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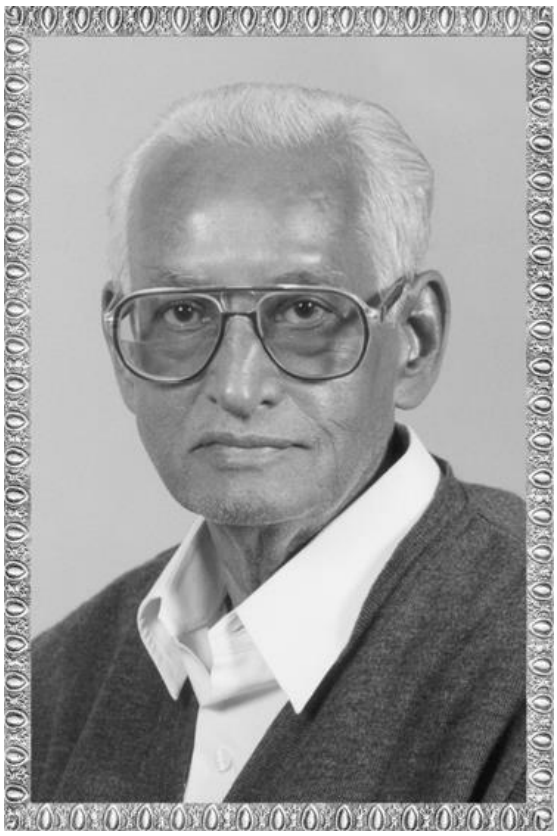

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UNIT -1 –GENERAL PRINCIPLE OF TORT

UNIT NO.	TOPIC NAME
1	GENERAL PRINCIPLES OF TORT
1.1	TORT-DEFINITION, DISTINCTION FROM CRIME, BREACHOF CONTRACT ETC., NATURE.SCOPE AND OBJECT TORT, WHO MAY BE SUED ? WHO MAY NOT BE SUED?
1.2	DAMNUM SINE INJURIA , INJURIA SINE DAMNUM
1.3	VOLENTI NON FIT INJURIA, UBI JUS IBI REMEDIUM
1.4	VICARIOUS LIABILITY – BASICS, SCOPE , JUSTIFICATION, DIFFERENT TYPES
1.5	EXTINGUISHMENT OF LIABILITY IN TORT
1.6	JUSTIFICATION OF TORT , DEFENCES TO THE DEFENDANT

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UNIT -1- GENERAL PRINCIPLES OF TORT :

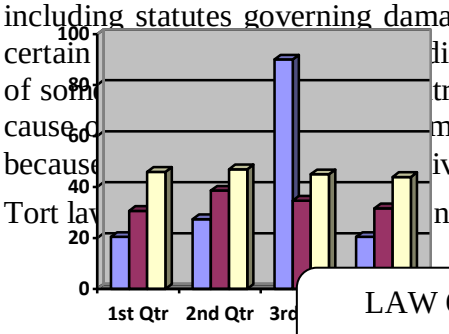
GENERAL PRINCIPLES OF TORT:

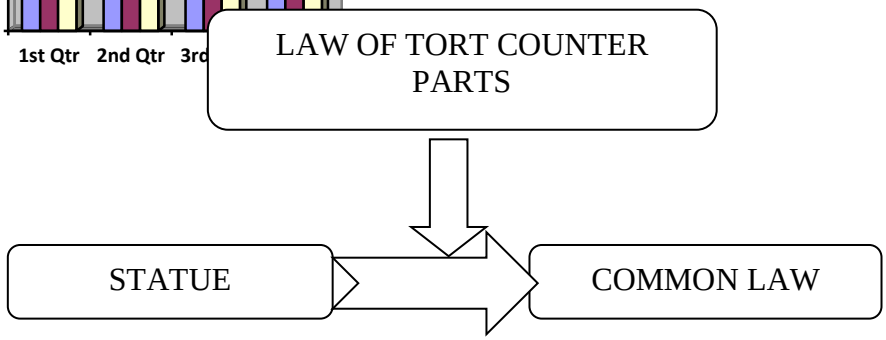
English tort law concerns civil wrongs, as distinguished from criminal wrongs, in the law of England and Wales. Some wrongs are the concern of the state, and so the police can enforce the law on the wrongdoersin court – in a criminal case. A tort is not enforced by the police, and it is a civil action taken by one citizen against another, and tried in a court in front of a judge (only rarely, in certain cases of defamation, with a jury). Tort derives from middle English for "injury", from Anglo-French, from Medieval Latin *tortum*, from Latin, neuter of *tortus* "twisted", from past participle of *torquēre*.

Following Roman law, the English system has long been based on a closed system] of nominate torts, such as trespass, battery and conversion. This is in contrast to continental legal systems, which have since adopted more open systems of tortious liability. There are various categories of tort, which lead back to the system of separate causes of action. The tort of negligence is however increasing in importance over other types of tort, providing a wide scope of protection, especially since*Donoghue v Stevenson*. For liability undernegligence a duty of care must be established owed to a group of persons to which the victim belongs, a nebulous concept into which many other categories are being pulled.

Tort law in India is a relatively new common law development supplemented by codifying statutes including statutes governing damages. While India generally follows the UK approach, there are certain dicate judicial activism, hence creating controversy. Tort is breach of som tract which has caused damage to the plaintiff giving rise to civil cause medy is available. If there is no remedy it cannot be called a tort becaus ive remedy to the person who has suffered injury.

Tort la n law counterparts, stems from both statute and common law.





Statutes

Similar to other common law countries, aspects of tort law have been codified. Furthermore, the Indian Penal Code criminalises certain areas of tort law.

Common law

As tort law is a relatively young area of law in India, apart from referring to local judicial precedents, courts have readily referred to case law from other common law jurisdictions, such as UK, Australia, and Canada. Relevant local customs and practices

However, attention is given to local socio-cultural practices and conditions in applying foreign legal principles. The legislature have also created statutes to provide for certain social conditions; for example, due to the nature of Indian families, a statute was passed to simplify determination of damages in the event of family members

MEANING OF TORT:

Tort is a Civil / Legal Wrong. Tort Law is one of the important branches of Civil Law.

The word Tort is derived from a Latin word 'Tortus' which means 'twisted' or 'cooked act'. In English it means, 'wrong'. The Expression 'Tort' is of French Origin.

The term 'Tort' means a wrongful act committed by a person, causing injury or damage to another, thereby the injured institutes (files) an action in Civil Court for a remedy viz., unliquidated damages or injunction or restitution of property or other available relief. Unliquidated damages mean the amount of damages to be fixed or determined by the Court. The 'Law of Torts' owes its origin to the Common Law of England. It is well developed in the UK, USA and other advanced Countries. In India, Law of Torts is non codified, like other branches of law eg: Indian Contract Act, 1872 and Indian Penal Code, 1860. It is still in the process of development. A tort can take place either by commission of an act or by omission of an act.

WRONG

- Public Wrong: Crime is the public wrong these are acts that are tried in Criminal Courts and are punishable under the Penal law (such as Indian Penal Code, 1860)
- Private Wrong: Tort is a private wrong. These are acts against an individual person or a person within a community and are tried in Civil court

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Definition

According to Prof. Winfield, Tortious Liability arises from breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressable by an action for unliquidated damages.

Sir John Salmond defined Tort as a civil wrong for which the remedy is common law action for unliquidated damages and which is not exclusively the breach of contract or the breach of trust or other merely equitable obligation.

- The person who commits or is guilty of a tort is called a "**tortfeasor**".
- The person who suffered injury or damage by a tortfeasor is called **injured** or aggrieved.
- Tort is a common law term and its equivalent in Civil Law is "**Delict**".
- In general, the victim of a tortious act is the plaintiff in a tort case.
- As a general rule, all persons have the capacity to sue and be sued in a tort.
- **Liquidated damages** (also referred to as liquidated and ascertained damages) are damages whose amount the parties designate during the formation of a contract for the injured party to collect as compensation upon a specific breach (e.g., late performance).

- **Unliquidated damages** (uncountable) (law) An amount owed to a plaintiff in a lawsuit by the defendant that cannot be determined by operation of law, such as the value of pain and suffering in a tort case.

- **Malice-** A condition of mind which prompts a person to do a wrongful act wilfully, that is, on purpose, to the injury of another, or to do intentionally a wrongful act toward another without justification or excuse.
- In its legal sense it means a wrongful act done intentionally without just cause or excuse.
- Malice is a wish to injure a party, rather than to vindicate the law. Malice of two types:
- i) Malice in fact
- ii) Malice in law
- ***Malice in fact* –** Means an actual malicious intention on the part of the person who has done the wrongful act. It is also called express or actual malice.
- ***Malice in law* –** It is not necessarily personal hate or ill will, but it is that state of mind which is reckless of law and of the legal rights of the citizen.

