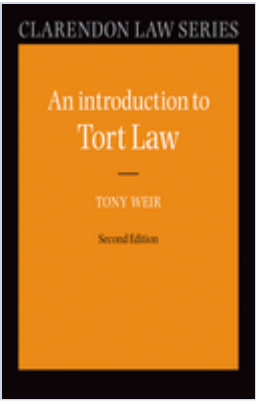

An Introduction to Tort Law (2nd edn)
Tony Weir

8. Contributory Negligence

Tony Weir, Fellow of Trinity College, Cambridge

https://doi.org/10.1093/he/9780199290376.003.0008
Published in print: 07 September 2006
Published online: June 2015

Abstract

Celebrated for their conceptual clarity, titles in the Clarendon Law Series offer concise, accessible overviews of major fields of law and legal thought. This chapter discusses the law on contributory negligence. In England, contributory negligence denotes only the negligence of the claimant himself, not that of a third party whose negligence contributes to the occurrence of the harm. Under the Contributory Negligence Act 1945, the claimant's damages are reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage. The chapter also deals with contributory negligence as a defence that the defendant must plead and prove. It considers two defences. The first is that the claimant consented to the harmful conduct or accepted the risk of ensuing damage; the second that the claim arose out of illicit conduct on the part of the claimant.

Keywords: tort law, Contributory Negligence Act, claimants, damages, defence

It used to be the rule at common law that if your own carelessness had contributed to your injury, your claim in negligence was completely barred, even if the defendant's fault and contribution were much greater than your own. This rule was very harsh, since most accidents, especially those at work, would be avoided if the victim had been more careful, and even if the accident itself cannot be prevented, the harm resulting from it can be reduced by sensible precautions, such as wearing a seat-belt or a hard hat. In 1945 this vicious old rule was replaced by statute.[1] Nowadays damages for an injury are to be reduced to the extent that the claimant's fault contributed to it. 'Contributory negligence' is thus only a partial defence—it affects the claimant's

quantum of recovery rather than the defendant's liability—but it is raised very frequently, and has a great impact on the operation of the law. Note that while in the United States ' contributory negligence' refers to the old rule, now generally replaced there by 'comparative negligence', in England 'contributory negligence' denotes only the negligence of the claimant himself, not that of a third party whose negligence contributes to the occurrence of the harm.

According to the 1945 Act the claimant's damages are to be reduced 'to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage'. When both parties have been careless, there is no real difficulty, but what if the defendant is either strictly liable and not careless at all, or else worse than careless, that is, deceitful or wicked? The courts apply the Act in the first case but not in the second. As to the case where the defendant is strictly liable, the argument has been heard, and sometimes accepted in other systems, that if the defendant's fault is irrelevant to his liability, the claimant's fault should be irrelevant to his recovery: in France, indeed, this has led to the abolition of any reduction of damages in traffic accidents (unless the claimant was himself at the wheel), and in the United States to problems where a thoughtless consumer is injured by a defective product. The question does not seem to bother our courts, who operate on the basis that since the defendant would be liable in full had the victim not contributed to the harm, one simply docks the victim's damages by the amount of his contribution. As to the case where the defendant was very wicked, the courts hold that damages are not to be reduced:[2] the con-man can hardly complain that it was stupid of his dupe to be taken in.

It is not only under the Act that a claimant's conduct may affect his claim. If his conduct was voluntary, one must consider the possibility that it constitutes a *novus actus interveniens* which 'breaks the chain of causation' with the result that the defendant, though at fault, is not liable at all. Thus when a person broke his right leg by jumping downstairs when his left leg, defective owing to a prior injury which the defendant had paid for, 'went' under him, the House of Lords dismissed his claim.[3] The House has been criticised for not awarding reduced damages under the 1945 Act, a criticism quite in line with the tendency to resort to the Act in order to split the difference between the parties rather than adopt the 'all or nothing' approach characteristic of the common law. Indeed, if we ignore the established doctrine of mitigation of loss and the unorthodox concept of 'proportional damages' embraced by the Court of Appeal, the Act provides the only means by which a court can award reduced damages. Accordingly, when judges feel diffident about awarding either full damages or none at all they increasingly resort to the Act, however inappropriately.

