

General Defences against Tortious Liability: Analytical Approach

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Abstract

Under Tort it is very important to learn about the general defences. This article tells you about the eight fundamental defences used in Tort. It is general presumption of law that if your acts gives injury to anyone then you are liable to compensate them but this tortious liability or general defences gives immunity to defendant to escape her liability to compensate petitioner in certain situations and occasions. Therefore, this article explained various types of general defences available for defendant under Tort.

Keywords: General defence, liability, defendant, compensate, consent, Injury, defence, law of tort, Intention, voluntarily.

INTRODUCTION

Before understanding the meaning, procedure or how to use general defences. First of all we have to understand the meaning of word 'Defence' what it actually means? In legal sense the word defence is used to refer to those arguments which were used to persuade the court to conclude that defendant is not guilty.

Whenever a case bring against a person for the commission of a tort and all the essential elements of that wrong are present so in this situation the person is held liable for same. Even in this critical situation the defendant can avoid his liability to pay by taking the plea of defenses available under torts.

There are some defences which are especially related to some offences for example in case of defamation the defence available to defendant are fair comment and justification.

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Let's understand defences available under the law of tort and how can it be used with some of the important cases.

Generally there are various type of tortious liability and the significance of each liability is different. Many people does a wrongful act which causes injury to other person and the person sues him and claiming for compensation so in this type of situation the other person who doesn't do any wrongful act and the injury occurs due to some other reason have to pay them compensation which violates his fundamental rights and also impose burden on court.

So the general defence plays a very important role. After coming of general defences under law of tort. The person takes the benefit of defences and escape her liability to compensate her.

This research had been done on the basis of some books and on some research, articles so it is doctrinal research.

RESEARCH QUESTIONS

1. Why is there a need for defences against tortious liability?
2. Which defences are most oftenly resorted to in courts of law?
3. What has been the judiciary's approach towards tortious liability and the relevant defences?

RESEARCH OBJECTIVES

The objective of current research is:

1. To comprehend the relevance behind tortious liability as a concept under torts law.
2. To analyze the position of tortious liability in law of torts.
3. To analyze the judicial approach towards giving defences in tortious liability cases.

LITERATURE REVIEW

R.K. Bangia; Law of Torts 24th edition, 2017 With the help of this book came to know the meaning and nature of general defences and also understand the different types of general defences available to escape one's liability to compensate.

Ratanlal and Dhirajlal; Law of Torts 28th edition, from this book we clearly understand the concept of consent under *volenti non fit injuria*.

B.M Gandhi; Law of Torts, 4th edition, This book help us to understand the concept of *vis major* which also known as act of God. In this book it is clearly stated that under which circumstances the defence act of God is granted.

Article published by Aditi Agarwal at September 2014 on lawctopus we understands the concept of inevitable accident and also analysis the cases.

The article published on legal bites June 23, 2018 by Aanchal Karla. Mainly we study the concept and nature of Necessity.

The article published by Nisha Agarwal and Richa Singh on blog.ipleaders helps to clear the study on limitation on doctrine scope. Generally we understand the concept of Rescue cases.

The article on Tortious Negligence Liability on Law Teacher says that negligence is defined as "failure to do or recognize something that a reasonable person would do or recognize, or do something that a reasonable person would not do". Negligence protects an individual against economic loss, property and personal injury. However, the claimant must prove the defendant's negligence with a preponderance of evidence.

SIGNIFICANCE OF RESEARCH

It is vital to study about General Tort Defenses while learning about tort law. General defenses are a series of "excuses" that you can use to avoid being held responsible. In order to avoid culpability in a case where the plaintiff pursues an action against the defendant for a specific tort, the defendant would have to prove the existence of all the necessary elements of that tort. It lists all of the defenses that can be used in a case, depending on the facts and circumstances. To argue a defense, it is necessary to first comprehend the offense and then apply the appropriate defense. As in current era, the suing culture is becoming a prominent part of India's legal framework. Hence, such study like a present one is of much significance.

