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RETHINKING RISK-TAKING: THE DEATH OF *VOLENTI?*

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ABSTRACT. Volenti non fit injuria *allows a negligent defendant to escape liability by showing that the claimant voluntarily and willingly accepted the risk in question. This article combines the theoretical limitations of the* volenti *defence with a case analysis of how its application has played out in the "real world", and argues it is not fit for modern tort law. The defence has a controversial and chequered history, being described as a "so-called principle … of little help: indeed, it is confusing, unnecessary, and if we are not careful, it will lead us to the wrong outcome". It is submitted that* volenti *is based on unjustified concepts of people agreeing to risks, leads to harmful outcomes and that the defence does not fit with current approaches to tort liability. This article therefore concludes that the harmful outcomes of the* volenti *defence far exceed any potential benefits provided, and the defence should therefore be abolished.*

KEYWORDS: *tort, defences,* volenti non fit injuria*, risk-taking, consent.*

> "Few branches of English case law are as confused and inconsistent as the decisions on a man's right to complain of physical injury after he has knowingly incurred danger."[1]

I. INTRODUCTION

Volenti non fit injuria allows a negligent defendant to escape liability by showing that the claimant voluntarily agreed to accept the risk in question. This paper combines the theoretical limitations of the *volenti* defence with a case analysis of its application in the "real world" to advocate for its abolition. The defence has a controversial and chequered history, being

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[1] D.M. Gordon, "Wrong Turns in the Volens Cases" (1945) 61 L.Q.R. 140, 140.

described as a "so-called principle that may or may not apply [and] is of little help: indeed, it is confusing, unnecessary, and if we are not careful, it will lead us to the wrong outcome".[2] It will be shown that *volenti* is based on unjustified notions of people agreeing to risks, leads to harmful outcomes and does not fit modern approaches to tort liability.

There are six parts to this article (including this introduction). Section II explores the relationship between *volenti* and consent, highlighting that any reform or abolition of *volenti* will not impact the important role that consent has in tort law. Section III focuses on the limitations of *volenti* as a defence, arguing that it is inappropriate and unnecessary for modern tort law. Section IV then considers how the law should be reformed. It argues that *volenti* should be abolished and that any relevant facts be dealt with on the basis of contributory negligence or an absent element in a negligence action. Section V is a case analysis. It reviews the cases considering *volenti*, showing that abolition of the defence will change the outcome in a relatively small number of cases. These will be where parties are held liable for negligence, despite the claimant's acceptance of the risk in question. Whilst the change may affect few cases, it will nonetheless be argued that this step is important because *volenti* is an inherently flawed device. Thus, even if its abolition results in greater protection for only a small number of claimants, the law will have been placed on a more satisfactory footing: one that is fair, intellectually honest, and transparent. Section VI concludes.

Volenti has been subjected to serious academic and judicial criticism,[3] and its operation has been affected by statutory interventions that severely restrict its practical application. It is therefore surprising that there has not yet been a detailed analysis of the defence's application to the law in England and Wales, or a consideration of the impact that removing the defence would have on tort law.[4] The difficulties created by the application of *volenti* to concurrent liability claims in tort and contract has recently been explored, but – as the authors of that work highlight – further analysis of the defence's flaws is both justified and necessary.[5] The arguments and findings of this paper are important for several reasons. First, *volenti* is still a key part of the tort law syllabus and taught in almost every, if not every, law school in the UK. Future lawyers, judges and policy-makers are therefore being taught that the defence still has an important role to play.

[2] S.D. Sugarman, "Assumption of Risk: The Monsanto Lecture" (1996) 31 Valparaiso U.L.R. 833, 834.

[3] See e.g. R. Kidner, "The Variable Standard of Care, Contributory Negligence and Volenti" (1991) 11(1) Legal Studies 1; A.J.E. Jaffey, "Volenti Non Fit Injuria" [1985] C.L.J. 87.

[4] It is however noted that previous academic arguments have typically focused on restricting the application of the defence to situations where there is a consensual relationship or transaction between the parties: see e.g. Jaffey, "Volenti Non Fit Injuria" and G.L. Williams, *Joint Torts and Contributory Negligence: A Study of Concurrent Fault in Great Britain, Ireland and the Common-law Dominions* (London 1951), 295.

[5] J. Gardner and J. Murphy, "Concurrent Liability in Contract and Tort: A Separation Thesis" (2021) 137 L.Q.R. 77, 97.

Second, the defence is of practical significance. Despite being rarely successful, over 70 reported cases in the last 10 years[6] involved a claim of *volenti*: its abolition would save valuable, limited legal resources. Third, the defence raises important issues of inequalities of power that ought to be confronted. Finally, an analysis of *volenti* is academically worthwhile, as it highlights how the values and expectations of society have changed considerably over the last century and how the common law is sometimes slow to reflect these changes.[7]

II. The Relationship Between *Volenti* and Consent

Volenti is often, but not invariably, regarded as synonymous with "the defence of consent". Accordingly, the first issue that must be considered is the nature of the relationship between consent and *volenti*. Whilst there are similarities between these principles – they both serve to defeat the claimant's cause of action[8] – there are also important differences in terms of substance and in terms of the types of cases to which they apply. Consent plays such an important role in tort law (for example in the intentional torts, in *Rylands v Fletcher* cases and in private nuisance) that any reform of *volenti* must not undermine those causes of action in which consent is a defence, or its absence constitutes an element of the tort in question.

In terms of substance, the differences between consent and *volenti* are subtle but significant. First, although the presence of consent *always* operates to defeat a claim in tort, there are two discrete ways in which it does this. In some cases, consent is invoked as a defence proper: that is, although the claimant can successfully establish the elements of the tort, the fact that they consented to the act in question serves to negate liability.[9] On other occasions, though, the presence of consent constitutes an absent element in the tort. And it is because the tort has not been made out that the action fails. This is clearly highlighted in Bristow J.'s discussion of informed consent in *Chatterton v Gerson*, where it was confirmed that the claimant had the burden of showing the absence of consent, as it was an element of the tort in question.[10] This can be contrasted with *volenti*,

[6] The case research methodology is outlined in notes 117 and 118.

[7] See discussion of the "living common law" in J. Stapleton, *Three Essays on Torts* (Oxford 2021), 4–10.

[8] P. Cane and J. Goudkamp, *Atiyah's Accidents, Compensation and the Law*, 9th ed. (Cambridge 2018), 54. It may however be possible to consent to part of a claim and not another part, therefore it would only defeat part of the claim.

[9] See e.g. *Lyttleton Times Co. Ltd. v Warners Ltd.* [1907] A.C. 476: the fact the claimant consented to the defendant's operation of noisy printing equipment served to preclude an action based on private nuisance: "both parties agreed upon a building scheme with the intention that the building should be used . . . for a printing house according to a design agreed upon" (481).

[10] *Chatterton v Gerson* [1981] Q.B. 432, 442–43. See also *Freeman v Home Office (No. 2)* [1984] Q.B. 524: McCowan J. said of the battery case of *Chatterton v Gerson* that: "Bristow J took the view that it was for the plaintiff to show the absence of real consent" (538) and discussion by Goudkamp, that

which is always a defence, and considered only once all the elements of the tort have been proven.[11]

The second key difference between consent and *volenti* turns on the certainty that the claimant will suffer harm. Consent is based on the fact that the claim cannot succeed if the claimant authorised the action in question. For example, there is no battery if there was consent to the complained of touch.[12] Consent therefore is based on agreeing to a certain state of affairs or "invasion of interest".[13] By contrast, as discussed by Fox L.J. in *Morris v Murray*,[14] *volenti* is about the claimant's accepting the *risk* that something harmful *may* occur. To establish the defence, it must be shown that the claimant voluntarily agreed to take the risk, knowing the full nature and extent of the specific risk. The confusion between the two is understandable: by agreeing to take the risk, the claimant has consented to that *risk.* But crucially they have not consented to the specific infringement of a right, or infliction of harm. This is confirmed in the discussion in *Blake v Galloway*, where *volenti* was considered the relevant principle when it was held that the claimant had consented to the risk of being struck by a flying piece of bark, even if it was thrown without reasonable care. A further illustration is *Morris v Murray* where it was determined by the Court of Appeal that the claimant agreed to the *risk* of being injured by the negligent actions of the drunken pilot. It is unlikely, however, that, had the pilot specifically asked the claimant "may I injure you by crashing the aircraft?", the claimant would have consented to the pilot's doing that.

Whilst there has been some judicial conflation of the two principles,[15] this second important difference between them was highlighted as early as 1887 in *Thomas v Quartermaine.* There, Bowen L.J., when discussing the scope and application of *volenti* was insistent that there was a difference between the claimant being aware of a risk and their knowing of, and agreeing to, a specific outcome.[16] More recent case law also tends to reinforce the distinction between the two defences. In the present era, judges have for

consent at times works as a defence and is can also be indicative of an absent element: J. Goudkamp, *Tort Law Defences* (Oxford 2013), 65–67.

[11] See discussion of this point in the Scottish case *Raybould v T N Gilmartin (Contractors) Ltd.* [2018] SAC (CIV) 31 where the appeal court commented that the Sheriff "not make a finding that *volenti* applied without first of all accepting that the defenders owed a duty of care to the pursuer which they had breached", at [15].

[12] See comments from Holt C.J. in *Cole v Turner* (1704) 6 Mod. Rep. 149.

[13] *Clerk & Lindsell on Torts*, 23rd ed. (London 2020), [3-103].

