Defences to negligence

Introduction

It is traditional to find a chapter on defences at the end of a tort textbook. However, the development of negligence doctrines means that it is convenient to consider certain defences which have particular relevance to negligence at this stage.

There are three defences to a negligence action. *Volenti non fit injuria* means that the claimant voluntarily agrees to undertake the legal risk of harm at his own expense. This is a complete defence to an action. Contributory negligence is where the claimant’s fault has contributed to their damage and the damages awarded are reduced in proportion to their fault. *Ex turpi causa* means that from a bad cause no action arises. A person who is involved in a criminal act at the time they are injured may be denied an action.

Example

John and Brian had been drinking together. John offered Brian a lift home and Brian accepted. Due to John’s negligent driving the car crashed and Brian was injured. Brian was not wearing a seat belt, was thrown forward and hit his head on the windscreen.

If Brian sued John for negligence he could be met with the defences of volenti non fit injuria and contributory negligence. The defence of volenti would fail as Brian may be aware that John is drunk but he did not consent to him driving negligently. Knowledge of a risk does not equal consent to run that risk. There is also a statutory provision which prevents volenti operating in these circumstances. Brian would have his damages reduced for contributory negligence in riding with a driver who he knew was drunk and in failing to wear a seat belt.

If Brian and John were engaged in a get-away from the scene of a crime at the time of the accident, John could also raise the defence of *ex turpi causa* (illegality) to the action.
CHAPTER 9 DEFENCES TO NEGLIGENCE

Volenti non fit injuria

Introduction

The requirements for a defence of volenti non fit injuria in a negligence action are a matter for some controversy. It must be shown that the claimant acted voluntarily in the sense that they could exercise a free choice. Some judges are of the opinion that there must be an express or implied agreement between the parties before the defence can operate. The other view is that where the claimant comes across a danger which has already been created by the defendant the defence can operate. If the defence is successful, then the claimant will recover no damages at all. This was also the case where contributory negligence was established before 1945. In cases before that date there was no practical difference for the claimant in being found to be volenti or contributorily negligent. The pre-1945 cases must be read with this in mind.

Before this defence has any role to play, it must be shown that the defendant has committed a tort.

Wooldridge v Sumner [1963] 2 QB 43

The plaintiff was a professional photographer. During a horse show he positioned himself at the edge of the arena. He was knocked down and injured by a horse when the rider lost control while riding too fast. The Court of Appeal held that the defendant rider’s failure to control his horse was simply an error of judgement which did not amount to negligence. The standard of care owed by a competitor to a spectator was not to act with reckless disregard for the spectator’s safety. As this duty had not been broken there was no room for the defence of volenti non fit injuria to operate.

Diplock LJ:

A person attending a game or competition takes the risk of any damage caused to him by any act of a participant done in the course of and for the purposes of the game or competition, notwithstanding that such an act may involve an error of judgement or lapse of skill, unless the participant’s conduct is such as to evince a reckless disregard of the spectator’s safety.

The spectator takes the risk because such an act involves no breach of the duty of care owed by the participant to him. He does not take the risk by virtue of the doctrine expressed or obscured by the maxim volenti non fit injuria. The maxim states a principle of estoppel applicable originally to a Roman citizen who consented to being sold as a slave. Although pleaded and argued below, it was only faintly relied on by counsel for the first defendant in this court. In my view, the maxim, in the absence of express contract, has no application to negligence simpliciter where the duty of care is based solely on proximity or “neighbourship” in the Atkinian sense. The maxim in English law presupposes a tortious act by the defendant. The consent that is relevant is not consent to the risk of injury, but consent to the lack of reasonable care that may produce that risk and requires on the part of the plaintiff at the time at which he gives his consent full knowledge of the nature and extent of the risk that he ran. In Dann v Hamilton, Asquith J expressed doubts whether the maxim ever could apply to license in advance a subsequent act of negligence, for if the consent precedes the act of negligence, the plaintiff cannot at that time have full knowledge of the extent as well as the nature of the risk which he will run.

The standard of care laid down in this case has been doubted in subsequent cases. In Condon v Basi [1985] 2 All ER 453 a standard of reasonable care was applied to participants in a football match. In Blake v Galloway [2004] 3 All ER 315 a number of people were involved in horseplay involving throwing pieces of bark at one another and a
participant was struck in the eye. The Court of Appeal set the standard of care in these circumstances as recklessness or a very high degree of carelessness.

The defence applies in cases of intentional and negligent infliction of harm, although it operates in different ways.

In intentional torts the defence operates in the form of consent. Where the claimant has consented to the defendant’s act they will have no action. So a boxer who is struck by their opponent cannot sue them for battery. A patient who signs a consent form for a surgical operation cannot later sue the surgeon for battery.

Where the harm was negligently inflicted, the defence gives rise to greater difficulties. The defendant has to show that the claimant assumed the legal risk of injury in circumstances where the defendant’s act would otherwise amount to negligence. The effect of the defence is that the claimant consents to exempt the defendant from a duty of care which would otherwise have been owed.

There are certain requirements before the defence will apply.

### Voluntary

The claimant must have had a genuine freedom of choice before the defence can be successfully raised against them.

A man cannot be said to be truly willing unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will. (Scott LJ in *Bowater v Rowley Regis Corp* [1944] KB 476.)

The approach to this point in employer–employee cases has changed. In the early part of the nineteenth century employees were assumed to consent to the risks in the work that they did. The courts did not accept that the employer–employee relationship was not an equal one and that an employee might have continued to work in the face of danger for fear of losing their job. At the end of the nineteenth century judicial attitudes changed.

*Smith v Baker* [1891] AC 325

The plaintiff was employed by the defendants on the construction of a railway. While he was working, a crane moved rocks over his head. Both he and his employers knew there was a risk of a stone falling on him and he had complained to them about this. A stone fell and injured the plaintiff and he sued his employers for negligence. The employers pleaded *volenti non fit injuria* but this was rejected by the court. Although the plaintiff knew of the risk and continued to work, there was no evidence that he had voluntarily undertaken to run the risk of injury. Merely continuing to work did not indicate *volens*.

The approach in this case has been continued by the courts and it is very rare for a *volenti* plea to succeed in an employee–employer case. Such a plea might be successful where the employee had been paid danger money to undertake precisely that risk. The defence has also succeeded where the employee was under no pressure to take a particular risk but deliberately chose a dangerous method of working.

