Defence against negligence
(Relevant to AAT Examination Paper 6: Fundamentals of Business Law)
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Negligence is a tort action where the defendant owes a duty of care to the plaintiff, the defendant breached that duty of care, and this proximately caused consequential damages.

The defendant in a negligence suit could defend himself by negating one of the elements of negligence: for example, that he did not owe a duty of case, he had exercised reasonable care, or the breach did not cause the damages.[1] In addition to negating one or more of these elements, a defendant may rely on some specific doctrine or statutory defence that may eliminate or reduce liability. Four of the more common defences are the doctrine of *volenti non fit injuria*, reliance on exemption clause, contributory negligence or claiming that the action is time-barred.

Case scenario

On 1 Jan 2007, Ivan participated in a rugby tournament held by a rugby club. When he entered the rugby field there was a large sign attached to the entrance gate stated that "the ruby club will not be responsible to any damages or injuries for whatever reason(s)".

During the tournament when Ivan was holding the ball and running towards the goal, the opponent team player Derek tackled him and Ivan fell to the ground. Unfortunately there were some rocks on the field and Ivan landed right on them and broke his knee. The reason that there were rocks on the field was due to improper maintenance by the rugby club.

The paramedic immediately escorted Ivan into a van and drove him to the nearest hospital. Ivan was sitting at the front seat but he forgot to wear the seatbelt. When the van approached an intersection, Cecil drove his sports car through a red light and hit the van and Ivan suffered a serious head injury. The doctor concluded that if Ivan had worn a seatbelt, his injury would have been significantly less.

On 1 February 2010, Ivan filed a lawsuit against Derek and the rugby club for his knee injury, and he also sued Cecil for his head injury on the ground of negligence. What are the defences that they could raise?

Defence against negligence

1. *Volenti non fit injuria*

[1] For example there was some intervening act which breaks the chain of causation (novus actus interveniens)

Derek

Derek could raise the defence of volenti non fit injuria (or "voluntary assumption of risk") It is a complete defence; if pled successfully, Derek will not be liable for Ivan's keen injury. The basis of this defence is that a person who consents to an activity which is associated with a risk of injury should not be able to hold responsible the person who caused that injury. By participating in the rugby tournament, Ivan by implication consented to the normal risks inherent in the game[2] such as being tackled.

In order to raise this defence:

- Ivan must have had full knowledge of the risk and also appreciated the nature and the extent of the risk[3]
- Ivan must have consented to the exact nature and degree of that risk[4]
- Ivan must consented to the risk under his own free will[5]

In Derek's case, the above requirements seems to have been satisfied unless Derek did not play the game according to the rules, as this would have exceeded the degree of risk that Ivan consented to.

The rugby club

The rugby club may not be able to claim the defence of *volenti non fit injuria* since Ivan did not expect a properly managed football field would have dangerous objects (such as rocks) in it. Being injured due to rocks on the pitch is not the type of risk that a rugby player is willing to assume.

2. Reliance of exemption clause

The rugby club

There was a large sign attached on the entrance gate stated that "the ruby club will not be responsible to any damages or injuries for whatever reason(s)" but the club cannot rely on this exemption clause to exclude liability. In this case, the club was negligent by failing to clean up the rocks which caused Ivan's knee injury. Under section 7(1) of the Control of Exemption Clauses Ordinance (Cap 71), any death or injury resulting from negligence cannot be contracted out by reference to contract clauses.

In addition to the statutory restriction, under common law, when the exemption clause was written in a document which does not require a signature[6] but merely posted, the exemption clause will not be effective unless the following requirements are satisfied:

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[2] *Simms v Leigh Rugby Football Club* [1969] 2 All ER 923
[3] *Osborne v London & North Western Railway Co* (1888) 21 QBD 220
[4] Ibid
[5] *Smith v Charles Baker & Sons* [1891] AC 325 (HL)

- The exemption clause maker must give reasonable and sufficient notice[7] to draw the attention of the claimant to the exemption clauses contained in the document.[8]

- The greater the exemption, the greater the degree of notice required.[9]

- The document which contained the exemption clause must be an integral part of the contract:[10] therefore the notice must be shown to the injured person before he accepts the contract or at a time when he can reject the contract.[11] For example, an exemption clause will be ineffective if it were posted inside a car park where the contract was already formed at the entrance gate when the driver took the car park ticket from the ticket machine. In Ivan's case, by the time he saw the notice it may have been too late for him to withdraw from the tournament.

3. Contributory negligence

Cecil

Cecil may be able to plea the defence of contributory negligence in relation to Ivan's head injury as part of the injury was caused by Ivan's failure to wear a seatbelt.

Under section 21 of the Law Amendment and Reform (Consolidation) Ordinance (Cap 23):

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage"

Applying the above statutory provision to Cecil's case, if the expert evidence indicates that Ivan's head injury would have been considerably reduced if he had worn a seatbelt then the court would reduce the award of damages to a fair proportion on an just and equitable basis.[12]

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[6] For example, a notice sign, bulletin board, a poster on the wall or an entrance ticket.

[7] For example, the size of the notice sign must be large and it must be displayed at a conspicuous spot; the words in the sign must be dark, bold or underlined.

[8] *Parker v South Eastern Railway Co.* (1887) 2 CPD 416

[9] In Ivan's case, the rugby club wished to exempt itself from all liabilities in the rugby field for any reason so the exemption is wide ranging and therefore the notice board must be very large.

[10] *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* (1949) 2 KB 528

[11] *Thornton v Shoe Lane Parking Ltd.* (1971) 2 QB 163

[12] In *Froom v Butcher* [1976] 1 QB 286, the court suggest the damages should be reduced by 15% - 25% for failing to wear a seatbelt. This case was referred to in *Tsoi Kwok Kuen v. Chan Wah Hin* HCPI1019/2005 and the award of damages was reduced by 20% for failing to wear a seatbelt.

4. The action commenced after the limitation period

Derek, rugby club, Cecil

Under section 27(4)(a) of the Limitation Ordinance (Cap 347), the limitation period for personal injuries is three years from the date on which the cause of action accrued[13] or at the date of knowledge[14] (if the injury was discovered or became significant at a later date).

Since the accident occurred at 1 January 2007, Ivan's action on negligence would be time-barred if it were instituted on or after 1 February 2010 unless the injuries were hidden and they were discovered at a later date.

[13] The cause of action in this case is common law negligence and it accrued on 1 January 2007.
[14] Section 27(4)(b)