METHODOLOGY

The researcher's selected research method is the doctrinal approach of study, which is appropriate given the nature of the study topic. In the in spite of the fact that other types of research, such as reform-oriented, theoretical, and foundational research, have been recognised as important, doctrinal research has always included an interdisciplinary component, doctrinal analysis has been the dominant legal technique in the common law world. Nonetheless, academic performance in law has been evaluated using a doctrinal methodological framework that involves tracking legal precedent and interpreting legislation. Doctrinal scholarship entails a "critical conceptual examination of all relevant legislation and case law to disclose a statement of the law pertinent to the subject under inquiry," according to its definition. To create his own view on the issue, the author will consult publications, journal articles, periodicals, and blogs. Books have been used for getting a gist of the topic. Research Papers have been referred for attaining the relevant data. Commentaries have been emphasized upon for understanding the viewpoints of jurists. Case laws have been incorporated to bring forth the approach of judiciary towards the topic. Journal Articles are bound to be referred to understand the current legal points on the research problem and online sources have been taken up for getting access to latest empirical data. The researcher will be referring to entire data with an analytical approach to arrive at fruitful results.

MEANING OF GENERAL DEFENCES

General defences is also known as tortious liability So general defence is a bundle of defences or reasons with that help the person can escape or avoid her liability in law of torts.

When the plaintiff brings an action against the defendant for committing tort he will be held liable for it. But with the help of tortious liability or general defences the defendant can escape or avoid her liability arising out of the wrong committed.

Defences available are given as:

1. Volenti not fit injuria.
2. Plaintiff the wrongdoer.
3. Inevitable accident.
4. Act of God.
5. Private defence.
6. Mistake.
7. Necessity.
8. Statutory authority.

VOLENTI NON FIT INJURIA

Volenti non fit injuria means when a person gives his consent to the infliction of some harm upon himself, then in this condition, he has no remedy in law of torts. Generally it means when plaintiff voluntarily agrees to suffer some harm, then he is not allowed to complain for that because his consent serves a good defence against him.

Some example of defences are:

1. When you invite somebody to your house you cannot sue him for trespass.
2. If you give your consent for publication of something you were aware of, then you can not sue him for defamation.
3. A player in the game is deemed to be ready to suffer any harm in the course of the game.

For the availability of the defence the act should not go beyond the limit of what has been consented.

In **Hall vs Brooklands Auto Racing Club [1]** the plaintiff was a spectator at a motor car racing being held at Brooklands on a track owned by the defendant company. At the time of race, there was

an accident between two cars, one of which was thrown among the spectators, which results in injury to the plaintiff. It was held that the plaintiff gives his consent to took the risk of such injury, the danger being common in the sports which any spectator could foresee, so the defendant was not liable.

In **Padmavati vs Dugganaika [2]** while the driver was taking the Jeep for filling petrol in the tank, two outsiders took lift in the Jeep. Suddenly one of the bolt fixing the right front wheel to the axle gave away toppling the Jeep. The two outsiders were thrown out and injured seriously, and one of them died as a consequence of the same.

It was held that the driver and master couldn't be made liable, firstly, it was a case of sheer accident and, on other hand, the outsiders had voluntarily got into the Jeep and as such, the principle of *volenti non fit injuria* was applicable in this situation.

In **Wooldrige vs Sumner [3]** the plaintiff was taking some photographs standing on the boundary of the arena. The defendants horse galloped furiously, towards the plaintiff due to which he got frightened and fell into the horses' course and he was seriously injured by the galloping horse. So in this case it was held that since the defendant had taken due care, they were not liable.

In **Thomas vs Quartermine [4]** the plaintiff is an employee in the defendant's brewery, plaintiff was trying to remove a lid from a boiling vat. The lid was stuck and by the plaintiff's extra pull to it, the lid came off suddenly and the plaintiff fell back into the cooling vat which contained scalding liquid. The plaintiff injured highly. The majority of the Court of Appeal held that the defendant was not liable because the danger was visible and the plaintiff accelerate and voluntarily encountered the same.

CONSENT MUST BE FREE

- For the defence availability it is important that the consent of plaintiff was given freely.
- If the consent of the plaintiff was obtained by fraud, compulsion then it doesn't serve a good defence.
- The act of defendant is exactly same for which the consent of plaintiff was given.

For example: If a guest is requested to sit in the living room and without permission of owner, he enters the kitchen, so he would be liable for trespass.

In **Lakshmi Rajan v. Malar hospital Ltd. [5]** A married woman whose age is near about 40 years she notice a painful lump in her breast the lump had no effect on her uterus but during operation her uterus was removed without any information or consent.