*ICI Ltd v Shatwell* [1965] AC 656

The plaintiff and his brother were both experienced shotfirers employed by the defendants. They jointly chose to ignore their employer’s orders and statutory safety regulations by testing
detonators without taking shelter. There was an explosion and the plaintiff was injured. He sued the defendants on the grounds of their vicarious liability for his brother’s negligence and breach of statutory duty. The question for the House of Lords was whether an employer who was under no statutory duty could be vicariously liable for an employee’s breach of statutory duty to another employee. Had the plaintiff acted on his own, rather than in combination with his brother, no action would have lain. The House held that the plaintiff was *volens* to the risk of harm and his action therefore failed. Had the plaintiff sued his brother then the action would have failed on the grounds of *volenti*. There had been no pressure brought by the employers to adopt that method of working. Therefore, there was no reason why *volenti* should not succeed for the employer.

There is a difficult problem posed by a person who commits suicide. Are they acting voluntarily or not? It was held that *volenti* would provide a complete defence in actions against the police or hospital authorities where the deceased was of sound mind. If the deceased’s judgement was impaired by mental illness and they were incapable of coming to a balanced decision, their act was not voluntary and *volenti* would not apply. (*Kirkham v Chief Constable of the Greater Manchester Police* [1990] 3 All ER 246.) However, in *Reeves v Commissioner of Police of the Metropolis* [1999] 3 WLR 363, the House of Lords held that the defence of *volenti* was inappropriate where the act of the defendant relied on to raise the defence was the act the defendant was under a duty to prevent. On this basis, a plea of *volenti* on a suicide in custody could not succeed, even where the deceased was of sound mind.

The concept of voluntariness implies that the claimant should take responsibility for their own actions, and tortious liability will not lie where the claimant was the author of their own misfortunes. Thus, in *Barrett v Ministry of Defence* [1995] 3 All ER 86 a member of the armed forces, who died after choking on his own vomit when drunk, was held not to be owed a duty of care by his employers to prevent him from consuming an excessive amount of alcohol. They were, however, held to be in breach of a duty of care in not taking sufficient care of him when they assumed responsibility for him after his collapse.

The issue of voluntariness also arises in the rescue cases. A rescuer who acts to save a person in danger and is injured cannot be said to exercise the free choice which is necessary for *volenti*. (See under ‘Rescue cases’.)

### Agreement

Where the parties have reached an express agreement that the claimant will voluntarily assume the risk of harm and this agreement is made before the negligent act, then the defence will operate.

This point is subject to any statutory restriction which is placed on the parties’ freedom to agree. If the agreement is subject to the Unfair Contract Terms Act 1977, then it is important that it does not contravene its provisions: for example, in certain circumstances it is not possible to exclude liability for death or personal injuries at all. The defendant will not be allowed to get round the Act by saying that the claimant was *volenti*. (See ss 2(1), 2(3).)

In limited circumstances the courts may be prepared to imply the agreement to run the risk (for example, *ICI v Shatwell*). The reluctance of the courts to imply an agreement can be seen in the cases where the claimant has accepted a lift with the defendant who is incapable of driving.


**Dann v Hamilton [1939] 1 KB 509**

The defendant drove the plaintiff and her mother to London to see the Coronation lights. They visited several public houses and the defendant’s ability to drive was clearly impaired. One passenger decided that the driver was drunk and got out of the car. The plaintiff said she would take the risk of an accident happening. A few minutes later there was an accident and the plaintiff was injured. It was held that *volenti* did not apply on these facts as the plaintiff had not consented to or absolved the defendant from subsequent negligence on his part.

Asquith J stated that the defence of *volenti* was applicable where the plaintiff came to a situation where the danger had already been created by the defendant’s negligence.

**Nettleship v Weston [1971] 2 QB 691**

The plaintiff gave the defendant driving lessons. On the third lesson the defendant drove negligently and hit a lamp-post. The plaintiff was injured and sued in negligence. The action was successful and the defence of *volenti* failed. The plaintiff had not consented to run the risk of injury as he had checked on whether the car was covered for passenger’s insurance.

Lord Denning stated: ‘Nothing will suffice short of an agreement to waive any claim for negligence. The plaintiff must agree, expressly or impliedly, to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant.’

**Owens v Brimmell [1977] 2 WLR 943**

The plaintiff and defendant spent the evening on a pub crawl together. The plaintiff accepted a lift home with the defendant although he knew the defendant was drunk. The defendant drove negligently and the plaintiff received serious injuries in a crash. The defence of *volenti* was held to be inappropriate, but the plaintiff’s damages were reduced for his contributory negligence in riding with a drunken driver and failing to wear a seat belt.

In these cases the claimant is aware of the risk but does not consent to the act of negligence that causes their injury. It was pointed out in *Dann v Hamilton* that the defence could apply in cases where:

the drunkenness of the driver at the material time is so extreme and so glaring that to accept a lift from him is like engaging in an intrinsically and obviously dangerous occupation, intermeddling with an unexploded bomb or walking along on the edge of an unfenced cliff.

**Morris v Murray [1990] 3 All ER 801**

The plaintiff went for a ride in a private plane piloted by the defendant, despite the fact that he knew the defendant was drunk. The plane crashed and the plaintiff was injured. It was held by the Court of Appeal that the pilot’s drunkenness was so extreme and obvious that participating in the flight was like engaging in an intrinsically and obviously dangerous occupation. The defence of *volenti* succeeded. Accepting lifts with drunken pilots is more dangerous than with drunken drivers.

The position with drunken drivers is affected by a statutory provision. The Road Traffic Act 1988 s 149 provides that *volenti* is not available where a passenger in a car sues the driver in circumstances where insurance is compulsory. At one time it was thought that
the section applied only to express agreements and not to an implied agreement. This view has now been rejected by the Court of Appeal.

**Pitts v Hunt** [1990] 3 All ER 344

The plaintiff was a pillion passenger on a motor bike driven by the defendant. The defendant was drunk, had never passed a driving test, was uninsured and drove dangerously. The plaintiff encouraged him in this behaviour. The statutory provision was held to prevent the defendant from relying on any form of the *volenti* defence. Had it not been for the section, the court was of the view that the claim would have been defeated by *volenti*.

The plaintiff’s claim was held to have been defeated by the maxim of *ex turpi causa*. This would appear to defeat the intention of the statutory provision.

**Problem**

Is it necessary for the defendant to prove that the claimant agreed to waive their legal rights in order to succeed in a *volenti* plea?

Judicial views on whether an agreement that the claimant will waive any claim against the defendant is necessary, are mixed. At one extreme Diplock LJ stated in *Wooldridge v Sumner*: ‘The [defence of *volenti*] in the absence of express contract, has no application to negligence simpliciter where the duty of care is based solely on proximity or “neighbourship” in the Atkinian sense.’