[14] *Morris v Murray* [1991] 2 Q.B. 6, 13–14.

[15] *Herd v Weardale Steel, Coal and Coke Co.* [1915] A.C. 67; *Chapman v Ellesmere* [1932] 2 K.B. 431.

[16] *Thomas v Quartermaine* (1887) 18 Q.B.D. 685, 696. This case was cited, and the distinction between consent and *volenti* emphasised, by the Northern Ireland Oireachtas (the Irish legislature) in the Explanatory Notes to the Civil Liability Act 1961 (at p. 14), however cf. *Slater v Clay Cross Co.* [1956] 2 Q.B. 264. A clear distinction between the two principles is further confirmed in *Clerk & Lindsell* which proposes that there are two "forms" of consent in tort law: (1) authorisation of the act which would otherwise constitute an invasion of the claimant's interests (which is consent) and (2) assuming the risk of a tort being committed (which is *volenti*): [3-103].

the most part[17] treated *volenti* as relevant principally to negligence and breach of statutory duty cases.[18] The general concepts are also built into the Occupiers' Liability Act.[19] By contrast, consent is, as noted, predominately applied to torts of intention (for it is only where the defendant does something intentionally that the claimant can be said to consent to the certainty of a particular outcome). This difference in the types of cases to which the principles apply has been specifically recognised in *Blake v Galloway*,[20] *Flint v Tittensor*,[21] *Dann v Hamilton*,[22] *Duce v Worcestershire Acute Hospitals NHS Trust*[23] and *Sophie Ashraf v The Royal Military Academy Sandhurst*.[24] The distinction is also inherent in the structure of chapters or sections on *volenti* and consent in most of the leading textbooks, which generally have *volenti* included as general defence and discussion of consent as relevant to a limited number of specific torts, such as intentional torts, nuisance, *Rylands v Fletcher* and defamation.[25]

These points highlight how, these days, judges generally perceive consent and *volenti* to be very different principles. Reflecting this, many of the leading tort treatises follow suit. It is therefore safe to state that the orthodox view, though assailed by sceptics here and there, is that the two principles come apart from one another and have different roles. The abolition of *volenti* need not therefore negatively impact the application of the consent defence in tort law.

III. Limitations of *Volenti*

The overall argument of this paper is that *volenti* should not play a role in modern tort law. To provide a foundation for this claim, this section discusses four key limitations of the defence: the fact that it (1) manifests inequalities, (2) creates tensions between tort and contract law, (3) is based on inaccurate and outmoded notions of agreement and (4) has been significantly reduced in scope with the result that there is restricted practical utility in maintaining it.

[17] *Arthur v Anker* [1997] Q.B. 564 where consenting to a clamping of the claimant's car was determined to be the basis of a successful *volenti* defence.

[18] See *Cummings v Granger* [1977] Q.B. 397 (where *volenti* is permitted under the Animals Act 1971, s. 5 (2)).

[19] Occupiers Liability Act 1957, s. 2(5); for discussion see *James v White Lion Hotel* [2021] EWCA Civ 31, [2021] Q.B. 1153, at [89]–[99]. Although see discussion at Section IV below advocating that this should properly be categorised as defining the duty of care owed by the defendant.

[20] *Blake v Galloway* [2004] EWCA Civ 814, [2004] 1 W.L.R. 2844.

[21] *Flint v Tittensor* [2015] EWHC 466 (QB), [2015] 1 W.L.R. 4370.

[22] *Dann v Hamilton* [1939] 1 K.B. 509.

[23] *Duce v Worcestershire Acute Hospitals NHS Trust* [2018] EWCA Civ 1307, 164 B.M.L.R. 1.

[24] *Sophie Ashraf v The Royal Military Academy Sandhurst* [2020] 7 W.L.U.K. 705.

[25] See e.g. E. Peel and J. Goudkamp, *Winfield and Jolowicz: On Tort*, 20th ed. (London 2020); S. Deakin and Z. Adams, *Markesinis & Deakin's Tort Law*, 8th ed. (Oxford 2019); M. Lunney and K. Oliphant, *Tort Law*, 6th ed. (Oxford 2017); J. Steele, *Tort Law – Text, Cases and Materials*, 4th ed. (Oxford 2017); S. Green and J. Gardner, *Tort Law*, 1st ed. (London 2021).

A. Inequality and Risk-taking

First, it is contended that the basis of *volenti* – that someone knowingly accepts the risk of being harmed – is an intrinsically troubling principle. A significant portion of the factual scenarios of the *volenti* cases involve imbalances of power; employee and employer, passenger and driver, doctor and patient, consumer and business. A tort law defence that allows people's claims to be denied on the basis that they agreed to the risk may involve turning a blind eye towards structural inequalities of power that exist in our society. Those who have less in life will more often be required to accept risks than others who have greater resources or power. People with less choice in their lives are, for example, more likely to accept work in inherently dangerous situations simply because they have few or no alternative choices.

The relationship between risk-taking and inequality is clearly shown in the (now thankfully abolished) doctrine of common employment.[26] The policy implications of this principle were succinctly captured in *Thrussell v Handyside*, when Hawkins J. said: "his poverty, not his will" accepted this risk.[27]

This concern continues in the modern day, with multiple studies across economics, psychology and neuroscience confirming that economic inequality increases the propensity to undertake risky activities. Psychological research highlights that "in humans, perceptions of need may be influenced not only by material resources but also by subjective factors and relative comparisons and, therefore, by inequality".[28] Behavioural studies completed in the United States, Canada, Germany and England have all found that inequality – both geographical and income-based – increased the risk-taking behaviours of participants.[29] Hopkins's economic analysis determined that unequal social relationships can also increase risk-taking behaviour, with those who are disadvantaged in society engaging in more risky behaviours.[30]

[26] Law Reform (Personal Injuries) Act 1948, s. 1; *McMullen v National Coal Board* [1982] I.C.R. 148; *Bolt v William Moss & Sons* [1966] 110 S.J. 385; *Bowater v Rowley Regis Corp* [1944] K.B. 476; *Herd v Weardale Steel Coal & Coke* [1915] A.C. 67; *Membery v Great Western Railway Co.* (1889) 14 App. Cas. 179; *Thomas v Quartermaine* (1887) 18 Q.B.D. 685.

[27] *Thrussell v Handyside* (1888) 20 Q.B.D. 359, 364.

[28] B. K. Payne, J. L. Brown-Iannuzzi and J. J. W. Hannay, "Economic Inequality Increases Risk Taking" (2017) 114 Proceedings of the National Academy of Sciences of the United States of America 4643, 4643.

[29] U. Schmidt, L. Neyse and M. Aleknonyte, *Income Inequality and Risk Taking* (Kiel Institute for the World Economy (IfW) 2015). S. Mishra, L. Hing and M.L. Lalumière, "Inequality and Risk-taking" (2015) 13 Evolutionary Psychology 1. See also A. Robson, "Status, the Distribution of Wealth, Private and Social Attitudes to Risk" (1992) 60 Econometrica 837. It is recognised that this type of research has clear limitations and "they may not reflect how inequality and risk taking operate in everyday life. Data on risky behaviour are difficult to collect because people often underreport risky behaviours on surveys": Payne et al., "Economic Inequality Increases Risk Taking", 4646. The underlying finding is however supported by many different studies across multiple countries.

[30] E. Hopkins, "Inequality and Risk-taking Behaviour" (2018) 107 Games and Economic Behavior 316.

If the theoretical grounding of *volenti* is a concern with what the claimant voluntarily risked, there are valid reasons to doubt the aptness of that belief. In its research on addressing and responding to consumer vulnerability, the Financial Conduct Authority (FCA) confirmed a link between risk-taking and financial difficulties. In the paper *Consumer Vulnerability*, the FCA outlined that one of the key behavioural and personal consequences of vulnerability was a changing attitude towards risk – with people becoming more reckless and risk-taking when under financial stress.[31] A defence founded on the claimant's risk-taking behaviour therefore can manifest and exacerbate existing inequalities. There is a significant body of literature highlighting the individual and societal benefits that come from decreasing wealth and income in society.[32] Given that inequality is increasing in the UK (and, in fact, across most countries in the world), it is crucial to understand the effects of inequality and – where possible – address the consequences.[33]

B. Conflict with Contract Law

The second limitation of the application of *volenti* relates to the tension between the common law of tort and developments in contract law. The defence is at odds with the current approach to exclusion of liability in contract law. The Unfair Contract Terms Act 1977 and the Consumer Rights Act 2015 both include a provision striking down clauses which exclude liability for personal injury or death. These legislative provisions apply regardless of the status of the parties[34] and regardless of whether the contracts are standard-form or negotiated.[35] This statutory approach – *because it applies to all contracts* – strongly supports the idea that, where there are good grounds for a claim in respect of such loss, compensation should be paid if it occurs by virtue of the defendant's fault.[36] The restrictions effectively mean that, in contract law, individuals cannot voluntarily assume the risk of the defendant causing them injury or death – which is the specific purpose and aim of the *volenti* defence. The relationship between express contract terms, duties of care in tort, and the legislation governing exclusion has been highlighted – but not directly addressed – in *Johnstone v*

[31] Occasional Paper No.8: Consumer Vulnerability (fca.org.uk), 18; FG21/1: Guidance for Firms on the Fair Treatment of Vulnerable Customers (fca.org.uk), [2.19].

