



VOLENTI NON FIT INJURIA

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I. Introduction

When a person gives his consent to suffer harm upon himself, he has no remedy for that in tort. If, the plaintiff voluntarily agrees to suffer damage, he is not allowed to complain and his consent serves as a defense for the defendant. Consent to suffer harm can be express or implied. For an instance, if a person invites somebody to his house, he cannot sue him for trespass, nor can anyone sue the surgeon after submitting to a surgical operation because he has expressly consented to these acts. Similarly, no action for defamation can be brought by a person who agrees to the publication of a matter defamatory of himself.

Many times the consent to suffer harm can be implied also. A person going on a highway is presumed to consent to the risk of pure accident.¹ In the same way, a spectator at a cricket match cannot recover damages if he is hit by the ball.

For the defense of volenti non fit injuria to be available, the act causing harm must not go beyond a certain limit. A player in a game has no right of action if he is hit while the game is being lawfully played. But if there is a deliberate injury caused by another player, the defense of volenti non fit injuria cannot be pleaded. Similarly, if a surgeon negligently performs an operation, he cannot plea the defense.

¹Holmes v. Marther 1875

In **Hall v. Brooklands Auto Racing Club**,² the plaintiff was a spectator at a motor car race being held at Brooklands on a track owned by the defendant company. During the race, there was a collision between two cars, one of which was thrown among the spectators, thereby injuring the plaintiff. It was held that the plaintiff impliedly took the risk of such injury, the danger being inherent in the sports which any spectator could foresee, the defendant was not liable.

In **Padmavati v. Dugganaika**³, while the driver was taking the jeep for filling petrol in the tank, two strangers took lift in the jeep. Suddenly one of the bolts fixing the right front wheel to the axle gave way toppling the jeep. The two strangers were thrown out and sustained injuries, and one of them died as a consequence of the same.

It was held that neither the driver nor his master could be made liable, firstly, because it was a case of sheer accident and, secondly, the strangers had voluntarily got into the jeep and as such, the principle of volenti non fit injuria was applicable into this case.

The defense of volenti non fit injuria was successfully pleaded in **Thomas v. Quartermaine**.⁴ There, the plaintiff, an employee in the defendant's brewery, was trying to remove a lid from a boiling vat. The lid was struck and by the plaintiff's extra pull to it, it came off suddenly and the plaintiff fell back into the cooling vat which contained scalding liquid. The plaintiff was

²1933 1 KB 205

³1975 ACJ 222

⁴(1887) 18 QBD 685



severely injured. The majority of the Court of Appeal held that the defendant was not liable because the danger was visible and the plaintiff appreciated and voluntarily encountered the same.

In **Illot v. Wilkes**,⁵ a trespasser, who knew about the presence of spring gun on a land, could not recover damages when he was shot by a spring gun. Similarly, damages caused to a trespasser by broken glass or spikes on a wall, or a fierce dog, is not actionable. If someone goes and watch a fire-work maker for my own amusement, and the shop is blown up, it seems he shall have no cause of action even if he was handling his material unskillfully.

II. The Consent must Free

For the defense of volenti non fit injuria to be available, it is necessary to show that the plaintiff's consent to suffer harm was free. If the consent of the plaintiff has been obtained by fraud or under compulsion or under some mistake, such consent does not serve as a defense. Moreover, the act done by the defendant must be the same for which the consent is given. Thus, if you invite some person to your house, you cannot sue him for trespass when he enters your premises. But, if the visitor goes to place for which no consent is given, he will be liable for trespass. For example, if a guest is requested to sit in the drawing room and without any authority or justification, he enters the bedroom, he would be liable for trespass and he cannot take the defense of your consent to his visit to your house. Similarly, a

postman has implied consent of the resident of a building to go up to a particular place to deliver the dak. For his entry up to that particular point, he cannot be made liable. If the postman goes beyond the limit and enters the rooms of the house, he would be liable for the trespass.

In **Lakshmi Rajan v. Malar Hospital Ltd.**,⁶ the complaint, a married woman, aged 40 years, noticed development of a painful lump in her breast. The lump had no effect on her uterus, but during surgery, uterus was removed without any justification.