One cannot really object to the use of the Act to reduce the damages of the victim of exposure to asbestos whose continual smoking of cigarettes contributed to his early demise from lung cancer.[4] There the defendant's breach of duty actually contributed to the harm, but where liability arises only under *Fairchild* (for contributing to the risk of harm rather than to the harm itself) the Act is inapplicable since the defendant now pays only for his own contribution to the risk, not for the whole harm less the claimant's contribution to it.[5] But in other cases the invocation of the Act has been very objectionable. In one case a burglar, shot but not aimed at by the defendant occupier, was awarded reduced damages, whereas his claim should have been dismissed altogether on the grounds that he was a criminal,[6] especially as the House of Lords had held that damages were not to be reduced just because the claimant was trespassing, but only if he should have realised that he was exposing himself to danger.[7] In another case, Sedley LJ indulged in a cadenza to the effect that the Act should always be applied in claims by criminal claimants because it produces a fairer result.[8] Again,

suppose that by assaulting you, I provoke a fist-fight and you go beyond self-defence by striking me with a knuckle-duster: do I get full damages or should they be reduced? The courts have split on this issue.[9] Another unresolved question is whether damages may be reduced by 100% under the Act. This also arises from a reluctance to award nothing: 20% is doubtless fairer (and carries entitlement to costs!).

The House of Lords has even contrived to hold that it was contributory negligence for a detainee to commit suicide, the occasion for which was presented by the very slight negligence of the police.[10] The case was remarkable in that in the Court of Appeal one judge would have made no reduction at all, another would have reduced the claim to zero, and the third opted for a reduction of 50%, which was upheld by the House of Lords. Such unpredictability as regards quantum is unsatisfactory, for although the outcome of a lawsuit is never certain, it is important to reduce the uncertainties as far as possible, and there is no doubt that if an increasing number of careless claimants win nowadays, it is less clear how much they will receive. If litigants are quite unable to predict what damages may be awarded, they can hardly settle their differences, and they are encouraged to settle, not least by the rule that if an offer is made and rejected which later proves adequate, the costs of the unnecessary trial and expenses incurred after the offer was made must all be borne by the party unwise enough to reject it, even though the eventual decision on liability was in his favour.

One effect of this is that since far more turns on a successful appeal than simply the amount by which the trial judge's award may be increased or diminished, appeals on apportionment are brought quite frequently. The Court of Appeal keeps saying that it will rarely interfere, but in fact it does so quite often. On one day it increased from 50% to 75% the reduction made in the damages awarded when a pedal cyclist travelling in the wrong direction was struck by a motorist emerging from his driveway[11] and lowered to 50% the reduction in the damages awarded to a 13 year old boy who filched a drum of waste solvent put out for collection and, despite warnings from his friends, set fire to it and was burned in the ensuing explosion.[12] Generally the courts are fairly tender to silly young victims,[13] but they have not followed the recommendation of the Pearson Commission in 1976 that no reduction should be made if a child injured in a highway accident is as young as 12.

Third Parties

The presence of a third party on either side leads to the usual complications. The claimant is affected by the contributory fault of anyone for whom he would have been vicariously liable. Thus in the case where Murphie's Austin Healey, being driven to Monte Carlo at his request by Ormrod, was damaged in a collision with a bus, any claim Murphie might have had against the bus company would have been reduced to the extent of Ormrod's negligence.[14] That would have been a case of property damage, unusual in that the party vicariously liable was an individual, and not a corporate employer. The principle is generally inapplicable in claims for personal injuries, for the fault of the driver is not imputable to an injured passenger, unless the driver is his 'agent', nor, contrary to what one might expect, is the fault of a parent imputable to a child injured through the parent's failure to look after him.[15] By contrast, however, if a person's own fault contributes to his death, his relatives' claim under the Fatal Accidents Act will be reduced, and the person who gratuitously cares for an injured victim will get less if the victim himself contributed to the injury, because it is only in the victim's own claim that any sum for the carer may be awarded.

In cases where more than one tortfeasor is liable for the harm to which the careless victim has himself contributed, the apportionment must be effected between the three parties. Between claimant and tortfeasors the apportionment is done under the Contributory Negligence Act 1945, while as between tortfeasors liable for the same damage it is done under the Contribution Act 1978. Fortunately both statutes provide that the apportionment is to be what is 'just and equitable'. The proper way to proceed is first to ask how much the claimant himself contributed to the harm, as compared with the total contributions of those found liable to him, and to reduce his damages to the extent of his contribution relative to theirs. He then gets judgment for the balance against each of the tortfeasors and can proceed to execute against either.[16] Thus if V is one-third to blame and T1 and T2 are respectively one half and one sixth to blame, V will get judgment against both defendants for two-thirds of his harm. It is true that though V was twice as much to blame as T2, he can claim two-thirds from him; but if T2 pays the two-thirds he can claim three quarters of that from T1, who was three times as much to blame.

The Act Inapplicable

Although 'It's your own fault' would seem to be a powerful riposte to any claim, there are certain situations where the defence is not available. Suppose I leave my car on the street unlocked with the keys in the ignition and it is stolen and sold by the thief. The law is that I can claim the full value from the blameless purchaser, even if he no longer has the car. This unfair common law rule is confirmed by the deliberate decision of the legislature to provide that 'Contributory negligence is no defence in proceedings founded on conversion, or on intentional trespass to goods'.[17] It was soon realised that this had to be changed so far as cheques were concerned, for it was manifestly unacceptable to make a bank liable for paying out on a cheque which the drawer had drawn so carelessly as to facilitate fraud.

