed reduction rule would be a category in which the claimant was guilty of contributory negligence in failing to follow the defendant’s instructions. There would be little homogeneity to such a category. Cases that fall within it might be thought to require very different treatment depending on, for example, how persistently or brazenly the claimant had failed to follow instructions, the clarity of the instructions and the force with which the need to comply to them was impressed upon the claimant, whether the defendant was a professional who was advising the claimant, and the vulnerability of the claimant. What is meant by condition (2), and its importance, is self-evident. There is no utility in developing a fixed reduction rule for a group of cases if cases fall within that group only once in a blue moon. The significance of condition (3) is also axiomatic. If a given category is not defined with sufficient precision, frequent arguments will inevitably break out as to whether a given case falls within it. This will undermine the goal of promoting certainty, which is one of the reasons that has been offered for introducing fixed reduction rules.124 Condition (4) recognises the limitations of human foresight. No matter how carefully a given category of case to which a fixed reduction rule is to be applied is defined, there are bound to be cases which are thought to be sufficiently different from most of the other cases that fall within the category such that they warrant separate treatment. Hence, it would be desirable for judges to enjoy an exclusionary discretion, as they do in the case of the Froom rules,125 so that atypical cases can be insulated from the fixed reduction rule. Such a discretion should be exercised sparingly or else the purpose of creating the fixed reduction rule would be defeated.

(d) To Which Categories of Case should Fixed Reduction Rules be Applied?

One question that the foregoing discussion presents is what categories of case should be isolated and subjected to fixed reduction rules, bearing in mind the constraints mentioned under the previous heading? To an extent, it is possible to leave this question to one side for present purposes on the ground that it is subsidiary one. It should first be decided whether the proposal that has been advanced, namely, that more fixed reduction rules should be welcomed into tort law, is one that should be adopted in principle before categories of case to which such rules should apply are identified. However, simply by way of suggestion, some possible categories of case to which fixed reduction rules might sensibly be applied include cases in which the claimant drove while voluntarily intoxicated or travelled with a driver whom he knew or ought to have known was intoxicated, crossed a road without looking for incoming traffic, failed to use a designated and conveniently available pedestrian crossing, and failed to wear protective clothing. These are, it is emphasised, merely suggestions of categories of cases that might be relevant. The idea is to put them forward merely so that it can be debated whether they ought to be governed by a fixed reduction rule.

(e) What Discount should be Applied?

What discounts should be yielded by any fixed reduction rules that are introduced? This is an easier question to answer than might initially appear to be. Recall that the decision to reduce

124 See the text accompanying nn 108–109.
125 See the text accompanying nn 49–55.
damages by a particular amount for contributory negligence is an arbitrary one.\textsuperscript{126} A decision to reduce damages by, for example, 25\%, in cases in which the claimant accepts a ride from an intoxicated driver is neither more nor less justifiable than a decision to reduce damages in such a case by 10\% or 50\%. Accordingly, subject to what follows, any discount that is selected is neither more nor less justifiably than any other discount. Nevertheless, there are a few considerations that should guide the decision-making process. First, it would not make sense to settle upon very small discounts, such as 1\%, or very large discounts, such as 99\%. A rule that prescribed such discounts would, as Glanville Williams pointed out, be a ‘needless technicality’.\textsuperscript{127} The claim might as well be allowed to succeed in full or be denied altogether. Secondly, there should be some proportionality between the various discounts laid down by fixed reduction rules. It would not be just, for example, to reduce damages by just 10\% for driving while intoxicated and to reduce damages by 90\% for accepting a lift from an intoxicated driver. Thirdly, minute differences between different discounts should be tolerated. It would be artificial to select, for instance, a discount of 40\% for one act of contributory negligence and 41\% for another act. Such differences suggest that the selection of the discount is a mathematical exercise, which it is not. This explains, incidentally, why judges tend to reduce damages for contributory negligence in a fairly large increments. Discounts are usually in multiples of 10 or 5 rather than smaller units. These three considerations which it is suggested should be borne in mind in determining the quantum of discounts imposed by fixed reduction rules are not, of course, intended to be exhaustive.

(f) Should Fixed Reduction Rules be Introduced by the Courts or the Legislature?

