

**DE JURE NEXUS LAW JOURNAL**

Author:

Ayushi P. Mavani

Kirti P. Mehta School of Law, NMIMS, Mumbai

1<sup>st</sup> Year, BBA LL.B. (Hons.)



**REDUCTION IN DAMAGES IN CONTRIBUTORY AND  
COMPARATIVE NEGLIGENCE**

**Introduction:**

Negligence is a pivotal legal term in India as well as the world, as a tort it has evolved from the English law and been accepted by the Indian law as a substantially important tort. Negligence is a failure to take reasonable care to avoid causing injury or loss to another person. Under this tort there are defences in a suit for negligence which can be used by the defendant to defend himself from a suit issued by the plaintiff such as comparative negligence, act of god, and inevitable accident. Another such defence is contributory negligence, which arises when the plaintiff is partly responsible for the accident which lead to his own losses, this defence has had a considerably large impact on personal injury civil cases. The aim of this paper is to determine and analyse the role and significance of contributory negligence as a defence in torts along with the exceptions of the same and to eradicate any confusion regarding Contributory negligence, Composite negligence and Comparative negligence by addressing the differences the between the same.

**Contributory Negligence:**

Contributory negligence refers to the ignorance to take due care on behalf of the plaintiff to avoid the consequences resulting from the negligence of the defendant, therefore the liability

of negligence lies on both the plaintiff as well as the defendant. This concept entered the legal world in 1809 because of the English case, *Butterfield v. Forrester* which is considered to be the beginning of the application of the defence of Contributory negligence.<sup>1</sup> In this case, the plaintiff was injured due to a fall while riding his horse as he ran into an obstruction on the road left by the defendant while repairing his home. It was later discovered that the plaintiff was negligent as well, and was riding the horse at a considerably fast pace. Although the defendant's negligent conduct of was a significant cause of the plaintiff's injuries in court it was held that, under such circumstances the plaintiff should be absolutely barred from compensation as he failed to take proper caution while riding.<sup>2</sup>

There are three theories that are commonly used to determine the application of the defence of contributory negligence in a particular case. These theories are (1) the proximity of legal reasoning such as the foreseeability and proximity to the negligence of different torts; (2) indemnity or the contribution of damages given by joint tortfeasors or (3) a voluntary assumption of risk as given in the maxim *volenti non fit injuria*.<sup>3</sup>

In the case of *Davies v. Swan Motor co.*, Davies had been standing on the steps at the side of a dust lorry which was a dangerous place to stand.<sup>4</sup> When the lorry was travelling along a narrow road and a bus tried to pass the lorry, Davies was unfortunately killed. The court held that Davies was himself one-fifth responsible for the damage because of his negligence in standing on the steps, or being upon, the side of the dust lorry. His damages were accordingly reduced under the Law Reform (Contributory Negligence) Act 1945.

### **Apportionment of Damages for Contributory Negligence:**

The knowledge of all facts of the case is required for allocating damages and understanding of the type of injury suffered by the plaintiff, which includes knowing all of the plaintiff's losses as well as physical and mental injuries due to the accident.<sup>5</sup>

The degree of the liability of negligence of each party is a question of fact and is determined by the jury or the trial judge. Once this has been identified, it must be proved that the injury is a consequence of actions of the defendant. Establishing this aids in identifying the number

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<sup>1</sup> J.A. Henderson, 2007 'The Torts Process, Seventh Edition.' *Aspen Publishers*.

<sup>2</sup> Francis H. Bohlen, February, 1908. 'Contributory Negligence'. *Harvard Law Review*, Vol. 21(4): 233–260.

<sup>3</sup> *Ibid*.

<sup>4</sup> *Davies v Swan Motor Co.* (1949) 2 KB 291

<sup>5</sup> Sydney Blackmore, 19 March, 2014. 'The ABCs of Damage Apportionment.' *Martindale- Hubell Legal Library*.

of tortfeasors or defendants that are potentially liable to pay damages to the plaintiff. The apportionment of damages also requires the consideration of other factors such as the nature of the duty owed by the defendant to the injured plaintiff, most importantly the timing of the different acts of negligence and the number of acts of fault or negligence committed by the person at fault.

When the plaintiff performs or does not perform particular acts to reasonably protect himself from a foreseeable accident, this negligent behaviour results in more chances of injury due to negligent acts of others is classified as an act of contributory negligence by the court.<sup>6</sup> The fault of the plaintiff leading to his own injuries or losses due to contributory negligence is non-compensatory in nature, which means that the plaintiff is barred from recovering damages relative to the degree of his or her fault in contributory negligence.