[32] R. Wilkinson and K. Pickett, *The Spirit Level: Why Equality is Better for Everyone* (London 2010); A. Sen, *Inequality Reexamined* (Oxford 1992); L. Warwick-Booth, *Social Inequality* (Los Angeles 2013); R. Thaler and C. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (London 2008); M. Sandel, *What Money Can't Buy: The Moral Limits of Markets* (London 2013).

[33] Payne et al., "Economic Inequality Increases Risk Taking".

[34] The Unfair Contract Terms Act 1977 applies to business-to-business contracts and consumer-to-consumer contracts, and the Consumer Rights Act 2015 applies to trader-to-consumer contracts.

[35] Unfair Contract Terms Act 1977, s. 2(1); Consumer Rights Act 2015, s. 65(1).

[36] Cane and Goudkamp, *Atiyah's Accidents*, 53.

Bloomsbury HA. Stuart-Smith L.J. stated (in *obiter*) that an express assumption of risk term could amount to *volenti* and thus fall within the scope of the UCTA 1977.[37] Although, on one interpretation, section 2(3) of UCTA and section 65(2) of CRA could be taken to indicate Parliament's willingness to tolerate a defence of "voluntary acceptance" to a certain extent. It will be seen below that the better interpretation is that these provisions serve to define the duty of care owed by the defendant.

Gardner and Murphy have elsewhere outlined the tension created by the application of *volenti* to concurrent liability claims in tort and contract in these words:

> Allowing the defence of *volenti* in tort … means, effectively, that a claimant will be bound to bear responsibility for their own seriously foolhardy behaviour. One could draft a contract containing a term to similar effect: that is, a term stipulating that the claimant should bear the risk of the defendant performing their side of the contract negligently. However, any such clause would be deemed ineffective under the Unfair Contract Terms Act 1977 or the Consumer Rights Act 2015. These statutes prohibit the use of terms designed to exclude liability for injury caused by negligence. The end result would be private law sending out mixed messages. Tort law would convey the message that claimants must bear personal responsibility for their own foolhardy behaviour, but contract law would do the opposite.[38]

The underlying message of the statutes is a recognition on the part of the legislature that people's lives and health are of such importance that it should not be possible for individuals to contract out of these rights. The fact that the statutes are premised on this principle gives rise to two related reasons why the common law of torts should follow suit. The first involves a concern for coherence in the law generally; the second draws on the idea that the courts may develop area of one area of law (i.e. tort) by analogy with the principles that underpin a statute in adjacent area of the law (i.e. contract).

More fully, the coherence point runs as follows. If consenting to the risk of one's injury or death has been deemed impermissible by statute in the contract law setting *in accordance with the intrinsic value of life and health*, there would be incoherence in the law of obligations if the law of torts did not to follow suit. Coherence in the law, after all, requires not just harmony between different causes of action, but also harmony between common law and statute.[39] Since the statutes are unlikely to be repealed, the

[37] *Johnstone v Bloomsbury HA* [1992] Q.B. 333, 346. See also discussion in Jaffey, "Volenti Non Fit Injuria", 94–95.

[38] Gardner and Murphy, "Concurrent Liability", 96. The authors go further and argue that "the better solution to the inconsistency within private law here would probably be to abolish the defence altogether given that it is objectionable on independent grounds"; 97.

[39] Lord Hodge, "The Scope of Judicial Law-making in the Common Law Tradition" (2020) 84 Rabels Zeitschrift für ausländisches und internationals Privatrecht 211, 222. See also K. Barker, "Private Law as a Complex System: Agendas for the Twenty-first Century" in K. Barker, K. Fairweather and R. Granthaml (eds.), *Private Law in the 21st Century* (London 2017); Stapleton, *Three Essays on*

onus is on the common law to come into line with what the legislation says.[40] This coherence argument further strengthens the justification for abolishing *volenti*.

The second point relies on the fact, neatly captured by Stapleton, that "people want the law to move with the times"[41] and the contract law statutes represent the modern approach to risk-taking, vulnerability and power imbalances. Furthermore, there is a well-established practice of reasoning by analogy with a statute in developing the adjacent areas of judge-made law.[42] Thus, as Lord Burrows (writing extrajudicially) has noted, there are numerous instances in which the principle that underscores a particular statute operating in one area of law, has been treated as a guide to the way judge-made law should be developed in an adjacent area. One good illustration is the fact that the Limitation Act 1980 which put in place limitation periods for *common law actions* has been judicially recognised on several occasions as a suitable guide to the limitation periods that should be applied to equitable actions not strictly governed by the statute.[43]

C. Genuine and Voluntary Agreement

The third key concern of the *volenti* defence is that it accepts the notion of the claimant agreeing to the risk without adequate analysis of whether they were *genuinely* and *voluntarily* willing to run the risk of the defendant's negligence. Liberal tradition has conventionally placed great importance on people's freedom to undertake obligations voluntarily, valuing (and in turn shaping) the legal practice of recognising and enforcing these obligations.[44] This is however an oversimplification and further critique is necessary. As outlined by Atiyah, agreeing to something "without inquiry into the reasons for which the [agreement] was given, seems a barren thing. It is, indeed, an example of formal reasoning, which can easily become formalistic if not fetishistic, to insist that [agreement] must bind, no matter what the reasons".[45]

The limits of agreement in other aspects of private law have been examined and recognised.[46] The role of agreement in contractual arrangements

Torts; A. Burrows, "The Relationship Between the Common Law and Statute in the Law of Obligations" (2012) 128 L.Q.R. 232; Gardner and Murphy, "Concurrent Liability".

[40] Statutes have become increasingly focused on protecting individual welfare; see e.g. the Law Reform (Contributory Negligence) Act 1945, Occupiers' Liability Act 1984 and the Consumer Protection Act 1987.

[41] Stapleton, *Three Essays on Torts*, 10.

[42] Burrows, "Relationship Between the Common Law and Statute", 250–54.

[43] Ibid., at 250–51.

[44] D. Kimel, "Neutrality, Autonomy, and Freedom of Contract" (2001) 21 O.J.L.S. 473, 473. See also D. Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Oxford 2003).

[45] P. Atiyah, *Essays on Contract Law* (Oxford 1990), Essay 11, 353. See also discussion in M. Chen-Wishart, "The Nature of Vitiating Factors in Contract" in P. Saprai, G. Letsas and G. Klass (eds.), *Philosophical Foundations of Contract Law* (Oxford 2014), 295–96.

[46] R.E. Barnett, "A Consent Theory of Contract" (1986) 86 Colum. L. Rev. 269; S. Saintier, "Defects of Consent in English Law" in L. DiMatteo and M. Hogg (eds.), *Comparative Contract Law: British and*

has been questioned and critiqued in both the common law and statute.[47] If an individual's ability genuinely and voluntarily to agree to the transaction in question is unacceptably limited, the mere notion of "choice" is not sufficient to ground obligations or deny claims. It is therefore important to recognise that choice and agreement are not as clear-cut as they are often made out to be.[48]

The same level of critique of what constitutes genuine agreement for the *volenti* defence has not occurred in the tort setting. The difficulties of determining when and whether the claimant agreed to the risk were highlighted by Asquith J. After summarising the facts in *Dann v Hamilton*, including the lack of legal or social pressure on the claimant and the alternative forms of transport available, he stated: "Is this enough to constitute her volens for the purposes of the maxim? Indeed, is it clear that the maxim applies at all to the present case? The authorities as to the scope and limits of the maxim, and its application, afford less guidance than might have been desired."[49]

Asquith J. not only draws a distinction between the "agreement" allegedly made in *volenti* cases and consent to cases of trespass to the person, but also, more importantly, highlights the significant difficulties that surround the former. We knowingly agree to take all sorts of risks every day. But the vast majority of these could never reasonably be taken to indicate a willingness to surrender potential claims; crossing the road when you know there are negligent drivers – or even just driving one's own car – cannot be seen as voluntarily assuming the risk of being injured.

There have been some attempts at analysis, but they fall far short of what has occurred in contract law; this can be seen from Stocker L.J.'s discussion in *Morris v Murray* of whether consent is subjectively or objectively determined,[50] and Lord Denning's consideration of the relationship between *volenti* and waiver in *Nettleship v Weston*.[51] It is however telling that neither of these cases provide clear guidance on what "genuine agreement" would be. Stocker L.J. stated "I do not, for my part, go so far as to say

American Perspectives (Oxford 2016); A. Marciano, "Freedom, Choice and Consent: A Note on a Libertarian Paternalist Dilemma" (2015) 32 Homo Oeconomicus 287; P.H. Schnuk, "Rethinking Informed Consent" (1994) 103 Yale L.J. 899; M. Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton 2012); M. Chen-Wishart, "Regulating Unfair Terms" in L. Gullifer and S. Vogenaur (eds.), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (London 2015); A.T. Kronman, "Contract Law and Distributive Justice" (1980) 89 Yale L.J. 472; S. Smith, *Contract Theory* (Oxford 2004), 323–40.

[47] This is evident in many aspects of contract law, including incorporation of terms (see *Interfoto Picture Library Ltd. v Stiletto Visual Programmes Ltd.* [1989] Q.B. 433 and *Parker v South Eastern Railway* (1877) 2 C.P.D. 416 (C.A.) and vitiating factors (see *B&S Contractors v Victor Green Publications* [1984] I.C.R. 419; *Pao On v Lau Yiu Long* [1980] A.C. 614); statutory provisions are discussed below.

[48] G. Hadfield, "An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualisation of Rational Choice in Contract Law" (1998) 146 U. Pa. L. Rev. 1235, 1251, 1260.