- **Motive –** Motive is that which incites or stimulates a person to do an act. It is the moving power which impels to action for a definite result.
- Motive is mainspring of human action. It is cause or reason. It is something which prompts a man to form an intention.

- **Intention –** A settled direction of the mind towards the doing of a certain act; that upon which the mind is set or which it wishes to express or achieve; the willingness to bring about something planned or foreseen.

- **Injury-** In legal parlance, 'injury' means any wrong or damage done to another, either in his person, rights, reputation or property.

- **Hurt –** Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.

- **Malfeasance –** it is a wrongful act which the actor has no legal right to do, or any wrongful conduct which affects, interrupts, or interferes with performance of official duty, or an act for which there is no authority or warrant of law or which a person ought not to do at all, or has contracted not, to do.
- The word 'malfeasance' would apply to a case where an act prohibited by law is done by a person. *(Khairul Bahsar v. Thana Lal AIR 1957)*

- **Misfeasance –** Unlawful use of power; wrongful performance of a normally legal act; injurious exercise of lawful authority; official misconduct; breach of law.
- The word 'misfeasance' would apply to a case where a lawful act is done in an improper manner.

- **Nonfeasance -** Non performance of some act which ought to be performed, omission to perform a required duty at all, or total neglect of duty.
- Nonfeasance would apply to a case where a person omits to do some act prescribed by law.

- Distinction between 'Misfeasance', 'nonfeasance' and 'malfeasance' – Misfeasance is the improper doing of an act which a person may wilfully do. Nonfeasance means the omission of an act which a person ought to do. Malfeasance is the doing of an act which a person ought not to do at all.

Tort Law provides an avenue for an injured person of a remedy. It does not provide a guarantee ofrecovery.

- Meaning under Penal Code, 1860 (section 44) – the word injury denotes any harm whateverillegally caused to any person, in body, mind, reputation or property.

Intentional Torts

An intentional tort is when an individual or entity purposely engages in conduct that causes injury or damage to another. For instance, striking someone in a fight would be consider an intentional act that would fall under the tort of battery; whereas accidentally hitting another person would not qualify as"intentional" because there was no intent to strike the individual (…however, this act may be considered negligent if the person hit was injured).

Although it may seem like an intentional tort can be categorized as a criminal case, there are important differences between the two. A crime can be defined as a wrongful act that injures or interferes with the interests of *society*. In comparison, intentional torts are wrongful acts that injure or interfere with an *individual's* well-being or property. While criminal charges are brought by the government and can result in a fine or jail sentence, tort charges are filed by a plaintiff seeking monetary compensation for damages that the defendant must pay if they lose. Sometimes a wrongful act may be both a criminal and tort case.

Negligence

There is a specific code of conduct which every person is expected to follow and a legal duty of the public to act a certain way in order to reduce the risk of harm to others. Failure to adhere to these standards is known as negligence. Negligence is by far the most prevalent type of tort.

Unlike intentional torts, negligence cases do not involve deliberate actions, but instead are when an individual or entity is careless and fails to provide a duty owed to another person. The most common examples of negligence torts are cases of slip and fall, which occur when a property owner fails to act as a reasonable person would, thus resulting in harm to the visitor or customer.

Strict Liability

Last are torts involving strict liability. Strict, or "absolute," liability applies to cases where responsibility for an injury can be imposed on the wrongdoer without proof of negligence or direct fault. What matters is that an action occurred and resulted in the eventual injury of another person.

Defective product cases are prime examples of when liability is maintained despite intent. In lawsuits such as these, the injured consumer only has to establish that their injuries were directly caused by the product in question in order to have the law on their side. The fact that the company did not "intend" for the consumer to be injured is not a factor.

Characteristics:

1. Tort, is a private wrong, which infringes the legal right of an individual or specific group ofindividuals.
2. The person, who commits tort is called "tort-feasor" or "Wrong doer"
3. The place of trial is Civil Court.
4. Tort litigation is compoundable i.e. the plaintiff can withdraw the suit filed by him.
5. Tort is a species of civil wrong.
6. Tort is other than a breach of contract
7. The remedy in tort is unliquidated damages or other equitable relief to the injured.

Essential elements to prove Tort

- Existence of legal duty from defendant to plaintiff
- Breach of duty
- Damage as proximate result.

Nature and Scope of Law Of Tort :

Distinction between Tort and Crime

Tort	**Crime**
i) Less serious wrongs are considered asprivate wrongs and have been labelled as civil wrong.	i) More serious wrongs have been consideredto be public wrongs and are known as crimes.
ii) The suit is filed by the injured personhimself.	ii) The case is brought by the state.
iii) Compromise is always possible.	iii) Except in certain cases, compromise is not possible.
iv) the wrongdoers pays compensation to the injured party.	iv) The wrongdoer is punished.
V) A person who commits Tort is a 'tortfeasor'	V) A person who commits Crime is a 'Criminal'or 'Offender'
vi) The remedy of tort is unliquidated damagesor other equitable relief to the injured	vi) The remedy is to punish the offender

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Distinction between Tort and breach of contract

Breach of Contract	Tort
i) It results from breach of a duty undertakenby the parties themselves.	i) It occurs from the breach of such duties which are not undertaken by the parties but which are imposed by law.
ii) In contract, each party owes duty to theother.	ii) Duties imposed by law of torts are not towards any specific individual but towards the world at large.
iii) Damage of contract is liquidated.	iii) Damage of tort is unliquidated.
iv) It provides limited remedy	iv) It provides unlimited remedy.

Distinction between tort and Breach of Contract

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Distinction between Tort and Breach of Trust

Tort	Breach Of Trust
i) Damage of tort is unliquidated.	i) Damage of breach of trust is liquidated.
ii) Law of tort was part of common law.	ii) Law of trust was part of Court of Chancery.
iii) Tort is partly related to the law of property.	iii) Trust is a branch of law of property.

OBJECTIVE OF LAW OF TORT :

Tort law has several objectives. Some of the important objectives are mentioned here-
1. The purpose of tort law is to restore someone who has been injured as a result of the wrong of another to the condition they were prior to the injury by awarding them monetary damages which will pay for medical expenses, lost wages and compensate for physical and mental pain and suffering as a result of their injuries.
2. To restore the victim to the place they were at before the injury occurred.
3. To create a system where victims can get redress without resorting to vigilante justice.
4. Allow victims to seek redress outside of the criminal system.
5. To deter others from committing tort.

WHO MAY SUE AND WHO MAY NOT BE SUED ?

There are seven categories of persons cannot sue, only subject to certain limitations:

1. An Alien enemy
2. Convict
3. Bankrupt
4. Husband and wife
5. Corporation
6. An Infant/Minor
7. A foreign state

1. An Alien Enemy

An Alien enemy is the person of enemy nationality or residing in the enemy territory. Such a person doesn't have the right to sue for tort.

According to English law, the person cannot maintain the right of sue unless allowed by order in council.

According to Indian law, the person cannot maintain the right to sue unless obtains the permission of the central government under section 83 of the civil procedure code is obtained.

Illustration

If A is a resident/citizen of an enemy country and wants to sue B, a resident of India, he cannot do that unless he obtains the permission of the central government.

2. Convict

A convict is a person against whom a judgement of death or imprisonment has been pronounced by the court of law.

According to English law, the person whose sentence is unexpired does not have the right to sue for any damages to his property or for recovery. But this concept was removed by criminal justice act, 1948.

In India, until 1921, in the offence of forfeiture of the property, the offender is disabled from right to sue for any injury. But today, a convict in India may sue for torts, both to his property and his body.

Illustration

Situation 1: Before 1921, if A is a convict and want to sue B for injury regarding the property, in that situation he cannot sue the person in the offence of forfeiture of the property.

Situation 2: After the 1921 changes in IPC, if A is a convict and want to sue B for injury regarding property or body, he gets the right to sue for both injury to property as well as to the body.

3. Bankrupt

A bankrupt is also under the disability to sue for the act against his property.

According to the Indian law, All his property is vested in possession of bank or official assignee and in English law all property is vested to the trustee. All the offences against the property, the right to action is vested with the trustee or the assignee. But in the case of personal wrong, the person has a right to sue.

In the situation, where a tort causes injury to both the person and the property, so the right of action will split between the two.

Illustration

Situation 1: If A is a bankrupt and his property is vested in the possession of official assignee i.e. C by the bank. If B trespasses his property, the right of action is vested on official assignee i.e. C.

Situation 2: But if B trespasses A's body then in that situation the right of action is vested on A.

4. Husband and wife

Back in times, in English law, the husband and wife cannot sue. By the virtue of the married women's property act, 1882, a wife can sue her husband. But the husband cannot sue his wife. A wife could not sue her husband for the antenuptial tort or personal wrong.

The law reform (husband and wife) act 1962 made a drastic change and allowed both to sue.

In India, both the spouses have the right to sue in any offences.

5. Corporation

A corporation does not have right to sue for the personal injury as because of its nature it is clear, that a corporation cannot be injured personally but a corporation can sue for the tort affecting its property.

