CHAPTER 7: GENERAL DEFENCES

INTRODUCTION

A person sued in tort has at his disposal certain defences, some of which are restricted to particular torts (e.g. contributory negligence is a defence only to the tort of negligence), while other are of a general defences.

The following general defences are available to a defendant in every action for tort where they are appropriate:-

(i) Volenti non fit Injuria

(ii) Inevitable Accident.

(iii) Act of God

(iv) Necessity

(v) Self-defence

(vi) Mistake

(vii) Statutory Authority

(viii) Exemption Clauses (or Disclaimers)

These are explained as under:-

Volenti Non Fit Injuria

Volenti non fit injuria is also known as the voluntary assumption of risk. Where a defendant pleads this defence, he is in effect saying that the plaintiff consented to the act which is now being complained of. The plaintiff's consent may be either express or implied from his conduct. Before 'volenti' can be upheld as a defence, it must be proved that the risk involved, for a person cannot consent to what is not within his knowledge. By his consent the plaintiff voluntarily assumes the risk of whatever consequences might follow from the act he has consented to., Consequently, where 'volenti' is successfully pleaded its effect is to deny the plaintiff any remedy at all against the defendant:

Volenti non fit injuria means no injury can be done to a willing person. For example, a football player cannot complain for being injured while playing the game. Similarly, a surgeon can claim this defence if the person being operated dies during the process of operation. It also applies in other sports like boxing, cricket etc.

Khimji v. Tanga Mombasa Transport Co. Ltd (1962)

The plaintiffs were the person representatives of a deceased who met his death while traveling as a passenger in the defendant's bus. The bus reached a place where the road was flooded and it was risky to

cross. The driver was reluctant to continue the journey but some of the passengers, including the deceased, insisted that the journey should be continued. The driver eventually yielded and continued with some of the passengers, including the deceased. The bus got drowned together with all those aboard it. The deceased's dead body was found the following day. Held: The plaintiff's action against the defendants could not be maintained because the deceased knew the risk involved and assumed it voluntarily and so the defence of *volenti non fit injuria* rightly applied.

Apart from instances like those of the above case, the defence of 'volenti' has been pleaded in a number of situations, including the followings: 1) A passenger injured by the act of a driver whom he knew to be under the influence of drink at the material time; 2) A spectator at a game, match or competition injured by the act of the players or participants; and (3) A patient injured by the act of his surgeon, where the patient has consented to the operation. The viability of the defence depends on the circumstances of each case; otherwise the consenting party does not, by his consent, necessarily give an open cheque to the other party to act negligently, high-handedly or in any manner he pleases. Moreover, volenti is not available as a defence to certain actions. This is particularly so in rescue cases. Where the defendant creates a situation in which some person is put in imminent danger, and the plaintiff, at the risk of his own life and safety, rescues the endangered person incurring injury or damage in the rescue process, the defendant cannot plead that the plaintiff has voluntarily assumed the risk to his life: he is liable for the injury or damage sustained by the plaintiff:

Haynes v. Harwood, (1935)

The defendant's servant left a van and horses unattended in a crowded street. A boy threw a stone at the horses and they bolted. This exposed a woman and some children nearby to some grave danger. The plaintiff, a police constable, managed to stop both horses; but he did so at great personal risk and in fact sustained severe injuries. In an action brought against him, the defendant pleaded volenti. Held: (1) The doctrine of voluntary assumption of risk did not apply because the plaintiff, in rescuing the persons in imminent danger, had acted under an emergency caused by the defendant's wrongful act. (2) It was immaterial that the persons to be saved were strangers, and the defendants were liable.

Necessity:

A person may sometimes find himself in a position whereby he is forced to interfere with rights of another person so as to prevent harm to himself or his property. For instance, if he is about to be shot he may feel constrained to use the person next to him as a shield against the gunman; or being hungry he my steal food in order to survive; or being about to fall into a pit he may grab another person for support, in the process taking the latter with him into the pit. In all these cases he may seek to justify his action as a matter of necessity. It is based on the maxim *"salus populi supreme lex"* i.e. the welfare of the people is the supreme law.

All the cases decided on the defence of necessity point to the fact that this defence is difficult to maintain and is very rarely allowed by court. The general rule is that no person should unduly interfere with the person or property of another. It is only in exceptional circumstances of an urgent situation of imminent danger that this defence may be upheld:

Cope v. Sharpe, (1912)

The defendant committed certain acts of trespass on the plaintiff's land in order to prevent fire from spreading to his master's land. The fire never in fact caused the damage and would not have done so even if the defendant had not taken the precautions he took. But the danger of the fire spreading to the master's land was real and imminent. Held: The defendant was not liable as the risk to his master's property was real and imminent and a reasonable person in his position would have done what the defendant did.

In view of the difficulty posed by the above defence, it is not advisable for a defendant to rely solely on it, especially where there are other defences. It is safer to plead it as an alternative to another defence.