It was held that the opposite party, i.e., the hospital, was liable for deficiency in services. It was also held that the patient's consent for the operation did not imply her consent to the removal of the uterus.

When a person is incapable of giving his consent because of his insanity or minority, consent of such person's parents or guardians is sufficient. Thus, a surgeon performing a surgical operation of a child with the guardian's consent is protected even though the child protests against the operations.

III. Consent obtained by Fraud

Consent obtained by fraud is not real and that does not serve as a good defense. In the Irish case of **Hegarty v. Shine**⁷, it has, however, been held that mere concealment of facts may not be such a fraud as to vitiate consent. There, the plaintiff's paramour had

⁵(1820) 3 B & Ald 304 m

⁶1998

⁷14 COX C.C 145 (1878)



infected her with venereal disease and she, therefore, brought an action for assault. The action failed partly on the ground that mere non-disclosure of the disease by the plaintiff was not such a fraud as to vitiate consent, and partly on the ground *ex turpi causa non oritur action*. (It means that from an immoral cause, no action arises). In some criminal cases, it has been held that mere submission to an intercourse does not imply consent, if the submission had been by fraud which induced mistake in the mind of the victim as to the real nature of the act done.

Thus, in **R. v. Williams**,⁸ the accused, a music teacher, was held guilty of rape when he had sexual intercourse with a girl student of 16 years of age under the pretence that his act was an operation to improve her voice. If, on the other hand, the mistake which the fraud induces is not such which goes to the real nature of the act done, it cannot be considered to be an element as vitiating the consent. In **R. v. Clarence**,⁹ it was held that a husband was not liable for an offence when the intercourse with his wife infected her with venereal disease, even though the husband had failed to make her aware of his condition. In **William's case**, the victim misunderstood the very nature of the act which was being done. She had consented to the act of accused believing that to be a surgical operation. In the other case, on the other hand, the wife was fully aware of the nature of the act that was being done, although she was unaware as regards the consequences of the act done. Since she gave her consent knowing full well the nature of the act done, the consent was enough to save her husband from liability.

⁸1923

⁹1888

IV. Consent obtained under Compulsion

Consent given under circumstances when the person does not have freedom of choice is not the proper consent. A person may be compelled by some situation to knowingly undertake some risky work which, if he had a free choice, he would not have undertaken. That situation generally arises in master-servant relationship. The servant may sometimes be faced with the situation of either accepting the risky work or losing the job. /if he agrees to the first alternative, it does not necessarily imply has agreed to suffer the consequences of the risky job which he has undertaken. Thus, "a man cannot be said to be truly willing unless he is in a position to choose freely, and freedom of choice is conditional, so that he may be able to choose wisely, but the absence of any feeling of constraint so that nothing shall interfere with the freedom of his will."¹⁰ Thus, there is no *volenti non fit injuria* when a servant is compelled to do some work in spite of his protests. But, if a workman adopts a risky method of work, not because of any compulsion of his employer but of his own free will, he can be met with the defense of *volenti non fit injuria*.

V. Mere Knowledge does not imply Consent

For the maxim of *volenti non fit injuria* to be applicable, two points have to be proved—

- i. The plaintiff knew that the risk is there.

¹⁰Bowater v. Rowley Regis Corporation 1944



- ii. He, knowing the same, agreed to suffer harm

If only first of these point is present, i.e. there is only the knowledge of the risk, and it is no defense because the maxim is *volenti non fit injuria*. Merely because the plaintiff knows of the harm does not imply that he assent to suffer it.

In **Bowater v. Rowley Regis Corporation**,¹¹ the plaintiff, a cart driver, was asked by the defendant's foreman to drive a horse which to the knowledge of both was liable to bolt. The plaintiff protested but ultimately took out the horse in obedience to order. The horse bolted and the plaintiff was injured thereby.