The qualification is:

1. The tort must not be impossible in nature.
2. In the case of defamation, the corporation can sue the other person if, it can prove that the injury has the tendency to cause actual damages.
3. A corporation may sue for a libel or any other wrong affecting its property or business.

In *Manchester v. Williams*

In this case, it was held that a corporation has a right to sue, not only for the property but also for its personal reputation.

6. An Infant/Minor

A minor can sue for the tort committed against him, subject to that by his next friend or guardian. But he cannot maintain a remedy for the injury sustained when he was in his mother's womb.

In *Walker v. Great Northern Railways*

In this case, a pregnant woman injured due to a train accident, as a result of which her child was born deformed. The Court held that the minor cannot maintain a remedy for the injury sustained when he was in his mother womb.

But in a case having similar facts, the supreme court of Canada provided the remedy to the infant.

7. A foreign State

In England, a foreign state cannot be sued in any court unless the action is recognised by her majesty.

In India under section 84 of the civil procedure code, a foreign state can have the right to sue provided that such state has been recognised by the central government.

WHO CAN NOT BE SUED ?

1. The Government
2. Foreign sovereign'
3. Ambassadors
4. Public Official
5. Infants/Minor
6. Lunatic
7. The Corporation
8. Trade Union
9. Married Woman

1. **The Government**

Under Article 361 of Indian Constitution, the president, Governor, Rajpramukhas of the state are not answerable to the court:

1. For exercise and performance of the power and duties of their office.
2. For any act done by them in the exercise of their power and duties.

Five rules regarding the liability of the government

1. The government is liable for the act done by its servant in the course of transaction in which a private person is engaged.

In Secretary of state of India v. Shivranji

2. The government is liable for the loss caused by the improper interference of the forest officer in the removal of the timber by the plaintiff who had purchased a forest.

3. The government cannot be sued in respect of the act done by the servant in the exercise of its sovereign powers. Like, act done at the time of war, use of land to practice bombing, act done during riots etc.

Illustration

If A, a policeman, during the riots gives the order of lathi charge. In that process, Z got injured and sued A. Here A is not liable as he is acting under sovereign power.

3. Liable to restore the property or money wrongfully obtained by its servant on its behalf. **Illustration**

If A, a government servant restores B's property wrongfully on behalf of the government. Here the government is liable to restore the property.

5. The government is not liable if the act is done by its servant in the course of his duty unless expressly authorised to him.

In *kastorilal v. state of U.P*

In this case, the policeman detains the gold of the petitioner. The gold is misplaced from the custody of the police. The plaintiff filed the case against the government as the policemen are the servant of government of India. Here the court stated that the government is not liable for the act done by its servant in the course of his duty unless expressly authorised to him.

If a tortious act committed by the servant there are two situations relating to the liability of the government:

1. The action for the damages for the loss cannot arise if the servant did the act under the sovereign power of the state.
2. But, if committed in discharge his duty assigns to him, not by the virtue of the delegation of sovereign power, there arises the action for damages.

In *U.O.I. v. Sugrabai*

A military driver of the school of Artillery, once assigned a task to transport the machine, hit B, as a result, B died. Here the government is liable as the work is assigned to him and the act committed during the discharge of the duty.

2. Foreign sovereign

A foreign Sovereign cannot be sued unless they themselves submit to the jurisdiction to the local government.

By residing in a foreign country, one does not waive his right to the jurisdiction from the local government.

Under the civil procedure code, a foreign sovereign can be sued in the Indian court only with the consent of the central government.

The conditions under which the Central Government gives permission:-

1. If the foreign sovereign has instituted a suit in the court against the applicant.
2. If the foreign sovereign, by himself or by agent, trades within the local limits of the Indian court.
3. If the foreign sovereign's immovable property, in respect of which the applicant wants to sue, is situated in India.

As per provisions of Ss. 86 and 87 of CPC, a suit against a foreign sovereign without the consent of the Central Government is only permissible where the plaintiff is a tenant under the foreign sovereign and the suit relates to lands held by him.

Otherwise, the permission of the Central Government is mandatory, and when permission has been applied for and refused by the Government, it is not open to the court to question the propriety of the order refusing consent.

Illustration

A wants to sue B, a foreign sovereign. He can sue only by taking permission from the central government.

3. Ambassadors

Foreign ambassadors, their family, servants also, cannot be sued, unless they waived their privilege by submitting to the jurisdiction of the court. An ambassador cannot be sued during his term of office.

Foreign ambassadors can be sued in the Indian court only with the consent of the central government.

In *Harbhajan Singh Dhalla v Union of India*

The petitioner, in this case, carried out building maintenance, reconditioning and renovations at the Algerian Embassy and the residence of the Algerian Ambassador in New Delhi. He tried to collect his dues but failed and then requested the Ministry of External Affairs to grant the permission to sue the Algerian Embassy. The Ministry refused to grant the permission on "political grounds" and also contended that under section 86 petitioner failed to make the *prima facie* case. And if permission has been applied for and refused by the Government, it is not open to the court to question the propriety of the order refusing consent.

4. Public Official

No action lies against the public official in their official capacity with respect to torts committed by them. But, they can be sued for the act committed by them in their private capacity.

If the act by the servant of the government is done under sovereign power no action lies against the government.

In U.O.I. v. Bhagwati Prasad

In this case, the train collides with the taxi. For these, Bhagwati prasad files a case against the U.O.I, of negligence. It was held that a suit for the damages can be filed against the act of the official in their private capacity but not for the act done under sovereign power.

5. Infants/Minor

The infant/ minor can be sued for the act committed by them as an adult. Thus a minor can be sued for assault, false imprisonment, libel, slander, fraud etc. but where intention, knowledge or some other condition of mind are essential ingredients of liability then in that cases minor/ infant can be exempted due to their mental incapacity.

In *Walmsey v. Humonick* (1954 2 D.L.R. 232)

Two little boys were playing cowboy related games. One boy hit the arrow and it hit another boy in his eye. The court gives the judgement in defendant's favour as a five-year child doesn't even think about it. Hence the defendant is not liable.

6. Lunatic

There are two conditions related to lunatic:

1. If the act was done by a lunatic, when he is not in the condition of a stable mind, in that condition the lunatic cannot be sued.

Illustration

If A commits battery against B when he is not in a condition of stable mind. He cannot be sued.

2. But, if the act was done by a lunatic when he is in the condition of a stable mind, he can be sued.

Illustration

If A has a disease where he becomes lunatic for some period but, becomes a normal person after some time. If he commits battery against B when he is normal. In that situation A can be sued.

7. Corporation

A corporation cannot be sued, unless

1. The act done was within the scope of agent employed by the corporation
2. The act done was within the purpose of the incorporation.

In *Poulton v. London and S.W. Rly. Company* (1867 L.R.2 Q.B. 534)

The railway master was employed by the defendant company, arrested a man for not paying the freight charges of the horse he is carrying with him. The petitioner filed a case against the corporation. It was held that the railway master was employed to arrest the person only if the person does not pay the freight of himself. No order was given to him to arrest a person if he is not paying the freight charges for the goods carried by him. Here, he is acting in his private capacity so a corporation cannot be held liable, only the station master can be held liable

8. Trade Union

In India, under the Indian Trade Union Act, 1926, a registered trade union cannot be sued. But the changes in the Act in 1939, now a trade union can be sued in its registered name.

Illustration

If one of the members of a trade union named XYZ commits a tort then:

Situation 1: As per the Trade union act, 1926, XYZ cannot be sued

Situation 2: After changes in 1939, XYZ can be sued.

Maxims in Tort

Even when a plaintiff provides proof for the existence of all the essential elements of a tort, it is possible in some cases for the defendant to take certain defences which can remove his liability, These defences are nothing but specific situations or circumstances in which a defendant is given a waiver for his tortious action. These are as follows –

1. Volenti non Fit Injuria :

When a person consents for infliction of harm upon himself, he has no remedy for that in Tort. That means, if a person has consented to do something or has given permission to another to do certain thing, and if he is injured because of that, he cannot claim damages. For example, A purchases tickets for a Car race and while watching the race, an collision of cars happens and the person is injured. Here, by agreeing to watch the race, which is a risky sport, it is assumed that he voluntarily took on the risk of being hurt in an accident. Thus, he cannot claim compensation for the injury.
Such consent may be implied or express. For example, a person practicing the sport of Fencing with another, impliedly consents to the injury that might happen while playing.

In Woolridge vs Sumner 1963, the plaintiff a photographer was taking photographs at a horse show, during which one horse rounded the bend too fast. As the horse galloped furiously, the plaintiff was frightened and he fell in the course. He was seriously injured. It was held that the defendants had taken proper care in closing the course and the plaintiff, by being in the show, agreed to take the risk of such an accident. The defendants were not held liable.