Finally, should more fixed reduction rules be introduced by legislation or by the courts? The answer to this question is straightforward. For the reasons given earlier,\textsuperscript{128} the apportionment legislation in all of the major common law jurisdictions is committed to an extreme discretionary system of apportionment. Rules that limit the discretion that is conferred by the legislation are therefore inconsistent with it\textsuperscript{129} and judges are not free, therefore, to lay down fixed apportionment rules. It is for this reason that \textit{Froom}, as argued above, was decided \textit{per incuriam}.\textsuperscript{130} Surprisingly, \textit{Froom} does not seem to have been challenged on this ground.\textsuperscript{131} However, it is obviously inappropriate for the courts to disregard legislation. Any fixed reduction rules that are introduced should be introduced by statute, and the \textit{Froom} rules should be put on a statutory footing.\textsuperscript{132}

\textsuperscript{126} See Section 7(a).
\textsuperscript{127} Williams (n 4) 393.
\textsuperscript{128} See Section 3.
\textsuperscript{129} See Section 5.
\textsuperscript{130} See Section 6(b).
\textsuperscript{131} It have been attacked on other bases: see the text accompanying nn 43–44.
\textsuperscript{132} It has been suggested to me that it would be undesirable for the changes to be made legislatively given the experience in this connection in relation to Australia. This is not the place to delve into the Australia provisions (many of which have been discussed above) in detail. It suffices to say for present purposes that the Australian provisions were not carefully thought out, and for the sake of entertaining this suggestion, let this be assumed. One difficulty with this suggestion is that there is no reason to think that just because legislatures in one country proceeded without due care that legislatures generally should not be trusted to enacted fixed reduction rules. More fundamentally, this suggestion cannot get around the fact that because the system of discretionary apportionment is established by statute, any changes that are made to that system must be made by Parliament.
9. Objections to the Reform Recommendations

It was recommended in the previous section that the law on the apportionment of damages for contributory negligence would be improved by retreating from discretionary apportionment and moving in the direction of fixed apportionment, specifically, by embracing more fixed reduction rules. This section considers some objections that might be raised against this prescription. One objection that might be made is that if more fixed apportionment rules were introduced, at least if they were statutory in nature (which it has been argued they should be\textsuperscript{133}), they would undermine the independence of the judiciary. This objection is frequently raised against removing judges’ discretion in the context of sentencing. However, this complaint (which is very different from a complaint that it would be undesirable to restrict judges’ discretion) is unjustified, in both the sentencing context and the present setting.\textsuperscript{134} Parliament very frequently lays down rules that leave relatively little scope for judicial discretion, in tort law and beyond, and this does nothing to offend the independence of the judiciary. The principle of judicial independence demands that Parliament should not exert inappropriate control over the judiciary, such as by removing judges whose decisions are politically unpopular from office or reducing their remuneration. Fixed apportionment rules obviously do not raise that spectre.

Secondly, it might be argued that the advantages of fixed apportionment rules could to some extent be obtained other than by adopting fixed apportionment rules. For example, one way in the way in which the law on apportionment of damages for contributory negligence could be rendered more certain and consistent in its application without departing from the paradigm of discretionary apportionment would be to make more decisions on apportionment publically available. As explained above,\textsuperscript{135} the way in which judges apportion damages is extremely opaque because there is no convenient way to access decisions of courts that sit lower in the judicial hierarchy than the High Court in the case of England and Wales (and courts in other jurisdictions similarly situated in the judicial hierarchy). A second way in which greater certainty and consistency could be brought to this area of the law other than by embracing fixed apportionment rules is by publishing guidelines similar to, for example, the guidelines issued by the Judicial College in relation to the award of general damages in personal injury cases.\textsuperscript{136} It is certainly true that implementing these alternatives would clearly go some way towards improving the present situation. However, in order for this objection to hit home, it would be necessary to establish (1) that these alternatives (individually or in combination) would yield a more satisfactory state of affairs than embracing more fixed apportionment rules and; (2) that embracing fixed apportionment rules in addition to these alternatives would bring no or only a marginal additional net gain. This would be a tall order.