[49] *Dann v Hamilton* [1938] 1 K.B. 509, 515.

[50] *Morris v Murray* [1991] 2 Q.B. 6, 25, 28–29. Stocker L.J. does not provide a firm conclusion on this question, stating "I do not, for my part, go so far as to say that the test is an objective one" (30).

[51] *Nettleship v Weston* [1971] 2 Q.B. 691.

that the test is an objective one"[52] and Lord Denning did no more than state the need for an "express or implied" waiver.[53] Further analysis is required. It is unconscionable to exploit someone's necessities or desires, even if they have appeared to agree to the risk in question.[54] Goodin emphasised the ethical limitations of *volenti*, highlighting the difficulties of ensuring that agreement is given completely genuinely and voluntarily.[55] In considering the application of *volenti* to tort law claims, Lloyd-Morris highlighted that the conditions regulating the agreement required for the defence are "at best onerous".[56]

Despite these insights, without further analysis of what type of agreement is needed to enliven *volenti* and what protections are in place to ensure that any agreement given is genuine and informed, it is hard to think that the defence rests on secure principles. On the other hand, there are good reasons to question its retention. For example, in *Dann v Hamilton* the claimant could have taken the bus home for twopence instead of accepting a lift with a driver whom she knew had consumed alcohol. Can we really say that a young female "agreed" to run the risk of a car accident if her only alternative was unfamiliar London public transport by herself at 11.50pm?

D. Restrictions in Scope

The final limitation of *volenti* is related to the practicalities of keeping such a defence as part of the current legal system. The utility of *volenti*, has been significantly circumscribed in three key ways. First, the enactment of the Law Reform (Contributory Negligence) Act 1945 has meant that cases are more likely to result in damages being apportioned on the grounds of contributory negligence than defeated by a successful plea of *volenti*. Lord Denning acknowledged as much when he said: "now that contributory negligence is not a complete defence, but only a ground for reducing the damages, the defence of *volenti non fit injuria* … has been severely limited."[57] Second, the modernisation of employment rights and obligations has restricted the application of the *volenti* defence in dangerous workplaces.[58] Finally, the Road Traffic Act 1988 removed the applicability of the defence to motor vehicle accidents on public roads.[59] Between them, these reforms have had a profound practical impact on the application of

[52] *Morris v Murray* [1991] 2 Q.B. 6, 29.
[53] *Nettleship v Weston* [1971] 2 Q.B. 691, 701.
[54] R.E. Goodin, "*Volenti* Goes to Market" (2006) 10 The Journal of Ethics 53, 59.
[55] Ibid.; see also Jaffey, "Volenti Non Fit Injuria", 90–91.
[56] S. Lloyd-Morris, "New Beginnings, Defences and the New Civil Procedure Rules" (1999) 149 N.L.J. 596.
[57] *Nettleship v Weston* [1971] 2 Q.B. 691, 701.
[58] Law Reform (Personal Injuries) Act 1948, s. 1; The defence is generally not available if the employer has breached a statutory duty: see *Bowater v Rowley Regis BC* [1944] K.B. 476, 479 (Scott L.J.).
[59] "The fact that a person so carried has willingly accepted as his the risk of negligence on the part of the user shall not be treated as negativing any such liability of the user": Road Accidents Act 1988, s. 149(3).

the defence. According to the Compensation Recovery Unit, road accidents account for 79 per cent of all successful tort claims, and work-related injuries and illnesses contribute a further 7.5 per cent of successful claims.[60] These three measures have therefore removed most circumstances where *volenti* would have previously applied. They also provide a strong indication that the defence is out of place in modern-day society.

To conclude this part, whilst it is mostly accepted that *volenti* has limited general application, the four limitations on the availability of the defence discussed here demonstrate that the basis of, and justification for, the principle is questionable. These criticisms suggest that the maxim *cessante ratione legis, cessat lex ipsa*[61] could usefully be invoked here. As outlined by Justice Sutherland in the US Supreme Court this is one of the oldest maxims of the common law, and it states "where the reason of a rule ceased, the rule also ceased …. No rule of the common law could survive the reason on which it was founded. It needed no statute to change it, but abrogated itself".[62] Section IV proceeds from this argument and analyses how we could, and should, go about abolishing *volenti*.

IV. Reforming the Law

Considering the multiple limitations of *volenti*, it is apt to ask how the law should respond. The answer supplied in this paper is that that the defence has no role to play in modern-day tort law and should be abolished. This could occur through a Supreme Court decision overturning the defence, or through statutory reform.[63] Abolishing *volenti* does not mean that the claimant's actions in potentially accepting risks will no longer be relevant, merely that the law should either (1) rethink *why* the claim fails or (2) apportion liability between the parties.

A. Abolishing Volenti

The abolition of *volenti* may ostensibly seem like a radical departure from established principles of tort law. Yet on closer inspection it would not be a drastic manoeuvre. For a large portion of tort law's history, there was doubt about whether the defence applied in torts other than the intentional torts, and in a way that was substantively different to the operation of the consent. In 1929, Sir Frederick Pollock in the 13th edition of *Pollock on Torts* assumed that *volenti* would not apply to negligence, stating that "a man is not bound at his peril to fly from a risk from which it is another's

[60] Cane and Goudkamp, *Atiyah's Accidents*, 184, referring to 2016/2017 figures.
[61] "If the if the reason for the law ceases, so should the law itself."
[62] *Funk v United States*, 290 U.S. 371, 384 (1933).
[63] For example, this has largely occurred in Northern Ireland through the Northern Irish Civil Liability Act 1961.

duty to protect him, merely because the risk is known".[64] This approach is also reflected in more modern case law, with strong criticisms from Lord Denning in *Nettleship v Weston*[65] and Lord Hobhouse in *Reeves v MPC*.[66]

Other jurisdictions have also seen movements away from a risk-based defence to tort liability. *Volenti* has not applied in any meaningful sense in Northern Ireland since the fundamental reforms made by the Civil Liability Act 1961. Under section 34(1)(b) of that Act, *volenti* can only apply where the defendant shows that the claimant expressly agreed to waive their rights in respect of any claim. This significantly narrows the application of *volenti*, making it virtually inoperative in many contexts.[67] The abolition of the defence was also recommended in the USA in the *Restatement of Torts (Third): Apportionment of Liability*, which states that no complete defence is available "when a plaintiff's conduct demonstrates merely that the plaintiff was aware of a risk and voluntarily confronted it", but that these actions might "result in a percentage reduction of the plaintiff's recovery".[68] Some Australian jurisdictions appear to have done the opposite, and have instead moved towards giving more effect to parties' allocations of risks via statutes drafted in response to the 2022 *Review of the Law of Negligence* Report. However, an analysis of the case law shows that the statutes in question have not brought about substantial changes, and the courts remain hesitant to apply the *volenti* defence and deny claims on this basis.[69]

B. Rethinking Risk-taking: Apportioning Liability

The first possible approach to reforming the law is to use the claimant's actions as the basis for a finding of contributory negligence. The relationship between *volenti* and contributory negligence has been an ongoing source of confusion, with the difficulties examined by Warren as early as 1895.[70] Prior to 1945, when contributory negligence led to an apportionment of the loss in negligence claims, the two legal principles were often used interchangeably, without adequate analysis about which applied and why. This changed after the passing of the Law Reform (Contributory Negligence) Act. Weir highlighted how the common law, in particular tort law, has moved away from the traditional "all or nothing" approach

[64] F. Pollock, *Pollock's Law of Torts*, 13th ed. (London 1929), 173.
[65] *Nettleship v Weston* [1971] 2 Q.B. 691.
[66] *Reeves v MPC* [2000] 1 A.C. 360.
[67] See e.g. N. Cox, "Civil Liability for Foul Play in Sport" (2020) 54 N.I.L.Q. 364; *O'Hanlon v ESB* [1979] I.R. 75, 91–92 (Walsh J.).
[68] The American Law Institute, *Restatement of the Law, Torts – Apportionment of Liability* (St. Paul, MN 2000), 22.
[69] For more details on this, see J. Gardner, "'A Risk by Any Other Name': Rejecting *Volenti* in Australian Tort Law" in D. Rolph, T. Pilkington and J. Elridge (eds.), *Australian Tort Law in the 21st Century* (Alexandria, NSW forthcoming 2023).
[70] C. Warren, "'Volenti Non Fit Injuria' in Actions of Negligence" (1895) 8 Harv. L. Rev. 457, 459, 469–70.

to liability and instead aims to find a compromise, to "split the difference" between the two parties.[71]

As discussed above, Northern Ireland has removed *volenti* in favour of contributory negligence. One of the aims of the Northern Irish Civil Liability Act 1961 was to expand the role of contributory negligence. During the discussion of the Bill, the Minister for Justice declared that the forms would "provide that in every case of negligence, where both the plaintiff and the defendant are at fault, each party will pay for his own share in the responsibility for the damage" and later argued that "apportionment legislation has met with almost universal approval".[72] It is easy to see the benefits of this argument. Contributory negligence allows a more nuanced and flexible approach in that it sanctions apportionment between two morally blameworthy parties.[73]

There is, of course, a debate about whether contributory negligence and *volenti* cover the same ground, and whether contributory negligence could be utilised for every potential *volenti* claim. For example, in *Accidents Compensation and the Law*, Cane and Goudkamp seem to indicate that there is almost complete overlap, commenting that