Where there is an express agreement to such effect there is little difficulty. Whether the agreement takes the form of a contract term or notice, it will be regulated by statute. Such waivers are probably covered by the Unfair Contract Terms Act 1977. An express agreement by a passenger in a car to waive their rights to sue the driver for negligently inflicted injuries is, as we have seen, negated by statute.

Slightly less extreme was Lord Denning’s view in *Nettleship v Weston*: ‘Nothing will suffice short of an agreement to waive any claim for negligence. The plaintiff must agree, expressly or impliedly, to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant.’

The courts are understandably reluctant to imply an agreement. It is necessary that there should be some kind of previous relationship between the parties. We have seen this in cases such as *Dann v Hamilton*. However, in *Morris v Murray* the Court of Appeal held that the defence of *volenti* should have succeeded. This was on the basis that the act of the claimant relied on as consent preceded, and licensed in advance, a possible subsequent act of negligence. The claimant had waived the defendant’s duty to take care. A similar view may be taken where the parties embark on a criminal act together and the claimant is injured as a result of the defendant’s negligence. The trend in such cases is, however, to apply the maxim *ex turpi causa*.

Can *volenti* be raised where the claimant encounters a risk which has already been created by the defendant’s negligence?

**Baker v T E Hopkins & Son Ltd** [1959] 1 WLR 966

The defendant’s employees had been placed in danger by being required to work in a confined space with a petrol-driven engine producing poisonous fumes. A doctor attempted to rescue the men and was killed by the fumes. He was aware of the danger at the time he attempted the rescue. *Volenti* was held to be inapplicable as the doctor could not be said to have agreed to the risk. He had only become involved after the defendant’s negligent act.
This case can perhaps be explained on policy grounds as the plaintiff was a rescuer and the courts do not wish to deter rescue. It could also be argued that the doctor was not acting voluntarily.

Judicial support for the view that volenti can be raised in these circumstances exists in Dann v Hamilton, Morris v Murray and Pitts v Hunt. This presents certain problems. The fact that the claimant chose to run the risk should not give rise to volenti, as knowledge of the risk is not sufficient. In these circumstances the claimant’s conduct amounts to contributory negligence as they acted negligently. This confuses the two defences, which have different outcomes. Volenti operates to defeat the claim completely. Contributory negligence reduces the claimant’s damages.

Statutory provisions also exist which suggest that a volenti plea can succeed in the absence of agreement. These provisions are the Occupiers’ Liability Act 1957 s 2(5), the Animals Act 1971 s 5(2) and the Unfair Contract Terms Act 1977 s 2(3). However, these provisions could be viewed as one-off examples of voluntary acceptance of risk.

Knowledge

In order for volenti to operate, the claimant must have knowledge of the existence of the risk and its nature and extent. The test for knowledge is subjective. If the claimant should have been aware of the risk but was not, the defence will fail. (Smith v Austin Lifts Ltd [1959] 1 WLR 100.) This raises problems where the claimant was drunk at the time. If they were so drunk that they could not appreciate the nature of the risk, they will not be volenti.

The relationship between volenti and exclusion clauses

In cases where volenti is based on agreement, that agreement may amount to an exclusion clause. If it does, then it will be subject to the provisions of the Unfair Contract Terms Act 1977. Attempts to exclude liability for negligence are governed by s 2. This section operates where the clause attempts to exclude or restrict business liability as defined in s 1(3).

Section 2(1) will operate to defeat any attempt to exclude or restrict liability for death or personal injuries caused by negligence.

Section 2(2) applies a test of reasonableness to other types of damage caused by negligence.

Section 2(3) states: ‘Where a contract term or notice purports to exclude or restrict liability for negligence a person’s agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk.’

As any agreement between the parties will be covered by the rest of the section, this subsection will only apply where there is no agreement between the parties and the claimant comes upon an already existing risk.

Contributory negligence

Introduction

This defence will apply where the damage which the claimant has suffered was caused partly by their own fault and partly by the fault of the defendant. In order to establish
the defence, the defendant must prove that the claimant failed to take reasonable care for their own safety and that this failure was a cause of their damage. If contributory negligence is established, the modern position is that the claimant will have their damages reduced by the court in proportion to their fault. If they would have received £10,000 but were found to be 25 per cent contributorily negligent, their damages will be £7,500. This was not always the case. At common law, if the court found that the claimant was partially to blame for their injuries, they received nothing at all. Contributory negligence operated as a complete defence.

**Butterfield v Forrester** (1809) 11 East 60

The plaintiff rode his horse violently and collided with a pole which the defendant had negligently left in the road. It was held that if the plaintiff had used ordinary care the accident would not have happened. The plaintiff was therefore guilty of contributory negligence and could recover nothing.

This rule proved too severe for the courts and exceptions were developed to it. One of these was the rule of last opportunity or effective last chance.

**Davies v Mann** (1842) 10 M&W 546

The plaintiff negligently fastened his ass up on the highway. The defendant drove his wagon too fast and collided with the ass, which was killed. The defendant was held liable as, if he had driven more slowly, he could have avoided the accident.

After this the law became increasingly convoluted as the courts tried to escape the rigours of a rule which meant that the court had to make a finding in favour of one party or the other. The rule was all or nothing.

In 1911 courts were given a statutory power to apportion damages in cases of collision at sea (Maritime Conventions Act 1911). In 1945 a general power to apportion damages was given to the courts by the Law Reform (Contributory Negligence) Act 1945. Section 1(1) provides:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such an extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage.

### The scope of the 1945 Act

The Act will apply only where a person has suffered damage. Damage is defined by s 4 as including loss of life and personal injury. Property damage would appear to be included as this was the case before the Act was passed.

The Act will apply only where the damage was caused partly by the fault of the defendant and partly by the fault of the claimant. In the absence of fault, the court therefore has no power under the Act to apportion damages.

Fault is defined by s 4: ‘negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from the Act give rise to the defence of contributory negligence.’
It must be remembered that fault is referred to in two contexts, the fault of the defendant and the fault of the claimant. Fault of the defendant means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort. This causes no problem, as the defendant can be said to be at fault whenever they commit a tort. The fault of the claimant means an act or omission which would, apart from the Act, give rise to the defence of contributory negligence. This causes problems of interpretation.

A narrow view would be that if contributory negligence was not a defence at common law, then it will not be available under the Act. This would mean that the defence was not available for torts such as deceit and intentional trespass to the person. This view was applied by the House of Lords in a deceit case. (*Standard Chartered Bank v Pakistan National Shipping Corp* (No 2) [2002] UKHL 43.)

The other view is that where the conduct of the claimant would have given rise to the defence at common law if they were suing for negligence, the defence is applicable. What is clear is that the Act does not apply to conversion or intentional torts against goods by virtue of the Torts (Interference with Goods) Act 1977 s 11.