Self Defence

It is sometimes said that a person who is attacked does not owe his attacker a duty to escape. Everyone whose person is threatened is entitled to defend himself; and he may do so by using force. Force, however, may only be used where necessary, otherwise the person claiming to defend himself might find himself liable to his alleged attacker. Thus, where a person is assaulted i.e. threatened with immediate harm, but no harm is actually inflicted to him, he should not himself use force in an effort to defend himself. Where force has actually been applied (i.e. where there has been a battery the person attacked has a right to defend himself in the same way, i.e. by applying force. But the force used in self-defence must be reasonable and proportionate to that used in attacking him; otherwise if it is unreasonable or excessive in the circumstances he will himself be liable to his attacker. Thus a person attacked with a fist, pocket knife or small stick may respectively defend himself with a fist, pocket knife or small stick, or he may even use lesser force. But if in these circumstances he responds with a panga or spear or gun, clearly the force used by him in self-defence will be unreasonable and disproportionate and he will be liable to his attacker.

Cresswell v. Sirl, (1948)

A dog by plaintiff, C, attacked during the night some in-lamb ewes owned by S. The dog had just stopped worrying the sheep and started towards S, who shot it when it was 40 yards away. C sued for trespass to goods (dog). Held: S was justified in shooting the dog if (i) it was actually attacking the sheep; or (ii) if left the dog would renew the attack on them, and shooting was the only practicable and reasonable means of preventing revival. The onus on justifying the trespass lay on the defendant. (protecting livestock against dogs is now on a statutory basis; s. 9 of the Animal Act, 1971.)

An occupier of property may also defend his property where his interest therein is wrongfully interfered with. Once again, reasonable force must be used in the defence of property. A trespasser, for instance, may be lawfully ejected using reasonable force. The use of force which is not called for in the circumstances entails legal liability on the part of the person purporting to defend his property.

Mistake

The general rule is that a mistake is no defence in tort, whether it is a mistake of law or of fact. Mistake of fact may be relevant as a defence to any tort in some exceptional cases. This could arise in cases of

malicious prosecution, false imprisonment and deceit. For example, where a police officer arrests a person about to commit a crime but the person arrested is innocent then the police officer is not liable. In this case, the mistake is reasonable ground for the defence in the tort. Mistake cannot be a defence in actions for conversion or defamation.

Statutory Authority

Where a statute authorizes a particular act, a person who does it is not liable in tort. The authorization of an act is also an authorization of its natural consequences. But the person acting must do so in good faith and within the scope of the powers conferred by the statute; or else he will not be protected. Where the person acting exceeds the powers conferred by the statute, the compensation payable by him to the injured party cannot be more than what is provided by the statute itself. The statute may stipulate a definite sum, or it may give powers to certain officials to assess the loss suffered by the injured party. Thus, where a person has acted in pursuance of the provisions of a statute, he may plead statutory authority in his defence; and where the statute does not protect him from liability (e.g. where he has exceeded his powers) and the injured party claims by way of compensation a sum in excess of that stipulated by the statute, he may plead the statute in mitigation. This is especially so in what are known as statutory torts.

Vaughan v. Taff Vale Railway Co. (1960)

A railway company was authorized by statute to run a railway which transversed the plaintiff's land. Sparks from the engine set fire to the plaintiff's woods.Held: that the railway company was not liable. It had taken all known care to prevent emission of sparks. The running of locomotives was statutorily authorized.

Exemption Clauses (or Disclaimers)

Exemption clauses have already been dealt with in Chapter 6. As already seen, torts are common law wrongs based on certain duties imposed by law. This is different from contract where the duties imposed on the parties are created by the parties themselves. For this reason a strict construction is imposed by common law on any exemption clause whose purport is to displace a duty of care created by law. Thus, under the 'contra proferentem rule' an exemption clause which doe not expressly cover negligence cannot protect the party seeking to rely on it in an action based on negligence. But where the exemption clause is phrased in such a way that a duty imposed by law is expressly displace, then the exemption clause may be relied upon as a defence to an action brought in tort, as was the case in Hedley – Byrne & Co. Ltd. V. Heller & Co. Ltd. (1963).

Chapter 7 : General Defences

Outline

7.1 Introduction

7.2 Contributory negligence

7.3 *Volenti non fit injuria*

7.4 The relationship between contributory negligence and *volenti*

7.5 *Ex turpi causa*

7.6 Mistake

7.7 Inevitable accident

7.8 Summary

7.1 Introduction

At this stage it is convenient to deal with general defences. The first three defences (contributory negligence, *volenti* and *ex turpicausa*) are not confined to negligence and may apply to other torts, but most examples arise in the context of the tort of negligence and they are best studied after reading the preceding five chapters. The remaining defences are rarely argued but have played a role in developing the law of tort. Defences which are **specific** to a given tort can be found in the appropriate chapter.

7.2 Contributory negligence

7.2.1 The common law approach

At common law, if the claimant's injury was caused partly by his own fault and partly by the negligence of the defendant then he (the claimant) could recover nothing. In **Butterfield v Forrester [1809]**, the defendant wrongfully obstructed the road with a pole. The claimant rode violently down the road at dusk and was thrown off his horse by the pole, which could be seen from a distance of approximately 100 yards. As the claimant had contributed to his own injury the defendant was not liable.

