**Defences in Tort**

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1. **What is a ‘defence’**?
2. Any fact which, if proven, prevents liability.
3. Any fact which, if proven, prevents liability arising even if all of the elements of the tort/crime are satisfied.
4. Any fact for which the defendant bears the burden of proof
5. :

‘suppresses the difference between the claimant’s cause of action and liability-defeating rules that are external to the elements of the claimant’s cause of action. Obscuring this distinction is undesirable. This is because it is one of the most basic organizing devices in tort law’: J Goudkamp, *Tort Law Defences*, p.5.

Definition (b) is accurate.

1. **Justificatory defences (in outline)**

* What is a justification?

Does tort law recognise justifications?

‘That a norm-violation was justified is…irrelevant to the law of torts. Torts are wrongs – breaches of obligation – and one owes damages for their commission even if one’s wrong was justified’:

J Gardner, ‘What is Tort Law For? Part 1. The Place of Corrective Justice’ (2011) 30 Law and Phil 1, at 43.

*Vincent v Lake Erie Transportation Co Ltd* 109 Minn 456; 124 NW 221 (1910)

But there is a lot of contrary evidence that tort law does recognise justifications:

e.g. self-defence

truth

publication on a matter of public interest

justification (inducing breach of contract)

1. **Excusatory defences (in outline)**

‘tort law does not recognize excuses’: J Goldberg, ‘Inexcusable Wrongs’ (2015) 103 Calif L Rev 467, 470

* What is an excuse?

>A denial that one acted at all?

> *But* : provocation, duress

“the better view is that a defendant who claims that he is not liable

because he is excused actually endeavours to demonstrate that, like

justified defendants, he was operating within the realm of reason.”: Goudkamp, p.220

J Goudkamp, ‘Defences in Tort and Crime’, in M Dyson (ed) *Unravelling Tort and Crime* (CUP, 2014) (available on SSRN).

* Provocation?

See generally: I Field, ‘The Problem of Provocation in Trespass’ (2021) 84 MLR 297

*Co-Operative Group (CWS) Ltd v Pritchard* [2011] EWCA Civ 329, [2012] QB 320 at [26]-[63] *per* Aikens LJ, [78]-[85] *per* Smith LJ.

* Duress?

*Gilbert v Stone* (1647) Style 72; 82 ER 539

Should tort lawrecognize excuses?

Arguments for excuses:

***Absence of moral culpability makes the defendant lack desert*:**

“It might be quickly responded that, even if the character theory justifies the presence of excuses in the criminal law, it does not show that tort law should provide for excuses because tort law, unlike the criminal law, is unconcerned with retribution. The problem with such a move is that retribution is not alien to tort law.”: Goudkamp, p.225

***Absence of moral culpability makes the defendant liable without fair warning or reasonable opportunity to avoid becoming liability***:

Hart, *Punishment and Responsibility*, 17–24, 28–53.

*Against excuses*:

1. Is tort liability in general justified by the defendant’s blameworthiness?

S Steel, ‘Culpability and compensation’ in J Goudkamp et al (eds) *Taking Law Seriously: Essays in Honour of Peter Cane* (Hart, 2022)

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4054344>

1. Shifting one’s own problems onto others?

“To allow defendants to escape from liability on the basis of duress would, in effect, transfer the problem with which the defendant was faced to the claimant. What reason is there to permit the defendant to shift his problem to the innocent claimant, especially when the defendant, although morally innocent, is at least causally responsible for the loss?”: Goudkamp, p.230

1. **Consent and Volenti Non Fit Iniuria (**‘to the person who willingly accepts, there is no wrong’)

‘Consent’ is typically the term used to refer to a person’s permitting an intentional interference with their person, land, goods, privacy [etc] when that interference would otherwise be a wrong.