The Act does apply in negligence, nuisance, and actions under the rule in *Rylands v Fletcher*. The Act does not apply to actions in deceit. It is unclear whether the Act applies to trespass to the person, but apparently it does.

**Barnes v Nayer (1986) Times, 19 December**

The defendant was convicted of the manslaughter of the plaintiff’s wife. A civil action for trespass to the person followed. The defendant raised contributory negligence as a defence (among others), on the ground that he had been provoked. The Court of Appeal considered that the defendant’s response was out of all proportion to the alleged provocation, but on appropriate facts contributory negligence could be relied on as a defence to battery.

Where there is concurrent liability and the claim in contract is co-extensive with an independent tort claim, the defence of contributory negligence will apply in a contract action. (*Barclays Bank plc v Fairclough Building Ltd* [1995] 1 All ER 289.) This means that the claimant cannot avoid the defence by bringing proceedings in contract which could have been brought in negligence.

This issue has been clarified by the litigation which arose from the rise and fall of the property market in the late 1980s. Numerous actions were brought against valuers and solicitors who had acted on the transactions. (See Chapter 5.) The courts held that the imprudent lending policies of the time would amount to contributory negligence, whether the proceedings were brought in contract or tort. (See *Bristol & West Building Society v Fancy & Jackson* [1997] 4 All ER 582 – solicitors; *Platform Home Loans Ltd v Oyston Shipways Ltd* [1999] 2 WLR 518 – valuers.)

### Elements of contributory negligence

The defendant must prove that the claimant failed to take reasonable care for their own safety and that this failure was a cause of their damage.

It is not necessary for the claimant to owe the defendant a duty of care:

Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a
reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless. (Denning LJ in *Jones v Livox Quarries Ltd* [1952] 2 QB 608.)

A motorcyclist does not owe a duty to other road users to wear a crash helmet, but in failing to do so they are guilty of contributory negligence if they suffer head injuries in an accident. They should foresee harm to themselves, although there is no risk of harm to anyone else. A person who smokes should foresee that they are likely to develop lung cancer and where they are exposed to cancer causing material such as asbestos and also smoke, their damages will be reduced for contributory negligence. (*Badger v Ministry of Defence* [2006] 3 All ER 173.)

### The claimant’s conduct

In considering whether the claimant was contributorily negligent, the court will take into account factors similar to those which would render the defendant negligent. The test is basically an objective one, although subjective factors are introduced when looking at child defendants and persons under a disability.

The claimant’s failure to take care for their own safety may be a cause of the accident which results in their damage. This occurs where two motorists are held to be equally to blame for a collision and the claimant is injured. A person who plies a driver with drinks and then accepts a lift and is injured will also be liable under this head.

Alternatively, a person may place themselves in a dangerous position which exposes them to the risk of involvement in the accident in which they are harmed.

*Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 KB 291

The plaintiff’s husband rode on the offside step of a dust-cart. He was aware of the danger of such a practice. The dust-cart was being overtaken by one of the defendant’s buses when a collision occurred; the husband was killed. The driver of the dust-cart, the driver of the bus and the husband were all held to have been negligent, the husband because of the dangerous manner in which he was riding on the dust-cart. He was therefore held to have been guilty of contributory negligence and the widow’s damages reduced.

*Jones v Livox Quarries Ltd* [1952] 2 QB 608

The plaintiff was riding on the tow bar at the back of a traxcavator on his way back to the canteen. Another vehicle was driven negligently into the back of the traxcavator, causing injury to the plaintiff. The plaintiff’s damages were reduced on the grounds of his contributory negligence. Lord Denning said that the result would have been otherwise if the plaintiff had been, for example, hit in the eye by a shot from a negligent sportsman.

Similar reasoning could be applied where the claimant puts themselves in a position which is not dangerous in itself but they are aware of circumstances which make it more likely that they will suffer harm. This would explain the cases where the claimant accepts a lift with a driver who they know is drunk. In these circumstances the courts will find that the claimant was guilty of contributory negligence but not *volens* to the risk. (*Owens v Brinnell* [1977] 2 WLR 943.)

The third possibility is that the claimant may take up a position which is not in itself dangerous but where their failure to take precautions increases the risk of the extent of harm which they may suffer.
The plaintiff’s car was in a collision with the defendant’s car caused by the defendant’s negligence. At the time of the accident the plaintiff was not wearing a seat belt. His injuries were worse than they would have been if he had been wearing a seat belt. It was held by the Court of Appeal that his damages should be reduced by 20 per cent. The standard of care was to be judged objectively and the prudent man would wear a seat belt unless there were exceptional circumstances.

Lord Denning MR:

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

Since this case, it has been made a criminal offence not to wear a seat belt in the front seat of a car. There are certain exceptions to this, such as pregnant women.

There are a number of areas where problems are caused in trying to ascertain the appropriate standard of care for the claimant.

Children

The traditional view is that there is no age below which a child cannot be held to be guilty of contributory negligence. This view has been challenged by Lord Denning.

**Gough v Thorne** [1966] 1 WLR 1387

The plaintiff was aged 13 years. A lorry driver signalled to her to cross the road. She did so without stopping to see if the road was clear. She was run over by a car travelling at excessive speed and overtaking on the wrong side. It was held that the plaintiff was not guilty of contributory negligence. If she had been an adult the position would have been different. Lord Denning stated:

A very young child cannot be guilty of contributory negligence. An older child may be; but it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as reasonably to be expected to take precautions for his or her own safety; and then he or she is only to be found guilty if blame should be attached to him or her.

(See also **Mullin v Richards** [1998] 1 All ER 920.)

**Yachuk v Oliver Blais** [1949] AC 386

A nine-year-old child bought petrol from the defendants after falsely stating that his mother needed it for her car. The child used the petrol for a game in which he was burned. The defendants were held to have been negligent in selling the child the petrol but the child was not contributorily negligent. He did not know and could not have been expected to know the qualities of petrol.
CHAPTER 9 DEFENCES TO NEGLIGENCE

Dilemma
When assessing the claimant’s conduct, the court will make allowance for the fact that the defendant’s negligence has placed the claimant in a dilemma. If the claimant chooses a course which carries a risk of harm in order to avoid a reasonably perceived greater danger, they will not be contributorily negligent.

Jones v Boyce (1816) 171 ER 540
The plaintiff was a passenger on the defendant’s coach. A coupling rein broke loose and, thinking that the coach was about to crash, the plaintiff jumped out and broke his leg. The coach did not in fact crash and if he had remained on it he would have suffered no harm. As his actions were those of a prudent and reasonable man, he was not contributorily negligent.