The severity of this rule was mitigated by the "rule of last opportunity". The claimant could recover despite his own fault if the defendant could have avoided the accident and the claimant could not. In **Davies v Mann [1842],** the claimant negligently turned his donkey loose on the highway and the defendant drove into it negligently. The defendant was liable, as he might have avoided the consequences of the claimant's negligence.

When the defendant puts the claimant in a dilemma, the claimant may react to the situation in a manner which was ill advised when considered with the benefit of hindsight. In such a situation, the claimant will not be contributorily negligent if the course of action adopted was reasonable in the circumstances as they appeared at the crucial time. A very early example of this principle can be found **in Jones v Boyce [1816]** in which the claimant formed the opinion that the coach on which he was traveling was about to crash. He decided to jump from his position on top of the coach and broke his leg on impact with the ground. The coach was brought to a safe halt a little further down the road. On these facts, the jury held that the claimant had acted in a reasonable and prudent manner in the "*agony of the moment".*

7.2.2 The statutory regime

A power to apportion damages was permitted in cases of collision at sea by the **Maritime Conventions Act 1911**. A general power to apportion damages was permitted in non-Admiralty cases when the **Law Reform (Contributory Negligence) Act 1945 (LR(CN)A 1945**) was passed.

sl(1) LR(CN)A 1945 provides:

Where any person suffered damage as the result partly 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.

In relation to types of damage suffered by the claimant, ***s4 LR(CN)A 1945*** *provides that the damage referred to in* ***sl(1)*** *includes loss of life and personal injury.*

Property damage would also appear to be included as this was the case before the passing of **LR(CN)A 1945.**

"Fault" is defined by **s4** as: negligence, breach of statutory duty or other act or omission which gives rise to liability in tort or would, apart from the Act, give rise to the d4ence of contributory negligence. **LR(CN)A 1945** therefore applies to most torts except intentional interference with chattels (s11 Torts **(Interference with Goods) Act 1977).** It is unclear whether it applies to cases of trespass to the person. The Court of Appeal was asked to consider the defence of contributory negligence in **Barnes v Nayer [1986**]. The defendant was convicted of tine manslaughter of the claimant's wife. In the civil action which followed (trespass to the person), the defendant raised three defences, based on the allegation that the deceased had provoked the attack which killed her. None of the defences was successful On the question of contributory negligence, May LJ saw the defendant's response as out of all proportion to the alleged

provocation. The more normal defence in less extreme circumstances would be for the "provoked" party to try to establish the defence of self¬defence.

In **Standard Chartered Bank v Pakistan National Shipping Corporation [2003]** the House of Lords has confirmed that the defence has no application in the tort of deceit (see also 20.2.2). When Parliament enacted **LR(CN)A 1945** three relevant issues could be identified.

(1) The legal rules as to causation were not affected.

(2) The apportionment of damages was determined by the claimant's share in responsibility for the loss suffered.

(3) The definition of the word "fault" in LR(CN)A 1945 (see above) is wider than the terms in which the Law Revision Committee, whose report led to the change in the law, had expressed itself, in that it refers, for example, to "liability in tort".

Both litigants made reference to the writings of Professor Glanville Williams, in which the exclusion of contributory negligence as a defence to an allegation of intentional tortious conduct is attributed to policy reasons and "to the ordain human feeling that the defendant's wrongful intention so outweighs the [claimant's] wrongful negligence as to efface it altogether". A contrast can be drawn with Reeves v Commissioner of Police for the Metropolis [1999J, where the deceased prisoner's intentional suicide was regarded as "fault" within **LR(CN)A 1945.**

To establish a defence of contributory negligence, the defendant must therefore prove that the claimant was at fault and that the claimant's contributory negligence was a cause of the injuries he suffered.

5.2.2 Fault of the claimant

The defence is not based upon the argument that the claimant owes a duty of care to the defendant. All that is necessary is that the claimant has failed to take reasonable care **for his own safety**. Therefore, while a motorcyclist owes no duty to other road users to wear a crash helmet, by failing to do so he is guilty of contributory negligence if he suffers head injuries in a road accident while not wearing such a helmet: **O'Connell v Jackson [1972].**

Just as actionable negligence requires foreseeability of harm to others, so contributory negligence requires **foreseeability of harm to oneself**. It follows that a person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable man would have acted, he might be harmed. The test for the standard of care expected of the claimant appears to be an objective one which varies according to the facts of the case.

The claimant's failure to take reasonable care for his own safety may also be a cause of the accident in which he is injured, for example, where two motorists are equally to blame for a collision.