‘Volenti’ is typically the term used to refer to free, knowing, acceptance of a *risk* of harm, rather than the interference with the claimant which constitutes the wrong. However, arguably, the basic rationale of volenti is still that the claimant *consented* to the risk which is partly constitutive of the tort of negligence. If the duty of care in negligence is a duty not to impose unreasonable *risk* of harm, then it makes sense that consent relates to the *unreasonable risk.* [Cf Gardner’s article, below]

1. Free and knowing assent to a risk which would otherwise amount to a breach of a duty of care

*Nettleship v Weston* [1971] 2QB691:

“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 any injury that may befall him due to the lack of reasonable care by the defendant.” Lord Denning at 701.

Does this confuse waiver of the claimant’s right to sue the defendant and waiver of the claimant’s right not to be unreasonably exposed to the risk of harm?

(Compare trespass to the person: if I consent to a person’s touching me, there is no wrong. Whether I have agreed not to sue the person if they wrong me is a different matter. I can agree not to sue you for a wrong, without agreeing that you may do an act that would otherwise wrong me. What should matter for consent is whether I have consented to the act which is said to amount to a wrong against me).

*Morris v Murray* [1991] 2 QB 6:

Stocker LJ at 18:

the defendant must establish that the plaintiff at the material time knew the nature and extent of the risk and voluntarily agreed to absolve the defendant from the consequences of it by consenting to the lack of reasonable care that might produce the risk

(Notice the subtle shift here from agreeing to waive a claim and ‘consenting to the lack of reasonable care that might produce the risk’)

*ICI v Shatwell* [1965] AC 656:

Lord Pearce at 687-688:

“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. In Williams v. Port of Liverpool Stevedoring Co. Ltd. [1956] 1 W.L.R. P 551 Lynskey J. rejected the defence where one stevedore was injured by the deliberate negligence of the whole gang (to which the plaintiff gave 'tacit consent') in adopting a dangerous system of unloading. There was an overall duty on the master to provide a safe system of work, and it is difficult for one man to stand out against his gang. In such circumstances one may not have that deliberate free assumption of risk which is essential to the plea and which makes it as a rule unsuitable in master and servant cases owing to the possible existence of indefinable social and economic pressure. If the plaintiff had been shown to be a moving spirit in the decision to unload in the wrong manner it would be different. But these matters are questions of fact and degree”

Statutory bar on *volenti* (and exclusion of liability)towards passengers in vehicles: *Motor Vehicles Insurance (Third Party Risks) Ordinance (Cap 272), s12(2)*:

Where a person uses, or causes or permits any person to use, a motor vehicle on a road in such circumstances that under section 4(1) there is required to be in force in relation to his use of it such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Ordinance, then, if any other person is carried in or upon the vehicle while the user is so using it, any antecedent agreement or understanding between them (whether intended to be legally binding or not) shall be of no effect so far as it purports or might be held—

(a) to negative or restrict any such liability of the user in respect of persons carried in or upon the vehicle as is required by section 6(1) to be covered by a policy of insurance; or

(b) to impose any conditions with respect to the enforcement of any such liability of the user, and the fact that a person so carried has willingly accepted as his the risk of negligence on the part of the user shall not be treated as negativing any such liability of the user.

Gardner, ‘Re-thinking Risk-taking: The Death of Volenti?’ [2023] *Cambridge Law Journal* <https://www.cambridge.org/core/journals/cambridge-law-journal/article/rethinking-risktaking-the-death-of-volenti/4C62EE44B997FB2609C582ECEB312EC7>

Gardner argues in favour of abolishing the defence of *volenti*, but not the defence of ‘consent’: is this a persuasive position?

1. **Exclusion of liability**

Basis of this defence: (i) contractual, (ii) power (by notice) to impose conditions on permitted use of land or things

*Control of Exemption Clauses Ordinance (Cap 71)*

s 7(1) (no exclusion of business liability for personal injury/death) s 7(2) (exclusion of business liability for other forms of loss due to negligence subject to reasonableness restriction)

1. **Illegality (sometimes in Latin: ‘ex turpi causa non oritur actio – from a base cause, no legal action arises)**

*Patel v Mirza* [2016] UKSC 42, at [120]:

“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 (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) 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. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.”