Where the defendant’s negligence has placed a person in danger and the claimant has attempted a rescue, the court will be slow to find the rescuer contributorily negligent. (See ‘Rescue cases’.)

Workers
In cases where an employee sues their employer for breach of statutory duty, the court will be slow to find that the employee was guilty of contributory negligence. Regard must be had to the fact that the employee’s sense of danger will have been dulled by familiarity, repetition, noise, confusion, fatigue and preoccupation with work. (Caswell v Powell Duffryn Associated Collieries Ltd [1940] AC 152.) The reason for this lenient approach is that the court will not want to undermine the statutory regulations which are often designed to protect workers from the consequences of their own carelessness.

The courts will hold employees liable for their contributory negligence, however.

Jayes v IMI (Kynoch) Ltd [1985] ICR 155
The plaintiff, an experienced workman, was cleaning a machine when his hand was pulled into the machine and he lost the tip of a finger. The machine had had its safety guard removed. The plaintiff, in an action under the Factories Act 1961 s 14, was held to have been 100 per cent contributorily negligent after he admitted that what he had done had been extremely foolish.

This decision can be criticised on a number of grounds. The defence is one of contributory negligence, which indicates that there must be fault on the part of both parties. Second, a finding of 100 per cent contributory negligence has the same effect as a finding of volenti and would undermine the principle in Smith v Baker that such a finding should not usually be made in employer–employee cases. Finally, the Law Reform (Contributory Negligence) Act 1945 s 1, which comes into operation only where there is fault on the part of both parties, provides that a claim shall not be defeated by the fault of the plaintiff.

The Court of Appeal held, without reference to Jayes, that a finding of 100 per cent contributory negligence is logically indefensible. (Pitts v Hunt.)

In Anderson v Newham College of Further Education [2003] ICR 212 it was suggested that Jayes had been decided per incuriam and that it should not be followed. Where the fault lies entirely on the part of the claimant, there can be no fault by the defendant.
The claimant’s contributory negligence could reduce the defendant’s liability but it could not nullify it.

None of this is intended to suggest that actions of this kind should not be defensible by the employer, but the argument should be on causation grounds, not those of contributory negligence.

Causation

In order for contributory negligence to constitute a defence, the claimant’s fault must be a legal and factual cause of the harm suffered. It is not necessary that the claimant’s fault be a cause of the accident itself.

In Jones v Livox Quarries, the plaintiff's position on the traxcavator was held to be one of the causes of his damage, although the most obvious risk to the plaintiff was that he would fall off. His action in riding on the tow bar had sufficient causal potency to be regarded as a cause of his injuries. Factual causation was established and the damage was not too remote. Had the plaintiff been shot, then this would have been too remote a consequence and causation not established.

In the seat belt cases the claimant's failure to take precautions for their own safety is regarded as a contributing cause of their injuries, but it is necessary for the defendant to prove that the failure to wear a seat belt was a cause of the injuries. If the claimant was thrown forwards and injured, then clearly failure to wear a seat belt is contributory negligence. But for the failure, either the claimant would not have been injured or their injuries would not have been so severe. However, if something enters the vehicle and crushes the claimant backwards against the seat, the failure to wear the seat belt would appear to be irrelevant and fail the test of causation. The claimant would have suffered the injuries even if they had been wearing a seat belt.

The first test that must be passed is the ‘but for’ test for factual causation. Would the alleged consequence have occurred but for the negligent cause? If the claimant's alleged contributory negligence fails this test it is not necessary to go any further.

The Act itself does not change the rules on causation, so it is still necessary to use common law rules. This can give rise to some difficult problems.

Stapley v Gypsum Mines Ltd [1953] AC 663

Two miners had been instructed to bring down an unsafe part of the roof which presented a danger to the miners. They disobeyed instructions by continuing to work when they had failed to do this. The roof collapsed and one of the men was killed. His widow sued the defendants for negligence. The court had to decide whether the damage was solely as a result of the negligence of the plaintiff’s husband or whether the negligence of his workmate was also a factor. The House of Lords approached the question in a common-sense manner and held the actions of both workmen were causes. The plaintiff’s action succeeded but his damages were reduced by 80 per cent on the ground of contributory negligence.

Lord Reid:

One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally. It may often be dangerous to apply to this kind of case tests which have been used in traffic accidents by land or sea, but in this case I think it useful to adopt phrases from the speech of Viscount Birkenhead LC in Admiralty Comrs v SS.
Volunte and to ask: Was Dale’s fault ‘so much mixed up with the state of things brought about’ by Stapley that ‘in the ordinary plain common sense of this business’ it must be regarded as having contributed to the accident? I can only say that I think it was and there was not ‘sufficient separation of time, place or circumstance’ between them to justify its being excluded. Dale’s fault was one of omission rather than commission and it may often be impossible to say that, if a man had done what he omitted to do, the accident would certainly have been prevented. It is enough, in my judgment, if there is a sufficiently high degree of probability that the accident would have been prevented. I have already stated my view of the probabilities in this case and I think that it must lead to the conclusion that Dale’s fault ought to be regarded as having contributed to the accident.

It is important to remember that if one act is held to be the sole cause of the damage and that act is one of the claimant, then the claimant will recover nothing. The act could be regarded as a *novus actus interveniens*. (See, for example, *McKew v Holland & Hannen & Cubbitts*.)

**Apportionment**

The Law Reform (Contribution Negligence) Act s 1(1) directs the court to reduce the claimant’s damages to the extent that the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage.

There are two possible ways of assessing the claimant’s share in the responsibility for the damage: causation and blameworthiness.

If a test of causative potency is used, then logically every case should end with a 50/50 apportionment, as the conduct of both the claimant and the defendant is a cause. The courts however take a common-sense view, rather than a philosophical view, and arrive at apportionments other than 50/50. (See *Stapley v Gypsum Mines Ltd*.)

Where the comparative blameworthiness or culpability of the parties is taken into account, then the test is an objective one of deviating from the standard of behaviour of the reasonable person. It is not a moral test. The reasonable person, for example, would wear a seat belt.

The requirement that the reduction should be just and equitable means that there is no single test for determining the level of reduction of damages. The courts treat it as a question of fact and take an *ad hoc* approach.

*Reeves v Commissioner of Police of the Metropolis* [1999] 3 WLR 363

Lord Hoffmann:

What section 1 requires the court to apportion is not merely degrees of carelessness but ‘responsibility’ and . . . an assessment of responsibility must take into account the policy of the rule . . . A person may be responsible although he has not been careless at all, as in the case of a breach of an absolute statutory duty. And he may have been careless without being responsible, as in the case of ‘acts of inattention’ by workmen.

