

SCRUTINIZING VOLENTI NON-FIT INJURIA WITH EXCEPTIONS AND SCOPE ON TORTS

Treasy Nilopher* Nandana P*

ABSTRACT

A concept adopted from the English law in India is the legal maxim volenti non-fit injuria that expounds on the nature of personal agency in willingly accepting or welcoming harm. this is profoundly used in civil cases under the law of torts. This notion is encapsulated in the maxim volenti non-fit injuria, which directly translates to "anything which a man consents to cannot be reported of as an injury." ¹ voluntary harm does not amount to a legal injury. This paper discusses the nuances of the legal maxim volenti non-fit injuria by referring to case laws. The evolution of this maxim is traced to the exhaustive study of different exceptions. The stance on rescue cases and ratifying the consent and the widened scope is examined in crime. The enforcement in India and other countries is compared. This paper discusses the various dimensions of this particular general defence.

Keywords: Legal Maxim, Law of Torts, Consent, Defence.

ANALYSIS OF VOLENTI NON-FIT INJURIA

Journal of Legal Research and Juridical Sciences

Volenti non-fit injuria gives the defendant a chance to escape from his liability toward the plaintiff. However, the same cannot be used as an excuse every time to protect himself and thus there are two requisites for the maxim to be applied. The plaintiff should know the presence of the risk and then give his consent to the same. In the case of *Smith v. Baker*², a warning was not given to the employee when stones were moved with the help of a crane which in turn made the defendant liable for his injuries as there was neither mentioned to the plaintiff nor did he give his consent for it. In the landmark case of *Dann v Hamilton*³, the defendants were victorious in applying the said maxim as the plaintiff already knew the condition of the driver and yet took the risk to sit in the car, proving the fact that there was knowledge of the risk and there was consent of the plaintiff. Volenti non-fit injuria can be applied in various situations

*BA LLB, FIRST YEAR, SASTRA UNIVERSITY, TANJORE.

*BA LLB, FIRST YEAR, SASTRA UNIVERSITY, TANJORE.

¹ Neha Astha, 'Volenti Non Fit Injuria – A Critical Analysis' (*international journal of law management and humanities*) <<https://ijlmh.com/paper/volenti-non-fit-injuria-a-critical-analysis/>> accessed 13 January 2024

² *Smith v Baker & Sons* [1891] AC 325

³ *Dann v Hamilton* [1939] 1 KB 509

and has a wide scope. When various sports are held both the spectators and the players should know the presence of the risk that is involved and hence this maxim can be applied to an injury caused by fair play. In the case of *Hall v. Brooklands Auto Racing Club*⁴, the defendants were not liable for the injury caused to the plaintiff and were successful in pleading this maxim. In the case of medical procedures, the patient is expected to have knowledge of what they have consented to and are well aware of the risks that come with it. However, if something happens to the plaintiff that he has not consented to or something has happened due to the negligence of the defendant, they cannot use the maxim as a defence.

EVOLUTION OF THE LEGAL MAXIM

The law of torts falls under civil wrongs. The term "tort" originated from the Latin word 'tortum', which means twisted or crooked. A tort is a civil wrong that is not exclusively the breach of a contract or trust⁵. When a person commits a wrongful act, they are held liable and will have to compensate accordingly. However, the defendant can escape liability towards the plaintiff through defences, which are bifurcated into specific and general. General defences are those available for several wrongs whereas Specific defences are available for a particular tort to which it relates.⁶ One such defence under the general defense category is "Volenti non-fit injuria" which means "to a willing person, it is not a wrong."⁷ in layman's terms When a person consents to an event with full knowledge of the potential risks involved and is willing to proceed without any kind of force or persuasion, it is considered a voluntary action and they cannot claim compensation for any resulting damages. However, it's important to note that this defence does not apply in every situation, as there are many exceptions and limitations to this legal maxim. It is believed that the legal maxim was formulated by Roman jurist Ulpian which was originally coined as *Nullainiuriaest, quæ in volentem fiat*.⁸ It is necessary to note that the knowledge of the plaintiff should have made him consent to the act freely, and if there existed negligence on the part of the defendant then the legal maxim does not stand as a defence. In the past the concepts of volenti non-fit injuria and contributory negligence were confused they both thought they were legal concepts regarding self-induced damages, the former is a