In this case the hospital was liable for deficiency in service because the consent of patient for the operation did not imply her consent to the removal of the uterus.

Where in a case a person is incapable of giving his consent because of insanity or minority so in this case the consent of such person's parents or guardian is sufficient.

CONSENT OBTAINED BY FRAUD

Consent of plaintiff is obtained by fraud is not real and does not serve as a good defence.

In **R vs Clarence [6]** in this case it was held that a husband was not liable for an offence when the intercourse with his wife infected her with some venereal disease, even though, the husband had failed to make her aware about his condition.

In **R vs Williams [7]** in this case a music teacher was held Guilty of rape when he had sexually intercourse with a girl he student of 16 years under the pretence that this act will improve her voice as well as skill of singing. The girl misunderstood the nature of the act done with him and give his consent for the act and expecting that the act will help him to improve his singing skill and voice.

CONSENT OBTAINED UNDER COMPULSION

There is no consent when a person consents to an act without free will, freedom or under some compulsion.

When the person's not have a freedom of choice.

This type of situation mostly occurs in master and servant relationship many times the servant is pressurized to do everything that his master ask him to do.

Then there is no 'volenti non fit injuria' when a servant is compelled to do some work without his own will.

MERE KNOWLEDGE DOES NOT IMPLY ASSENT

There are two points which have to be proved:

1. The plenty knew that the risk is there.
2. He, knowing the same and also agreed to suffer the harm.

In **Smith vs Baker [8]** In this case the plaintiff was a Workman working on a drill for the purpose of a cutting rock. With the help of crane stones were being conveyed from one side to another side and each time the crane passed from over the plaintiffs head. Suddenly a stone fell from the crane and injured him. The defendant were negligent as they did not inform him.

Held by the House of Lords that there was mere knowledge of risk without the assumption of it the maxim volenti non fit injuria did not apply and the defendants were held liable.

But, if a workman not follow the rules and regulations of his employer thereby causing injury, in such cases this maxim applies.

NEGLIGENCE OF THE DEFENDANT

It means when the plaintiff consents to take some risk, the presumption is that the defendant will not be negligent.

For example: while playing hockey, I am injured while the game is being lawfully played, I can't claim anything from any other player because I am deemed to have consented to the incidents of the game I have gone to play. In case, another player negligently or voluntarily hits me with a stick, I can definitely make him liable and he can't take defence of volenti non fit injuria because I never consented for an injury being caused in that manner.

In **Slater vs Clay Cross Co. Ltd. [9]**. In this case the plaintiff suffered from injuries due to negligence behaviour of the defendant's servant while she was walking along a tunnel, owned by the defendant. The company knows that the tunnel is used by the society, public and also give guidelines to drivers to keep his hand on horn and drive carefully as well as slowly whenever they enters to tunnel. The driver failed in doing so. It is decided that defendant is responsible for accident.

LIMITATION ON DOCTRINE SCOPE

Rescue cases

When the plaintiff voluntarily encounters a risk to rescue someone from a serious danger which was created by mistake of defendant then he cannot be met with the defence of volenti non fit injuria.

In **Haynes vs Harwood [10]**. In this case the defendant servant left two horse unattended in a street a boy threw a stone on the horses and they bolted and cause grave danger to woman and other persons on road a police constable who was on duty Come forward to protect them and he himself suffered from serious injuries While doing so. The defendants held liable because it's a rescue case and the defence of *volenti non fit injuria* was not granted in this case.

In the case of **Wagner vs International Railway [11]** a railway passenger was thrown out of a moving train due to the negligence of the railway company. When the train stopped one of his friends got down to rescue her, there was darkness suddenly he missed the footing and fell down from bridge and suffered from injuries. The railway company held liable because it was a rescue case.

Plaintiff the Wrongdoer

There is maxim 'Ex Turpi Causa Non Oritur Actio' which means, from an immoral cause no action arises. It means that if the basis of the action of the plaintiff is an unlawful contract, he will not, in general, succeed to his action and not able to recover damages.

According to sir Frederick Pollock, When the plaintiff himself is a wrongdoer, he is not disabled from recovering in tort 'unless some unlawful act or conduct on his own part is connected with the harm suffered by him as a part of the same transaction.' Thus, it has to be seen as to what is the connection between the plaintiff's wrongful act and the harm suffered by him. If his own act is the determining cause of the harm suffered by him, he has no A cause of action.