Can there be a 100 per cent reduction for contributory negligence? If there can be then there is no practical difference between this defence and *volenti*, as the claimant receives no damages. In *Pitts v Hunt* [1990] 3 All ER 344, the trial judge felt he was unable to apply *volenti non fit injuria* because of the statutory provision. However, he held the plaintiff to be 100 per cent contributorily negligent. The Court of Appeal stated that it was
impermissible to make a finding of 100 per cent contributory negligence, as the Act states that the plaintiff must suffer damage partly as a result of their own fault and partly as a result of the defendant’s fault. The trial judge must therefore apportion blame between the parties. A finding of 100 per cent contributory negligence does not do this. (But see Jayes v IMI (Kynoch) Ltd, and discussion above.)

That the argument on 100 per cent reduction is not over is shown by the case of suicide in police custody of Reeves v Commissioner of Police [1998] 2 WLR 401. The trial judge had held the deceased to be 100 per cent contributorily negligent, with which Morritt LJ (dissenting) agreed in the Court of Appeal. The majority were hesitant. Buxton LJ held that a claim which was not susceptible to attack on the grounds of volenti or novus actus interveniens, could not be defeated on the ground of contributory negligence. Lord Bingham MR would have held the deceased to be 50 per cent contributorily negligent, but in order to avoid all three judges disagreeing, he concurred with Buxton LJ.

In the House of Lords it was held that where the deceased was of sound mind he bore at least partial responsibility for killing himself and damages were reduced by 50 per cent ([1999] 3 WLR 363). Could the damages of an insane suicide be reduced? Lord Hoffmann was of the opinion that they could not and drew an analogy with children who were not of full understanding.

Multiple defendants

Difficulties arise where there is more than one defendant. In cases where the claimant was not at fault, they can recover their full loss against any of the defendants. That person will then have to seek a contribution from the other defendants under the Civil Liability (Contribution) Act 1978.

Where the claimant was at fault and contributed to their own injuries, is it necessary to balance the claimant’s contributory negligence against each defendant separately?

Fitzgerald v Lane [1987] QB 781

The plaintiff stepped out into the traffic on a busy road. He was struck by a vehicle driven by the first defendant. This pushed him into the path of an oncoming vehicle driven by the second defendant. Both defendants were accepted to be negligent and the plaintiff was contributorily negligent. At first instance the three parties were held equally to blame and the plaintiff’s damages were therefore reduced by one-third. This was held to be the wrong approach by the House of Lords. It was necessary to distinguish two questions. First, the contributory negligence of the plaintiff and the amount by which his damages should be reduced. Second, the amount of contribution recoverable between the two defendants. The plaintiff’s culpability was in setting the scene for the accident. The response of the defendants then had to be looked at. The plaintiff’s conduct and the totality of the tortious conduct of the defendants were compared. As the plaintiff was as much to blame for his injuries as the defendants, his damages were reduced by 50 per cent.

Lord Ackner:

It is axiomatic that, whether the plaintiff is suing one or more defendants for damages for personal injuries, the first question which the judge has to determine is whether the plaintiff has established liability against one or other or all the defendants, i.e. that they, or one or more of them, were negligent (or in breach of statutory duty) and that that negligence (or breach of statutory duty) caused or materially contributed to his injuries. The next step, of course, after liability has been established, is to assess what is the total of the damage that the plaintiff has sustained.
as a result of the established negligence. It is only after these two decisions have been made that
the next question arises, namely whether the defendant or defendants have established (for the
onus is on them) that the plaintiff, by his own negligence, contributed to the damage which he
suffered. If, and only if, contributory negligence is established does the court then have to decide,
pursuant to s 1 of the Law Reform (Contributory Negligence) Act 1945, to what extent it is
just and equitable to reduce the damages which would otherwise be recoverable by the plaintiff,
having regard to his 'share in the responsibility for the damage'.

All the decisions referred to above are made in the main action. Apportionment of liability in
a case of contributory negligence between plaintiff and defendants must be kept separate from
apportionment of contribution between the defendants inter se. Although the defendants are
each liable to the plaintiff for the whole amount for which he has obtained judgment, the pro-
portions in which, as between themselves, the defendants must meet the plaintiff's claim do not
have any direct relationship to the extent to which the total damages have been reduced by the
contributory negligence, although the facts of any given case may justify the proportions being
the same.

Once the questions referred to above in the main action have been determined in favour of the
plaintiff to the extent that he has obtained a judgment against two or more defendants, then and
only then should the court focus its attention on the claims which may be made between those
defendants for contribution pursuant to the Civil Liability (Contribution) Act 1978, re-enacting
and extending the court's powers under s 6 of the Law Reform ( Married Women and Tortfeasors)
Act 1935. In the contribution proceedings, whether or not they are heard during the trial of the
main action or by separate proceedings, the court is concerned to discover what contribution is
just and equitable, having regard to the responsibility between the tortfeasors inter se, for the
damage which the plaintiff has been adjudged entitled to recover. That damage may, of course,
have been subject to a reduction as a result of the decision in the main action that the plaintiff,
by his own negligence, contributed to the damage which he sustained.

Thus, where the plaintiff successfully sues more than one defendant for damages for personal
injuries and there is a claim between co-defendants for contribution, there are two distinct and
different stages in the decision-making process, the one in the main action and the other in the
contribution proceedings.

One final point to be remembered about contributory negligence is that it differs in effect
from a finding of negligence. The latter does not usually directly affect the defendant's
pocket, as they will be insured. A finding of contributory negligence on the other hand
has a direct financial effect on the claimant. They get less in damages.

**Ex turpi causa**

The court may deny an action to a claimant who suffered damage while participating in
a criminal activity. In negligence actions the court may find that no duty of care was
owed in the circumstances. The defence may be referred to as illegality or *ex turpi causa
non oritur actio*. This means that an action cannot be founded on a bad cause.

**Pitts v Hunt [1990] 3 All ER 344**

(For facts see 'Volenti non fit injuria'.) Beldam LJ reviewed the authorities and stated that
deciding whether the defence applied involved answering two questions. First, had there been
any illegality of which the court should take note? Second, would it be an affront to the public
conscience to allow the plaintiff to recover? A robust approach should be taken to these ques-
tions. The fact that there had been unlawfulness should not mean that a remedy should be
denied. Taking account of the view of drunk driving, the plaintiff should be precluded on
grounds of public policy from recovering compensation.