Thirdly, it might be objected that the analysis complains about inconsistency (or a threat of inconsistency) in apportionment cases but without adducing any evidence of inconsistency. It is true that this article has not demonstrated that there are statistically significant differences in the way in which similar cases are treated in so far as apportionment for contributory negligence is concerned. However, several points should be kept in mind in this regard. First, it is not the purpose of this article to ascertain whether such differences exist. The main goals

\textsuperscript{133} See the text accompanying 129–131.
\textsuperscript{134} See Ashworth (n 102) 50–54.
\textsuperscript{135} See Section 7(b).
\textsuperscript{136} Judicial College, \textit{Guidelines for the Assessment of General Damages in Personal Injury Cases} (11\textsuperscript{th} ed, Oxford, Oxford University Press, 2012). These guidelines are used as the starting point by the courts in assessing general damages in personal injury cases. Their value, in bringing certainty and consistency to assessments, and the consequent desirability of paying close attention to them, has frequently been stressed by the courts: see, e.g., \textsuperscript{22}. 

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of this article are to introduce the concepts of fixed apportionment and discretionary apportionment, to examine the extent to which the major common law jurisdictions have embraced these concepts, and to consider the arguments based in theory for and against discretionary apportionment and fixed apportionment. Secondly, the objection would not answer the point that the current system presents an unacceptable risk that apportionment cases will be decided inconsistently. Even if there is no inconsistency, the lack of transparency in relation to decisions regarding apportionment in the County Courts (and equivalent courts in other jurisdictions) coupled with the lack of appellate oversight presents a serious risk that inconsistency will creep into this area of the law even if it does not already exist. Thirdly, inconsistency (or the risk of inconsistency) is only one of several grounds that have been offered for limiting judicial discretion in apportionment cases. So even if this consideration is thought to be unconvincing that would not show that the other arguments are unpersuasive.

10. Wider Implications: the Law of Contribution

What implications does the analysis in this article have for the law of torts generally? One part of tort law that needs to be kept in mind in this regard is the law of contribution. In most common law jurisdictions, legislation has modified the common law rule that where one concurrent tortfeasor satisfies the claimant’s judgment in full he cannot recover contribution or obtain an indemnity from any other tortfeasor.\textsuperscript{137} Leaving aside the details, which are unimportant for present purposes, the legislation permits a wrongdoer to recover contribution from any other person who is liable for the same damage. The quantum of contribution is to be ‘such as may be found by the court to be just and equitable having regard to the extent of [the] responsibility [of the person from whom contribution is sought] for the damage in question.’\textsuperscript{138} This language, which confers judges with significant discretion, bears a striking similarity to that used in many apportionment statutes. It is not surprising, therefore, that the \textit{Froom} rules have been applied in cases in which a negligent motorist sought contribution from a parent who negligently failed to secure their infant child with an approved child safety restraint.\textsuperscript{139} This article has not addressed contribution. However, because the rules that govern the apportionment of damages for contributory negligence and contribution are so similar, the argument that has been offered in relation to contributory negligence would seem to apply also to contribution. The goal, therefore, if the analysis that has been offered in relation to contributory negligence is correct, should be to develop rules that limit judicial discretion in the contribution context too. Exactly how this might be achieved is something that cannot be conveniently addressed in this article.

11. Conclusion

The main argument advanced in this article is that the apportionment legislation is slanted much too far in the direction of discretionary apportionment. The law regarding contributory negligence would be considerably improved if more fixed apportionment rules were introduced. Because the apportionment legislation is fundamentally committed to an extreme system of discretionary apportionment, it follows that the landmark case of \textit{Froom} was decided \textit{per incuriam} in so far as that decision created (or, it might be better to say, sought to

\textsuperscript{137} See, e.g., Civil Liability (Contribution) Act 1978. The \textit{fons et origo} of the common law rule is \textit{Merryweather v Nixan} (1799) 8 TR 186; 101 ER 1337.

\textsuperscript{138} Civil Liability (Contribution) Act 1978, s 2(1).

\textsuperscript{139} \textit{Jones v Wilkins} [2001] RTR 19, [13]–[14] (CA) (parent liable for 25% of the damages); \textit{Hughes v Williams} [2013] EWCA Civ 455; [2013] PIQR P17 (same).
create) fixed apportionment rules. However, on the analysis that has been presented here, Lord Denning MR, although he acted in defiance of the apportionment legislation, was right to be attracted to a more fixed system of apportionment.