> the only difference between the defence of assumption of risk and that of contributory negligence is that in the former case the claimant must actually have known of the risk whereas in the latter case it is enough that the claimant knew or ought to have known of the risk. On this basis, *in any case in which a defence of assumption of risk would be available, a defence of contributory negligence would also be available.*[74]

The authors then go on to question why courts would ever utilise the defence of *volenti* if contributory negligence is available. They highlight that as contributory negligence allows a "just solution", a pleading of the *volenti* defence is rarely successful.[75] However, it is not quite so simple as the two principles do not always cover the same ground. So much was highlighted in *ICI v Shatwell* where, in discussing the difference between *volenti* and contributory negligence, Lord Reid contended that "there is a world of difference between … collaborating carelessly, so that the acts of both contribute to cause injury to one of them, and … combining to disobey an order deliberately, though they know the risk

[71] T. Weir, "All or Nothing" (2004) 78 Tul. L. Rev. 511.
[72] Parliamentary Secretary to the Minister of Justice (Mr. Haughey), Committee on Finance – Civil Liability Bill, 1960 – Second Stage Dáil Éireann Debate, 3 May 1961, Vol. 188 No.11.
[73] Cf. R. Stevens, "Should Contributory Fault Be Analogue or Digital?" in A. Dyson, J. Goudkamp and F. Wilmot-Smith (eds.), *Defences in Tort* (Oxford 2015).
[74] Cane and Goudkamp, *Atiyah's Accidents*, 55 (emphasis added).
[75] Ibid. The authors interestingly refer to *Geary v JD Weatherspoon Plc* [2011] EWHC 1506 (QB) to provide an example when the defence has been successful. As will be discussed below, this cannot be accurately portrayed as a *volenti* case.

involved".[76] So whilst the contributory negligence legislation will apply to a significant portion of cases previously considered *volenti* cases, some actions will continue to fail entirely (by virtue of an absence of one of the relevant tort's essential elements).

Tort law has justifiably moved away from "all or nothing" liability.[77] If both parties have fallen below the standard of care expected, why should the actions of the claimant give the defendant a "get out of jail free" card? As outlined by Sugarman, contributory negligence provides:

> an official device for blaming both parties to an accident by making each of them take partial responsibility for paying for its financial consequences. In other words, the attitude of tort law today towards … riding with your drunk driver friend is "a plague on both of your houses". The driver was clearly negligent in driving while seriously inebriated; you, too, were negligent, however, by accepting a ride in those circumstances. The way we punish you both for your combined foolishness is by making the defendant pay something, but at the same time by denying you full recovery.[78]

In terms of moral responsibility for actions, contributory negligence seems a fairer approach than *volenti*, which completely removes liability despite the presence of fault on the part of defendant. The basis of apportionment in contributory negligence is what is "just and equitable" in the circumstances, so – by definition – if appropriately applied, the principle should result in a fair distribution of responsibility between the parties.[79] This reflects the reality of shared moral culpability. Using *volenti*, when contributory negligence is more appropriate carries with it the danger of being both an incorrect classification of the situation *and* generating the wrong overall outcome.[80]

Contributory negligence is merely one part of a general trend in private law towards allocating responsibility for wrongs on a shared basis, even if historically an all or nothing approach was taken. Other examples include dual vicarious liability,[81] the trend towards proportionate liability among

[76] Similar comments were made by the Court of Appeal in *Thomas v Quartermaine* (1887) 18 Q.B.D. 685: "the doctrine of volenti non fit injuria stands outside the defence of contributory negligence and is no way limited by it" and by American academic Simons, although he largely combined *volenti* with consent in making this argument: K.W. Simons, "Exploring the Relationship Between Consent, Assumption of Risk, and Victim Negligence" in J. Oberdiek (ed.), *Philosophical Foundations of the Law of Torts* (Oxford 2014). See also Jaffey, "Volenti Non Fit Injuria", 96.

[77] Weir, "All or Nothing".

[78] Sugarman, "Assumption of Risk", 852.

[79] Law Reform (Contributory Negligence) Act 1945, s. 1(1). The emphasis on apportionment on the basis of moral blameworthiness is confirmed by *Froom v Butcher* [1976] Q.B. 286, 296; C. Kennedy Q.C. and M. Snarr, "Intoxication and Inebriation: Another Late Night" (2015) 2 Journal of Personal Injury Law 84.

[80] This approach was discussed in *obiter* in *Pinchbeck v Craggy Island Ltd.* [2012] EWHC 2745 (QB); *Nettleship v Weston* [1971] Q.B. 691; *Flint v Tittensor* [2015] EWHC 466 (QB); *Owens v Brimmell* [1977] Q.B. 859 (contributory negligence); *Pitts v Hunt* [1990] 1 Q.B. 302 (illegality).

[81] *Viasystems (Tyneside) Ltd. v Thermal Transfer (Northern) Ltd.* [2006] Q.B. 510.

multiple wrongdoers[82] and the application of section 1(1) of the Civil Liability Act which allows any person liable to a party (whether in contract, tort, breach of trust or another other cause of action) to recover contribution from a third party in respect of the same damage, regardless of the basis of the liability.[83] Abolishing *volenti* and considering whether the claimant's behaviour should result in an apportionment of damages would be in line with this trend and therefore conducive to the coherence of the law.

C. Rethinking Risk-taking: Defeating the Claim

There are long-standing questions on the role that *volenti* plays in tort law claims. As Goudkamp comments: "significant problems arise in this connection on account of the use of imprecise language and a widespread failure to keep the distinction between torts and defences in view."[84] Whilst there are strong justifications for the removal of the defence of *volenti*, it does not mean that the circumstances enlivening the defence are no longer relevant to tort law. There are factors and circumstances underlying the finding of *volenti*, that courts can, should (and often do) consider under another rubric. If that is the case it can be "dangerously misleading" to classify the reasoning of the courts in terms of assumption of risks.[85] In his 1997 Monsanto Lecture, Sugarman detailed how assumption of risk cases were better considered as "something else" in tort law. This something else could be a denial of duty, a denial of breach, an issue of causation or remoteness or the presence of contributory negligence.[86]

If *volenti* were to be abolished, certain actions of claimants (and defendants) that have traditionally been considered the basis of the defence will continue to be relevant. It is argued that these issues are better considered under duty of care, breach, causation or remoteness. This would circumvent the limitations of the *volenti* principle discussed above, whilst still providing courts with the opportunity to defeat unmeritorious claims. An analysis of the case law highlights that this approach has already been taken. Some judges clearly treat *volenti* not as a defence in the strict sense of the word[87] but instead as being relevant to establishing an element of the relevant tort. This has also been discussed by Goudkamp, who comments "when judges hold that the principle [of *volenti*] applies, it is difficult to escape from the conclusion that they are actually reaching their decisions on the ground that one or more of the elements of the action in negligence is absent".[88] He

[82] K. Barker and J. Steele, "Drifting Towards Proportionate Liability: Ethics and Pragmatics" [2015] C.L.J. 49.
[83] See e.g. *Baker & Davies Plc v Leslie Wilks* [2005] EWHC 1179 (TCC).
[84] Goudkamp, *Tort Law Defences*, 55.
[85] Sugarman, "Assumption of Risk", 836.
[86] Ibid., Section II.
[87] That is, it is not a liability defeating rule external to the elements of the claimant's action.
[88] Goudkamp, *Tort Law Defences*, 57.

examines the confusing relationship between elements of tort law and the defences, submitting that *volenti* is symptomatic of the law's failure to address these issues.[89] Whilst I agree with these sentiments, this confusion also highlights that any relevant factual bases for *volenti* can – and should – be considered under the rubric of various elements of the tort in question.

D. Volenti *as Duty of Care*

The alleged risk-taking of the claimant is often inherently linked with a question of whether a duty of care is owed by the defendant.[90] This is evident in the "obvious risks" cases, where the relationship between whether there is a duty of care and *volenti* is closely linked. In *Proctor v Young* the claimant was injured riding a horse on the beach and the case is considered an application of *volenti*. This is however clearly incorrect with Gillen J. commenting that:

> In many respects this was a locus classicus of the principle of *volenti non fit injuria*. I consider that this is not one of those rare instances where the occupier of this land … was under a duty to prevent her from taking risks which were inherent in the activity of horse riding which she freely chose to engage in. In my view there was no duty in common law to protect against this obvious risk.[91]

Volenti – as a defence – could not apply if there were no duty (and therefore no cause of action) in the first place. When considering obvious risks cases, Patten commented that the claims could be defeated on the basis of *volenti*. However, he went further and argued that "this is not the analytical route generally used in these cases" with the judges instead finding that no duty owed to the claimant. It is therefore submitted by Patten that "logically, the issue of a defence cannot arise unless and until the defendant has first been found to be in breach of duty".[92] It is easy to see where this confusion arises. Take, for example, section 2(5) of the Occupiers Liability Act 1957 which states that "[t]he common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another)".