However, the action causing harm must not go beyond the limit of what has been consented. For example, in a sport of fencing, a person consents to an injruy that happens while playing by the rules. If he is injured due to an action that violates the rules, he can claim compensation because he never consented to an injury while playing without rules.
In Laxmi Rajan vs Malar Hospital 1998, a woman consented for a surgery to remove a lump from her breast. But the hospital removed her uterus as well without any genuine reason. It was held that removing of her uterus exceed beyond what she had consented for.

2. **Ubi jus Ibi Remedium** :

It is a Latin maxim which means that where there is a wrong, there is a remedy. If any wrong is committed then the law provides a remedy for that. The maxim can be phrased as that any person will not suffer a wrong without a remedy, it means that once it is proved that the right was breached then equity will provide a suitable remedy. This principle also underlines the fact that no wrong should be allowed to go without any compensation if it can be redressed by a court of law. The law presumes that there is no right without a remedy; and if all remedies are gone to enforce a right, the right in point of law ceases to exist.

Justice Pollock said that right and wrong are contrary to each other. Right actions are those which are prescribed by moral rules, wrong actions are those which are not prescribed by moral rules or which are prohibited by law. In case of legal action, anything which is wrong is not recognized by laws. It is presumed that whenever a wrong is committed it means that legal duties have been omitted. Hence the existence of duty involves a right then it also provides the possibility of wrong. Duty, right and wrong are not separate but they are the different legal aspects of the same rules and events. Sometimes it happens that there may be both duties and wrong, and the wrong does not happen only when duty is truly justified. If there exists a duty to do something and if it is properly done then it is said that the duty is discharged and the man who was legally bound is now freed.

The law of tort is said to be the development of the maxim *Ubi jus ibi remedium*. The word "*jus*" **means legal authority to do something or to demand something. The word** "*remedium*" **means that the person has the right of action in the court of law. The literal meaning of the maxim is where there is a wrong there is a remedy.**

This maxim also says that there is no remedy without any wrong and the persons whose right is being violated has a right to stand before the court of law. This principle also states that if the rights are available to a person then it is required to be maintained by that person only and remedy is available only when he is injured in the exercise of duty or enjoyment of it; It is useless to imagine and think a right without a remedy. It is necessary to keep in mind that both rights violated and the remedy sought or to be obtained should be legal. There are many moral and political wrong but are not actionable or it does not give many sufficient reasons to take legal action as they are not recognized by law. The maxim does not mean that there is a legal remedy for each and every wrong committed.

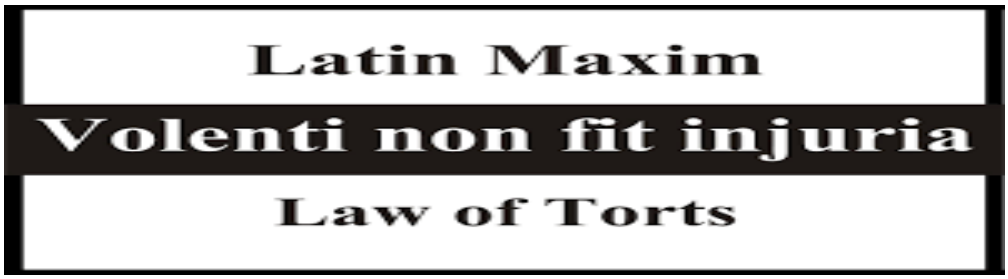
For example, a contract which was required to be made on stamped paper may be made orally; in such circumstances, irrecoverable harm may be caused to other person and yet no legal remedy is available.

Thus, the maxim does not mean that there is a remedy for every possible wrong. It is appropriately said by *Justice Stephen* that maxim would be correctly stated if maxim were to be reversed to say that "where there is no legal remedy, there is no legal wrong.

Essentials of Ubi jus ibi remedium

- The maxim *ubi jus ibi remedium* can be applied only where the right exists and that right should be recognized by the court of law;
- A wrongful act must have been done which violates the legal rights of a person clearly.
- This maxim can be used only when sufficient relief has not been provided by the court to the person who sustained the injury.
- This maxim is applicable if any legal injury had been caused to any person, if no legal injury has been caused then the maxim *damnum sine injuria* will be used which means damage without any legal injury.

VOLENTI NON FIT INJURIA :



In the law of torts, there is a duty on every person do acts with reasonable care in order to avoid any harm which may occur due to their failure of taking such care. For e.g., If a person is driving his car, he has a duty to drive the car safely and within speed limits so that no accident occurs which can also harm any other person.

This is the general rule in torts but there are certain exceptions which are allowed in these cases and these called as defences to tort. Under these defences, a defendant can escape liability and volenti non-fit injuria is also one such defence which is available for the defendant.

In case a person gives his consent to doing of an act which leads to him getting injured, then even if an injury is caused by the other person, he cannot claim any damages from that person because the act was one for which he voluntarily consented. The consent of the plaintiff acts as a defence and this defence is called volenti non fit injuria which means to a willing person no injury happens.

Illustration: If A has a bike whose brakes do not work and B knowing about the conditions of the bike still chooses to sit on it with A driving it and due to the failure of such brakes they both sustain injuries in an accident, B cannot claim relief from A because he had voluntarily consented to sit on the bike.

But in the above illustration, if B was not aware of the conditions of brakes and then he sustained injuries sitting in it, he would not be stopped from claiming damages from A because here B did not give his consent to accept the risk of getting injured due to failure of the brakes.

Elements of Volenti non-fit injuria

For the application of the defence of volenti non fit injuria there are some essential elements or conditions which should be present in a case and only when they are fulfilled, this defence can be taken to prevent liability.

There are 2 essential elements in this defence:

1. The plaintiff has the knowledge of the risk
2. The plaintiff with the knowledge of risk has voluntarily agreed to suffer the harm.

Thus, whenever the plaintiff is aware of the possibility of harm which is likely to be caused by an act and when he still accepts to do that act and therefore agrees to suffer the injury, a defendant is relieved of his liability.

But only having knowledge about the risk is not enough for the application of this defence, It is known as **Scienti non fit injuria,** which means that mere knowledge does mean consent to the risk. Thus having knowledge is only a partial fulfilment of the conditions for the application of volenti non fit injuria.

Illustration: A goes for bungee jumping and he knows that he might get injured by it but he still decides to do it and as a result, he suffers injury despite all the necessary care being taken by the organisers. Here A cannot claim damages from the organisers because he had full knowledge of the risks and he had voluntarily agreed to suffer that injury by choosing to do bungee jumping.

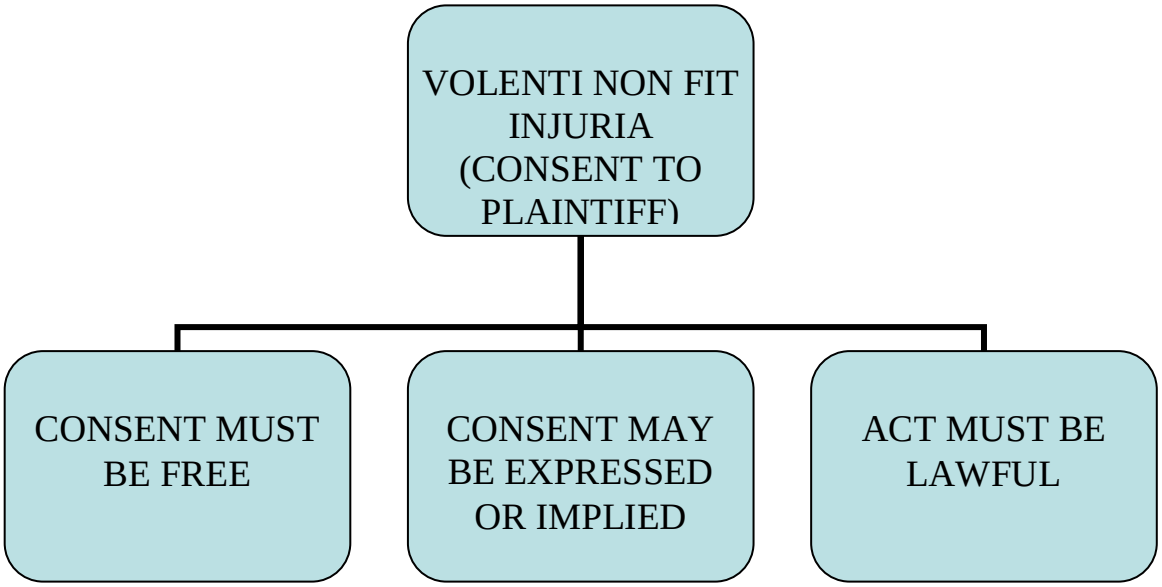
In **Smith v. Baker & sons, (1891) AC 325,** the plaintiff was an employee of the defendant and the site where he used to work had a crane which carried rocks over their heads. The plaintiff had also complained to the defendant about it. One day the plaintiff was injured because of these rocks falling on him and thus he sued the defendant for damages. It was held that the defendant was liable and had to pay

damages to the plaintiff because the plaintiff had consented to the danger of the job but not to the lack of care.

