

Defences and Remedies in Tort Law

I. General Defences in Tort

A. The Meaning of Defence

There are quite a few definitions of a defence that have been proposed over the years.

- (i) On one definition, they include **any** argument made by **D** that persuades the court not to hold him liable. [See, eg, *Chakravarti v Advertiser Newspapers Ltd* [1998] 193 CLR 519, [8] (per Brennan CJ and McHugh J)]
- (ii) Another use of the word defence refers to any rule of tort law that serves to **reduce** or **exclude D's liability**. It is a usage one finds (implicitly if not explicitly) in many tort textbooks. [See, eg, Giliker, *Textbook on Tort* ch16]
- (iii) A third use refers to any aspect of the case that **D must prove**. [The thinking runs as follows: it is for P to make out a tort; while D's task, naturally enough, is to **establish a defence**. [See, eg, Weir, *Introduction to Tort Law* (2006) 109]
- (iv) A fourth use refers to rules of law that **serve to negate liability**. [See, eg, J Goudkamp, *Tort Law Defences*]

Definition (i) is wrong: it includes **'absent elements'**

- anything that the defendant alludes to that persuades the court not to hold the defendant liable > assumes that anything that the defendant proves in court will be a defence, but actions then may prove the absence of one of the ingredients of its court > problem of this definition
- E.g., negligence, D able to show the way he behaved is just as the same as what a reasonable person would behave > no breach of duty, no negligence
- E.g., battery, D might say he does not have intent > no battery
- D's defence being essential ingredients is not present > cannot be any liability > no need of a defence (no liability imposed > no defence needed): a flawed definition

Definition (ii) is wrong: it **includes contributory negligence**, which is best seen as **a rule on damages** (see, eg, J Gardner & J Murphy, "Concurrent Liability in Contract and Tort: A Separation Thesis" (2020) 137 LQR 77).

- Contributory negligence is historically a defence: if show P has contributed to the negligence, D would have a complete defence > not liable
- Intervention of statute: reduced to damages liable > rule about remedies; not a liability rule, not something that excludes liability

- Merely seeking legal cost: even if the D successfully raised defence, P winning the case would be paid cost by the losing D

Definition (iii) is wrong: **D need not prove that the limitation period has expired**, he or she need only raise the prospect of its having expired and it then falls to P to prove that the action was brought within the permitted time (as this may be extended here and there).

- Court entitled to look at time lapse between the event and course of action
- But not sth D has to prove; definition too broad definition, that it suggest that D must prove sth (simply look at time lapse)

Definition (iv) is the best available. It involves **(a) public policy defences** (eg, limitation of actions) and **(b) justifications** (eg, self-defence, and consent).

- exclude liability otherwise D would obtain
- E.g., summary judgement > if parties do not turn up to court > default judgement (can say D is liable, but still has not settle damages) > D is still entitled to come back to seek reduced damages
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In our course, then, we proceed on the ground that **defences are rules of law that serve to exclude liability on the part of D that would otherwise arise.**

- Murphy: the 4th one is the best defined
- Definition is not itself rule of law; vs laying down the ingredients of the tort is the law

B. Consent/ *Volenti Non Fit Injuria* (to one who volunteers, no harm is done)

- General defence: applied broadly; not to one particular group of person
- also applied in other areas of tort: e.g., defence to an allegation of defamation: definition that saying sth that impact one's reputation; defence that not liable if shown what said is true, said things in public interest > D has defensive qualified privilege to say those things

Related to, but distinct from, consent, the defence of *volenti* involves **P having voluntarily assumed the risk of injury**.

Volenti captures **P's consent to run the risk of injury at D's hands knowing of the nature and the extent of the risk**.

