

Torts Tutorial Chapter 5 – Contributory Fault

INTRODUCTION

This program is designed to provide a review of basic concepts covered in a first-year torts class and is based on DeWolf, Cases and Materials on Torts (<http://guweb2.gonzaga.edu/~dewolf/torts/text>). You have accessed the tutorial for Chapter 5, "Contributory Fault." Prior to doing these exercises you should read the relevant material in DeWolf, Cases and Materials on Torts. A brief overview of this Chapter is provided below.

OVERVIEW

Ch. 5. Contributory Fault

Plaintiffs are unable to recover the full extent of their damages if they have also contributed to causing the injury. The common law rule was that a plaintiff's contributory negligence barred *any* recovery; modern statutes and decisions, however, permit a recovery so long as the plaintiff pays for his "share" of fault. *Li v. Yellow Cab* is a good statement of the modern view that liability should follow fault. Some jurisdictions limit the comparative fault principle to situations where the plaintiff is less negligent than the defendant; this is called "modified comparative negligence" (as opposed to a "pure" comparative negligence system).



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Also at common law, assumption of risk was a complete bar to recovery. Although assumption of risk was originally a kind of contract doctrine (a "voluntary assumption of a known risk"), in which the plaintiff has presumably "agreed" to the risk in order to induce the defendant to engage in the relationship, it eventually was muddled with concepts of unreasonable conduct and fault. Modern comparative fault treats one form of assumption of risk (often called "secondary" assumption of risk) as a version of comparative negligence (and thus reduces the plaintiff's recovery only where the plaintiff is in fact acting unreasonably). Another form of assumption of risk (often called "primary" assumption of risk)—where plaintiff wants the defendant to leave a danger in place (e.g. unscreened baseball seats or a steep ski slope)—is not so much a defense to negligence as it is a redefinition of what reasonable care is in such circumstances. A final form of assumption of risk has been recognized in some jurisdictions—*reasonable* assumption of risk—as a damage-reducing factor. For example, as in the *Kirk* case the court may reject an all-or-nothing approach to plaintiffs injured by inherent dangers as well as the defendant's negligence.

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To Exercise

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EXERCISE

Each question gives you a fact pattern, and then you must choose an answer that best reflects the law as you understand it. Be careful to read the question and the suggested answers thoroughly. Select your answer by clicking on it. If you give an incorrect answer, you will be given feedback on what was wrong with your answer. By clicking on the feedback you will be taken back to the question to try again. Once a correct answer is selected, click on the feedback to go to the next question.

You may begin the exercise by click on a question number below. Throughout the tutorial three Shortcut Buttons will be located in the bottom right-hand corner of each page. The Return Button  brings you back to this page allowing you jump to questions of your choice if you prefer. The Information Button  takes you to the Torts Glossary. The Home Button  takes you to the Torts Tutorial Home Page.

Questions:

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Question #1

Milly Graham was driving down Sixth St. when her car was struck by another car driven by Homer Pyle. Both parties suffered substantial injuries. Assume for purposes of this question that both parties were acting negligently, and that a jury would make the following assessment: Milly was 20% at fault and Homer was 80% at fault. Which of the following is correct:

- (1) Both Milly and Homer could recover, but their damages would be reduced by their share of negligence;
- (2) Milly would get a partial recovery, but Homer's claim would be barred.
- (3) Homer could recover but Milly's claim would be barred.
- (4) None of the above, because the answer depends upon the jurisdiction.



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(3)Homer could recover but Milly's claim would be barred.

(4)None of the above, because the answer depends upon the jurisdiction.

This answer would be true in some jurisdictions (those that use "pure" comparative fault), but not all jurisdictions do so. Try again.



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- (4) None of the above, because the answer depends upon the jurisdiction.

That's incorrect. It wouldn't be the case in any jurisdiction, since Milly's fault was considerably less than Homer. If Milly's claim were barred, Homer's would most certainly be. Try again.



