



# Application of the tort of negligence and its defences.

UNIT 5: ASPECTS OF CONTRACT AND NEGLIGENCE

A.C. 4.1

# What is the Tort of negligence.

## Questions to guide your definition.

1. Is this a deliberate act?
2. Who are the parties involved?
3. Does a special relationship need to exist between these parties?
4. Does the tortfeasor have a duty of care towards the victim?
5. Was the duty of care breached?
6. What are the results of such breach?

# Defences for Negligence

- ▶ To successfully defend against a negligence suit, the defendant will try to negate one of the elements of the plaintiff's cause of action. In other words, the defendant introduces evidence that he or she did not owe a duty to the plaintiff; exercised reasonable care; did not cause the plaintiff's damages; and so forth. In addition, a defendant may rely on one of a few doctrines that may eliminate or limit liability based on alleged negligence.
- ▶ There are three defences for the tort of Negligence.
- ▶ [http://catalogue.pearsoned.co.uk/assets/hip/gb/hip\\_gb\\_pearsonhighered/samplechapter/Cooke\\_C09.pdf](http://catalogue.pearsoned.co.uk/assets/hip/gb/hip_gb_pearsonhighered/samplechapter/Cooke_C09.pdf)

# Three Defences.

- ▶ **Volenti Non Fit Injuria:** This is a complete defence to an action. It means that the Claimant voluntarily agrees to undertake the legal risk of harm at his own expense.
- ▶ **Contributory Negligence:** This 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:** This means that from a bad cause no action arises. A person who is involved in a criminal act the time they are injured may be denied an action

# What would be your advise in this situation?

## Scenario 1

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.

## Scenario 2

What if Brian and John were engaged in a get-away from the scene of a crime which they committed at the time of the accident?

# Volenti Non Fit Injuria

Before this defence can be used, it must be shown that the Defendant has committed a tort.

## ***Wooldridge v Summer* [1963] 2 QB 43**

### **Facts**

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

### **Held**

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*.

But note the situation in employer- employee situations.

***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*.

# Contributory Negligence

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.

## Elements

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

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- ▶ 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.

# 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.

## Rescue Situations

- ▶ 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.

### ***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.
- ▶ <http://torts.uslegal.com/negligence/defenses-to-negligence/>
- ▶ <http://injury.findlaw.com/accident-injury-law/defenses-to-negligence-claims.html>