In cases where the defence of Contributory negligence is used after successfully proving the negligent behaviour of the plaintiff, compensation that is to be awarded for injuries to the plaintiff is not awarded according to the original rule of contributory negligence. There have been recent changes in this rule, such that the compensation given to the plaintiff is relatively reduced by the same degree that the plaintiff is found to be at fault, this is also known as Comparative negligence in many countries. Hence, if the plaintiff is found to be at fault of 30% of the accident, then the compensations of damages is reduced by 30% as well.<sup>7</sup>

### **Exceptions to the Defence of Contributory Negligence:**

Contributory negligence is not available as a defence in torts when it is not necessary for the plaintiff to take due care, however on the other hand the defendant is legally obligated to perform the duty of care. The failure of not performing this duty of care results in the liability of negligence for the defendant. For example, person 'X' is travelling on a bus with his sister. In order to show her something on the streets outside, 'X' got up and placed his hand on the window which all of a sudden flew open and broke. Although 'X' could have avoided the accident, here, the state bus transport service has a legal duty to have properly screwed windows and doors which would prevent such accidents for the safety of the passengers.

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<sup>6</sup> *Ibid.*

<sup>7</sup> Hina Modha, 21st June 2018. 'What is contributory negligence and what does it mean for your personal injury claim?' *Hodge Jones and Allen Solicitors*.

The concept of Contributory negligence is a defence for acts of negligence and is never applied to intentional torts such as assault or battery, from this arises its first exception, that contributory negligence is not a defence where the defendant's conduct is so aggravated that it can be characterized as 'wilful,' 'wanton,' or 'reckless.'<sup>8</sup> In cases where the plaintiff has a similar conduct with wrongful intentions, the plaintiff is barred from any compensation as well.

Another exception of Contributory negligence is when the defendant's actions lead to a violation of a statute of law.<sup>9</sup> For example, violation of the Child Labour Act by the defendant places the entire responsibility of the wrongful act on the defendant and protects the plaintiff from the consequences of his own negligence. In common law it is stated that when the defendant has the last opportunity to avoid the accident, his negligence supersedes that of the plaintiff's negligence, therefore in such cases contributory negligence is not available as a defence to the defendant.

### **Composite Negligence:**

In case of contributory negligence, the plaintiff who has himself contributed to the accident cannot claim remedy for the injuries sustained by him in the same accident to the degree of his own negligence, whereas in case of composite negligence, the plaintiff who has suffered injuries has not contributed in any way to the accident, but the injury is due to the consequences of the combination of the negligence of two or more people.<sup>10</sup> In case of contributory negligence, the injured is not required to establish the extent of responsibility of each wrongdoer separately while it is required to do so in composite negligence. Under composite negligence each wrongdoer is severally and jointly liable to the injured plaintiff for the remuneration of damages, where the plaintiff has the option of taking legal action against all of the defendants or any one of them. It is only in cases of contributory negligence that the injured has contributed to his own injuries whereas in composite negligence the plaintiff is not responsible for his injury or losses.

### **Difference between Contributory and Comparative Negligence:**

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<sup>8</sup> William L Prosser, 1953. "Comparative Negligence." *California Law Review*, Vol. 41(1): 1-37.

<sup>9</sup> *Ibid.*

<sup>10</sup> *The Managing Director B.M.T.C. and others v. Deanish M.A. and others* (2016)

In many countries, the original concept of Contributory negligence has been perceived as a harsh rule, therefore some countries have deviated from the concept and have adopted an alternative concept of negligence called Comparative negligence. This system is used to allocate compensation of damages for injuries. The plaintiff's or the injured party's compensation is based on a comparison of defendant's negligent conduct with that of the plaintiff's conduct. Although the formulae for making the allocations can be complex and challenging at times, this is a system adopted by Texas and 32 other states in the United States of America<sup>11</sup> under another the defence of torts. Under this defence the plaintiff can seek to recover damages for his injuries against the defendant only if the plaintiff's negligence is less than defendant's negligence.<sup>12</sup>

In situations where the plaintiff and defendant both indicate a negligent conduct, each of the parties' fault in the accident is compared and each party's negligence is lowered to match the percentage of the total amount of negligence that has contributed to the injuries or losses.<sup>13</sup>

If the plaintiff is proven to be 40% negligent in the accident, and defendant A is found to have been 60% at fault then the plaintiff's total compensation is reduced by 20% only and the remaining damages are shared according to the calculations of the defendants fault. In case the plaintiff is proven to be more than 50% at fault of the accident due to his or her negligent conduct, then he or she is prohibited from any recovery of damages.

### **Conclusion:**

One can conclude that contributory negligence is a defence in torts that is available to the defendant which limits the plaintiff from receiving the total compensation or remedy. It is the omission of an act or ignorance to take due care to avoid injuries due to the negligence of other tortfeasors. Deviations from the concept of negligence in the form of defences and rules such as composite negligence, contributory negligence and comparative negligence are all systems used to calculate the appropriate amount of damages to be awarded to the plaintiff. In conclusion there are two aspects of the rule of contributory negligence which are (1) the plaintiff's contributory negligence affects his recovery of damages for an action of negligence and (2) the remuneration of damages is affected by the extent of the percentage

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<sup>11</sup> Herman and Herman P.L.L.C., 8 December, 2017. 'What is Comparative Negligence?'

<sup>12</sup> Legal Information Institute. 'Comparitive Negligence,' *Wex at Cornell Law School*.

<sup>13</sup> *Ibid*.

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of the plaintiff's fault in contributory negligence, in these cases burden of proof lies on the defendant who chooses to apply the defence of contributory negligence.



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