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"Contributory Negligence"

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ABSTRACT

The term 'tort' is derived from the Latin word "tortum" which means "to twist". It is a counterpart to English term "wrong". Tort is committed in the form of a tortious act. Tortious Act refers to that conduct, which violates the legal right of other person. The main aim of law of tort is to compensate the aggrieved party for the loss suffered. Compensation is shifting or transferring loss suffered by the victim to the defendant. It is a system of loss distribution. The "deterrent" aim of tort is designed to reduce the frequency and the severity of accidents

The difficulty presented by the law of torts is that it has developed with only limited reference to these aims. In addition, deterrence and compensation are almost certainly compatible with each other.

This project is aimed at identifying the wrong of contributory negligence as a tort. A detailed research is done to show the ingredients essential to constitute this tort and the remedies available. To understand the various provisions related and to analyse the various principles of contributory negligence various landmark cases are discussed and cited. The objective of this project is to highlight and understand the ingredients that form the essence of constituting this tort and how it acts as a defence. Through illustrations and cases, the project will reflect the theory of contributory negligence.

Keywords: tort, compensation, contributory negligence, remedies

INTRODUCTION

Definition- A doctrine of common law that if a person was injured in part due to his/her own negligence (his/her negligence "contributed" to the accident), the injured party would not be entitled to collect any damages (money) from another party who supposedly caused the accident. Under this rule, a badly injured person who was only slightly negligent could not win in court against a very negligent defendant.[1]

When the plaintiff by his own want of care contributes to the damage caused by the negligence or wrongful conduct of the defendant, he is considered to be guilty of Contributory Negligence.

Explaining the concept of Contributory Negligence, the Supreme Court in a case[2] observed: Where an accident is due to negligence of both the parties, substantially there would be Contributory Negligence and both would be blamed. In such a case, the crucial question on

[1] Law.com, Law.com, http://dictionary.law.com/Default.aspx?selected=341 (last visited Apr 12, 2017).
[2] Municipal Corpn. of Greater Bombay v. Laxman Iyer, 4182 (2003).

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which liability depends would be whether either party could by exercise of reasonable care, have avoided the consequence of other's negligence. Whichever party could have avoided the consequence of other's negligence would be liable for the accident. If a person's negligent act or omission was the proximate and immediate cause of death , the fact that the person suffering injury was himself negligent and also contributed to the accident or other circumstances by which the injury was caused would not afford a defence to the other. Contributory Negligence is applicable solely to the conduct of a plaintiff. This is a defence in which the defendant has to prove that the plaintiff failed to take reasonable care of his own safety and that was a contributing factor to the harm ultimately suffered by the plaintiff. For e.g. if A is going on the wrong side of the road, is hit by a vehicle coming from the opposite direction and driven rashly by B, A can be met with the defence of Contributory Negligence on his part.

Following cases will explain how contributory negligence is established.

In Rural Transport Service v. Bezlum Bibi[3], the conductor of an overcrowded bus invited passengers to travel on the roof of the bus. The driver ignored the fact that there were passengers on the roof and tried to overtake a cart. As he swerved the bus on the right for the purpose and went on the kutcha road, a passenger sitting on the roof was hit by a branch of a tree, he fell down, received severe injuries, and then died. It was held that both the driver and conductor were negligent towards the passengers, who were invited to sit on the roof. There was also contributory negligence on the part of the passengers including the deceased, who took the risk of travelling on the roof of the bus.

In Yoginder Paul Chowdhury v. Durgadas[4], the Delhi High Court has held that a pedestrian who tries to cross a road all of a sudden and is hit by a moving vehicle, is guilty of Contributory Negligence.

In Harris v. Toronto Transit Commission,[5] the Supreme Court of Canada has held that if a boy sitting in a bus projected his arm outside the bus in spite of warning and is injured, he is guilty of Contributory Negligence.

RULES DETERMINING CONTRIBUTORY NEGLIGENCE[6]

The Contributory Negligence Act, 1945 prescribes the rule when there is Contributory Negligence on the part of the plaintiff. Whether there is Contributory Negligence or not has to be determined by the following rules:

- Negligence of the plaintiff in relation to the defence of Contributory Negligence doesn't have the same meaning as is assigned to it as a tort of Negligence. Here the plaintiff need not necessarily owe a duty of care to the other party. What has to be proved is that the plaintiff didn't take due care of his own safety and thus contributed to his own damage. Thus, all that is necessary to establish Contributory Negligence is to prove to the satisfaction of jury that the injured

[3] A.IR. 1980 Cal. 165.
[4] 1972 S.C.J. 483 Delhi.
[5] 1968 A.C.J. 264.
[6] Dr. R.K.Bangia, Law of Torts, 262.