Alternatively, a person may place himself in a dangerous position which exposes him to the risk of involvement in the accident in which he is harmed - for example, by standing on the side steps of a long and being struck by an overtaking vehicle: **Davie S v Swan Motor CO [1949**], or by taking a lift with a

driver who has been drinking. There is, however, no legal obligation to interrogate a driver about ability to drive or about the amount of alcohol consumed before agreeing to be a passenger in the car. In **Booth v White [2003]** it was argued by the defendant that contemporary attitudes to drink driving imposed a responsibility on passengers to obtain information about the capacity of drivers to drive safely. This was rejected by the Court of Appeal; had the passenger known of the driver's drinking, the claimant would have been contributory negligent, but the law did not require the passenger to enquire.

The claimant may take up a position which is not dangerous in itself but where his failure to take precautions **increases the extent of the harm** which he may suffer, for example, if a passenger in a car fails to wear a seat belt. In **Froom v Butcher [1976]** the claimant suffered the following injuries in a car accident caused by the defendant's negligence: broken ribs, bruises to his chest, head abrasions and a broken finger. The first two injuries would probably have been avoided if he had worn a seat belt. Lord Denning MR stated:

"The accident is caused by bad driving. The damage is caused in part by the bad driving of the defendant, and in part by the failure of the claimant to wear a seat belt."

He went on to suggest that damages should be reduced by 25 per cent if the damage in question would have been prevented by a seat belt and a reduction of 15 per cent if the damage would have been less severe. These figures do not bind the judges. The wording of sl(l) LR(CN)A 1945 gives the court an unfettered discretion to reduce the damages as it thinks just and equitable. Since Froom v Butcher, failure to wear seat belts has been made a criminal offence, subject to certain exceptions. Students should note, however, that the illegality of the claimant's failure to wear a seat belt remains a separate consideration from those principles upon which a judge will determine the apportionment of blame for civil law purposes.

A further example of careful examination of the nature of the claimant's fault can be found in **Dorning v PR of Paul Rigby (Deceased) [2007].** The claimant was riding his motorcycle along a road at an appropriate distance behind a motorcycle ridden by the defendant, Rigby, who was negligent in negotiating a bend in the road. Rigby's motorcycle hit a car on the opposite side of the road and caused an explosion, as a result of which Rigby was killed. The claimant reacted to the explosion ahead of him and he braked heavily, causing him to lose control of his own motorcycle and it slid across the road and into a nearby field. The trial judge found against the claimant on the basis that he would not have negotiated the bend successfully regardless of the accident ahead but the Court of Appeal criticized the judge's analysis of the facts of the case and allowed the appeal. When looking at the respective blameworthiness of both parties, the evidence was that the claimant was not behaving without reasonable care either in his speed or the positioning of his vehicle relative to that of the defendant. However, he was sufficiently close to the vehicle in front to have to react very quickly to the collision and explosion and this was reflected in a 20 per cent reduction in damages.

There are certain situations where the courts will be reluctant to ascribe contributory negligence to the claimant. In the case of children it is not certain whether there is an age below which a child cannot be guilty of contributory negligence. In **Gough v Thorne [1966]** a girl of 13½ years of age was not contributorily negligent when she crossed the road in reliance on the encouragement of a lorry driver to

do so. Similarly, in **Yachuk and Another v Oliver Blais Co Ltd [1949]** a nine-year-old boy was not expected to understand the dangers of petrol. He had bought the petrol to play with and was burnt when it ignited. Even if a minor were to be considered contributory negligent, he should be judged by the standard of a reasonably prudent child or young person of that age and not against the standard of a reasonably prudent adult. In determining the contributory negligence of a child in traffic accidents, the court will take into account that the child is a "vulnerable road user" and will consider what is just and equitable in determining the child's share of responsibility for the accident. In **Russell v Smith [2003]** it was held that while a 10-year-old cyclist was primarily responsible for the accident, it was just and equitable to reduce the damages only by 50 per cent to reflect the claimant's age.

The courts will also be slow to ascribe contributory negligence to a workman injured in an accident at work. In these cases regard should be had to the dulling of the sense of danger through familiarity, repetition, noise, confusion, fatigue and preoccupation with work: **Caswell v Powell Duffryn Collieries [1940]. In Badger v Ministry of Defence [2005**], however, the claimant's husband died after being exposed to asbestos by the Ministry of Defence. In the claim for damages, the court found that the husband's smoking had also contributed to his lung cancer and reduced the damages by 20 per cent to reflect his contributory negligence.

Where a person attempts to rescue another and is injured in the attempt, the courts will be reluctant to find that the rescuer was careless for his own safety. In **Harrison v British Railways Board [1981**], however, the claimant, a guard on a train, was injured when attempting to pull a passenger on to a moving train. As the guard had contravened his employer's instructions to apply the brake in such cases, he was found to have been contributory negligent.

If the defendant's negligence has placed the claimant in a dilemma, the claimant may not be regarded as contributory negligent if he acts in a reasonable way and is injured attempting to avoid greater injury: **Jones v Boyce (see 5.2.1**). To take advantage of this principle, the claimant must show that he was placed in a dilemma by the defendant's negligence, that he acted in reasonable apprehension of danger and that the method by which he attempted to avoid danger was a reasonable one. In contrast with **Jones v Boyce, the claimant in Sayers v Harlow Urban District Council [1958]** was found to be 25 per cent contributory negligent when she attempted to climb out of the public lavatory in which she was trapped, by putting her weight briefly on the toilet roll holder. In Brandon v Osborne Garrett & Co Ltd [1924J, by contrast, owing to the defendant's negligence, broken glass fell from the roof of a shop imperiling the claimant's husband. The claimant grabbed her husband and injured herself trying to take him to a place of safety. Had she remained where she was, she would not have been injured. She was held not to have been contributory negligent.