Held, the maxim *volenti non fit injuria* did not apply and the plaintiff was entitled to recover. Goddard L.J., said: "The maxim *volenti non fit injuria* is one which in the case of master servant is to be applied with extreme caution. Indeed, I would say that it can hardly ever be applicable where the act to which the servant is said to be *volens* arises out of his ordinary duty, unless the work for which he is engaged is one in which danger is necessarily involved. A man, however, whose occupation is not one of a nature inherently dangerous but who is asked or required to undertake a risky operation is in a different position....it is not enough to show that whether under protest or not, he obeyed an order or complied with a request which he might have declined as one which was not bound to obey or to comply with. It must be shown that he agreed that what risk there was should lie on him."

In **Smith v. Baker**,¹² the plaintiff was a workman employed by the defendants on working a drill for the purpose of cutting a rock. By the help of a crane, stones were being conveyed from one side to other, and each time when the stones conveyed, the crane passed from the over the plaintiff's head. While he was busy in his work, a stone fell from the crane and injured him. The employers were negligent in not warning him at the moment of a recurring danger, although the plaintiff had been generally aware of the risk.

It was held by the House of Lords that as there was mere knowledge of risk without the assumption of it, the maxim *volenti non fit injuria* did not apply, and the defendant was liable.

If a workman ignores the employer's instructions and contravenes statutory provisions thereby causing damage to him, he can certainly be met with the defense of *volenti non fit injuria*. The case of **Imperial Chemical Industries v. Shatwell**¹³ illustrates the point. In that case, two brothers, George Shatwell and James, had been working in the defendant's quarry. They tried to test some detonators without taking requisite precautions and their act was in contravention of statutory provisions also the employer's orders in the matter. The same resulted in the explosion causing an injury to the plaintiff, George Shatwell. He brought an action against the defendants on the ground that his brother was equally responsible with him for the accident and the defendant was vicariously liable for his brother's conduct. One of the defenses pleaded by the defendant was *volenti non fit injuria*. The plaintiff argued that the defense

¹¹Supra 10

¹²1891

¹³1965



of *volenti non fit injuria* is not applicable where there is a breach of statutory obligation. The House of Lords, however, rejected the plaintiff's plea and granted the defense of *volenti non fit injuria*. Lord Reid said: "I can find no reason at all why the facts that these two brothers agreed to commit an offence by contravening a statutory prohibition imposed on them as well as agreeing to defy their employer's order should affect the application of the principle *volenti non fit injuria* either to an action by one of them against the other or to an action by one against the employer based on his vicarious responsibility for the conduct of the other.

In **Dann v. Hamilton**,¹⁴ a lady, knowing that the driver of the car was drunk chose to travel in it instead of an omnibus. Due to the driver's negligent driving, an accident was caused resulting in the death of the driver himself and injuries of the lady passenger. In an action by the lady passenger for such injuries against the representatives of the driver, the defense of *volenti non fit injuria* was pleaded but the same was rejected and the lady was held entitled to claim compensation. The reason why the defense of *volenti non fit injuria* was considered not to be applicable was that the degree of intoxication of the driver was not to such an extent that taking a lift could be deemed to be consenting to an obvious danger. In the words of Asquith J.: "There may be cases in which the drunkenness of the driver at the material time is so extreme and so glaring that to accept a life from him is so like engaging in an intrinsically and obviously dangerous occupation, intermeddling with an unexploded bomb or walking on the edge of an unfenced cliff. It is not necessary to

decide whether in such a case the *maxim volenti non fit injuria* would apply, for in the present case. I find as a fact that the driver's degree of intoxication fell short of this degree, I, therefore, conclude that the defense fails and the claim succeeds.

VI. Negligence of the Defendant

For the defense to be available, it is further necessary that the act done must be the same to which the consent has been given. Thus, if while playing hockey, a player is injured while the game is being played, he can't claim anything from any other player because he is deemed to have consented to the incidents of the game he has gone to play. In case, another player negligently hits him with a stick, he can definitely make the other player liable and he can't plead *volenti non fit injuria* because the injured player never consented to an injury being caused in that matter.