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That's correct. In cases like this, the rules of the jurisdiction are all important, and they are usually found in some kind of comparative fault statute. The exercises in the next section will help you deal with different kinds of comparative fault statutes.



Question #2

Which of the following is correct in most jurisdictions:

- (1) Assumption of risk may bar the plaintiff's claim, but contributory negligence will not.
- (2) Assumption of risk has been abolished in favor of comparative negligence.
- (3) Assumption of risk is only applied when the plaintiff has consented in advance to the injury.
- (4) Assumption of risk is only applied if the defendant's conduct is found to be reasonable.



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That's correct. Although it's not always the case that application of assumption of risk results in barring a claim, it may. For example, in the Uniform Comparative Fault Act, the statute talks about using comparative fault principles for "unreasonable assumption of risk not constituting an enforceable express consent." Even though the UCFA uses comparative fault (rather than a bar) in cases of most cases, in those cases that DO constitute an enforceable express consent, even the UCFA recognizes that such consent will bar the claim. Try again.



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No, that's incorrect. Most jurisdictions say something like what the California Supreme Court said in *Li v. Yellow Cab*: Assumption of risk will be abolished "to the extent it is nothing more than contributory negligence." The problem is that there are lots of cases where it is something other than contributory negligence, and most jurisdictions have retained some form of assumption of risk to deal with those other kinds of situations. Try again.



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No, that's incorrect. In those cases where the plaintiff has consented in advance to the injury (e.g., in a boxing match, or a football game), the assumption of risk doctrine may be applied. But those aren't the only kinds of cases. Often the argument is made that the plaintiff and the defendant agreed that the plaintiff would bear the *risk* of injury. That's different from agreeing in advance to be injured. Try again.



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That's incorrect. Remember that the defendant doesn't need the assumption of risk doctrine if his behavior is found to be reasonable, since in that case he won't be liable anyway. Assumption of risk is important only in those cases where the defendant's conduct is found to be something other than reasonable, and then the argument arises as to whether, despite the fact that the defendant would ordinarily be liable, the plaintiff's recovery should be barred (or reduced) because of some separate policy. Try again.



Question #3

A statute provides:

CONTRIBUTORY NEGLIGENCE--EFFECT. In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

Which of the following is the correct description of this statute?

- (1) It is a pure contributory negligence statute.
- (2) It is a pure comparative negligence statute.
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- (4) None of the above.



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Sorry that's incorrect. There's no such thing as a pure contributory negligence statute. Most jurisdictions that still use the contributory negligence rule originally adopted it by absorption of the common law and have left it that way. Try another answer.



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Sorry, that's incorrect. A pure comparative negligence statute would provide for a recovery regardless of how much the plaintiff was at fault. This statute does not do that. Try another answer.



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That's correct. Because the statute provides for a recovery to the plaintiff only when "such negligence was greater than" that of the defendants, it's a so-called modified" comparative fault statute. In this case it would be considered a 50% statute, since it allows the plaintiff to be as much as 50% at fault and still recover.



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That's incorrect. There's a correct answer in the group, try again.



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Question #4

A Statute provides:

^s 1411. Damages recoverable when contributory negligence or unreasonable assumption of risk is established.

In any action to recover damages for personal injury, injury to property, or wrongful death, with culpable conduct attributable to the claimant or to the decedent, including contributory negligence or unreasonable assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.

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That's correct. Because the statute provides no cutoff point at which the plaintiff's claim would be barred, it's called a pure comparative negligence statute. That means that if the plaintiff is 80% at fault, 80% of her damages will be deducted leaving her with a 20% recovery.

You have now completed the exercises in Chapter 5. You will now be returned to the menu.



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No, that's incorrect. Because the statute contains no limiting language (e.g, "so long as..." or "unless...") it is not a modified comparative negligence statute. Try again.



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END

Find more exercises at the Torts Home Page by clicking the Home Action Button