5.2.3 Causation

It is not necessary that the claimant's negligence contributes to the accident. The negligence must, however, **contribute to the damage** that he has suffered. In **Jones v Livox Quarries [1952]** the claimant was riding on the tow bar of a vehicle when another vehicle negligently ran into it and injured him. His damages were reduced as he was partly responsible for his own injuries. This was a risk to which he had exposed himself by his own negligence.

The same principle applies where the claimant is involved in a car crash caused by negligence and is not wearing a seat belt. If he would have suffered no injuries or reduced injuries had he been wearing a seat belt, his damages will be reduced. If he accepts a lift in a car knowing that the driver is intoxicated, this amounts to contributory negligence: **Owens v Brimmell [1977].**

An imprudent lending policy can constitute contributory negligence - for example, where a loan was made in reliance upon a negligent valuation of the security for it: **Platform Home Loans v Oyston Shipways Ltd [1999].** In this case the claimant lender had imprudently made a non-status loan of a sum which represented 70 per cent of the value of the property used as security for the loan. This lack of care for its own interests was determined to represent 20 per cent contributory negligence. The House of Lords has stated that the reduction for contributory negligence should be applied to the lender's "basic" loss before any further reductions based upon the **South Australia Asset Management Co v York Montague [1996]** case are made (see **5.2.2.3**). Both cases are concerned with the losses caused by reliance on the negligent overvaluation of security for a loan. Two steps are involved in the calculation of the claimant's loss. The first is to establish the "basic" loss (i.e. that which is caused by the defendant's negligence and which meets the test of remoteness of damage) and the second is to check whether this sum exceeds the amount of the overvaluation. If it does, the amount recoverable is limited to the amount of the overvaluation. An example can be provided by figures similar to those in **Platform Home Loans** itself. The claimant's "basic" loss was £600,000 but the overvaluation was only £500,000. If the 20 per cent reduction for contributory negligence was applied to the "basic" loss, the resulting figure of £490,000 (approximately) would still be within the overvaluation and therefore recoverable. If the reduction was applied to the overvaluation figure itself, however, the claimant would be entitled to £400,000 only. The House of Lords did not regard this latter outcome as just and equitable, given that it was the **totality** of the claimant's loss to which the contributory negligence calculation should be applied.

LR(CN)A 1945 did not change the rules for determining whether contributory negligence existed or when the claimant's negligence would be the sole cause of his injuries. In **Stapley v Gypsum Mines [1953]**, Sand D, two miners of equal status employed in the defendants' mine, were ordered to bring down a dangerous part of the roof and not to resume their normal work until they had done so. Their attempt was unsuccessful, so they jointly decided to abandon it and resume their normal work. The roof fell and S was killed. His widow sued the defendants as being vicariously liable for D's negligence. It was held that D's negligence in disobeying orders was a cause of S's death although S himself was guilty of contributory negligence and the damages were reduced by 80 per cent.

5.2.4 Apportionment

sl(1) LR(CN)A 1945 provides that the claimant's damages shall be reduced by such extent as the court thinks is just and equitable having regard to the claimant's share in the responsibility for the damage. In determining what this responsibility is, the courts consider both causative potency and comparative blameworthiness.

As **Stapley** shows, it is quite possible for the claimant to bear the "lion's share" of the responsibility for the accident. If the claimant is totally to blame for the accident, a c6urt cannot apportion responsibility between claimant and defendant. There cannot be a finding of 100 per cent contributory negligence:

Anderson v Newham College [2003].

In **Fitzgerald v Lane [1988]** the claimant had stepped into the traffic on a busy road. He was struck by the first defendant's car and deflected into the path of the second defendant's car. Both defendants were negligent and the claimant was contributory negligent. The trial judge allocated a third of the responsibility to each party and reduced damages by one third. The House of Lords held that this was the wrong approach and that, where the claimant's fault is a cause of the accident, the court should first determine the proportion of his blame and then determine the contributions of the separate tortfeasors. The claimant was considered to be just as much to blame as the two defendants and his damages were reduced by 50 per cent. The remaining 50 per cent was divided equally between the two drivers.

Bland v Morris [2006] reminds us that every assessment of apportionment of blame depends on the specific facts of the case. In **Bland** the coach driver (M) was found to be two thirds to blame for the collision in which her coach was damaged and several passengers on the coach were either killed or injured. M pulled her coach onto the side of the road and put on her hazard lights after a minor traffic incident. She did not, however, move her passengers off the coach, which was then hit by a lorry driven by B. M hoped to rely on the argument that the following driver was normally held to be the more to blame for such a collision between two motor vehicles. The Court of Appeal acknowledged the normal rule but also identified the additional element on the facts of the current case that M had a separate, specific and direct responsibility for the people on her coach, which made her proportion of responsibility for their injuries the greater.