Burden of proof

In the cases where the defendant is taking the defence of volenti non fit injuria, the burden of proof is on him to show that the plaintiff had full knowledge of the act and he had consented to the risk involved in the act and the defendant has to show that the plaintiff was also aware of the extent of risk which was involved in the act for successfully taking this defence.

Illustration: A has to undergo an operation for his eye infection and the doctor fails to inform him about the risk of losing his vision due to the operation, as a result, A takes the operation believing that there is no such risk to his eye. In the operation, if A loses his eyesight, the doctor will be held liable because A did not have the knowledge about the extent of the risk which was involved in the operation and therefore, the defence of volenti non-fit injuria cannot be taken.



Consent of the plaintiff

The consent of the plaintiff is very important in the defence of volenti non fit injuria because only when he voluntarily gives his consent to an act, the defendant can take this defence.

In the case of **Hall v. Brookland (1932) All E.R. Rep 208,** the plaintiff went to see a car race in which two cars collided with each other and as a result of the collision, the plaintiff who was sitting as an audience was also injured when one of the cars flew into the audience. Here the defence of volenti non fit injuria was applied because the plaintiff had given his consent to such a risk by going to the race.

Consent may be Express or Implied

In the cases of this defence, the consent of the defendant is not required to be expressly given and even by his conduct, his consent can be taken.

Illustration: C is a cricket player and due to a full toss ball he gets hits by it on his shoulder. Here C cannot claim any damages because C has consented to the risk by agreeing to play cricket.

Illustration: A goes to watch a cricket match and while watching the match the batsman hits a six that hurts A's hands when he attempts to catch it. Here A cannot hold the batsman or the owner of the Cricket stadium liable because he had impliedly consented to this injury by his act of purchasing the ticket and sitting in the stadium and thus despite no express consent, the defence of volenti non fit injuria will apply here and his consent will be deemed to be implied for such injury.

Consent of the Plaintiff must be free

When a plaintiff gives his consent for an act such consent should be free from any coercion, fraud or any other such means by which the free consent can be affected.

For e.g., A has a heart problem and he goes to a hospital for surgery. There he is informed by the surgeons that the required surgery is very complicated and there is a chance of the surgery failing which can cause his death. If A gives his consent to have the surgery and the surgeon despite taking all reasonable care in doing the surgery is not able to save A, then the surgeon cannot be held liable because A had given his consent for it and this consent was given freely.

In case the consent of a person is not free, the defendant cannot claim this defence to escape liability and he will be held liable for damage caused.

For e.g., A having heart problem goes to a surgeon and he is told that he needs surgery to which he agrees. During the surgery, the surgeon removes one kidney of A without his knowledge. In this case, even though the surgery is successful the surgeon will be held liable because A did not give his consent to the removal of his kidney.

In the case of Ravindra Padmanabhan (Dr.) vs Lakshmi Rajan And Anr., the plaintiff had a tumour on her breasts and therefore she went to the hospital to have it removed. While operating her the doctor also removed the uterus even though it had nothing to do with the tumour. Thus, the Court held the defendants liable and thus, the defence of volenti non fit injuria was rejected.

In the case of Padmavati v. Dugganaika, the plaintiffs had asked for a lift in the jeep of the defendants and while travelling in it one of the screws of the wheel of the jeep fell out, as a result, the jeep crashed and it caused the death of one of the plaintiffs. In the case, the Court held that the defence of volenti non fit injuria will apply and thus the defendants were not liable because by sitting in the jeep the plaintiffs had assumed the risk of being injured in an accident.

Consent by fraud

In cases of consent having been obtained by fraud, the defence of volenti non fit injuria will not apply and the defendant will be held liable for the wrong by him.

For e.g., in the case of **R v. Williams (193) 1 KB 340,** the defendant was a singing coach and he had convinced a 16-year-old student to have sexual intercourse with him by telling her that it will help her in improving her voice and singing. The defendant was held liable by the Court because the consent was obtained by fraud.

Consent in cases of intentional infliction of harm

In the cases where harm is caused to a person intentionally, the defence of volenti non fit injuria will apply if the person has given his consent to such harm.

Illustration: A is a boxer who is fighting B in a boxing match. During the match, B punches A very hard as a result of which he suffers head injuries. In this case, even though B had intentionally inflicted harm on B it will not make B liable because A had willingly given his consent.

Illustration: K is a football player and during a match, he gets injured due to a tackle another player, as a result of which he needs surgery. Here A cannot claim any damages because by playing the sport he has impliedly consented to the risk of being injured.

Limitations on the application of volenti non fit injuria

There are certain limitations under which the defence of volenti non fit injuria cannot be taken by a defendant even if the essentials of this defence are present in the case.

1. Rescue Cases

When the plaintiff suffers an injury as a result of him doing an act which he knows is likely to cause harm to him but it is an act to rescue someone, then this defence will not apply and the defendant will be held liable.

Illustration: A fire is caused due to the negligence of A, and B is trapped inside the fire. C sees B and jumps into the fire to rescue him but in doing so he is also burned. Here even though C went into the fire voluntarily, knowing fully well that he may be burned, A will be held liable for negligence and the defence of volenti non fit injuria cannot be applied in this case, therefore, C will is entitled to receive damages from A.

In the case of **Haynes v. Harwood (1935), 1 KB 146,** the servant of the defendant brought two horses in the town near a police station and left them to do some other work. The horses were upset by the children and they broke free, seeing them in rage the plaintiff who was a police officer went to stop the horses and in doing so he got injured and brought a case against the owner for damages. The court held the defendant liable because the defence of volenti non-fit injuria did not apply in a rescue case.

2. Illegal Acts

If the consent is given for an act which is not allowed by law then, even on the fulfilment of all the essential conditions of this defence, the liability cannot be escaped and thus in such cases, this defence becomes inoperative.

Illustration: If A and B decide to do a fight with sharp swords, when such an act is prohibited by law, and A suffers a big cut due to which he suffers serious injuries, then in such case B cannot take the defence of having A's consent in doing this act because it was prohibited by law and thus B will be liable.

3. Negligence of the defendant

The defence of volenti non fit injuria is not applicable in a case where the defendant has been negligent. Thus only where there is no negligence by the defendant, he can claim this defence to escape liability.

Illustration: If A goes undergoes a heart operation and he gives his consent for it even though he knows that there is a risk of the operation failing which can cause his death, the surgeon will not be liable if A dies as a result of the surgery if he had taken all due care. But if the operation had failed because of the negligence in carrying out the surgery then in such a case, the surgeon cannot claim the defence of having received the consent of A and he will be liable because there was negligence on his part in conducting the surgery.

In the case of **Slater v. Clay Cros Co. Ltd. 1956] 2 QB 264,** the plaintiff was hit by a train in the tunnel of the defendant railway company. The railway company had given instructions to all the drivers of its trains that they have to blow the whistle at the entrance of the tunnel and they should also slow the speed of the train but the driver did not follow these instructions and negligently drove it inside the tunnel, as a result, the plaintiff was injured. The defendant had taken the defence of volenti non fit injuria but the Court held that this defence could not be applied because even though the plaintiff took the risk of walking inside the tunnel, this risk was enhanced by the negligence of the driver. Thus, when a plaintiff gives his consent to take some risk, there is a presumption that the defendant has not been negligent.

Volenti non fit injuria and Contributory negligence

Both contributory negligence and volenti non fit injuria are used as a defence by the defendant to escape liability but they differ from each other.

In contributory negligence, the plaintiff who has suffered an injury is also at fault along with the defendant and therefore the quantum of damages which he can be awarded is reduced in proportion to the degree of his negligence in the act which caused him injury. Thus, both the parties are at fault in such a case and therefore this is a partial defence available to the defendant.

Illustration: A gets hit by a car while crossing a road, which was being driven by B and he drove it rashly and over speed limit due to which A sustained many injuries. But this accident happened because A decided to cross the road even though the traffic signal was on and thus the pedestrians could not cross it until the signal stopped for the vehicles. Here both A and B are at fault and therefore even though B will be held liable, the damages which he has to provide will be reduced because A was also at fault and thus the defence of contributory negligence applies here,

In volenti non fit injuria, the defendant is completely exempted from his liability because of plaintiff's consent and thus it is a total defence.

Shree H.N.Shukla Group Of Colleges

(Affiliate to Saurashtra University & BCI)

Vicarious Liability

Respondeat superior, which literally means "let the master answer," is a doctrine that holds one party liable for another's actions based on their relationship. While commonly applied to hold employers responsible for certain types of their employees' actions, this doctrine can also be relevant in principal/agent relationships. Simple negligence claims (e.g., *negligent hiring, negligent entrustment of an automobile*) may also apply in these relationships.

What is Vicarious Liability?

Vicarious liability means the liability of a person for an act committed by another person and such liability arises due to the nature of the relation between the two. For e.g. A, is a driver who works for B and while driving B's car for taking him to his office, he hits C, a pedestrian due to his negligence in driving. In such a case even though B was not driving the car he will still be liable for the accident which was caused due to the negligence of A.