- **Consent:**

- Used as element in tort in law of battery (in the case of freedom and home office), But as a defence elsewhere in tort law
- consent to **some certain acts** (with certainty) that would otherwise be invasion to your right
- e.g., consent to a medical invasive treatment > no battery

- ***Volenti*:**

- Someone who volunteers that there is no wrong/injury done; but does not mean it is identical to consent
- **Knowing certain risk** (with of no certainty), **and agreeing to run a risk that one has appreciation of**
- e.g., getting on a car driven by a person with sleep deprivation); notionally different from agreeing to sth of certainty
- Murphy: a watering-down defence, or a slightly different defence applied in negligence case

Nettleship v Weston [1971] 2QB 691:

The knowledge of the risk is not enough. Nor is a willingness to take a risk of injury. Nothing will suffice short of an agreement to **waive any claim for negligence**. The [claimant] must agree, expressly or impliedly, to waive any claim for an injury that may befall him due to the lack of reasonable care by the defendant.

Held	Lord Denning: <i>Volenti</i> understood as P agreeing to waive any claims of negligence
Note	Murphy: But that is not what ppl really think when accepting the risk (e.g., getting on the car, but would not think that one is waiving the claim), does not tally with people's mind; not the right definition

Dann v Hamilton [1939] 1 KB 509

Facts	P voluntarily got into a car in which the driver is under influence of a drink (voluntariness > agreeing the risk); driver crashed, P survived and sued for the driver's estate
Held	<p>Asquith J said:</p> <p>There may be cases in which the drunkenness of the driver ... is so extreme and so glaring that to accept a lift from him is like ... intermeddling with an unexploded bomb or walking on the edge of an unfenced cliff. (Judge implying risk here)</p> <p>Asquith J also distinguished consent:</p> <p>the consent of the patient relieves the dentist who extracts a tooth ... In these cases the certainty of physical injury is consented to. In another class of cases, perhaps more numerous, a man is not courting injury, and wishes to avoid it, but he nevertheless consents to the risk of its occurrence.</p> <ul style="list-style-type: none"> - <i>Volenti</i>: not consenting to a certainty of some sort of contact or injury, but consenting to the high degree of risk - Defence not available; need to be consenting to sth more certain (injury that with a very high degree of risk), required <u>virtual certainty</u>

The cases in which this defence succeeds are very few and far between.

- Exception: ICI case

ICI v Shatwell [1965] AC 656.

So far as concerns common law negligence, **the defence of volenti non fit injuria is clearly applicable** if there was a **genuine full agreement, free from any kind of pressure**, to **assume the risk of loss**. (Lord Pearce.)

Facts	Two brothers working in D's mine, involves use of explosives; they thought not to follow the absolute protocol to make more progress; explosion occurs and got injured; the injured brother claimed the other brother > claim VL against the employer > employer raised defence of <i>Volenti</i>
Held	<p>Agree that the brothers agreed on the risk > no liability of the employer</p> <ul style="list-style-type: none"> • Assume the risk of loss > the defence of <i>volenti</i>
Note	

Generally, the courts will prefer to treat P's foolhardy conduct as contributory negligence.

J Gardner, "Rethinking Risk-Taking: The Death of Volenti" [2023] CLJ (forthcoming).

- thinks that it is a terrible defence, that does not capture the way ppl's the way suffer from their injury; presuming the fact that ppl voluntarily take risk

- Not really a free choice: e.g., Accepting the risk as there is no other choice (or will lose the job)

Statutory limitations

(a) *Control of Exemption Clauses Ordinance (Cap 71)*

By s 7(1) – where the liability in question would be **business liability** (the statute gives examples of businesses, and you should have detailed notes on this from contract).

Also, by s 7(2), **contract clauses or notices excluding liability for other loss** (eg, property damage) can only do so as long as the clause or notice satisfies the requirement of reasonableness.

- Impact that where one notices the risk but signed up a contract to accept that risk; exclusion clause > voluntarily accept the risk knowing that if that happens there would be no action available
- Statue imposes that: cannot make the claim to say the person waive such right

(b) *Motor Vehicles Insurance (Third Party Risks) Ordinance (Cap 272)*

Section 12 prohibits drivers from excluding liability to passengers: i.e., it excludes the prospect of *volenti* being raised.