5.3 Volenti non fit injuria

This Latin phrase has been translated as "one who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong", per Lord Herschell in **Smith v Baker [1891].** *Volenti* is a complete defence to the claimant's action. A person can consent to an act which would otherwise amount to the commission of a tort. A tort must have been committed before the defence becomes relevant. In **Wooldridge v Sumner [1963**] the Court of Appeal was concerned with injury to spectators at a sporting event allegedly caused by the negligence of a participant. The court stated that before *volenti* became relevant, the defendant had to be in breach of duty. The standard of care owed by a participant to a spectator was not to act with reckless disregard for the spectator's safety. The defendant was competing in a horse show. He took the wrong line whilst galloping around the arena and caused the claimant to think that he was in the horse's path. The claimant fell into the horse's path, whilst attempting to pull another spectator out of the way. Despite the temporary lapse of skill and control on the defendant's part, he was not negligent. As no tort had been committed on the facts, *volenti* was irrelevant.

In the case of ir'1tentional torts, such as trespass to the person, the defence is called simply **consent.** A patient who signs a consent form for an operation cannot sue the surgeon who carried out the operation for battery. In trespass to land the consent is described as "leave and licence" (i.e. permission) given expressly or impliedly to a person to enter land or premises.

In relation to negligence the defence takes the form of assumption of risk. The application of *volenti* is controversial and some people take the view that it is only applicable in cases of express consent, but see

ICI v Shatwell [1965] at Mistake for a situation in which consent was implied from the circumstances. The defence of *volenti* was accepted in **Blake v Galloway [2004].** A group of boys playing with bark chippings threw the chippings at each other and a chip thrown by the defendant injured the claimant in the eye. The Court of Appeal found that by participating in the game the claimant had impliedly consented to the risk of a blow to his body, providing that the bark was thrown in accordance with the tacit understandings or conventions of the game.

5.3.1 Agreement

The defendant must establish that the claimant consented to the legal risk, that is, the risk of being the victim of a tort for which there will be no claim at law. If there is a contract between the parties, the defendant may attempt to exclude liability for negligence. Any such agreement may, however, be subject to the terms of the **Unfair Contract Terms Act 1977** and the **Unfair Terms in Consumer Contracts Regulations 1999**. A contractual relationship between the parties is not essential. In **Buckpitt v Oates [1968]** the claimant accepted a lift in a car canying a notice stating that passengers travelled at their own risk. This amounted to an express agreement. (**NB** Such agreements are now void under **s149 Road Traffic Act 1988 (RTA 1988).)**

The courts have been reluctant to imply an agreement that the claimant will accept the risk of injury. In cases of passengers accepting lifts with drunken drivers the courts have moved from a position that they may be prepared to infer assumption of risk **(Dann v Hamilton [1939])** to one where they will not **(Owens v Brimmell [1977]**). Parliament requires those persons using motor vehicles to have third party insurance cover. In support of this policy, **s149 RTA 1988** (see above) provides that antecedent agreements or understandings shall not be effective to negate or restrict such compulsory insurance cover. Dashboard notices are obviously covered by this provision but the question remains as to whether *volenti* could be implied from the general circumstances. In **Pitts v Hunt [1990]** the Court of Appeal considered the claim of a pillion passenger seriously injured in an accident involving the motorcycle on which he was riding. His friend (the driver) and the claimant had been drinking heavily and the claimant encouraged the driver to ride in a reckless fashion. The Court of Appeal was satisfied that the claimant was *volens* (had consented) but the statutory provision applicable (then s148(3) Road Traffic Act 1972) precluded the defence being used. Instead, the defence of ex turpicausa non orituractio (see **5.5)** was used successfully and the claim defeated.

There will, however, be some situations to which the compulsory third party insurance provisions do not apply. In **Morris v Murray [1990]** the claimant agreed to be flown in the defendant's light aeroplane, piloted by the defendant. Both men had been drinking heavily. The defendant crashed the plane, killing himself and injuring the claimant. The defence of *volenti* was successfully pleaded by the defendant's estate. The words of Asquith] in **Dann v Hamilton** were applied.

"There may be cases in which the drunkenness of the driver at the material time is so extre111e and so glaring that to accept a lift from him is like engaging in an intrinsically and obviously dangerous occupation, inter-meddling with an unexploded bomb or walking on the edge of an unfenced cliff"

One case in which the court was prepared to imply an agreement was **ICI v Shatwell [1965]**. Two brothers working for ICI as shot-firers jointly agreed to disobey their employer's orders and statutory

regulations. They tested detonators without taking the required precautions and the claimant (one of the brothers) was injured in an explosion. ICI was sued as being vicariously liable for the **other brother's breach of statutory duty**. As the defence of *volenti* would have been available to the brother if he had been sued, it was available to the defendant. The court was prepared to imply an agreement from the facts. Students should note that the defence of *volenti* is not available to an employer when sued for his **own** breach of statutory duty.