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party didn't in his own interest take reasonable care of himself and contributed, by his own want of care to his own injury.

In Bhagwat Sarup v. Hiamalaya Gas Co.,[7]the defendant company sent its deliveryman to deliver the replacement of a gas cylinder to the plaintiff at his residence. The cap of the cylinder was defective. The deliveryman obtained an axe from the plaintiff for opening the cylinder and hammered the cap with the axe. The gas leaked from there and caused fire resulting in death of the plaintiff's daughter, injuries to some other family members and damage to his property. It was held that the mere fact that the plaintiff gave an axe/hammer to the deliveryman on asking didn't imply Contributory Negligence on the part of the plaintiff, because the plaintiff was a layman but the deliveryman was a trained person and was supposed to know the implications of the act being done by him.

- It isn't enough to show that the plaintiff didn't take due care of his own safety. It has also to be proved that it is lack of care which contributed to the resulting damage. If the defendant's negligence would have caused the same damage even if the plaintiff had been careful and the plaintiff's negligence isn't the operative cause of accident, the defence of Contributory Negligence can't be pleaded.

In Agya Kaur v. Pepsu Road Transport Corporation[8] an overloaded rickshaw with 3 adults and a child on it, while being driven on the correct side of the road, was hit by a bus being driven at a high speed and also coming on the wrong side. It was held that there was negligence on the part of the bus driver only, and in spite of the fact that the rickshaw was overloaded, there was no contributory negligence on the part of the rickshaw driver, as the fact of overloading of the rickshaw didn't contribute to the occurrence of the accident.

In a case[9] when a cyclist falls into a ditch in the darkness, if the ditch is on a public road without a danger signal, because such a ditch couldn't be observed by the cyclist even if he had the lamp on his cycle. There is deemed to be no Contributory Negligence of the cyclist, but the sole cause of the accident is failure to give warning about the ditch by a local authority.

EXCEPTIONS TO THE RULES OF CONTRIBUTORY NEGLIGENCE

Following are the two situations where defence of Contributory Negligence can't exist.

- To be not guilty of Contributory Negligence the plaintiff should have acted like a prudent man. The situation of Contributory Negligence won't exist if the plaintiff has taken as much care as a prudent man in a similar situation would have taken.

In Sushma Mitra v. MPSRTC[10] the plaintiff was travelling in a bus resting her elbow on a window sill. The bus at that time was moving on a highway. She was injured when hit by a truck which was coming from the opposite direction. When sued for compensation, the defendant took the plea that act of resting elbow on a window sill was an act of Contributory Negligence. The Madhya Pradesh High Court didn't allow the defence. It was held that as she

[7] A.I.R. 1978 All. 168.
[8] A.I.R. 1980 P.& H. 183.
[9] Ibid., at 5
[10] A.I.R. 1974 M.P. 68.

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acted like a reasonable passenger while the bus was moving on a highway, she was entitled to claim compensation.

From the facts and the judgement of the above case it was established that in crowded streets of big towns, the passengers, who are adults are expected to keep their limbs within the carriage and Contributory Negligence may be inferred in certain circumstances if they fail to take this safety measure, but in the above case the bus was moving on a highway outside the limits of town and hence it is therefore observed that in such a case, even a man of ordinary prudence would rest his elbow on the window sill and he cant be expected to foresee any harm to himself in doing so.

In Klaus Mittlebachert v. East India Hotels Ltd.[11], the plaintiff, a co-pilot in Lufthansa Airlines checked into Hotel Oberoi Intercontinental, a 5-star hotel in Delhi, on 11th August 1972. As he dived from a diving board in the swimming pool, on 13th August,1972, he hit the bottom of the pool due to insufficiency of water in it and got serious injuries resulting in his paralysis, and died 13 years after the accident. The pool was considered to be a trap and the hotel premises were considered to be hazardous, for which the defendants running the said hotel were held liable. There was held to be no Contributory Negligence on the part of the plaintiff so as to affect his claim for compensation in the case.