Relations in which Vicarious Liability arises

These are the major relations in which vicarious liability of a person arises

1. Master and Servant.
2. Partners in a Partnership Firm.
3. Principal and Agent.
4. Company and its Directors.
5. Owner and Independent Contractor.

Vicarious Liability of Master for torts by Servant

In a Master-Servant relationship, the master employs the services of the servant and he works on the command of master and thus a special relation exists between the two and in case of a tort committed by the servant, his master is also held liable.

There are many cases in which the servant does an act for his master and thus in law, it is deemed that the master was doing that act himself, therefore if the servant commits an unlawful act the master will also be held liable for the same. This liability of the master is based on the following two maxims

***1.Qui facit per alium facit per se*: –** It means that whenever a person gets something done by another person then the person is viewed to be doing such an act himself.

Illustration: If A is the owner of many trucks and employs drivers to drive them for the purpose of trade and in case one of his drivers gets into an accident because of his rash driving, then even though A did not drive the truck himself, he will be liable for the accident.

***2. Respondant Superior*: –** It means that the superior should be held responsible for the acts done by his subordinate.

These two maxims have played a significant role in the development of the law of vicarious liability of the master.

Essentials of Vicarious liability in Master-Servant Relationship

These essential conditions have to be followed for the vicarious liability of master to arise: –

1. The servant has committed an act which amounts to a tort.

2. Such a tortious act is committed by the servant during the course of his employment under the master.

Reasons for liability of the Master

There are several reasons behind holding the master liable for the acts of his servants which are: –

1. An act which is committed by the servant is considered to be done by the master through him and therefore in the law of torts, it is assumed that if any wrong is done by the servant, it has been committed by his master indirectly and so the master is held liable for these wrongs.
2. The master is in a better financial position as compared to his servant and thus in case of any loss caused by the tortious act of the servant, the master is better suited to pay off the damages to the victim of the act. Also, since the master is made liable he makes sure that all reasonable care and precautions are carried so that he can avoid such liability.
3. When a servant does any act, the benefit from such an act is enjoyed by the master and thus for the liability arising out of the servant's act, the master should also shoulder that liability

Test for Determining Master-Servant Relationship

For the determination of a Master-Servant relationship, certain tests have been developed over a long period of time.

Traditional View – Control Test

As per this test, for the determination of a master and servant relationship, it should be seen whether the master has the power to not only instruct what should be done but also the manner of doing the act and if such power exists then as per this test, the master and servant relationship exists between the two.

Illustration: A is the owner of a big area of land on which farming activities are carried out and he has hired many workers for farming. A, not only instructs them how to do their jobs but also how to do it. Here, by the test of control, the relation between A and his employees is established as that of a master-servant.

Modern View

The old Control test is not applicable as an exhaustive test because in cases of work requiring skill such as a doctor working in a hospital, the owner of the Hospital cannot instruct the doctor on how to treat a patient and can only instruct him to treat patients. Thus certain other tests have been developed for determining the Master and Servant Relationship.

The test of work being an Integral Part of Business

In the case of **Stevenson Jordan & Harrison Ltd. V Macdonald & Evans (1952) 1 TLR 101**, the test of an integral part of the business was applied. Here, a **contract of service** was held to be a contract for such work which is an integral part of the business and a **contract for service** was held to be a contract for such work which is not an integral part of the business.

Illustration: In an IT company the programmers are the employees of the company and there is a master-servant relationship but if the company has hired catering services, the company does not have a master-servant relationship because the act of providing food is not an integral part of an IT company.

Multiple Test

This test provides that people who are in a contract **of** service are deemed to be employees whereas the people who are in contract **for** service are independent contractors. In the case of **Ready Mixed Concrete v Minister of Pensions and National Insurance (1968) 2 QB 497**, three conditions were laid down for a contract of service

1. The servant agrees to provide his skill and work to the master for performing some service in exchange for wages or some other consideration.
2. He agrees to be subjected to such a degree of control so as to make the person his master in performance of his work.
3. The other provisions of the contract are consistent with this provision of being a contract of service.

This view was also reiterated in the case of The Management of Indian Bank v. The Presiding Officer.

This test also includes other important factors that are used to determine the master-servant relationship such as who owns the tools being used for the work, is the employee paid wages monthly or on a daily basis and all other relevant factors.

Thus the old view of using Control test is no longer the only method of determining the relation of master and servant as it has been realized that in the present complex world where there are a wide number of factors which affect the process of determining the relation between the employee and the employer, it is not possible to use just one test and thus the various aspects of a case are seen to determine the nature of the relationship and to decide whether such a relation is that of master and servant or not.

DISCHARGE OR EXTINGUISHMENT OF LIABILITY IN TORT :

There are seven different modes through which tort is discharged and no remedy will lie for tort. It is a process through which the tort comes to an end. A wrongdoer is not liable for his actions.

Following are the methods of discharge of torts.

1. **Death of the parties**

Here the maxim **'*actio personalis moritur*** *cum persona'* applies which means if the person dies his personal right of action dies with him.

Actio personalis moritur cum persona this is the important maxim, it means if the person who commits a tort or the person against whom the tort is committed dies, the personal right or the right to receive the damages or the right of action dies with the person.

There are two situations where this maxim applies

- Death of the person against whom tort was committed i.e., Petitioner.

when the person against whom the tort was committed i.e. the plaintiff who approached the court and filed a case died, so his personal right of action dies with him only.

Illustration

If A files a case against the act of tort done by B. If A dies during the course of trial and the case is still pending before the court. Due to the death of the A, the tort gets discharged, as the right of action of A dies with him only.

Exceptions to the maxim of 'Actio personalis moritor cum persona' with respect to Petitioner

In India there are laws which constitute the exception to the above maxim like;

The Legal Representative Suits Act, 1885

As per this Act, the legal representative or the executors of any person, after his death can represent the deceased person in the court of law.

Illustration

If A died during the procedure of trial of court. His legal heir or representative can represent him in the court of law.

Similarly, in different laws/act like Fatal accident act, the Indian Succession Act, Workmen Compensation Act etc. the representative of the plaintiff can represent him in the court of law.

- Death of the person who commits tort i.e. Defendant

It means the person who commits the act of tort against any other person i.e. the defendant dies, the tort gets discharged.

Illustration

If Ram commits the act of tort against Geeta, if Geeta files a complaint against Ram, but if during the course of trial Ram died, then his right of action also dies with him i.e. the discharge of tort.

In *Prusti v. Mohanty*

In this case, the defendant received some amount by misrepresentation of fact, but the defendant died. The High Court of Orissa held that where a money decree was passed against a person in respect of the amount received by him from the decree-holder by misrepresentation of the facts, the liability would be personal and could not be extended to his son under the law, as whatever the relief a decree-holder has against the father ended with the father's death.

Exceptions to the maxim of 'Actio personalis moritor cum persona' with respect to Defendant.

In India there are various laws which constitute the exception to the above maxim like;

The Legal Representative Suits Act, 1885-

As per this act, if any person involved in any type of tortious act, died during the course of the trial. The right of action passes to the legal representative of that person.

Illustration

If A does an act of trespass to the good against B in past. Now if A dies and it is proved that he was liable for damaging B's good. So the damages for damaging B's good has to be paid by his legal representative.

Similarly, in different laws/act like the Fatal Accident Act, Indian Succession Act, Workmen Compensation Act etc. The representative of the defendant has to represent him in the court of law

2. **By Waiver**

The second method of discharge of tort is by the waiver. The concept of waiver is when a person has more that one remedy available to him, as a result, he has to elect one of them. He cannot apply for both the remedy except in the case of defamation and assault.

Illustration

If A files a case against B that B has committed a tort against A. If A has right to get more than one remedy he has to choose any one of them, i.e. if he has the remedy in both tort and contract law, now he has to choose one between them.

The main two principles lying in the doctrine of Waiver are:

1. The person has to choose any one remedy.

2. If the person fails to get the remedy he chooses, the court of law does not allow him to go back to an alternative remedy.

Illustration

If A files a case against Z and has two remedies for which he can approach the court of law. If he chooses the first remedy and loses the case. A cannot approach to the court for the alternate remedy i.e., remedy number 2.

The Waiver can be Implied or Express

In Express waiver, the person expressly communicates about his choice in the court of law.

Illustration

If A file a case and he has the remedy in both, contract as well as Tort. When the court asks him he has to communicate his choice to the court.

In the Implied form of waiver, the person impliedly communicates about his choice for which remedy he is applying.

Illustration

If A has two remedies available to him like one under contract and one under Tort. if he applies for Contract, it becomes clear, he elects the remedy under the contract.

3. **Accord and Satisfaction**

Concept of accord means when the parties of the tort i.e. the person who commits the tort and the person against whom the tort has been committed, come to an agreement and settle the dispute. Such an agreement is known as Accord. In general term, it means settling the issue by accepting some consideration in lieu of the right of action.