Superficially, the section appears to be a statutory enactment of *volenti*. This provision is, however, delimiting *the duty of care* by reference to risks that the visitor has willingly accepted.[93] It is therefore not providing the

[89] Ibid., at 56.
[90] D. Nolan, "Deconstructing the Duty of Care" (2013) 129 L.Q.R. 559, 572.
[91] *Proctor v Young* [2009] NIQB 56, at [35].
[92] K. Patten, "Public Benefit, Private Burden? The Role of Social Utility in Breach of Duty Decisions in Negligence" (2019) 4 Journal of Professional Negligence 230, 233.
[93] Weir, "All or Nothing", 534.

courts with a statutory defence of *volenti*. Rather, it is a way of determining the scope of the duty owed by the claimant.[94]

The same confusion appears in general acceptance of risk cases. Norris Q.C. in his analysis of *Anderson v Lyotier* commented that the claimant's informed decision to take a risk is not so much "a case of *volenti non fit injuria*; rather, it may be more appropriate to say that the claimant's own choice meant that the general duty of care owed by the instructor did not exten[d] to protect him from the consequences of his own choice".[95] Agreeing to accept a risk is often more appropriately addressed when determining whether the duty of care owed to the claimant extended to protect them from the consequences of their own choice (or potentially whether the claimant's free choice broke the chain of causation, which will be discussed below). Norris argues that it is a relevant consideration in the elements of negligence, as opposed to *volenti*. He highlighted that the judges in numerous landmark tort cases took cognisance of assumed risks yet did not dispose of those cases on the basis of the *volenti* defence, writing "Mr Poppleton, Mr Evans or Mr Tomlinson or [Ms.] Donoghue freely chose to do something with full awareness of the dangers involved" yet *volenti* was not considered relevant in these cases.[96]

E. Volenti *as Breach of Duty*

Another mechanism sometimes available to consider the factors previously dealt with under the rubric of *volenti* is the breach element. Williams implicitly made this connection in *Joint Torts and Contributory Negligence* when he discussed the impact that *volenti* had on the "presumptive" breach by the defendant.[97] There are many examples of this in the case law. For example, in *Dann v Hamilton* the plea of *volenti* worked as a denial of the breach of the duty.[98] The same approach is seen in sports-based personal injuries cases such as *Condon v Basi*[99] and *Vowles v Evans*,[100] with Swift commenting that "in the sporting context, the defence [of *volenti*] seems to have little if no application on the law as it currently stands".[101] One of the most famous examples of this is the American case of *Murphy v Steeplechase Amusement Co., Inc.*, where Justice Cardozo rejected a claim from an amusement park patron who fell and broke his knee on a park ride

[94] Cf. D. Grant and J. Sharpley, "Hotelkeepers' Liability for the Safety of Guests" [2003] International Travel Law Journal 226, 236 where section 2(5) is defined as "the common law defence of volenti in statutory form". I contend, with respect, this cannot be the correct classification of the section.
[95] W. Norris, "The Duty of Care Owed by Instructors in a Sporting Context" (2010) Journal of Personal Injury Law 183, 190.
[96] Ibid.
[97] Williams, *Joint Torts and Contributory Negligence*, 295.
[98] *Dann v Hamilton* [1939] 1 K.B. 509.
[99] *Condon v Basi* [1985] 1 W.L.R. 866.
[100] *Vowles v Evans* [2003] EWCA Civ 318, [2003] 1 W.L.R. 1607.
[101] J. Swift, "Sports Personal Injury" (2005) I.S.L.R. 61.

called the "Flopper". The case is almost uniformly referred to as an application of *volenti* to defeat the claim and is often discussed in the defences section of tort textbooks. A closer reading of the case, however, highlights that Justice Cardozo actually held that there was no breach and therefore no negligence on the defendant's part.[102] This approach can also be seen in informed consent cases, such as *Montgomery v Lanarkshire Health Board*.[103] If the defendant warns the claimant of the inherent risks in surgery and the claimant decides to go ahead with the procedure, there is no actionable claim as there is no breach of the defendant's duty.

Reviewing the factors previously considered to constitute the defence of *volenti* in terms of the breach calculus can sometimes provide a more flexible, appropriate way to look at the situation and consider both the actions of the claimant and the defendant, as well as the general circumstances related to the alleged breach. This approach is shown in the Court of Appeal decision in *Murray v Harringay Arena Ltd.*,[104] where the six-year-old claimant was injured at an ice-hockey match. Whilst this case has been justified on the basis that the claimant accepted the risk associated with being a spectator of a hockey match, it is more appropriately viewed as a breach issue. In denying the claim, Singleton L.J. focused on the lack of fault on the part of the defendant – incorporating the facts and consideration of risk-taking into the breach calculus. His Lordship balanced the probability of harm, the likely seriousness of injury and the cost of guarding against the danger in question.[105] This approach is also more philosophically justifiable. If the defendant has been negligent and has fallen below the required standard of care, it is hard to see why the claimant's acceptance of this breach should defeat a claim. Why is the claimant's acceptance of the risk of the defendant's breach considered more legally "potent" than the actual breach itself? If it is because the claimant's actions lowered the relevant standard of care owed to them, it is important for the courts to justify it in this language – instead of putting the blame on the claimant for accepting such a risk.

F. Volenti *as Causation*

Finally, the risk-taking actions of the claimant could be so unusual or unexpected that they break the chain of causation.[106] As an example, the

[102] See discussion in R. Strassfeld, "Taking Another Ride on Flopper: Benjamin Cardozo, Safe Space, and the Cultural Significance of Coney Island" (2004) 25(6) Cardozo L. Rev. 2189, 2190.
[103] *Montgomery v Lanarkshire Health Board* [2015] A.C. 1430.
[104] *Murray v Harringay Arena Ltd.* [1951] 2 K.B. 529.
[105] Ibid., at 532–33.
[106] This was argued, ultimately unsuccessfully, in *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50, [2019] A.C. 831. See discussion of this case by C. Purshouse, "The Impatient Patient and the Unreceptive Receptionist: *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50" (2019) 27 (2) Med. L. Rev. 318. It was also discussed in the context of adventure sports by P. Limb, "'Between a Rock and a Court Case' – Tortious Liability in 'Adventure Sports' Cases" (2013) (1) Journal of

connection between *volenti* and *novus actus interveniens* was considered in *Reeves v Metropolitan Police Commissioner*, with the majority emphasising that they were both grounded in notions of "personal autonomy".[107] This is further supported by Williams, who states that "the question of *volens*" often is actually a reflection on whether the defendant has been proven to have been negligent or whether the damages claimed are too remote.[108]

G. Benefits of Repackaging Volenti

There are five benefits to abolishing *volenti* and reallocating consideration of the relevant behaviour to various aspects of the negligence enquiry. First, it is consistent with the normal, and perfectly logical, process for tort law of considering the claim before considering defences.[109] Second, it is what the courts often already do in practice whilst still inappropriately referring to *volenti* principles, so it would be a more transparent and honest approach. Third, particularly in terms of utilising a breach calculus, it provides the courts with more flexibility to consider the actions of both the claimant and defendant as opposed to merely whether the claimant appeared to have accepted a risk. Fourthly, it overcomes the issues with established genuine agreement discussed above. As outlined by Lloyd-Morris:

> there is something conceptually, if not morally, unattractive about implying that a particular plaintiff [agreed] to be horribly mutilated or even killed in all but the most extreme of cases. Conceptually, it may be more "politically correct" to establish that no duty was owed to the plaintiff at that particular instance, or that the duty was discharged by what would have been considered to be a rudimentary step in other circumstances.[110]

Finally, this approach simplifies the burden of proof in tort claims; ensuring that the requirement to provide all substantive elements remains clearly on the claimant.[111]

It is recognised that aspects of these arguments are in direct contrast with Nolan's analysis on streamlining the duty of care.[112] However, considering these benefits and bearing in mind, too, the specific limitations of the

Personal Injury Law 7. and in cases of suicide by I. Freckelton S.C., "Compensability for Suicide: A Causation Dilemma" (2009) 16 Psychiatry, Psychology and Law 1 and T. Weir, "Suicide in Custody" [1998] C.L.J. 241.

[107] *Reeves v Metropolitan Police Commissioner* [1999] 3 All E.R. 897. See discussion of this in J. Alder, "Dissents in Courts of Last Resort: Tragic Choices?" (2000) 20 O.J.L.S. 221, 227–28; Jaffey, "Volenti Non Fit Injuria", 97–98, 99.

[108] Williams, *Joint Torts and Contributory Negligence*, 295.

[109] See discussion of this point in the Scottish case *Raybould v T N Gilmartin* [2018] SAC (CIV) 31 where the appeal court commented that the Sheriff "not make a finding that *volenti* applied without first of all accepting that the defenders owed a duty of care to the pursuer which they had breached", at [15].

[110] Lloyd-Morris, "New Beginnings".

[111] See e.g. discussion by the Australian High Court in *Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited* [2022] HCA 11, at [106]–[119].

[112] Nolan, "Deconstructing the Duty of Care".

defence outlined in Section III, I would contend that repacking *volenti* is the preferred approach. The harmful aspects of the defence, such as its ability to exacerbate existing inequalities, will be limited and the defence will more accurately reflect modern social expectations.[113] The removal of the defence will not result in cases the facts of which replicate previously defeated claims being successful. The abolition of the defence will however require the courts to consider the factors under the rubric of a more appropriate element of tort law. This allows the important aspects of *volenti* to continue to be recognised, whilst removing an inherently flawed component of tort law as it presently stands.

To conclude, this part of the article has argued that the abolition of *volenti* is clearly justified. Sometimes the defence is used to reach the wrong result and, instead, liability should be apportioned between the parties. In other instances, *volenti* is redundant and the right decision is reached, just for the wrong reasons. Either way, its abolition will provide both concrete benefits and legal clarity.