- possible reason behind: many motor vehicle accident; does not need to trouble the court, but leave to the insurance company (loss of one individual is now spread to the widely society)

It probably applies to both **express** and **implied agreements**: *Pitts v Hunt* [1991] 1 QB 24.

C. Illegality

(1) Introduction

This defence is sometimes referred to as *ex turpi causa non oritur actio* and **its scope is regrettably uncertain.**

- P has done sth wrong > cannot have use this as the basis for the claim (as they did sth wrong being used as the platform for the claim they are making)

However, the Supreme Court in the UK has had made significant steps towards clarifying its remit and essential components.

- Merely got rid of some measures of the confusion but not clearing all of them up, the law is still hard to understand

(2) *Patel v Mirza*

Patel v Mirza [2016] UKSC 42

Facts	Case of unjust enrichment/restitution (in wrong payment) A gives some money to B to buy some shares, A wanted to buy shares through B but not by himself as there is rule regarding insider dealings; try to camouflage it by asking B to buy the shares; <u>B did not buy shares and refused to return the money back to A; B claimed the act itself is legal</u>
Held	A can get back the money; thoroughgoing re-examination of the illegality defense
Note	Important landmark case, but not a tort case <ul style="list-style-type: none">- legality defence is not a tort defence but a general defence in all private law (e.g., claiming illegal contract)- general principal that cannot base on illegal things for one's claim Murphy: still contestable on the clearness of law

Lord Toulson gave the leading speech and he said two key things of note:

First: “Looking behind the maxims, there are **two broad discernible policy reasons** for the **common law doctrine of illegality** as a defence to a civil claim. **One is that a person should not be allowed to profit from his own wrongdoing.** The other, linked, consideration is that **the law should be coherent and not self-defeating**, condoning illegality by giving with the left hand what it takes with the right hand.”

- 1st para: **what the basis for the defense is; Policy reasons: setting out the basis of which could be potentially said that illegality defence could arise**
- But there can be more to be considered: if satisfying these two > prima facie can rise a defence (the three points below: further suggest would not apply the defence even when public interest is harmed)
- Common law doctrine: suggest it is a general doctrine (applicable in all area of law)

Also: “The essential **rationale** of the illegality doctrine is that it would be **contrary to the public interest to enforce a claim** if to do so would be **harmful to the integrity of the legal system**. **In assessing whether the public interest would be harmed in that way**, it is necessary

- to consider the underlying purpose of the prohibition** which has been transgressed and **whether that purpose will be enhanced by denial of the claim**,
- to consider any other relevant public policy on which the denial of the claim may have an impact** and
- to consider whether denial of the claim would be a proportionate response to the illegality**, bearing in mind that punishment is a matter for the criminal courts.”

- 2nd para: **set out some considerations that defence would not be available** (even when satisfying the two grounds in the 1st para); more to consider here
- **In public interest to decline the claim** if it would be harmful to the integrity of the legal system & there is a public interest at stake
- To assess whether the public interest that animates this defense is harmed: three points to consider
- Whether the public interest on balance lies by reference to the purpose that underpins the prohibition that has been transgressed.

These paragraphs seem to break down into a two-part test.

Part 1: Would allowing P to claim result in (a) P profiting from her own wrongdoing or (b) the law becoming incoherent?

(a) Defence can be used to stop P profiting by wrongdoing (past examples)

Hewison v Meridian Shipping [2002] EWCA Civ 1821

Facts	<ul style="list-style-type: none"> • P gets a job with D as a crane operator, P should not have gotten this job, obtained this job fraudulently (lied that he did not have epilepsy); • tort of negligence on D's part (breach of statutory duty), P gets injured, claimed D provide unsafe equipment • P's condition comes into light, D claimed he cannot be sued as he was defrauded to give P the job (put him in the position where he would not have gotten injured)
Held	<ul style="list-style-type: none"> • The defense of illegality applies here. • <u>The plaintiff is trying to profit by their own wrongdoing.</u> • They're trying to get a huge award of damages based on the fact that they have <u>fraudulently obtained the job that put them in a position where they could have got injured</u> and thus been able to bring this claim.
Note	Inheritance, not tort law

(b) Defence can be used to prevent the law becoming incoherent.