A different approach was taken by Dillon and Balcombe LJJ. Dillon LJ dismissed the con-
science approach as it would be difficult to apply and would inevitably be affected by emotional
factors. This would lead to a graph of illegalities graded according to moral turpitude. Dillon
and Balcombe LJJ agreed that a preferable approach would be to deny a duty of care in certain
cases of joint illegal enterprises. The defence would have this effect where first, the plaintiff’s
action is directly connected with the joint illegal enterprise and not merely incidental to it.
Second, the circumstances of the illegal venture must be such that the court cannot determine
the standard of care to be observed.

Balcombe LJJ:

In a case of this kind I find the ritual incantation of the maxim *ex turpi causa non oritur actio* more
likely to confuse than to illuminate. I prefer to adopt the approach of the majority of the High
Court of Australia in the most recent of the several Australian cases to which we were referred,
*Jackson v Harrison* (1978) 138 CLR 438. That is to consider that what would have been the cause
of action had there been no joint illegal enterprise, that is the tort of negligence based on the
breach of a duty of care owed by the deceased to the plaintiff, and then to consider whether the
circumstances of the particular case are such as to preclude the existence of that cause of action
. . . I prefer to found my judgment on the simple basis that the circumstances of this particular
case were such as to preclude the court from finding that the deceased owed a duty of care to
the plaintiff.

I agree . . . that s 148(3) of the Road Traffic Act 1972 does not affect the position under this
head . . . Counsel for the first defendant sought to persuade us that the application of the *volenti*
doctrine is to extinguish liability and, if liability has already been extinguished, there is nothing
on which s 148(3) of the Road Traffic Act 1972 can bite. As Dillon LJ says, if this argument were
to be accepted, it would mean that s 148(3) could never apply to a normal case of *volenti*, although
that was clearly its intention . . . I agree that the effect of s 148(3) is to exclude any defence of
*volenti* which might otherwise be available. On this issue I agree with the judge below that
Ewbank J’s decision in *Ashton v Turner* [1981] QB 137 at 148 was incorrect . . .

I agree that the judge’s finding that the plaintiff was 100 per cent contributorily negligent is
logically unsupportable and, to use his own words, ‘defies common sense’. Such a finding is
equivalent to saying that the plaintiff was solely responsible for his own injuries, which he clearly
was not.

An objection to the use of the defence in this case was that it enabled the court to evade the
statutory prohibition on applying *volenti non fit injuria*. This cannot have been the intention of
Parliament when it prevented drivers from contracting out of their liability to a passenger.

The first point raised by Dillon and Balcombe LJJ can be illustrated as follows. Two
safebreakers are on their way to open a safe and they have a fight. One is injured. *Ex turpi
causa* would not provide a defence. (But see *Murphy v Culhane* [1977] QB 94 for a case
involving a criminal affray where the plaintiff got more than he bargained for and it was
stated that the defence could apply.) If the safebreakers were actually trying to open the
safe and one was injured by the other's negligent use of explosives, then the defence
could apply.

The second point is shown by cases where two criminals are engaged in attempting a
getaway from the scene of the crime. The car is driven negligently at speed and the pas-
senger is injured. The court would be unwilling or unable to determine what speed would
be expected from a competent getaway driver. (See *Ashton v Turner* [1981] QB 137.)

Which test will be followed remains to be seen. Despite the criticism levelled at the
public conscience test it has been used in a number of cases. For example, in *Kirkham v*
Chief Constable of the Greater Manchester Police [1990] 3 All ER 246, the court refused to bar the claim on the ground of suicide. This was no longer an affront to the public conscience, where the suicide resulted from mental instability. However, in Reeves v Commissioner of Police of the Metropolis [1999] 3 WLR 363, the House of Lords preferred the approach that neither am turpi nor volenti could be raised as a defence when they were based on the very act that the defendant was under a duty to prevent (in this case, to prevent suicide in custody).

However, in some cases the claimant’s illegality can prevent a duty of care from arising.

Vellino v Chief Constable of the Greater Manchester Police [2002] 1 WLR 218

The claimant was injured when he jumped from a second-floor window in order to avoid arrest by the police. He alleged that the police owed a duty of care not negligently to let him escape after they arrested him. The Court of Appeal (by a majority) held that there was no duty of care in these circumstances rather than applying the defence. The dissenting judge (Sedley LJ) felt that the power to apportion responsibility in contributory negligence was a more appropriate method of doing justice.

The public conscience test was rejected by the House of Lords in a trusts case in favour of a test of whether the plaintiff had to rely on illegality to found the claim. (Tinsley v Milligan [1994] 1 AC 340.) It is doubtful whether this approach is useful in the context of most tort cases as, in, for example, the car passenger cases, the claimant will usually be able to found the claim on negligent driving without mentioning any criminal context. However, in the following case the test was used to deny part of a claim for damages for personal injuries.

Hewison v Meridian Shipping PTE and others [2003] ICR 766

The claimant suffered serious personal injuries while employed by the defendant as a crane operator on a ship. One of the heads of damages claimed was for loss of future earnings for a period of 27 years. However, the claimant had lied to obtain the job by stating falsely that he had never suffered from epilepsy. This amounted to the criminal offence of obtaining a pecuniary advantage by deception. The Court of Appeal held that he was unable to base any loss of earnings claim on earnings he would have made as a seaman. This was on the basis that the claimant’s future employment had been dependent on his continuing deceit of his employers. The deceit was therefore not collateral, but essential to establish that part of his claim. The test was not whether an award of damages would be acceptable to public conscience. It was based on the rule of public policy that the court would not lend its aid to a man who founded his cause of action on an illegal or immoral act.

The test of difficulty in setting the appropriate standard of care poses problems. One is that the defence applies in torts other than negligence. A second is that cases arise where there is no doubt about the appropriate standard.

Rance v Mid-Downs Health Authority [1991] 1 All ER 801

The allegation of negligence was that the defendant had failed to observe a foetal abnormality during pregnancy and the plaintiff had been denied the possibility of an abortion. Such an
abortion would have been illegal under the then existing law. There would have been no difficulty in establishing the appropriate standard of care for the medical defendant. It was held that there had been no negligence, but on grounds of public policy the court would not award compensation where the plaintiff would have had to have broken the law.

It is not clear what kind of conduct will bar an action. The fact that a tort was committed is not sufficient. A duty of care can be owed to a trespasser. (See Chapter 10.) The conduct does not even have to be illegal. The conduct will usually be criminal, but not all crimes will be sufficient to raise the defence. For example, a breach of statutory duty will not bar a claim.

The dilemma facing the courts in the form of compensation weighed against the public policy of ‘crime does not pay’, is illustrated by the case of Clunis (below).