Satisfaction means the actual payment of consideration agreed by both, the person who commits a tort and the one against whom the tort committed.

When both the accord and satisfaction once completed, it results in the discharge of tort and the dispute does not proceed in a court of law.

Illustration

If A dies due to injury caused by B's car. If A's family comes to an agreement that B will pay Rs. 1,50,000 as compensation to them, that's the situation of Accord. When they received the actual payment of 1,50,000 Rs. from B, that's the situation of Satisfaction. So, by settling the issue and accepting some consideration A's family lost their right of action and the act of tort discharged.

The only condition in the concept of Accord and Satisfaction is the consent of the party should be free and not from fraud, coercion or undue influence.

Illustration

If A, a son of a successful businessman brutally hit one of his servant i.e. trespass to the body and if A tries to make his servant enter into accord by using some type of undue influence on him. Due to that influence, the servant gave his consent, this is not considered as free consent and the accord and satisfaction are not valid.

4. **Release**

A Release means giving up the right to the action. It means when a person by his own choice discharged the tort. This right is only provided to the person against whom the wrong has been done.

Illustration

Situation 1: A is the person against whom B does any act of Tort and if A, by his free consent want to release B from the liability, he can do so.

Situation 2: A is the person against whom B and C both commit an act of tort and A by his choice release B from the liability, this does not mean that C is also released from his liability.

The release should be voluntary and given by free consent from the injured person. If the consent is taken by coercion, undue influence, or any other unlawful means then that release should not be counted as a release and the tort is not discharged.

Illustration

If a person is a police inspector, commits an act of tort against another person. By using his position and by threat, take the consent of the injured person and release himself from the liability, that release is not a valid release.

5. **Judgement**

In this method, the discharge of tort happens by the judgement given by the court. If once the court gives judgement on the matter, the tort gets discharged, no appeal for the same act of tort can be claimed for the same remedy in the court of law.

The concept of this method of discharge of tort is based on the legal maxim of *Res-Judicata*, it means, if any cause of action decided previously by the court, the same cause of action should not be entertained by the court twice.

Illustration

If A gets the remedy against B for the accident committed by him previously by the judgement of the court. Later he found that he needs to go through a further operation. He cannot claim another remedy for the same again in the court of law.

In Fitter v. Veal, (1701 12 Mod. Rep. 542)

In this case, the plaintiff files a case against the defendant demanding damages against the act of assault by the defendant and finally he gets the remedy from the defendant as the court of law allows the remedy to him. Later he discovered that he has to go through a number of surgeries. He filed another petition against the defendant demanding more remedy against the act of assault again in the court of law.

The court denied the petition and state that, If once court gives judgement on the matter, no further appeal for the same act of tort can be filed in the court of law as the tort gets discharged.

Exceptions

- If the petition was between the same party but is for different remedy or the action taken in respect to the violation of another right. Then the petition can be allowed.

In *Brunsden v. Humphrey*

In this case, the plaintiff was a cab driver and already received compensation against the damage to his cab. Later discovered, due to the injury caused in the accident, he got a fracture in his hand. He has the right to apply for the remedy against the trespass to his body as well.

- If the person who is liable for the act previously does the same act another time.

Illustration

If A commits the tort of trespass against B previously and held liable by the court of law. If he again commits the same crime against B. If A plea defence that the court cannot punish him for the same offence twice. The defence is not valid because this case was considered as a fresh one.

6. **Acquiescence**

In this method, the tort gets discharged because of the incapacity of the plaintiff himself i.e. if he has no time to go to court, no money to pay the court fees, or any other incapacity. When any person is entitled to enforce his right, and he doesn't enforce his right for a long time, this makes other party waived from his liability.

Illustration

if A is entitled to enforce his right against B. If A neglects to enforce his right for a long time, it automatically waived B from his liability.

7. **Law of limitation**

Under this method the tort gets dismissed due to the limitation i.e. when the prescribed time limit to file the case gets over, in this situation the tort gets dismissed and no person is entitled to enforce his right.

Like, in the case of false imprisonment or libel the limit to file a case is 1 year, in case of trespass to immovable property, the limit set is 3 years etc after the time limit gets over, no person can enforce his/her right.

Illustration

If a tort of trespass to the property has been committed by B against A, if A fails to apply against it within 3 years in the court of law, then he cannot apply as he lost his right to apply due to limitation.

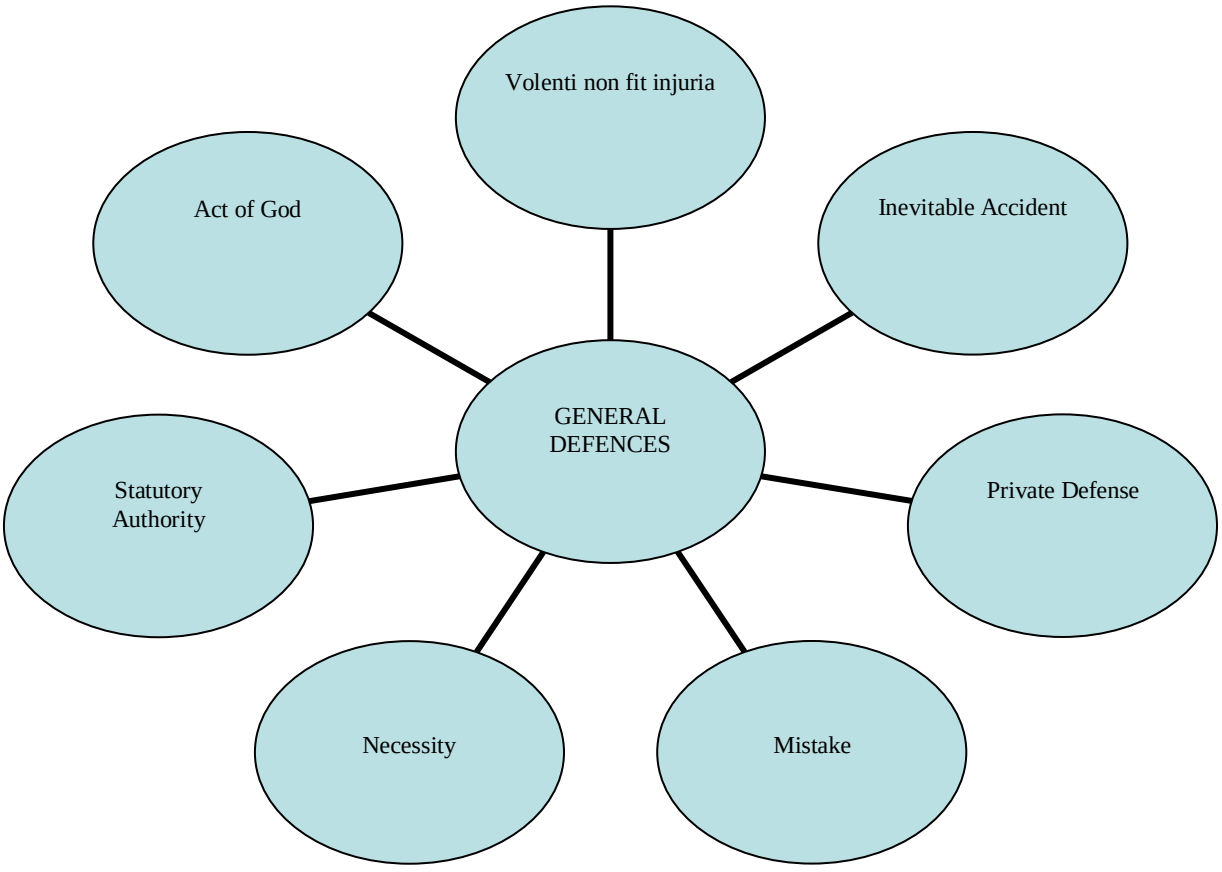
Shree H.N.Shukla Group Of Colleges

(Affiliate to Saurashtra University & BCI)

GENERAL DEFENCES TO DEFENDANTS :

When a plaintiff brings an action against the defendant for a tort committed by him, he will be held liable for it, if there exists all the essential ingredients which are required for that wrong. But there are some defences available to him using which he can absolve himself from the liability arising out of the wrong committed. These are known as '**General defences**' in the law of tort.

The defences available are given as follows:



- *Volenti non fit injuria or the defense of 'Consent'*
- The wrongdoer is the plaintiff
- Inevitable accident
- Act of god
- Private defense
- Mistake
- Necessity
- Statutory authority

1. Volenti non fit injuria

In case, a plaintiff voluntarily suffers some harm, he has no remedy for that under the law of tort and he is not allowed to complain about the same. The reason behind this defence is that no one can enforce a right that he has voluntarily abandoned or waived. Consent to suffer harm can be express or implied.