There are some potential arguments against the abolition of *volenti*, which should briefly be considered. First, it may not pass the "person on the street test", as the general public may not find it appropriate for an individual to accept the risk of harm and then turn around and sue when the harm eventuates.[114] This is more of a theoretical concern since, if the claimant's acceptance of the risk was relevant, it could still be utilised to defeat the claim or reduce the damages award. Second, the removal of the *volenti* defence takes away a discretionary tool judges have to defeat torts claims that they find unmeritorious. As outlined briefly above, and as will be discussed more fully in Section V below, there are several ways that judges can utilise risk-taking behaviour of claimants to deny claims – *volenti* is not needed for this to occur. Finally, it could be argued that the removal of the defence could undermine tort law's focus on personal responsibility.[115] Considering the limited role *volenti* plays in today's world, this is not a key concern; personal responsibility is protected in many other areas of tort law. As Norris commented, reframing the issues previously considered by *volenti* under other elements of tort law "is entirely consistent with the emphasis on personal responsibility and free will".[116] And, as mentioned above, applying *volenti* in situations where contributory negligence is more appropriate has the consequence of removing the personal responsibility of the *defendant* – allowing them to completely escape liability for their negligent behaviour.

[113] Stapleton, *Three Essays on Torts*, 10.
[114] Lord Reid, "The Judge as Law Maker" (1972) 12 J.S.P.T.L. 22, 25.
[115] See discussion in J. Stapleton, "Tort, Insurance and Ideology" (1995) 58 M.L.R. 820; cf. J. Morgan, "Tort, Insurance and Incoherence" (2004) 67 M.L.R. 384.
[116] Norris, "Duty of Care", 190.

V. Application to the Cases

The justifications for the abolition of *volenti* canvassed above have been largely philosophically or theoretically based. To reduce the risk that the recommended reform has unintended consequences, it is important to see how the defence works in practice. This part therefore undertakes a case analysis, to see how the courts have applied *volenti* on a substantive basis.[117] The cases are analysed to determine whether, and how, the defence would apply to modern-day scenarios, taking into account common law and statutory developments that limit its application.

A. Case Analysis

There have been 68 English cases considering the *volenti* defence in detail.[118] Among these, it was only in 16 cases that the defence was successfully invoked. Out of the unsuccessful cases, 14 claims failed because one of the elements of the tort was not fulfilled and in the remaining 38 the defence failed because it was not made out on the facts.

Thirteen out of the 16 successful cases are uncontroversial. Four of these 13 cases would now no longer be decided on the basis of *volenti* because they involved traffic accidents.[119] A further five cases would no longer be decided the same way because they related to dangerous working environments and, due to the abolition of the doctrine of common employment and developments in the common law's approach to employment conditions, *volenti* no longer applies to these situations.[120] Two cases did not concern personal injury or death and therefore did not raise the same practical issues.[121] A further case was based on an injured trespasser and the application of *volenti* would now be excluded by the Occupiers' Liability Act 1984.[122] A final case, *Cutler v United Dairies (London)*

[117] Multiple databases were searched to look for any relevant cases. Broad search terms used – namely "volenti", "risk", "voluntary" – and cases where *volenti* was pleaded or determined were chosen. A number of cases referred to volenti principles in general but were excluded because (1) it had no significance to the case and/or (2) was merely used as a brief analogy or passing reference in the judgment. In the last 10 years, there have been over 70 cases referring to *volenti*, although many of these did not consider the defence in any sort of detail.

[118] This list of cases was completed by searching LexisLibrary, WestLaw, HeinOnline and Baillii for cases referring to "*volenti*" or "voluntary assumption of responsibility". The cases range from 1814 to 2022.

[119] *Bridgeford v Weston* [1975] R.T.R. 189; *Bennett v Tugwell* [1971] 2 Q.B. 267; *Ashton v Turner* [1981] Q.B. 137 could also be considered by illegality defence as the parties driving away from a burglary and *Birch v Thomas* [1972] 1 W.L.R. 294 could also be excluded by UCTA/CRA as driver relied on a written exclusion notice in vehicle as the basis for *volenti*.

[120] *McMullen v National Coal Board* [1982] I.C.R. 148; *Bolt v William Moss & Sons* [1966] 1 WLUK 79; *Herd v Weardale Steel Coal & Coke* [1915] A.C. 67; *Membery v Great Western Railway Co.* (1889) 14 App. Cas. 179; *Thomas v Quartermaine* (1887) 18 Q.B.D. 685. This has clearly been a significant development as concerns with *volenti* applying to dangerous working environment were discussed in *obiter* in *Davies v Global Strategies Group (Hong Kong) Ltd.* [2009] EWHC 2342 (QB), (2009) 153(37) S.J.L.B. 37; *Bowater v Rowley Regis Corp* [1944] K.B. 476; *Dann v Hamilton* [1939] 1 K. B. 509.

[121] *Arthur and Another v Anker and Another* [1997] Q.B. 564; *Chapman v Ellesmere* [1932] 2 K.B. 431.

[122] *Ilott v Wilkes* (1820) 106 E.R. 674.

Ltd.,[123] was based on a rescuer voluntarily accepting the risk of injury during the rescue. Due to the increasing protection of rescuers, later cases have indicated that claims in these situations are now highly unlikely to be defeated by *volenti*.[124] There are, however three, more difficult, cases that warrant closer analysis. In line with the arguments in Section III, it is argued that these cases are better considered as either defeating the claim because one of the elements was not proven (*Geary v JD Weatherspoon*[125]) or are better dealt with under the banner of contributory negligence (*Morris v Murray*;[126] *ICI Ltd. v Shatwell*[127]).

B. Geary v JD Weatherspoon

In this case, the claimant slid down a banister at a Weatherspoon's public house and suffered life-changing physical injuries as a result. It was the living embodiment of Scrutton L.J.'s famous comments in *The Carlgarth*: "when you invite a person into your house to use the staircase, you do not invite him to slide down the banisters, you invite him to use the staircase in the ordinary way."[128] Whilst the case was defeated on the basis of *volenti*, I would contend that it is better viewed as an incomplete tort claim. This is because falling off the banister was an "obvious risk" and there is no duty for occupiers to warn of obvious risks.[129]

The claimant admitted that the risk of falling off the banister was obvious, and she was aware of the risk but decided to slide down anyway. The decisions referred to by the judges in the Court of Appeal – *Tomlinson v Congleton Borough Council* and *Evans v Kosmar v Villa Holidays PLC* – are all focused on a failure to warn of obvious risks. In fact, Coulson J. specifically stated that:

> In my view, *there is no difference in principle between* Tomlinson *and the present case*. Similarly, I also conclude that this case is indistinguishable from *Poppleton*. Both Mr Poppleton and the claimant deliberately took the risk that they might fall. Neither intended to fall but, due to a momentary misjudgement, they both did. And in both cases the defendant had taken some steps to deal with the problem (in *Poppleton* they had provided safety mats, here they had warned would-be sliders away from the banisters), and could not reasonably be expected to do more.[130]

[123] *Cutler v United Dairies (London) Ltd.* [1933] 2 K.B. 297.
[124] *Harrison v British Railways Board* [1981] 3 All. E.R. 679 (Q.B.); *Ogwo v Taylor* [1987] 3 W.L.R. 1145 (H.L.).
[125] *Geary v JD Weatherspoon* [2011] EWHC 1506 (QB).
[126] *Morris v Murray* [1991] 2 Q.B. 6.
[127] *ICI Ltd. v Shatwell* [1965] A.C. 656.
[128] *The Carlgarth* [1927] P. 93, 110.
[129] *Darby v The National Trust* [2001] EWCA Civ 189, (2001) 3 L.G.L.R. 29, at [16], [29].
[130] *Geary v JD Weatherspoon* [2011] EWHC 1506 (QB), at [45] (emphasis added).

Both *Tomlinson* and *Poppleton* are cases in which the claim was denied based on there being no obligation to warn of obvious risks. It is thus hard to see why *volenti* was relevant in *Geary v JD Weatherspoon*. As there is "no difference in principle" between *Tomlinson* and *Geary*, surely the claim must have been denied on the basis that there was no duty to warn of an obvious risk as opposed to a successful pleading of *volenti*.[131]

C. Morris v Murray

In *Morris v Murray* the claimant accepted a flight in a friend's light aircraft even though he was aware that the friend had consumed a considerable amount of alcohol that day. The plane crashed, killing the pilot, and seriously injuring the claimant. The autopsy revealed that the pilot had consumed the equivalent of 17 whiskies before flying. Fox L.J. held that:

> in embarking upon the flight the plaintiff had implicitly waived his rights in the event of injury consequent on Mr Murray's failure to fly with reasonable care. . . .. I would conclude, therefore, that the plaintiff accepted the risks and implicitly discharged Mr Murray from liability for injury in relation to the flying of the plane. The result, in my view, is that the maxim *volenti non fit injuria* does apply in this case.[132]

Due to the knowledge of the claimant and the significant amount of alcohol consumed, Stocker L.J. stated: "if this was not a case of *volenti non fit injuria* I find it very difficult to envisage circumstances in which that can ever be the case."[133] Despite these comments, there are moral and practical reasons why this would have been better dealt with according to the contributory negligence legislation. First, a steer could have been taken from the restrictions on *volenti* in road traffic accidents, given that both relate to inherently dangerous activities and have compulsory insurance requirements.[134] Second, the drunk driver was unjustifiably more dangerous than the passenger, and therefore should have additional responsibilities.[135] In light of these arguments, it is hard to see why the defence should continue to apply more broadly – for example to situations like *Morris v Murray*.