Can the defence of *volenti* be established when the claimant encounters an already existing danger created by the negligence of the defendant? Certain statutory provisions appear to assume that this is the case: **s2(5) Occupiers' Liability Act 1957 and s5(2) Animals Act 1971.**

5.3.2 Knowledge

The maxim is *volenti non fit injuria*. Mere **knowledge** of the danger does not establish the defence; the claimant must have **consented** to a known risk. In **Smith v Baker [1891]** the claimant was employed by the defendants in a quarry. He was told to work under a crane lifting heavy stones which sometimes fell. A stone fell and injured him. The doctrine of *volenti* was held to have no application to harm sustained from the negligence of employers. Although the worker knew the extent of the risk of harm to himself that the work entailed, the reason he kept working was to keep his job and not because he consented to the risk.

The above decision meant that *volenti* would rarely be available to an employer sued by his employee. A limited exception to this principle was created by the House of Lords in the unique facts of **ICI v Shatwell (see 5.3.1).**

5.3.3 Voluntariness

For *volenti* to apply it is essential that the claimant voluntarily submitted to the risk of injury. This can be seen in the employer-employee cases such as **Smith v Baker** and **ICI v Shatwell**. In the former type of case the employee is seen as having no genuine choice other than to continue working. In the latter the employee deliberately adopts a dangerous practice. A free choice between different courses of action is essential.

The courts have also been reluctant to find that a rescuer acts voluntarily and is therefore *valens* to the risk. In **Haynes v Harwood [1935]** the claimant policeman was injured when horses, which had been negligently left unattended, bolted and he attempted to stop them. As bystanders were in danger, it was held that the policeman had not exercised that freedom of choice which was essential to the defence of *volenti*. If no one is in any real danger then *volenti*is applicable: **Cutler v United Dairies [1933].** The principle does not only apply to professional rescuers, it applies to anyone who attempts a rescue with a reasonable chance of success: **Chadwick v British Transport Commission [1967**].

Those who become "Lloyd's names" might appear to have voluntarily exposed themselves to substantial risk of unlimited financial loss, but it was held in **Deeny v Gooda Walker Ltd [1995]** that such investors can still expect an underwriter acting as their] agent to exercise due skill and care in calculating exposure to risk and advising upon appropriate reinsurance of risks. On the facts of the case the names proved

breach of duty of care and were awarded compensation. The receipt of these damages has since been held by the House of Lords to be taxable in the hands of the names and the defendant cannot reduce the amounts payable by an amount equal to the tax: **Deeny v Gooda Walker (No.2) [1996].**

5.4 The relationship between contributory negligence and *volenti*

5.4.1 A comparison

Contributory negligence (CN) Volenti non fit injuria	
basis: **s1(1) LR(CN)A 1945** Total defence if successfully	established by the defendant.
and claimant: **s4 LR (CN)A 1945.** Can be **express** but usually **implied**	consent on the claimant's part to run a specific risk created by the tort committed by the defendant.
on claimant's part for his **own** safety in the context of the danger created by the defendant. Evidence of both knowledge of the	risk posed by the defendant **and** a Willingness to take that risk.
the damage caused to the claimant must exist whether the CN relates to the accident itself, the extent of the damage or both. Actionable wrongdoing on the part	of the defendant must be shown.

5.4.2 The rescue cases

Where A's negligence places B in danger and C is physically injured whilst attempting or effecting a rescue of B, three legal arguments may be relevant. These are *volenti*, contributory negligence and causation.

First, the defence of *volenti* will generally not be available against a rescuer because the *bonafide* rescuer is motivated by the desire to assist the victim and cannot be said to choose the risk as such (see **5.3.3).**

Second, the courts will be reluctant to find that a rescuer has been contributory negligent because the rescuer acts in the "agony of the moment" in a dangerous situation created (usually) by the defendant.

The situation is similar where the person who has been rescued is the person who has been negligent: **Baker v Hopkins [1959**]. Although in general no one owes a duty to anyone else to preserve his own safety, yet if by his own carelessness a man puts himself into a position of peril of a kind that invites rescue, he would in law be liable for any injury caused to someone whom he ought to have foreseen would attempt to come to his aid (Barty J). An interesting exception to the general rule is the duty of masters of ships at sea to rescue, if this is possible without serious risk to their own ships, persons in danger at sea (see **s6 Maritime Conventions Act 1911**).

In *Baker v Hopkins* Dr. Baker went down a well in an attempt to assist two workmen who had entered the well and thus exposed themselves to the risk of carbon monoxide poisoning. All three men died and successful actions were brought against the employer of the workmen. (One of the deceased employees was held to be 10 per cent contributory negligent for having entered the well against instructions.) The duty owed by the negligent person is owed directly to the rescuer and is not dependent on there being a duty to the person in danger.

Third, the rescuer's action may be regarded as a break in the chain of causation, but as it is foreseeable that if a person is injured someone may attempt a rescue, this is unlikely.