- When the plaintiff is negligent but his negligence hasn't contributed to the harm suffered by him, the defence of Contributory Negligence can't be pleaded.

In a case[12] the plaintiff, who was going on his cycle without headlight on a road in the darkness, fell into a ditch dug by the defendant who hadn't provided any light, danger signal or fence to prevent such accidents in the darkness. It was held that the accident couldn't have been avoided even if the cyclist had fixed kerosene lamp in front of his cycle, which is generally used by the cyclists and , therefore there was no Contributory Negligence.

In Agya Kaur v. Pepsu Road Transport Corporation[13], a rickshaw which was being driven on the correct side of the road was hit by a bus coming on the wrong side of the road at a high speed. The bus didn't stop after hitting the rickshaw but thereafter hit an electric pole on the wrong side. The rickshaw puller at that time was carrying 3 adults and a child in the rickshaw. It was held that although the rickshaw was overloaded but that factor didn't contribute to the consequences. The accident was held to be due to the negligence on the part of the defendants only, and there was held to be no contributory negligence on the part of the rickshaw puller and was further observed: "even if the rickshaw was without a passenger or with one or two passengers, the accident wouldn't have been avoided and, therefore, the mere fact that the deceased rickshaw puller was carrying 3 adults and a child would be no ground to make any deduction in the award of compensation on the ground of Contributory Negligence.

[11] A.I.R. 1997 Delhi 201.
[12] Municipal Board,Jaunpur v. Brahm Kishore, 1978 All. 168.
[13] Ibid., at 8

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LAST OPPORTUNITY RULE

At Common Law, Contributory Negligence on the part of the plaintiff was considered to be a good defence and the plaintiff lost his action. The plaintiff's own negligence disentitled him to bring any action against the negligent defendant. Here plaintiff's negligence doesn't mean breach of duty towards the other party but it means absence of due care on his part about his own safety. This rule worked a great hardship particularly for the plaintiff because for a slight negligence on his part, he may lose his action against a defendant whose negligence may have been the main cause of damage to the plaintiff. The courts modified the law relating to Contributory Negligence by introducing the so-called rule of 'Last Opportunity' or 'Last Chance'

According to this rule, when two persons are negligent, that one of them, who had the later opportunity of avoiding the accident by taking ordinary care, should be liable for the loss. It means that if the defendant is negligent and the plaintiff having a later opportunity to avoid the consequences of the negligence of the defendant doesn't observe ordinary care, he can't make defendant liable for that. Similarly, if the last opportunity to avoid the accident is with the defendant, he will be liable for whole of the loss to the plaintiff.

The case of Davies v. Mann[14] explains the rule. In that case, the plaintiff fettered the forefeet of his donkey and left it on a narrow highway. The defendant was driving his wagon driven by horses too fast that it negligently ran over and killed the donkey. In spite of his own negligence, the plaintiff was held entitled to recover because the defendant had the 'last opportunity' to avoid the accident.

The application of the rule of 'last opportunity' was further defined in the case of British Columbia Electric Co. v. Loach,[15] and the party who could have the last opportunity to avert the accident. In other words, the rule was extended to cases of 'Constructive Last Opportunity'. In that case, the driver of a wagon, in which the deceased was seated, negligently brought the wagon on the level crossing of defendant's tramline without trying to see whether any tram was coming on the line. A tram, which was being driven too fast caused the collision. It was found that the tram which caused the accident was allowed to go on the line with defective brakes and if the brakes were in order then, in spite of the negligence on the part of the wagon's driver, the tram could have been stopped and the accident averted. The personal representatives of the deceased pleaded the defence of Contributory Negligence. It was held that they couldn't take the defence of Contributory Negligence because they had the last opportunity to avoid the accident which they had incapacitated themselves from availing because of their own negligence. The defendants were, therefore, held liable.

The rule of last opportunity was also very unsatisfactory because the party, whose act of negligence was earlier, altogether escaped the responsibility and whose negligence was subsequent was made wholly liable even though the resulting damage was the product of the

[14] 1882 10 M. and W. 546.
[15] 1916 1 A.C. 719.

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negligence of both the parties. After that the law reform (Contributory Negligence) Act,c1945 was passed for negligence caused anywhere, and after that whenever both the parties are negligent and they have contributed to some damage, the damages will be apportioned as between them according to the degree of their fault.