Gray v Thames Trains Ltd [2009] 1 AC 1339

[T]he criminal law has taken him to be responsible for his actions, and has imposed an appropriate penalty. He should therefore bear the consequences of the punishment, both direct and indirect. If the law of negligence were to say, in effect, that the offender was not responsible for his actions and should be compensated by the tortfeasor, it would set the determination of the criminal court at naught. (Lord Hoffmann)

Facts	<ul style="list-style-type: none"> P injured by D's negligence in a train crash, P's brain is damaged (psychiatric trauma & instability); P got out & killed someone; <u>P claimed D's negligence made him have the condition > not put him in prison > loss of earning</u> D argued the reason P got into prison should not be the basis for him to claim under tort
Held	If allowing the tort claim, the law would be incoherent; if allowing him to sue against what criminal system is trying to do, then the law of tort is undermining the criminal law. It's an ineffectual punishment if the law of tort gives you the very money that the criminal justice system has seen fit to take from you.

Henderson v Dorset Healthcare University NHS Foundation Trust [2020] UKSC 43

Patel concerned a claim in unjust enrichment, but there can be little doubt that it was intended to provide guidance as to the proper approach to the common law illegality defence across civil law more generally... [however we must not] disregard the value of precedent built up in various areas of the law to address particular factual situations giving rise to the illegality defence. Those decisions remain of precedential value unless it can be shown that they are not compatible with the approach set out in *Patel* (Lord Hamblen).

Facts	A person has psychotic episode, need to be hospitalised from time to time; but D negligently failed to put him into hospital; P goes away and killed someone; case of manslaughter; P claimed lost liberty & etc, sued D (hospital)'s negligence; D claimed P does not have such defence; P rely on <i>Patel v Mirza</i>
Held	Disagreed that cannot rely on the present case; nothing wrong with following an earlier case, so long that it is not inconsistent with <i>Patel v Mirza</i> ;
Note	

Part 2 Is there some countervailing consideration that means that P should be allowed to sue *notwithstanding* the fact that Part 1 is satisfied.

(a) Defence to be rejected because it would undermine the point of the prohibition that has been abrogated.

Stoffel & Co v Grondona [2020] UKSC 42

[One] underlying purpose of the prohibition against mortgage fraud is ... protection of the public, and in particular mortgagees ... [Thus] not only was the required registration of the transfer to the respondent in the interests of the respondent ... it was also in the interests of the mortgagee ... [since] it was in ... [the lender's] interest that the respondent should have assets with which to meet her liability if sued [Lord Lloyd-Jones].

Facts	<ul style="list-style-type: none"> P got mortgage by fraudulent means, P use the loan to buy a property; solicitor supposed to register some docs with the land registry, but he did not do so; P is now not the legal owner of the property
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	<ul style="list-style-type: none"> • P now cannot sell the house, but the lender insists to get back the loan • P argued it's the fault of the solicitor (as failed to register the documents > got him in this situation); • Illegality defence: lender argued P's action is illegal (defrauded the lender in the first place > lender would never lend the loan)
Held	<p>True that P tried to base an action of damages on sth that he done illegally; tried to profit by his own wrongful doing (1st para)</p> <p><u>But defence not available:</u></p> <ul style="list-style-type: none"> - Look at the purpose underpinned the prohibition (2nd para) - Purpose of the prohibition: Rule against defrauding lenders to <u>protect lenders</u>; prohibition on defrauding lenders - But if defence allowed, meaning that solicitor needs not to pay P damages, P cannot repay the loan > lender would be one loses out - Only to allowing the claim against the solicitor to meet such purpose
Note	Further consideration that can rebut the presumption

(b) Defence to be rejected if it would undermine other public policies

Stoffel & Co v Grondona (supra)

Important countervailing public policies in play in the present case are that conveyancing solicitors should perform their duties to their clients diligently and without negligence and that, in the event of a negligent breach of duty, those who use their services should be entitled to seek a civil remedy for the loss they have suffered. [Lord Lloyd-Jones]

- The second thing that one might need to do is to consider any other relevant public policy on which the denial of the claim may have an impact.
- Other public policies, rebut the presumption that the defence to arise
- a strong public policy that legal services should be services that are provided for which there is accountability on the part of the professionals.
- Ppl account on competent solicitors to act on their behalf > policy that solicitor should be responsible & be held accountable
- refer to case *White v Jones* where negligence of solicitor causes daughters cannot get what the father intend to put into the will

(c) Defence to be denied if it would be out of proportion to P's criminality?

