

Defences to a Negligence Claim

Contributory Negligence

The main defence used in negligence and in fact most torts is contributory negligence. It is not a full defence but a partial defence so it does not remove all of the defendant's liability. It operates to reduce the amount D has to pay C in compensation. This is because C is partly to blame by contributing to the harm caused. The amount of compensation (damages) will be apportioned by the courts as both the D and C are partly to blame for the damage suffered by C. The judge will initially set out the full amount of damages as if there was no contributory negligence and then the judge will decide the percentage that the C is responsible for. This amount is then removed so C receives the balance of compensation. Contributory negligence commonly occurs in road accident claims.

This area of law is governed by the **Law Reform (Contributory Negligence) Act 1945. S1(1)** allows the court to use its discretion to reduce the damages awarded, "to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage".

In **Froom v Butcher** Lord Denning 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 C to wear a seat belt". **The Claimant was injured in a car accident due to the negligence of the Defendant. The Claimant was not wearing a seat belt.**

In this case Lord Denning stated that if a seat belt had been worn the damage would have been prevented altogether. So damages were reduced by what percentage? Lord Denning went on to state if a seat belt was worn there would be far less head injuries. In these cases damages would be reduced by what percentage? **The driver of a car suffered greater injuries than would have been the case if wearing a seatbelt. His damages were reduced by 20%**

Sawyers v Harlow Urban District Council

Damages were reduced by 25%? Was this fair in the circumstances? **Plaintiff was locked in a bathroom. Tried to attract attention to no success. Tried to escape over the door, had pressure on the toilet roll holder to which when the plaintiff realised, she couldn't get over the door and tried to get back down, toilet roll holder rotated and she fell sustaining injuries. She sued local authorities for negligence. Her claim was dismissed but she appealed and was blamed for 25% of the incident**

Jayes v IMI Ltd

By what percentage were the damages reduced?

Put his hand in a machine and lost the tips of his fingers. Held to be 100% contributory negligent as it would be unjust to compensate him

O'Connell v Jackson

Failure to wear a crash helmet will reduce damages by how much?

15%

Stinton v Stinton

How were C and D related? Who paid the compensation and why?

Damages were reduced by one-third for accepting a lift from a drunk driver. The claimant knew the driver was over the limit. If a passenger does not know this, or it would not have been obvious to a reasonable person, the court may decide that an injured claimant was not contributory negligent.

Children:

Yachuk v Oliver Blais Ltd 1949

A 9 year old boy was not contributory negligent after he bought petrol at a garage and then burnt himself. The court held that the child was not expected to see the danger involved in asking for petrol, so the garage, which sold it to him, was fully liable. He should be judged by the standard of a 9 year old and not an adult.

Contrast this with **Gannon v Rotherham MBC 1991**. The older the child the court is more likely to apportion the amount of compensation. How old was the claimant here? Is this rule fair?

Metropolitan Borough Council a claim succeeded where a schoolboy broke his neck when diving from a starting block at the shallow end of a swimming pool on the basis that his PE teacher had not shown him how to correctly effect such a dive. In that case the schoolboy's claim also succeeded against the Amateur Swimming Federation for failing to issue appropriate warnings of relevant dangers to instructors.

Consent – Volenti non fit injuria

This is a full defence so if C voluntarily accepts a risk of harm then C will not be entitled to any damages for any injuries that occur. For the defence to succeed there must be 3 factors that the defendant must prove?

1. Knowledge of the precise risk involved

Stermer v Lawson contrast with **ICI Ltd v Shatwell**

Stermer v Lawson - Consent was argued when the claimant had borrowed the defendant's motorbike. The defence failed because the claimant had not been properly shown how to use a motorbike and did not therefore appreciate the risks

ICI Ltd Shatwell – claimant and his brother were quarry workers. The claimant, following his brother's instructions, ignored his employer's instructions on the handling of the detonators and was injured when one exploded. He claimed negligence and breach of statutory duty against his employer. The court decided that by ignoring his employer's instructions and the statutory rules and by following his brother's unauthorised comments, he had assumed the risk of injury and the defence of volenti succeeded. Is the test for volenti a subjective or objective test? Which test is easier for the defendant to prove?

2. Exercise of free choice by the claimant

Smith v Baker

Was this true consent?

A worker was injured when a crane moved rocks over his head and some of them fell on him. The defence of consent failed. The workman had already all that he could in complaining about the risks involved in the work taking place above his head. He had no choice but to continue work and did not give his consent to the danger

3. a voluntary acceptance of the risk

Where a person has a duty to act such as rescuers and is then injured because of D's negligence, volenti will not be available as a defence. The duty means that the C had no choice but to act so C's consent is not freely and willingly given. D is still liable for any injuries.

Haynes v Harwood when the defendant failed to adequately tether his horse, the policeman who was injured trying to restrain the animal was not acting voluntarily. He was acting under a duty to protect the public. The defence of volenti could not be used against him

Ogwo v Taylor defendant had set fire to his house when attempting to burn off paint. The claimant was a fireman who attended the blaze. He and a colleague had to access the roof space to deal with the fire but despite wearing breathing apparatus and protective clothing, he suffered burns from the intense heat. The defendant's argued that the claimant consented to the injuries was dismissed

Consent and Medical Negligence

Sidaway v Governors of Bethlem Royal and Maudsley Hospitals Are doctors given more favourable treatment by the courts than other professions? The claimant suffered pain in the neck, shoulder and arms. Her surgeon obtained her consent for an operation but failed to explain that in less than 1% of these operations' paraplegia could be caused. Unfortunately, she developed paraplegia as a result of the operation, and she argued that she did not consent to this. The House of Lords decided that consent in medical cases does not require a detailed explanation of remote side effects. As a result, there was no liability when the doctor had warned of the likelihood of the risk but not all possible consequences

Consent and s.149 Road Traffic Act 1988

A driver cannot raise consent when harm occurs to a passenger (they agree to be in the car but do not agree to be injured), as liability still exists due to third party insurance. What does third party insurance cover? policy helps protect other people, vehicles and property in the event of an accident that was deemed to be your fault.

Consent and Proof of Negligence

Wooldridge v Sumner claimant attended a horse show as a professional photographer. A rider who was riding too fast lost control of the horse which then injured the claimant. The Court of Appeal confirmed that the rider owed spectators, including the claimant, a duty of care. However, they considered the rider had been guilty of an error of judgement in his riding of the horse but had not been negligent. There was no breach of duty so volenti was not an issue