TENETS OF CONTRIBUTORY NEGLIGENCE

I. DOCTRINE OF APPORTIONMENT OF DAMAGES

The Kerala Torts (Miscellaneous Provisions) Act, 1976 Sec 8 of the act makes provision for apportionment of liability in case of Contributory Negligence. The provision is similar to the one contained in the English Law Reform Act of 1945. Contributory Negligence has been considered as a defence to the extent the plaintiff is at fault.

In Rural Transport Service v. Bezlum Bibi[16], the conductor of an overloaded bus invited passengers to travel on the roof of the bus. The driver swerved the bus to the right to overtake a cart. As the driver turned on the kutcha portion of the road, Taher Sheikh, who was travelling on the roof, was hit by the branch of a tree. He fell down and got serious injuries and later he died due to that. In an action by the mother of the deceased to claim compensation, it was held that there was negligence on the part of the conductor and the driver of the bus and there was also Contributory Negligence on the part of the deceased because he took the risk of travelling on the roof of the bus. The compensation payable by the defendants was reduced by 50% and they were asked to pay Rs. 8000 instead of Rs. 16000.

The same rule has also been followed by the MP High Court in Vidya Devi v. MP Road Transport Corpn.[17] In that case, a motor cyclist driving negligently dashed against a bus and died in the accident. The driver of the bus was also found to be negligent in not keeping a good look out so as to avert a possible collision. It was held that between deceased motor cyclist and the driver of the bus, the blame was in the proportion of two-third and one-third and as such, the plaintiff was entitled to damages to the extent of one-third of what he would have been entitled to if the deceased wasn't negligent.

It is now well settled that in the case of Contributory Negligence, courts have power to apportion the loss between the parties as seems just and equitable. Apportionment in that context means that damages are reduced to such an extent as the court thinks just and equitable having regard to the claim shared in the responsibility for the damages.

II. DOCTRINE OF ALTERNATIVE DANGER

Although, the plaintiff is supposed to be careful in spite of the defendant's negligence, there may be certain circumstances when the plaintiff is justified in taking some risk where some dangerous situation created by defendant. The plaintiff might become perplexed or nervous by a dangerous situation created by the defendant and to save

[16] A.I.R. 1980 Cal. 165
[17] 1974 M.P.L.J. 573

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his person or property, or sometimes to save a third party from such danger, he may take an alternative risk. The law, therefore, permits the plaintiff to encounter an alternative danger to save himself from the danger created by the defendant. If the course adopted by him results in some harm to himself, his action against defendant will not fail. The judgement of the plaintiff should not, however be rash.

The position can be explained by the case of Jones v. Boyce[18] in that case, the plaintiff was a passenger in the defendant's coach and the coach was driven so negligently that the plaintiff was alarmed. With a view to save himself from the danger created by the defendant, he jumped off the coach and broke his leg. If the plaintiff had remained in his seat, he would not have suffered such harm because the coach was soon after stopped. It was held that the plaintiff had acted reasonably under the circumstances and he was entitled to recover.

III. DOCTRINE OF IDENTIFICATION

The defence of Contributory Negligence can be taken not only when the plaintiff himself has been negligent but also when there is negligence on the part of the plaintiff's servant or agent: provided that the master himself would have been liable for such negligence if some harm had ensued out of that.

The doctrine was expressly overruled by the House of Lords in the Bernina Mills v. Armstrong[19]. In that case, through the fault of the two ships they collided and two persons on board of one of those ships were drowned. The representatives of the deceased persons were held entitled to recover compensation from the owners of the ship other than that in which they were. The deceased weren't identified with their carrier for its negligence for the purpose of the defence of contributory Negligence.

CONCLUSION

Contributory Negligence is a type of defence for the defendant with which he can show some negligence on the part of the plaintiff so that the amount to be paid as compensation is reduced to the extent of the plaintiff's own negligence. Thus, Contributory Negligence is a good defence for the defendants to use against the plaintiffs in cases related to some specific torts.

Since this defence favoured the defendants in most of the cases, the last opportunity rule was brought in wherein whoever among the defendant and plaintiff had the last opportunity to prevent the accident was held liable.

[18] 1816 1 Stark, 493.
[19] 1881 13 A.C. 1.