⁴ *Hall v Brooklands Auto-Racing Club* [1933] 1 KB 205

⁵ The Limitation Act 1963, s 2(m)

⁶ Dheeraj Diwakar, 'Volenti Non-Fit Injuria: An Analysis' (*manupatra*, Aug 10, 2021)

<<https://articles.manupatra.com/article-details/Volenti-Non-Fit-Injuria-An-Analysi>> accessed 9 January 2024

⁷ https://www.law.cornell.edu/wex/volenti_non_fit_injuria

⁸ *Chatteron v. Gerson* [1981] Q.B. 432

complete defence whereas the latter shifts the blame on both the plaintiff & defendant. The law of torts in itself is a growing branch and so is this legal maxim too.

EXCEPTIONS TO VOLENTI NON-FIT INJURIA

Though this maxim serves as a great defence under the law of Torts, it does not act as a complete blanket but rather has many exceptions to it.

Illegal consent

All legal proceedings are dealt with by the court and anything that goes against the law will not be considered legal hence it does not allow the use of this maxim in the first place. This can be seen in the case of *R v Donovan*⁹ where the assault was caused with the help of a cane and was held that in cases where a person acts with intention to inflict bodily harm, the consent of the victim cannot render otherwise unlawful conduct lawful.

Negligence of the defendant

The defendant cannot use this maxim as a defence if the plaintiff's injury was caused by the defendant's negligence. When the plaintiff voluntarily accepted the risk usually he cannot claim compensation however if the defendant had considerably acted in negligence he will be held liable. The case of *Bradon v Osborne*¹⁰ The case popularly known as the Skylight Case held the defendant liable as the injury caused to the plaintiff's husband could not have been foreseen and it was the defendant's duty to maintain their shop. The negligence of the defendant is observed as an exception in many hospital cases where even when the consent of the plaintiff is given for medical examination or surgery exhibiting it negligently causing death or damage to the plaintiff will hold the medical practitioner liable, and the punishments for medical negligence is even regulated in the new criminal bill, *Bharatiya Nyaya Sanhita*.

Rescue cases

In these types of cases, the plaintiff voluntarily saves another in a particular situation which is caused by the actions of the defendant without foreseeing the risk and then rescues him. The maxim cannot be applicable in these cases as saving the life is seen as the utmost necessity and

⁹ *R v Donovan* [1934] 2 KB 498

¹⁰ *BRANDON AND ANOTHER v. OSBORNE GARRETT AND COMPANY, LIMITED, AND OTHERS.* [1922] B. 4861.

his actions are considered reasonable. In the case of *Haynes v Harwood*¹¹ where an on-duty police constable stopped the bolting horses, belonging to the defendant, which were causing harm to women and children, and sustained some injuries. It was held that the defendant was liable as it was a rescue case. Despite whether the action of the defendant directly or indirectly caused harm from which the plaintiff tried to rescue the vulnerable party with or without invitation the defendant is still held liable.

Fraudulent Consent

Consent should be given by understanding the nature of the act and by acknowledging all the inherent risks. If the consent has been obtained by manipulation or fraudulent activity the consent doesn't stand valid in the court of law as a defence. The fraud should be on the nature of the contract and should affect the fundamental fact. A music teacher fraudulently obtained the consent of a minor for intercourse under the pretense that it was an operation to improve her voice and hence was held liable and the consent was not held valid¹².

In cases where consent is not gained by manipulation but by the use of power and is obtained under compulsion it still is invalid. The consent should be made with freedom of choice. Thus, "a man cannot be said to be truly willing unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstance on which the exercise of choice is conditional, so that he may be able to choose with the freedom of his will".¹³ This stands as notice of the condition in which consent can amount to defence.