Students are reminded that, where the only harm suffered by the rescuer is psychiatric damage, a claim in negligence will be subject to the authorities set out in **Chapter 8.**

5.5 Ex turpicausa

The courts may deny a cause of action to a claimant who suffers damage while participating in a criminal activity. In ***Ashton v Turner [1981]*** the claimant and defendant made a getaway from a robbery in a car driven by the defendant. The car crashed and the claimant was injured. It was held that no duty of care was owed to the claimant on the grounds of *ex turpicausa*. See also ***Pitts v Hunt [1990]*** at **5.3.1.**

It is not every criminal offence that will trigger the maxim. See ***Revill v Newbery [1996]*** at **6.12.5.** If a driver is involved in an accident while speeding, he is unlikely to be met with it. Likewise, it is not every action undertaken during a criminal activity that will be subject to the defence. If A and B are blowing open a safe and B handles the explosives negligently with the result that A is injured, A has no action. But if B steals A's wallet on the way to commit the burglary, A would have an action. The underlying justification is public policy, that is, that the courts will not assist a person who is guilty of illegal conduct. To do so would be an affront to the public conscience in that it might appear to encourage the claimant, or others, to engage in similar illegal activities.

Public policy prevented a person who had been convicted of a serious criminal offence from suing the health authority which, he claimed, failed to treat his mental condition with reasonable care, prior to the offence being committed. The claimant in ***Clunis v Camden and Islington Health Authority [1998]*** had been convicted of manslaughter after being discharged from one of the defendant's hospitals. MrClunis' counsel tried to convince the Court of Appeal that the maxim *ex turpicausa non orituractio*had no

application in a tort action and that his client's cause of action did not depend upon proof that he was guilty of manslaughter - rather that the doctors should have reasonably foreseen the circumstances in which he was likely to commit an act of homicide. Their Lordships held that the maxim did provide a valid answer to the claimant's claim since the central issue did relate to the claimant's own criminal activity. *Ex turpicausa*also provided a defence in an action by the escaping criminal in ***Vellino v Chief Constable of Greater Manchester [2002].***

5.6 Mistake

Mistake is generally no defence in torts of strict liability or in negligence. It is clearly no defence to an action in trespass to land or trespass to goods (and conversion). Its relevance as a defence is limited to cases where "reasonableness" is required, for acting upon a reasonable mistake of fact may then be important. So, in the tort of false imprisonment, an arrest may be lawful even though based on a mistaken belief. The provisions relating to powers of arrest without warrant are now mainly contained in the **Police and Criminal Evidence Act 1984.** In deceit, there is no liability if the defendant honestly believes in the truth of the statement. Mistake will not necessarily provide a defence in negligence as the standard of care expected of the defendant is that of the reasonable, not the honest, man.

5.7 Inevitable accident

An accident will be inevitable where it was not intended by the defendant and could not have been avoided by the exercise of reasonable care. Thus, in fault based torts, it means no more than that the defendant was not at fault. As the burden of proof is on the claimant to show fault, inevitable accident is not truly a "defence". Equally, inevitable accident is not a defence to strict liability torts because the defendant is liable whether or not he has taken reasonable care.

5.8 Summary

(1) The court will take into account the behaviour of the claimant when determining the damages which the defendant should pay. The burden of establishing the defences on the balance of probabilities lies on the defendant.

(2) Where the claimant has also been negligent, the defendant may argue in defence that there has been contributory negligence on the part of the claimant. Contributory negligence is a partial defence and will serve to reduce the damages which the defendant is required to pay. It can never be a complete defence.

(3) The test for contributory negligence is determined by statute. Contributory negligence will be determined by what the court thinks equitable having regard to the claimant's share in the responsibility for the damage.

(4) The claimant need not have contributed to the accident itself. So long as the claimant's behaviour made damage more likely, his behaviour will amount to contributory negligence.

(5) If the claimant has impliedly consented to the risk of harm, the defence of *volenti non fit injuria*will constitute a complete defence to an action against him. This defence might apply, for example, to someone injured within the rules of a sporting match.

(6) Where the claimant has been given notice of the defendant's wish to have liability excluded, then the defence of express consent might apply. This would occur, for example, when the exclusion of liability appears on a sign on the entrance to property, or on the back of a transport ticket. Notice of exclusion of liability must be clearly worded, provided to the claimant before he is asked to take the risk and the claimant must be in a position freely to choose whether to take the risk. Any ambiguity in the wording will be construed against the defendant.

(7) Limits have been placed by statute on the extent to which a defendant can exclude liability for negligence. If the defendant is operating a business, he cannot exclude liability for negligence resulting in personal injury. He can exclude liability for property damage or economic loss only when it is reasonable in all the circumstances to do so.

(8) Where the claimant was engaged in an illegal or immoral act when the injury occurred, the defence of *ex turpicausa* might apply to provide a complete defence. For example, if the defendant were to slip on the floor while committing a burglary, the defence of *ex turpicausa* would prevent him from recovering damages from the occupier of the premises. The act of the claimant must amount to a serious crime or act of immorality for the defence to apply.