In **Slater v. Clay Cross Co. Ltd.**,¹⁵ the plaintiff was struck and injured by a train driver by the defendant's servant while she was walking along a narrow tunnel on a railway track which was owned and occupied by the defendant. The company knew that the tunnel was used by the members of the public and had instructed its drivers to whistle and slow down when entering the tunnel. The accident had occurred because of the driver's negligence in not observing those instructions. Held, that the defendant was liable. Denning L.J., said: "It seems to me that when this lady walked in the tunnel, although it may be said that she voluntarily took the risk of danger

¹⁴1939

¹⁵1956



from the running of the railway in the ordinary and accustomed way, nevertheless she did not take the risk of negligence by the driver. Her knowledge of the danger is a factor in contributory negligence but is not a bar to the action.”

VII. In Rescue Cases

‘Rescue cases’ form an exception to the application of the doctrine of volenti non fit injuria. When the plaintiff voluntarily encounters a risk to rescue somebody from an imminent danger created by the wrongful act of the defendant, he cannot be met with the defense of volenti non fit injuria.

Haynes v. Harwood¹⁶ is an important authority on the point. In that case, the defendant’s servant left a two-horse van unattended in a street. A boy threw a stone on the horses and they bolted, causing grave danger to women and children on the road. A police constable, who was on duty inside a nearby police station, on seeing the same, managed to stop the horses, but in doing so, he himself suffered serious personal injuries. It being a ‘rescue case’, the defense of volenti non fit injuria was not accepted and the defendants were held liable. Greer, L.J. adopting the American rule said that “the doctrine of the assumption of the risk does not apply where the plaintiff has, under an exigency caused by the defendant’s wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection, as a member of his family, or

is a mere stranger to whom he owes no such special duty. However, a person who is injured in an attempt to stop a horse which creates no danger will be without remedy.

Wagner v. International Railway¹⁷ an American authority on the point. There, a railway passenger was thrown out of a running railway car due to the negligence of the railway company. When the car stopped, his companion got down and went back to search for his friend. There was darkness, the rescuer missed his footing and fell down from the bridge resulting in injuries to him. He brought an action against the railway company. It was held that it being a rescue case, the railway company was liable. Cardozo, J. said: “Danger invites rescue. The cry of distress in the summons to relief. The law does not ignore those reactions in tracing conduct to its consequences. It recognizes them as normal. The wrong that imperils life is a wrong to that imperiled victim: it is a wrong also to the rescuer... the risk of rescue if only it is not wanton, is born of occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a delivery. He is accountable as if he had.

Baker v. T.E. Hopkins & Son¹⁸ is another illustration on the point. In this case due to the employer’s negligence, a well was filled with poisonous fumes of petrol driven pump and two of his workmen were overcome by fumes. Dr. Baker was called but he was told not to enter the well in view of the risk involved. In spite of that, Dr. Baker preferred to go into the well in view to make an attempt to help the two workmen already inside the well. He tied a rope around himself and went inside, while two women

¹⁶1935

¹⁷1921

¹⁸1959



held the rope at the top. The doctor himself was overcome by the fumes. He was pulled from well and taken to the hospital. He, however, died on the way to the hospital. The two workmen inside the well had already died. The doctor's widow sued the workmen's employers to claim compensation for her husband's death. The defendant pleaded volenti non fit injuria. It was held that the act of the rescuer was the natural and probable consequence of the defendant's wrongful act which the latter could have foreseen, and, therefore, the defense of volenti non fit injuria was not available. The defendant was held liable.

VIII. Volenti non fit injuria and Contributory Negligence Distinguish

- Volenti non fit injuria is a complete defense. In contributory negligence, the damages which the plaintiff can claim will be reduced to the extent the claimant himself was to blame for the loss.
- In the defense of contributory negligence, both the plaintiff and defendant are negligent. In volenti non fit injuria, the plaintiff is negligent.
- In case of volenti non fit injuria, the plaintiff is always aware of the nature and extent of danger he encounters. In contributory negligence, the plaintiff may or may not know the nature and extent of danger.

IX. Bibliography

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