Mere knowledge does not mean acceptance

The distinction between knowledge of risk from agreeing to get exposed to the same is necessary. There have been many cases in judicial history where the parties were aware of the potential danger but did not appreciate the same hence invalidating the defence. There needs to be a perpetual balance in navigating the factual scenario in terms of awareness and acceptance. This instance can be observed in employee and employer relations where the employee may have been generally aware of the risky nature of the job but that stands as no defence for harm caused to him during the course of employment since he was just aware and never assented to the same. In *Dann v Hamilton*¹⁴, a woman entered into the car of a drunk

¹¹ *Haynes v Harwood* [1936] 1 KB 146

¹² *R v Williams and Davies* [1992] 1 WLR 380

¹³ *Bowater v Rowley Regis Corporation*, [1944] K.B. 476

¹⁴ *Dann n(2)*

driver, the rash driving of the driver caused an accident resulting in the death of the driver and injury to the woman. When the plea of volenti non-fit injuria was made, the plea was rejected since the degree of intoxication of the driver was not deemed to bring in obvious danger.

EXECUTION IN CRIME

Consent legally means to agree upon the same thing in the same sense. The legal maxim volenti non-fit injuria cannot be said to be applied in criminal cases as the consent to perform an illegal activity does not count as valid or induce any defence. However, there are exceptions such as if a woman consented to the intercourse then she cannot claim it to be rape nevertheless the consent must be voluntarily given without any vitiating factors, it should be given with a free will, and the consent given by a minor or a person of unsound mind cannot be held valid¹⁵. Mere submission to intercourse does not imply consent. No one can consent to a criminal activity. Section 87 of the IPC states that if a person over 18 has given consent to an event and experiences harm, he cannot shift the liability on the person causing harm.¹⁶ This means if a sound person agrees to an activity and experiences damage from it the person is claimed to be solely responsible. Section 88 of IPC 1860 explains that if an act is done with good faith and not to cause death and with implied or expressed consent of the party then the act is considered no offense. These sections protect the doctors and other medical professionals. In conjunction even if a person voluntarily agreed or consented to do an act illegal or part of the unfair contract the act cannot be enforced. Hence, the application of this legal maxim in the realm of the crime branch is very limited and is mostly appropriated in civil cases.

INDIA VIS A VIS OTHER COUNTRIES

Indian law is inspired by the English law that originated from England and shares similar provisions under volenti non-fit injuria, where both countries hold it as a complete defence and wisely differentiate it from contributory negligence. It mandates knowledge and free consent as essential elements for the application of this defence. In addition, it provides a skeptical view on consent regarding relationships such as master & servant as in worker and employee. Mere knowledge of risk and acceptance to work will not attract volenti non-fit injuria.

¹⁵ Indian Penal Code 1860, s 90

¹⁶ Indian Penal Code 1860, s 87

USA though similar in approach uses doctrine of assumption of risk. It redeems the defendant from liability if the plaintiff is aware of the inherent risk and is willing to go forward. Hence, while filing a suit, one must recheck that the damage was not a result of voluntary action.

CONCLUSION

The legal maxim *volenti non-fit injuria* effectively works as an exception under general defences in the law of torts. Though it extends its frontiers in many fields it exists with many exceptions. When a person willingly accepts the risk associated with an act and faces damage on account of it he cannot hold any other person liable or claim compensation. The acceptance of the plea of *volenti non-fit injuria* in the court is not easily accepted rather the exceptions to this defence make it a tedious task to analyse. The knowledge, assent, consent, and other attributes discussed have to be considered under the factual circumstances to pass judgment. It falls in the hands of the law to maintain a striking balance in protecting the rights of the individual and at the same time check upon social concern. Hence, the court has to delicately scrutinize the authentication of the consent and check on how true it is. It should be proven that the plaintiff knew that the risk was there and he knowingly agreed to suffer the same. If only the former is present it is no defence¹⁷.

Examining the effect in the crime branch adds an engaging facet to the legal maxim *volenti non-fit injuria* that is primarily used in civil cases, yet there are provisions under criminal law too, which incorporate the same.

The stance across the globe for the same show's glimpses of the effects of legal history, precedents, society, and jurisdiction effects. Nonetheless, this is still a growing branch and will be widening its branches with the appraisal of different case instances.

Overall the legal aspect of *volenti non-fit injuria* helps discourage claims for self-induced risk and at the same time protects the rights of people by holding various exceptions for this defence.

¹⁷ Thomas v Quartermaine [1887] 18 Q.B.D. 658