By its very terms the Contributory Negligence Act applies only in tort cases. Thus it is no answer to a claim for the return of money paid by mistake that it was perfectly idiotic of the claimant to make the mistake.[18] Nor does the Act apply where the claim is based on the defendant's breach of contract,[19] unless the claim could equally well have been based on tort.[20] The strange result of this is that the careless claimant can recover full damages only where his contractor was not negligent at all. The Law Commission has made proposals.

Further Observations

Two further observations are in point. The first is that whenever damages are reduced in a personal injury claim, it is the claimant, an uninsured human being, who bears the loss to the extent of the reduction, rather the defendant's insurance company. Secondly, unlike damages, social security payments are not reduced by contributory negligence, and this is of some importance in that any relevant social security payments the claimant has received for the first five years will be deducted in full from his damages for lost earnings, reduced as they are by his contributory negligence, so that he may be left with little or nothing (apart from his (reduced) damages for pain and suffering and loss of amenity).

Mitigation of Damage

The 1945 Act is concerned with the effect of the claimant having made a causal contribution to the initial harm, but there is another principle, of judicial origin, whereby the damages which may be claimed for the consequences of the initial harm may be reduced. The principle is that you cannot claim compensation for items of damage you could reasonably have avoided or for expenditure needlessly incurred, and it applies in all claims for damages, whatever their basis, though not to claims for debts. It is always called the 'duty to mitigate the damage', though of course it is not a 'duty' such that you can be sued for breach of it, any more than contributory negligence itself is a breach of duty. The courts have room to play with in determining what is reasonable and what is not. A woman who finds herself pregnant as a result of a botched sterilisation operation clearly cannot be expected to have an abortion in order to reduce the damages payable by the doctor, but in a quite different case the Court of Appeal, reversing the county court judge, held that the owner of a car which he loved could not charge the person who damaged it for the cost of repairs when the repairs cost more than it could be sold for once it was mended.[21] More recently the House of Lords dealt with a case where a builder had installed a swimming pool somewhat shallower than specified but no less valuable for that; although the customer was refused the cost of replacement as being unreasonable, he was allowed a modest sum since its depth was particularly important to him.[22] Surely no less should be allowed to a person whose dearest chattel has been negligently wrecked, though insurance companies would deplore such a humane development.

Other Defences

Contributory negligence is unquestionably a defence, if only a partial one: it is for the defendant to plead and prove it. There are other defences, some of which have been glanced at, but there are not many. The reason there are not many defences to a claim in negligence is that before any defence is required the claimant must have shown that the defendant behaved unreasonably in breach of duty and that this contributed to harm which was reasonably foreseeable; if all this is established, extenuation is bound to be difficult, especially if considerations of what is ' fair just and reasonable' are taken into account on the preliminary question of the duty of care. However, two defences must be considered. The first is that the claimant consented to the harmful conduct or accepted the risk of ensuing damage, the second that the claim arose out of illicit conduct on the part of the claimant. Until recently these defences were respectively known by the Latin tags *volenti non fit injuria* and *ex turpi causa non oritur actio*.

Consent

If the claimant has, as against the defendant, freely and lucidly accepted the risk of injury, it does not seem right for the law to shift its cost back to the defendant. The risk of not being paid for any injury is often covered by a contract between the parties. Here the Unfair Contract Terms Act 1977 comes into play and invalidates any clause in a contract or notice which purports to exempt a business, a professional, or a public

authority from liability for personal injury or death negligently caused. This is doubtless because such consent is deemed to have been extracted rather than voluntarily given, as in the case of a lion-tamer in the defendant's employ.[23] As regards other types of harm, however, such a clause or notice may, if reasonable, be effective. Thus a disclaimer in a car park is likely to be upheld, though the House of Lords has held that a disclaimer attached to a valuation of a modest house does not protect the negligent valuer from a claim for economic loss.[24] As between individuals, the defence is excluded where the claimant is a passenger in the defendant's motor vehicle.[25] Can the risk be taken implicitly? It would be surprising if it could not, but the courts are evidently reluctant to apply this defence. If the court can hold that it was unreasonable of the claimant to run the risk in question, it can take refuge in the flexible, because partial, defence of contributory negligence and split the difference. Yet the defence was applied in a case where, after heavy drinking, the claimant agreed to go up in a plane piloted by his drinking partner: drunk as he was, he must have known that the defendant was incapable and was held to have taken the risk.[26] By contrast the defence was not applied where a person on remand committed suicide by seizing the opportunity provided by the negligence of the police in leaving a flap in his cell door open.[27] A clearer case of harm voluntarily espoused would be hard to imagine—this was not even a case of accepting a risk yet to eventuate, but of embracing the very situation presented by past negligence—but the House accepted the unwise concession of the police that they were under a duty to take care to prevent his committing suicide, and held the defence inapplicable where the harm was the very thing the defendants were under a duty to take care to prevent. The fact is that the courts are uneasy about landing—or leaving—people with the consequences of their deliberate choices. Whether this is consistent with personal autonomy is a question: the Court of Appeal thought not when a soldier alleged that it was a breach of the Army's duty to him to allow him to drink himself into a stupor.[28]