For ex. A who tries to trespass in house of B and therefore he gets injured due to the electric wiring. So here the defence of plaintiff the wrongdoer can be claimed.

In **Bird vs Holbrook [12]** in this case the plaintiff, a trespasser over the defendant's land was entitled to claim compensation for injury caused to defendant by a spring gun installed by the defendant without notice, in his garden area.

In **Pitts vs Hunt [13]**, there was a motorcycle rider who was 18 years of age. He abetted his friend who was 16 years old to rash and fast drive under drunken conditions. Suddenly their motorcycle met with an accident, the driver died on the spot. The Boy seated back seat suffered from some imminent injuries and sue relatives of deceased person for compensation this plea was rejected and the grounds that the plaintiff itself the wrongdoer.

INEVITABLE ACCIDENT

Inevitable accident generally means unexpected injury. It serves as a good defence the defendant shows that there was no intention to harm injury to the plaintiff and could not be stopped even after taking all precautions and safety measures.

According to Pollock, It does not mean absolutely inevitable, but it means not avoidable by any such precautions as a reasonable man, doing such an act then and there, could be expected to take.' It serves a good defence if defendant shows that he neither intended to injure the plaintiff nor could he avoid the injury by taking proper care.

In the case of **Stanley vs Powell [14]** the plaintiff and the defendant both were the members of a shooting party and they went for pheasant shooting the defendant fired towards pheasant but the shot from his gun missed and hit the oak tree and injured the plaintiff. It was held that injury caused to plaintiff was an accidental injury and the defendant was not liable for his act.

In **Assam State Corp., etc. Federation Ltd vs Smt. Anubha Sinha [15]**, the premises belongs to the plaintiff were given on rent to defendant. The tenant requested the landlord to repair defective

electric wirings, but the landlord didn't pay attention towards defective wires. Due to a short circuit, an fire spread in the whole house. No negligence were occur there from the tenant's side. The landlord claim compensation for the same, so it was held that the case is related to inevitable accident and the tenant is not liable in any manner.

Act of God (Vis Major)

Act of God is also known as vis major or force majeure.

Act of God is a kind of inevitable accident with the difference that in the act of God the damages or loss arises out of heavy rainfall, cyclones, storms, tides and volcanic outbreak

In a legal sense the act of God stands for an extraordinary occurrence of circumstances, which could not have been foreseen and could not have been guarded or stopped. Generally occurs due to natural cause.

The two important essentials are needed for this defence:

1. There must be working of some natural forces.
2. Occurrence must be extraordinary an not one which could be anticipated and reasonably guarded against.

Working of an natural forces

In **Ramalinga Nadar vs Narayan Reddiar [16]** OT has been held that the unruly mob robbed all the goods transported in the defendant's lorry. It cannot be accepted to be an Act of God and the defendant, as a common carrier, will be compensated for all the loss suffered by him.

Nichols vs Marsland [17] in this case the defendant created some artificial lake on his land. one day a heavy rainfall came which stated to be the heavily rainfall in human memory , which results in that all boundaries of lake destroyed and all water of lake spread out and take away all four bridges which belongs to the plaintiff. It was held that defendant was not liable for the loss occurred due to heavy rain which covers under act of God.

The Occurrence must be an extraordinary

In **kallulal vs Hemchand [18]** the wall of a building collapsed due to rainfall of about 2.66 inches. Resulted in the death of two children of respondents The Madhya Pradesh high court held that the defence of Act of God cannot be pleaded by the appellants in this case says that the rainfall was normal and extraordinary situation is required to take this defence. The appellant was held liable.

PRIVATE DEFENCE

The law permits use of reasonable force to protect one's person life or property. If the defendant uses the force which is necessary in context of self-defence, he will not be liable for the harm caused thereby. It is also important that such force is absolutely necessary to repel the invasion should be used.

1. The Use of force is mainly justified for the purpose of defence
2. There should be an close threat to the personal safety or property.

For example: A tried to commit a robbery in the House of B. B just draw his sword and chopped his head then this act of B would not be justified and the defence of private defence could not be given to B.

- The force used must be reasonable not excessive.
- For the protection of property, the law has only allowed to take measures to prevent danger.
- For ex; fixing of broken glass or spikes on a wall, or keeping a fierce dog.