Clunis v Camden and Islington Health Authority [1998] 3 All ER 180

The plaintiff sued the defendants for negligence on the ground that he had been released prematurely from their care and had then killed a stranger. The plaintiff had been charged with murder, reduced to manslaughter on the ground of diminished responsibility. No private law duty of care was held to be owed (see X v Bedfordshire County Council [1995] 2 AC 633), but the Court of Appeal stated that ex turpi would only be inappropriate where the plaintiff did not know the nature and quality of his acts, i.e. where a plea of insanity would have been successful in a murder case.

Some of the confusion and problems arising in this area are shown by the Law Commission Consultation Paper No 160 (2001). The main proposal is that the present law should be replaced by a structured discretion to bar a claim where the claim arises from or is connected to an illegal act on the part of the claimant. However, they doubt whether the defence should ever apply in personal injury actions. This is on the grounds that damages for personal injury are compensatory rather than profit-making and that the claimant could lose a lot of money and have to rely on other sources such as state benefits. Neither of these grounds is particularly compelling as virtually all tort damages are compensatory and the second ground has not been raised in other areas of negligence such as causation. The claimant in Ashton v Turner did lose £75,000 as a result of stealing three radios, but to suggest that this should give him a claim appears equivalent to saying that claims should be allowed where there is a clear cut case of volenti.

The rescue cases

We have seen that issues of causation and blameworthiness raise problems for the courts when deciding whether the claimant’s conduct was sufficiently serious to deserve a reduction in their entitlement to damages, or to deserve no damages at all. Public policy plays a part in a number of these decisions and a student could be forgiven for confusion at the complexity of the area and the number of legal doctrines used. This chapter will be concluded by looking at the so-called ‘rescue cases’ and seeing how the various doctrines apply.

The public policy issue in these cases is that the courts do not want to deter rescue and it has been held that a duty of care is owed to rescuers. (Chadwick v British Railways Board [1967] 1 WLR 912.)
Example

A’s negligence has placed B in danger and C is injured in attempting a rescue of B. C sues A in negligence. Assume that a duty of care is owed by A to C as a rescue was reasonably foreseeable in the circumstances.

There are three possible ‘defences’ that A can raise to C’s action.

He could argue that C’s action in attempting a rescue was a novus actus interveniens of the claimant which broke the chain of causation. A’s negligence would not then be a cause of C’s injuries. The court will apply a test of whether the claimant’s rescue attempt was likely as a result of the breach of duty and whether the claimant acted reasonably.

Alternatively, A could argue that, in attempting a rescue, C was volens to the risk of injury. Because of the nature of rescue cases, the danger will usually have been created by the defendant’s negligence before the claimant comes on the scene. If the view is taken [see ‘Volenti’] that an agreement is necessary for volenti, then it will usually be inapplicable in rescue cases. The courts do not always take this view.

Finally, A could attempt to prove that C was contributorily negligent in that his fault was a cause of his injuries.

The courts will generally be reluctant to invoke any of these defences to deny the rescuer compensation.

Haynes v Harwood [1935] 1 KB 146

A horse van was left unattended by the driver in an area with three schools. There were always a number of children in the street. A child threw a stone at the horse, which bolted. The plaintiff, a police officer, saw that highway users were in danger and tried to stop the horse. He suffered personal injuries. The court held that volenti non fit injuria did not succeed as a defence as the plaintiff did not exercise the freedom of choice which was necessary. (There is also a problem as to whether the defence applies where the plaintiff encounters an already existing danger.) There was no novus actus interveniens as what occurred was a likely result of the original breach of duty by the defendants.

Contrast this case with Cutler v United Dairies [1933] 2 KB 297. Here a horse had bolted into a field. Nobody was in any danger from the horse but the plaintiff entered the field and tried to calm the horse and was injured. The plaintiff was volenti as he had freedom of choice as to whether to attempt a rescue and there was a novus actus interveniens as the danger had passed.

Harrison v British Rail Board [1981] 3 All ER 679

The defendant attempted to board a moving train. The plaintiff guard saw the defendant on the outside of the train and gave the incorrect signal to the driver. It should have been a signal to stop but was the accelerate signal. The guard attempted to pull the defendant into the train but both fell out and the guard was injured. The court held that where a person places himself in danger and it is foreseeable that another person may attempt a rescue, the rescued person owes a duty of care to the rescuer. However, the plaintiff was found to have been contributorily negligent in pressing the wrong signal and his damages were reduced by 20 per cent.

The court pointed out that it was rare that a rescuer would be found to be contributorily negligent.
This case supports the view expressed in *Baker v Hopkins* that a person who places himself in danger may owe a duty of care to a rescuer. If a climber ignores safety advice and a member of the mountain rescue team is injured attempting a rescue, that person could sue the climber for negligence.

Would a rescuer be denied an action on the ground of *ex turpi causa*, for example, if one burglar was injured attempting to assist another who had been placed in danger by the dangerous condition of the house they were breaking into? (See *Pitts v Hunt* for possible tests.)

### Summary

This chapter deals with the defences to negligence

- There are three common law defences to negligence: *volenti non fit injuria*; contributory negligence; and *ex turpi causa*.

- In the defence of *volenti* the defendant must assume the legal risk of injury in circumstances in which the defendant's act would otherwise amount to negligence.

- The defence requires that the claimant acted voluntarily. The courts are reluctant to apply the defence in employer–employee cases for this reason. (*Smith v Baker.* Where a person commits suicide in police custody they are not acting voluntarily. (*Reeves v Commissioner of Police.*)

- Where there is an express agreement made before the negligent act this is sufficient to raise the defence in the absence of statutory prohibition. The defence may not be raised in cases of drunk drivers (Road Traffic Act 1988 s.149) but can operate against drunken pilots.

- The courts are reluctant to imply an agreement.

- In order for *volenti* to operate the claimant must have knowledge of the existence of the risk and its nature and extent.

- Contributory negligence can act as a defence where the damage was suffered partly as a result of the claimant's fault. Fault is defined by Contributory Negligence Act 1945 s 4.

- The defendant must prove that the claimant failed to take reasonable care for his own safety and this failure was a cause of his damage. It is not necessary for the claimant to owe the defendant a duty of care. The standard of care is the usual objective standard used in negligence with allowances made for children, people who act in a dilemma and workmen.

- The claimant's fault must be a legal and factual cause of the harm suffered.

- Where the defence is established the court will reduce to the extent that is just and equitable under s 1(1) of the 1945 Act.

- *Ex turpi causa* enables the court to deny a duty of care to a person who suffered damage while participating in a criminal activity. (*Pitts v Hunt.* There is some controversy as to the basis of the defence. Some judges base it on public conscience and some on joint illegal activity.)
Further reading


Jaffey, A. J. E. [1985], ‘Volenti Non Fit Injuria’ CLJ 87.


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