Stoffel & Co v Grondona [2020] UKSC 42

In the present case it is significant that ... the essential facts founding the claim can be established without reference to the illegality. The respondent's claim for breach of duty against her solicitors is conceptually entirely separate from her fraud on the mortgagee [Lord Lloyd-Jones].

- **proportionality** point: Illegality can be thought of **as a punishment for your own wrongdoing**; not strictly speaking as a criminal punishment but as a consequence of the act you committed illegally
 - e.g., no one can deny that the solicitor did sth negligently & should be held accountable; also does not deny P has wrongful act
 - taking away a right of action against solicitors who have acted on his behalf for acting negligently)
 - judge here: the right taken away must be proportionate to the wrongful act committed
- treated as two remoted actions:
 - between P and the solicitor; and between P and the lender, that P's claim for breach of duty against her solicitors is conceptually entirely separate from her fraud of the mortgage.
- **proportionality: can be understand as remoteness or connection here**
 - that the two events are too remote a connection > disproportionate
 - **trivial wrongdoing vs the serious wrongdoing** > disconnection between the two events
 - about tenuousness of link of the two events but not exactly about "proportionality"
 - e.g., at a bar, bartender sold alcohol to a school boy; school boy was drunk and hit someone, raised illegality defence that the bartender should not have sold the drink to him in the first placed
 - a mismatch between the relatively trivial offence of selling alcohol to someone under age and the illegal act that then ensues, which is a full-on battery.
 - The weighing of the seriousness of the thing that was done to the plaintiff against the wrong that the plaintiff did.

3. Quasi-criminal Conduct by the Claimant?

Les Laboratoires Servier v Apotex [2015] AC 430

The *ex turpi causa* principle is concerned with claims founded on acts which are contrary to the public law of the state and engage the public interest. The paradigm case is, as I have said, a criminal act. In addition, it is concerned with a limited category of acts which, **while not necessarily criminal, can conveniently be described as "quasi-criminal"** because they **engage the public interest in the same way**. [So it catches] some anomalous categories of misconduct, such as prostitution, which without itself being criminal are contrary to public policy and involve criminal liability on the part of secondary parties; and the infringement of statutory rules enacted for the protection of the public interest and attracting civil sanctions of a penal character. [*eg*, withdrawing a licence to run a betting shop because you have been letting children place bets when such shops are strictly for people aged 18+] (Lord Sumption, at [25].)

- How to understand illegality: whether as criminal illegal or also includes other wrongdoing but not as a crime (e.g., infringing patent)
- P made a copycat product in Canada infringing an EU patent, not contravening the domestic law; not criminal wrong but morally tainted
- Does not definitely tell what “conveniently be described as ‘quasi-criminal’” means
- Seems to suggest that wrong not strictly speaking criminal wrong could suffice as a defence

[March 27 III at 30:00] [transcribe again if have time]

Simplifying the law:

Subject to s(2) D will be entitled to a defence of illegality either

- (1) if the P claim against D involves D trying to profit by his own wrongdoing or not allowing D to raise the defense would render the law incoherent
- (2) no defence of illegality will be permitted if allowing the defense would undermine the purpose of the rule of law transpires ? by P or allowing the defense would undermine some pre-eminent rule of policy or allowing the defense could cause P's wrongdoing to be treated as the ? of D's wrongdoing????

Except that when ...

- (1) it would undermine the point of the prohibition that has been abrogated.
- (2)

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Note on 17 Jan:

- Get to defences and remedies when asked what extent the party could be held liable