In **Ramanuja Mudali vs M. Gangan [19]**, In this case a land owner also a defendant has put some live electric wire on his land. Plaintiff passing from the land at 10:00 PM to go his own land suddenly

he received a big shock from the wire and caused serious injuries, the defendant can't give warning about such wire. Therefore the defendant held liable for the injuries caused to the plaintiff.

In **Collins vs Rension [20]** the plaintiff went up a ladder for fixing a board on a wall in the defendant's garden. The defendant threw him off the ladder and when sued him he said that he just gently pushed him off the ladder and nothing else. It was held that the force used was not justifiable in defence.

MISTAKE

The mistake is of two types:

1. Mistake of fact.
2. Mistake of law.

Generally in this condition, no defence is available to defendant.

It means when any person's act gives injury to other person and the act is done under some mistake beliefs then he may use the defence of mistake to avoid his liability under tort law.

In **Consolidated Co. Vs Curtis [21]**. An auctioneer was asked to auction some goods by his customer honestly believing that the goods belong to the customer, he auctioned them and he paid the sale proceeds to the customer. In fact, the goods belong to some other person. In an action by the true owner, the auctioneer was held liable for tort of conversion.

NECESSITY

A Latin Term "necessitas inducit privilegium quod Jura private" which means necessity induces a privilege because of a private right. Necessity basically means an act done with intention to harm upon you but the reason is that to prevent a greater evil. So the action is not actionable and serves as a good defence. The defence recognize on the principal of *Salus Populi supreme lex*, that is known as the welfare of the people or society is the Supreme law.

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

1. In necessity there is an infliction of harm on an innocent person whereas in private defence, harm is caused to a plaintiff who himself is the wrongdoer.
2. Necessity is also different from inevitable accident because in necessity, the harm is an intended one whereas inevitable accident, the harm is caused in spite of the best effort to avoid it.

For example; Pitching goods overboard a ship to lighten it for saving the ship or persons on board of the ship.

In **Leigh vs Gladstone [22]**. In this case it was held that forcible feeding of a hunger striking prisoner to save her life. Is a good defence against battery under law of torts.

In **Cope vs Sharpe [23]**. In this case the defendant entered into plaintiff's land to prevent the spread of fire to the neighbour's or adjoining land over which the master of defendant had the shooting rights. So the defendant was not liable for trespass because the defendant act was considered important to save the game from serious injury.

STATUTORY AUTHORITY

The damages arises out from an act, authorized by legislatures or direct to be done, is not actionable even if it would constitute a tort.

It means when an act is done under the authority of an act it is a complete defence and the injured party has no remedy except for claiming compensation.

Immunity under statutory authority is for both harm which is obvious and harm which he incidental.

If a railway line is constructed, there is some interference with the private land. When the trains started to run, there may also be some incidental harm due to society i.e.: noise, vibration, smoke, emission of sparks, and many more etc.

In **Vaughan vs Taff Valde Rail.Co. [24]** sparks occurs from an engine of the respondent's railway company, and they have authorization to run the railway, set fire to the appellant's woods on adjoining area. The respondent were not liable, it had taken proper care to prevent the emission of sparks, they were doing nothing more than what the statute had authorized them to do.

In **Smith vs London and South western Railway Co. [25]**, in this case the servants of the railway company, left cutting of grass and hedges near a railway track. A spark occurs from engine and fires catch the grass near to track, fire was carried to plaintiff cottage 200 yards. Away from track with the help of wind. The whole cottage of plaintiff was burnt. The railway Co. will be held liable because it was the part of negligence.

Absolute and Conditional Authority

The authority given by the statute are of two types:

1. Absolute authority.
2. Conditional authority.

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

In **Metropolitan Asylum District vs Hill [26]**, In this case the appellant is an hospital authority wanted to set up a small pox hospital. They gets the permission for same. Hospital created in residential area which was not safe for society because there is chances of spreading disease in that area. It was held to be a nuisance and injunction were issued to remove the hospital. The authority in this case is conditional.

CONCLUSION

This is to emphasize the important role played by the tortious liability or general defences to escape, avoid one's liability in law of torts. While learning about tort it is necessary to learn about tortious liability under the law of tort.

In order to plead a defence it is necessary to learn it first and then apply the suitable defence accordingly.

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