

## Chapter 11: General Defences Extra Questions

### Question 1

‘Under the modern law of negligence the various defences have far less scope for operation than in previous years, and rightly so.’

In light of this statement, consider the modern operation of the various defences to an action in negligence.

### Answer guidance

Focus on discussion of contributory negligence, consent and illegality in your answer and how they have changed over the years.

Defences to Negligence – outline the context to defences and explain why they are needed.

Illegality – The court will not award damages in negligence to a claimant who suffers damage in the course of criminal activity – *Pitts v Hunt* [1991] 1 QB 24.

Consent – This defence is a complete defence to the tort of negligence, and is raised where the claimant has consented to, or assumed the risk of the accident. Statutory limitations include the Unfair Contract Terms Act 1977 and the Road Traffic Act 1988.

Contributory negligence – At Common Law this used to be a complete defence, but since the Law Reform (Contributory Negligence) Act 1945, it has the effect of reducing damages rather than excluding liability altogether. It is of limited application in personal injury cases - *Smith v Baker* [1891] AC 325.

Mistake, necessity and inevitable accident are all unlikely to amount to defences in negligence due to issues of burden of proof and reasonableness.

### Question 2

Ant and Dec had gone out to a large football stadium in London to see their team play. However, because of the matching going into extra time and the large crowd trying to get out of the stadium at the same time they missed the last train home. Having had a few alcoholic drinks, they thought they could walk back home along the river. After a few miles though they realised the journey would take them until the morning to complete. Dec joked that they could always jump on one of the speedboats parked along the river. Ant, who actually owned a speedboat, thought it was a good idea and they looked for one that was unattended. Upon finding one Ant started the speedboat and they set off.

However, along the way the speedboat stalled. Dec felt too drunk to help out and Ant said he would operate the speedboat but Dec would need to keep it steady so he could get on and off. Feeling pressured, Dec’s nerves got the better of him and the speedboat became

unsteady as Ant was disembarking and he fell into the river. In doing so, Ant hit his head on the bank, which knocked him out, and so he drowned in the river.

Advise Mike, Ant's relative, who wants to bring an action on behalf of Ant's estate. Assume that, in the absence of applicable defences, Mike would have a good claim in negligence.

### **Answer guidance**

As you are told to 'assume that, in the absence of applicable defences, Mike would have a good claim in negligence' there is no need to discuss issues relating to duty, breach, or causation issues in detail.

You should just state in your introduction that Dec owed Ant a duty of care, which he has breached by falling below the standard of care required of a reasonable person and that this caused Ant's injuries. Then consider whether Dec can defeat any claim by relying on Ant's own illegality, or at least have the level of damages reduced on account of Ant's own negligence.

The court will not award damages in negligence to a claimant who suffers damage in the course of criminal activity. You need to make an assessment as to whether you think Ant committed an illegal act that is likely to be sufficient to bar his claim. You should compare the three lines of reasoning in *Pitts v Hunt* [1991] 1 QB 24: (1) the principle of *ex turpi causa*; (2) the inability (and unwillingness) of the court to set a standard of care owed by those jointly engaged in a criminal act; (3) affront to the public conscience.

Dec may also wish to argue that Ant failed to take reasonable steps for his own safety and this failure has contributed to the injury he has then suffered, that is that Ant was contributory negligent. This defence does not defeat Mike's claim entirely but rather may reduce the damages the defendant must pay. The Law Reform (Contributory Negligence) Act 1945 section 1(1) states that a court can reduce the claimant's damages by whatever amount seems just according to their share in responsibility for the damage. In order for the defence to be raised, three questions need to be addressed which you should address in turn: Did Ant fail to exercise reasonable care for his own safety? Did this failure contribute to Ant's damage? And by what extent should Ant's damages be reduced?

### **Question 3**

'The scope of the defences to the Tort of Negligence is determined by questions of policy, not by any consistent requirements of logic.'

Through an examination of the case law, state the ways in which you agree or disagree with the above statement.

### **Answer guidance**

For this essay, it is necessary to look at the common defences and illustrate how and why their scope is determined.

Contributory negligence is concerned with reducing damages in accordance with the proportion of responsibility for the damage that the court thinks the claimant should bear – refer here to *Badger v Ministry of Defence* [2005] EWHC 2941. It is not necessary to show that the claimant owes the defendant a duty of care, merely that the claimant has contributed to the injury and not necessarily the cause of the accident – *Froom v Butcher* [1976] QB 286. The courts are concerned with the blameworthiness of the claimant in causing the damage rather than overall responsibility for causing the accident to happen – *Jones v Livox* [1952] 2 QB 608. The standard of care is the same as that in negligence per Lord Denning in *Jones v Livox* but in practice the courts seem to demand less of claimants than defendants. The purpose of such statutory regulations as the Factories Acts is to ensure the safety standards in workplaces and to protect workers from their own carelessness; this being the case, the courts tend to be less willing to make a finding of contributory negligence in these cases (this does not, however, mean that a workman can never be contributorily negligent – *Jayes v. IMI (Kynoch)* [1985] ICR 155).

Volenti is a complete defence to the tort of negligence, and is raised where the claimant has consented to, or assumed the risk of the accident. In the nineteenth century, this was a controversial defence, which was used to prevent successful claims of injured employees – *Smith v Baker* [1891] AC 325.

The court will not award damages in negligence to a claimant who suffers damage in the course of criminal activity – *Pitts v Hunt* [1991] 1 QB 24. There is no claim arising from voluntary participation in illegal activities (no action arises from a disgraceful claim). This is often abbreviated to *ex turpi causa* and is known as the defence of illegality.

It is also worth briefly mentioning the defences of mistake, inevitable accident and necessity and why they're generally unavailable.

#### Question 4

Jerry drops his gun during an armed robbery, shooting his friend Vince in the foot. Discuss what defences could Jerry rely upon if Vince sued him.

#### Answer guidance

Here you have to be selective in your answer and only discuss the defences that are relevant.

Illegality - Both parties voluntarily involved themselves in an unlawful enterprise so it would be contrary to public policy to allow Vince to recover for injuries caused during the enterprise. This is the most appropriate defence for Jerry to use to avoid liability.

The court will not award damages in negligence to a claimant who suffers damage in the course of criminal activity - *Pitts v Hunt* [1990] 3 All ER 344; *Ashton v Turner* [1981] QB 137. For a discussion of the limitations of the *Ex Turpi* defence, see the Court of Appeal decision in *Bilta v Nazir and others* [2013] EWCA Civ 968, [2013] All ER (D) 390.

In *National Coal Board v England* [1954] AC 403 a distinction was made between two types of situation: The case of two burglars on their way to commit a burglary and while proceeding one picks the other's pocket; and where they have agreed to open a safe by means of high explosive and one negligently handles the explosive charge while injuring the other. There would be liability in tort in the first situation, where the illegality is incidental to the cause of action in tort, but not in the second.