*Monat Investment Limited v All persons in occupation* [2023] HKCA 479

*Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43, [76]-[77]

“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…

that does not mean that Patel represents “year zero” and that in all future illegality cases it is Patel and only Patel that is to be considered and applied. That would be to 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 in the sense that they cannot stand with the reasoning in Patel or were wrongly decided in the light of that reasoning.”

Three questions:

1. Would allowing the claim allow the defendant to profit from their wrong or (otherwise) introduce an inconsistency into the legal system?
2. Should the claim nonetheless be allowed for reasons of ‘public policy’?
3. Would it be disproportionate to bar the claim?

Question (1):

Illustrations:

*Hewison v Meridian Shipping* [2002] EWCA Civ 1821

*Gray v Thames Trains* [2009] 1 AC 1339 (inconsistency when C seeks to recover for loss caused by a criminal punishment)

*Stoffel & Co v Grondona* [2020] UKSC 42 (no inconsistency when ‘essential facts founding the claim can be established without reference to the illegality’)

What kinds of ‘illegality’ can trigger an inconsistency? *Les Laboratoires Servier v Apotex* [2014] UKSC 55, [25]

Question (2)

*Hounga v Allen* [2014] UKSC 47, [2014] ICR 847

Question (3):

*Revill v Newbury* [1996] QB 567

1. **Contributory negligence** (note: some – e.g. McBride & Bagshaw in their textbook, James Goudkamp in his book on defences – take the view that this is not properly treated as a ‘defence’ since it does not *prevent* liability arising, but merely *reduces* liability. I think this is the right conclusion, but for the wrong reason. Nonetheless, it is convenient to treat of ‘contributory negligence’ here. If you are persuaded of the view that this is not a ‘defence’ strictly speaking, you may wish to consider this an early beginning of my next class on ‘Remedies’).

**Cap 23 Law Amendment and Reform (Consolidation) Ordinance**

**21. Apportionment of liability in case of contributory negligence**

(1)

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

*(Amended L.N. 337 of 1989)*

**s.21(10):**

***fault*** means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this section, give rise to the defence of contributory negligence

Three questions:

1. Is the defence available for the type of tort in question?

*Co-Operative Group (CWS) Ltd v Pritchard* [2011] EWCA Civ 329, [2012] QB 320

*Standard Chartered Bank v Pakistan Shipping* [2003] 1 AC 959

1. Was the claimant at fault?

*Jackson v Murray* [2015] UKSC 5

1. Did the claimant’s fault causally contribute to their damage ‘partly of his own fault’?

If so, then apportionment (previously, contributory negligence entirely defeated the defendant’s liability):

Relevant considerations: (i) relative blameworthiness of the parties, and (ii) relative causal potency: see *Stapley v Gypsum Mines Ltd* [1953] AC 663

*Froom v Butcher* [1976] QB 286

Question for us to go through if there is time:

Nate and Otis are both aged 18. One afternoon, they are alone in the house of Nate’s parents. They each drink several bottles of beer from the fridge. When they run out of beer, they decide to buy more. To this end, they steal a car from the street outside and set off towards a nearby supermarket. Nate is learning to drive, and has only driven a car a few times previously. Neither Nate nor Otis wears a seatbelt.

As Nate is turning a corner, he fails to straighten the car out properly, and it collides with Penny, a 10 year old girl who is cycling in the road. Penny is thrown from her bicycle. She is wearing a helmet, but the helmet’s straps are unfastened, as a result of which the helmet comes away from her head. Penny suffers serious head injuries.

Startled by the collision, Nate completely loses control of the car. The car clips Quentin’s van, and then careers into a tree. The paintwork of Quentin’s van, from which he is selling illegal drugs, is damaged. A branch from the tree crashes through the windscreen and injures Otis.

Advise Otis, Penny, and Quentin.