Illegality

Although, as we have seen, a defendant is not liable merely because his conduct was illegal, the illegal nature of the claimant's conduct may in certain circumstances bar his claim in tort, and not just in negligence. Thus when a youth riding pillion on a motorcycle on the way back from a club urged the driver, whom he knew to be unlicensed, to drive recklessly on the highway and was injured in consequence, his claim (which could not be defeated by *volenti non fit injuria* by reason of the Road Traffic Act) was dismissed on the ground that his injury arose out of his distinctly illegal behaviour.[29] As against that, a burglar who was shot, though not aimed at, by a householder whose shed he was trying, yet again, to burgle was awarded damages, subject to contributory negligence (!). This decision caused public outrage, but no matter: the House of Lords had seen fit to hold, in a case concerned with property rights, that it is of no concern to the law whether or not a decision causes public outrage,[30] the public presumably having no sense of what is fair, just, and reasonable. Even so, the Court of Appeal has subsequently held that a hunt saboteur who violently assaulted a farmer had no claim when struck a blow which proved unexpectedly serious in its effects, on the alternative grounds that the blow was subjectively not unreasonable or that the claimant's claim was barred by his illegal conduct in provoking it;[31] a claimant who killed a total stranger in a Tube station failed in his suit against the hospital which allowed him to be at large;[32] and a person lawfully arrested who broke away from the police and threw himself out of a window had his claim against the police rejected. In this last case, however, Sedley LJ wished to split

the difference, and said 'It is clear since the passing of the Law Reform (Contributory Negligence) Act 1945 that the power to apportion liability... has afforded a far more appropriate tool for doing justice than the blunt instrument of turpitude'.[33] One can see, therefore, that just as tortious negligence is taking over from the other torts, so contributory negligence is trying to eclipse the complete defences.

Notes

1 Law Reform (Contributory Negligence) Act 1945.

2 *Standard Chartered Bank v Pakistan National Shipping Corp* [2001] QB 167.

3 *McKew v Holland and Hannen and Cubitts* 1969] 3 All ER 1621.

4 *Badger v Ministry of Defence* [2005] EWHC 2941 (QB).

5 *Barker v Corus* [2006] UKHL 20.

6 *Revill v Newbery* [1996] 1 All ER 29L

7 *Westwood v Post Office* [1973] 3 All ER 184.

8 *Vellino v Chief Constable* [2001] EWCA Civ 1249.

9 *Murphy v Culhane* [1976] 3 All ER 533.

10 *Reeves v Commissioner of Police* [1999] 3 All ER 897.

11 *Chappell v Imperial Design* (CA, 31 October 2000).

12 *Richards v Quinton* (CA, 31 October 2000).

13 *Gough v Thorne* [1966] 3 All ER 398.

14 *Ormrod v Crosville Motor Services* [1953] 2 All ER 753.

15 *Oliver v Birmingham and Midland Omnibus Co* [1933] 1 KB 35.

16 *Fitzgerald v Lane* [1988] 2 All ER 961.

17 Torts (Interference with Goods) Act 1977, s 11(1).

18 *Kelly v Solari* (1841) 152 ER 24.

19 *Barclays Bank v Fairclough Building* [1995] 1 All ER 189.

20 *Forsikringsaktieselskapet Vesta v Butcher* [1988] 2 All ER 43.

21 *Darbishire v Warran* 1963] 3 All ER 310.

22 *Ruxley Electronics v Forsyth* [1995] 3 All ER 268.

23 Animals Act 1971, s 6(5).

24 *Smith v Eric S Bush* 1989] 2 All ER 514.

25 Road Traffic Act 1988, s 149(3).

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

27 *Reeves v Commissioner of Police* [1999] 3 All ER 897.

28 *Barrett v Ministry of Defence* [1995] 3 All ER 87.

29 *Pitts v Hunt* [199o] 3 All ER 344.

30 *Tinsley v Milligan* [1993] 3 All ER 65.

31 *Cross v Kirkby* [2000] TLR 268.

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

33 *Vellino v Chief Constable* [2001] EWCA Civ 1249, para 55.