The Court of Appeal did not adopt this analysis and, instead, emphasised the differences between the situations. For example, Fox L.J. noted that "flying is intrinsically dangerous and flying with a drunken pilot is great folly. The situation is very different from what has arisen in motoring cases".[136] Sir George Waller further commented:

[131] This approach was discussed, in *obiter*, in *Sophie Ashraf v The Royal Military Academy Sandhurst* [2020] 7 W.L.U.K. 705; *Wattleworth v Goodwood Road Racing Co. Ltd.* [2004] EWHC 140 (QB).
[132] *Morris v Murray* [1991] 2 Q.B. 6, 17.
[133] Ibid., at 28.
[134] Kidner, "Variable Standard of Care", 17.
[135] Sugarman, "Assumption of Risk", 854.
[136] *Morris v Murray* [1991] 2 Q.B. 6, 17.

> In my opinion, however, there is a fundamental difference between the driving of a motor car and the piloting of a light aircraft. Flying is much more risky than driving a motor car and requires greater accuracy of control. To fly with a pilot who has taken a small amount of alcohol is to increase the risk. To fly with a pilot who has consumed a large quantity of alcohol is very dangerous indeed.[137]

I respectfully disagree with the Court of Appeal judges for two reasons. First, the pilot is the party with greater knowledge and understanding of the danger, as well as significant training. The analysis from the Court of Appeal therefore appears to support the idea that the pilot should not be completely absolved of responsibility for the accident merely because the other party accepted the risk of their negligent flying. Second, to ensure coherence between the common law and statute, surely more analysis of this distinction is needed to have such a significantly different result between road traffic and other accidents.

The second point to make is that *volenti* also results in a substantively unfair outcome when compared with contributory negligence. *Morris v Murray* is a case where contributory negligence could easily have applied. In fact, the trial judge held that *volenti* was not established stating that "this case falls far short of what would be necessary to defend the action successfully on the ground of *volenti non fit injuria*". His Honour instead held that there was contributory negligence and reduced damages by 20 per cent on the basis that the pilot held more responsibility for the accident than the passenger. This is in line with the approach previously taken by the courts in cases of road traffic accidents. When discussing the matter *obiter*, both Fox and Stocker L.JJ. felt that 20 per cent was too small a reduction and would have increased it to 50 per cent, showing that they both thought the *defendant* still had significant moral culpability. In light of this, applying *volenti* and completely absolving the defendant of liability seems morally inappropriate.

Third, and finally, if the court thought that there were strong reasons to defeat the claim in its entirety (which I respectfully believe there were not) then *Morris v Murray* could have been disposed of on the basis of illegality – similar to the finding in *Pitts v Hunt*.[138] There were some indications of this type of approach in *Morris v Murray* with Fox L.J. emphasising the "joint nature" of the illegal flight and stating that "the plaintiff co-operated fully in the joint activity and did what he could to assist it".[139] This would allow the claim to be defeated but avoid the pitfalls of *volenti* discussed in Section III.[140]

[137] Ibid., at 32.
[138] *Pitts v Hunt* [1991] 1 Q.B. 24.
[139] *Morris v Murray* [1991] 2 Q.B. 6, 16.
[140] This was discussed by Kidner, "Variable Standard of Care", 18. The morality and applicability of the illegality defence is clearly outside of the scope of this discussion and has been widely considered by others; see e.g. L. Shmilovits, "When Is Illegality a Defence to a Tort" (2021) L.S. 603; N. McBride,

D. ICI Ltd. v Shatwell

Even though *ICI v Shatwell* is based on injuries incurred during employment, there was no master/servant power imbalance, and the injury did not arise from an inherently dangerous working environment. Consideration and application of *volenti* therefore survives significant developments in relation to employment rights and obligations, such as the abolition of the doctrine of common employment,[141] and this case needs to be considered separately. Like *Morris v Murray*, I believe that *ICI v Shatwell* would have been better dealt with under the rubric of contributory negligence. And, again, the trial judge treated the case as one of contributory negligence and reduced damages by 50 per cent.[142] The House of Lords however held that *volenti* applied and the claim was completely defeated. The moral arguments about the substantive unfairness of *volenti* discussed above in connection with *Morris v Murray* also apply to this case. It seems hard morally to justify the fact that, whilst both parties have contributed to the harm, one is completely absolved from liability.

Due to the employment context, *ICI v Shatwell* also has the added concern of the impact *volenti* has on vicarious liability. The judges in the House of Lords in *ICI v Shatwell* were clearly concerned about the morality of the employer having to pay for the injuries suffered, with Viscount Radcliffe stating: "their employer is in no way to blame …. If the decision appealed from is to stand, the respondent is none the less entitled to make his employer pay him damages in compensation …. To me this seems to be an indefensible result."[143] Whilst there is very limited relevant case law, the application of *volenti* in its current format treats a tort committed by an employee differently from that committed by the institution. This was exemplified by Lord Reid's comments that whilst the defence could apply to negligence by a fellow employee, in contrast "an employer who is himself at fault … could not possibly be allowed to escape liability because the injured workman had agreed to waive the breach".[144]

In light of the decision in *ICI v Shatwell*, if the claimant was suing a negligent work colleague but was held to have consented to the risk of their negligence, the defence could be successfully applied; thus, the employer would not be vicariously liable. However, if the claimant directly sued a negligent employer for breach of a personal duty, the *volenti* defence would not apply, even if the claimant could be considered to have ostensibly accepted the risk of the employer's negligence. Having a different outcome depending on whether the claimant is injured by a negligent

"Not a Principle of Justice?" in S. Green and A. Bogg (eds.), *Illegality After* Patel v Mirza (Oxford 2018), 85.

[141] Law Reform (Personal Injuries) Act 1948, s. 1.

[142] *ICI v Shatwell* [1965] A.C. 656.

[143] Ibid., at 675.

[144] Ibid., at 674.

employee or a negligent employer conflicts with the current approach to vicarious liability, which holds institutions liable without the need for any moral blameworthiness.[145] The claimant should be entitled to compensation regardless of which party committed the breach. By differentiating between the negligent acts of employees and those of employers, *ICI v Shatwell* undermines important developments in tort law concerning institutional liability.

VI. Conclusion

This article addresses the nature of *volenti*, the practical and moral objections that can be levelled against the defence, as well as various theoretical objections based on its tendency to unsettle the coherence between contract and tort. Sugarman has commented that *volenti* is "both redundant and confusing as a legal doctrine".[146] The limitations of *volenti* are widely accepted and have been used to minimise the scope of the defence on many different levels. However, in light of the inherent difficulties associated with it, instead of renaming the defence, it would surely be better to abolish it completely. It will ensure a more appropriate approach and way of thinking about the cases and about risk-taking in society. This is the best of all worlds; providing more clarity and coherence, responding to the concerns about inequality and excluding the undesirable aspects of an inappropriate tort law defence, whilst also ensuring that if the elements of the tort are not made out, defendants will not be held liable.

The common law has recently been described as "living"; as our society develops, so too does the common law.[147] *Clerk & Lindsell* asserts that the decline of *volenti* is due to "changing social values" and the "perception that conduct which in a previous age would have fallen under the umbrella of a robust doctrine of individual responsibility is not necessarily undertaken voluntarily".[148] Lord Reid commented in *ICI v Shatwell* that *volenti* has a chequered history, highlighting that "one can hardly read the robust judgment of Cockburn C.J. in *Woodley v Metropolitan District Railway Co.* without some astonishment".[149] His Lordship however highlighted that Cockburn C.J.'s views were in line with judges who, a generation or two earlier, had invented the doctrine of common employment. This was nearly 60 years ago, and further reform is now clearly justified. There is precedent here; the common law has the ability to examine social values when making decisions. Tort law, aside from a few "adjunct" statutes, is

[145] As an example, Lord Hughes comment that "Vicarious liability is strict liability, imposed on a party which has been in no sense at fault": *Armes v Nottinghamshire County Council* [2017] UKSC 60, [2018] A.C. 355, at [91].
[146] Sugarman, "Assumption of Risk", 876.
[147] Stapleton, *Three Essays on Torts*, 6–7.
[148] *Clerk & Lindsell*, [3-107].
[149] *ICI v Shatwell* [1965] A.C. 656, 671.

judge-made.[150] Both Lord Hodge and Stapleton highlight the key role that the medical practice's shift towards individual rights and patient-centred care had in the 2014 decision of *Montgomery v Lanarkshire Health Board*.[151] Murphy reflects that tort law has developed not in line with grand theories but instead as a series of reactions to the "material and intellectual conditions of social life".[152] In *Lane v Holloway*, Salmon L.J. commented that whilst *volenti* could be justified academically, on a practical level it was "quite absurd".[153] The limitations of the defence have now gone beyond Salmon's L.J.'s biting comments; it is both intellectually unjustified and practically absurd. Our living common law can (and should) move with "modern societal expectations".[154] It should do so here and put an end to this defence once and for all.

[150] Lord Hodge, "Scope of Judicial Law-making", 212.
[151] Stapleton, *Three Essays on Torts*, 8; Hodge, "Scope of Judicial Law-making", 218.
[152] J. Murphy, "Contemporary Tort Theory and Tort Law's Evolution" (2019) 32 Canadian Journal of Law & Jurisprudence 413, 442.
[153] *Lane v Holloway* [1968] 1 Q.B. 379, 389 (Salmon L.J.'s criticisms were levelled at both illegality and *volenti*).
[154] Stapleton, *Three Essays on Torts*, 4.