Some examples of the defence are:

- When you yourself call somebody to your house you cannot sue your guests for trespass;
- If you have agreed to a surgical operation then you cannot sue the surgeon for it; and
- If you agree to the publication of something you were aware of, then you cannot sue him for defamation.
- A player in the games is deemed to be ready to suffer any harm in the course of the game.
- A spectator in the game of cricket will not be allowed to claim compensation for any damages suffered.

For the defence to be available the act should not go beyond the limit of what has been consented.

In *Hallv. Brooklands Auto Racing Club*, the plaintiff was a spectator of a car racing event and the track on which the race was going on belonged to the defendant. During the race, two cars collided and out of which one was thrown among the people who were watching the race. The plaintiff was injured. The court held that the plaintiff knowingly undertook the risk of watching the race. It is a type of injury which could be foreseen by anyone watching the event. The defendant was not liable in this case.

2. **Plaintiff the wrongdoer**

There is a maxim "**Ex turpi causa non oritur actio**" which says that "from an immoral cause, no action arises".

If the basis of the action by the plaintiff is an unlawful contract then he will not succeed in his actions and he cannot recover damages.

If a defendant asserts that the claimant himself is the wrongdoer and is not entitled to the damages, then it does not mean that the court will declare him free from the liability but he will not be liable under this head.

In the case of *Bird v. Holbrook*, the plaintiff was entitled to recover damages suffered by him due to the spring-guns set by him in his garden without any notice for the same.

In *Pitts v. Hunt*, there was a rider who was 18 years of age. He encouraged his friend who was 16 years old to drive fast under drunken conditions. But their motorcycle met with an accident, the driver died on the spot. The pillion rider suffered serious injuries and filed a suit for claiming compensation from the relatives of the deceased person. This plea was rejected as he *himself was the wrongdoer* in this case.

3. **Inevitable accident**

Accident means an unexpected injury and if the same accident could not have been stopped or avoided in spite of taking all due care and precautions on the part of the defendant, then we call it an inevitable accident. It serves as a good defence as the defendant could show that the injury could not be stopped even after taking all the precautions and there was no intent to harm the plaintiff.

In *Stanley v. Powell*, the defendant and the plaintiff went to a pheasant shooting. The defendant fired at a pheasant but the bullet after getting reflected by an oak tree hit the plaintiff and he suffered serious injuries. The incident was considered an inevitable accident and the defendant was not liable in this case.

In *Assam State Coop., etc. Federation Ltd. v. Smt. Anubha Sinha*, the premises which belonged to the plaintiff were let out to the defendant. The tenant i.e. the defendant requested the landlord to repair the electric wirings of the portion which were defective, but the landlord did not take it seriously and failed to do so. Due to a short circuit, an accidental fire spread in the house. No negligence was there from the tenant's side. In an action by the landlord to claim compensation for the same, it was held that this was the case of an inevitable accident and the tenant is not liable.

4. Act of God

Act of God serves as a good defence under the law of torts. It is also recognized as a valid defence in the rule of '***Strict Liability***' in the case of *Rylands v. Fletcher*.

The defence of Act of God and Inevitable accident might look the same but they are different. Act of God is a kind of inevitable accident in which the natural forces play their role and causes damage. For example, heavy rainfall, storms, tides, etc.

Essentials required for this defence are:

- Natural forces' working should be there.
- There must be an extraordinary occurrence and not the one which could be anticipated and guarded against reasonably.

Working of natural forces

In *Ramalinga Nadar v. Narayan Reddiar*, the unruly mob robbed all the goods transported in the defendant's lorry. It cannot be considered to be an Act of God and the defendant, as a common carrier, will be compensated for all the loss suffered by him.

In *Nichols v. Marsland*, the defendant created an artificial lake on his land by collecting water from natural streams. Once there was an extraordinary rainfall, heaviest in human memory. The embankments of the lake got destroyed and washed away all the four bridges belonging to the plaintiff. The court held that the defendants were not liable as the same was due to the Act of God.

Occurrence must be extraordinary

Some extraordinary occurrence of natural forces is required to plead the defence under the law of torts.

In *Kallu Lal v. Hemchand*, the wall of a building collapsed due to normal rainfall of about 2.66 inches. The incident resulted in the death of the respondent's children. The court held that the defence of Act of God cannot be pleaded by the appellants in this case as that much rainfall was normal and something extraordinary is required to plead this defence. The appellant was held liable.

5. Private defence

The law has given permission to protect one's life and property and for that, it has allowed the use of reasonable force to protect himself and his property.

- The use of force is justified only for the purpose of self-defence.
- There should be an imminent threat to a person's life or property.

For example, A would not be justified in using force against B just because he believes that some day he will be attacked by B.

- The force used must be reasonable and to repel an imminent danger.

For example, if A tried to commit a robbery in the house of B and B just draw his sword and chopped his head, then this act of A would not be justified and the defence of private defence cannot be pleaded.

- For the protection of property also, the law has only allowed taking such measures which are necessary to prevent the danger.

For example, fixing of broken glass pieces on a wall, keeping a fierce dog, etc. is all justified in the eyes of law.

In *Bird v. Holbrook*, the defendant fixed up spring guns in his garden without displaying any notice regarding the same and the plaintiff who was a trespasser suffered injuries due to its automatic discharge. The court held that this act of the defendant is not justified and the plaintiff is entitled to get compensation for the injuries suffered by him.

Similarly, in *Ramanuja Mudali v. M. Gangan*, a landowner i.e. the defendant had laid a network of live wires on his land. The plaintiff in order to reach his own land tried to cross his land at 10 p.m. He received a shock and sustained some serious injuries due to the live wire and there was no notice regarding it. The defendant was held liable in this case and the use of live wires is not justified in the case.

In *Collins v. Renison*, the plaintiff went up a ladder for nailing a board on a wall in the defendant's garden. The defendant threw him off the ladder and when sued he said that he just gently pushed him off the ladder and nothing else. It was held that the force used was not justifiable as the defence.

6. Mistake

The mistake is of two types:

- Mistake of law
- Mistake of fact

In both conditions, no defence is available to the defendant.

When a defendant acts under a mistaken belief in some situations then he may use the defence of mistake to avoid his liability under the law of torts.

In *Morrison v. Ritchie & Co*, the defendant by mistake published a statement that the plaintiff had given birth to twins in good faith. The reality of the matter was that the plaintiff got married just two months before. The defendant was held liable for the offence of defamation and the element of good faith is immaterial in such cases.

In *Consolidated Company v. Curtis*, an auctioneer auctioned some goods of his customer, believing that the goods belonged to him. But then the true owner filed a suit against the auctioneer for the tort of conversion. The court held auctioneer liable and mentioned that the mistake of fact is not a defence that can be pleaded here.

7. Necessity

If an act is done to prevent greater harm, even though the act was done intentionally, is not actionable and serves as a good defence.

It should be distinguished with private defence and an inevitable accident.

The following points should be considered:

- In necessity, the infliction of harm is upon an innocent whereas in case of private defence the plaintiff is himself a wrongdoer.
- In necessity, the harm is done intentionally whereas in case of an inevitable accident the harm is caused in spite of making all the efforts to avoid it.

For example, performing an operation of an unconscious patient just to save his life is justified.

In *Leigh v. Gladstone*, it was held that the forcible feeding of a person who was hunger-striking in a prison served as a good defence for the tort of battery.

In *Cope v. Sharpe*, the defendant entered the plaintiff's premises to stop the spread of fire in the adjoining land where the defendant's master had the shooting rights. Since the defendant's act was to prevent greater harm so he was held not liable for trespass.

8. Statutory authority

If an act is authorized by any act or statute, then it is not actionable even if it would constitute a tort otherwise. It is a complete defence and the injured party has no remedy except for claiming compensation as may have been provided by the statute.

Immunity under statutory authority is not given only for the harm which is obvious but also for the harm which is incidental.

In *Vaughan v. Taff Valde Rail Co.*, sparks from an engine of the respondent's railway company were authorized to run the railway, set fire to the appellant's woods on the adjoining land. It was held that since they did not do anything which was prohibited by the statute and took due care and precaution, they were not liable.

In *Hammer Smith Rail Co. v. Brand,* the value of the property of the plaintiff depreciated due to the loud noise and vibrations produced from the running trains on the railway line which was constructed under a statutory provision. The court held that nothing can be claimed for the damage suffered as it was done as per the statutory provisions and if something is authorized by any statute or legislature then it serves as a complete defence. The defendant was held not liable in the case.

In *Smith v. London and South Western Railway Co,* the servants of a railway company negligently left the trimmings of hedges near the railway line. The sparks from the engine set fire to those hedges and due to high winds, it got spread to the plaintiff's cottage which was not very far from the line. The court held that the railway authority was negligent in leaving the grass hedges near the railway line and the plaintiff was entitled to claim compensation for the loss suffered.

Absolute and conditional authority

The authority given by a statute can be of two types:

- Absolute
- Conditional

In the case of Absolute authority, there is no liability if the nuisance or some other harm necessarily results but when the authority is conditional it means that the same is possible without nuisance or any other harm.