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Seminar

on

The Problems of Law of Torts

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"SOCIAL CONTEXT ASSESSMENT OF GENERAL DEFENCES AVAILABLE IN AN ACTION FOR TORTS IN INDIA; THE DETAILS OF HOW THE PROOF OR OTHER LEGAL REQUIREMENTS OF THE INGREDIENTS OF EACH DEFENCE, DETER OR ENCOURAGE TORT ACTIONS IN INDIA".

by

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Since independence, India has witnessed drastic changes in every walk of human life. As a result, various professions and disciplines, ideas and notions, concepts and values, principles and practices, have also undergone tremendous amount of modification and change corresponding with the rate and nature of change in the society as a whole. Growth of population, rapid urbanization, change in economic patterns of society, industrialisation etc., have posed altogether new problems. An assessment of modern Indian conditions and tort action in India is urgently needed.

Indian Judges have adopted this branch of law from the common law inconsonance with justice, equity and good conscience. In the absence of any express provisions of law, the Court is empowered toinvoke the aid of common law of England. But any Court in India which takes recourse to common law of England cannot affort to ignore the extent to which the common law stands abrogated by the Statutes.[1] It has been a considered view of many High Courts in India that there is no need to apply English law of torts in all its details when that is found to be wholly unacceptable and

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1. Secretary of State v. Rukmini Bai, AIR Nag.354.

unsuitable to local conditions. But at the same time it is generally recognised that English law is to be used as a basis but that does not give the Court power to invent new heads of law. Even rules of justice, equity and good conscience must proceed along logical lines and be consistent with themselves and other branches of law.[2] However its express doctrines are rapidly becoming obsolete in all advance countries under the pressure of modern social forces. Change of legal doctrine, however, is slow because precedent dies hard.

This paper is devoted to investigate whether the general defences to tort action in India of which the foundation lays in the technical rules and technical reasoning of English lawyers, suit modern Indian conditions. How far this branch of law has developed inconsonance with the social, economic or political needs of India? Do the technicalities of proof or other legal requirements of such defences deter or encourage tort action in India? Although the general defences available in India are many but the study is confined to two general defences e.g., Volenti non fit injuria and Statutory authority.

II

According to Clerk and Lindsell, "the types of defences to an action in tort are various. First, the plaintiff may fail to establish any one of the necessary facts essential to a prima facie case..... secondly, there may be defences peculiar to the particular tort. Thirdly, the defence may depend on the circumstances of the person committing the tort.... and finally, there are a certain number of defences to any, or most torts which, because they are not concerned with the nature of the particular torts are apt to be overlooked. As a result it is often not easy to state them with certainty.[3]

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2. Babo S/o Thakur Dhobi v. Mt.Subanshi, AIR 1942 Nag. 99 Another case Ram Charan v. Sarwar Khan, AIR 1927 Nag. 75 may also be noted in this connection.
3. Clerk & Lindsell on Tort - Page 54,55.

However, there are certain cases in which there is no liability because it is negatived by some general rule of law, These defences are of general application and may be studied under seven heads: 1) Harm suffered with the plaintiff's assent (Volenti non fit Injuria)2) act of God,3) necessity, 4) inevitable accident, 5) mistake, 6) private defence, and 7) statutory authority.

(1) VOLENTI NON FIT INJURIA

In India Torticus liability is negatived on many occasions on which harm - even sometimes grievous harm - may be inflicted on a person, because he consented, or at least assented to the risk of such harm. This principle is embodied in the maxim volenti not fit injuria. A man cannot complain of harm to the changes of which he has exposed himself with knowledge and of his free will. "One man cannot sue another in respect of a danger not unlawful perse that was visible, apparent and lawfully encountered." One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong. In other words, he will have no remedy in tort where a person has consented to the risk voluntarily. Simple examples are the harm caused in the course of a lawful game or sport, or in a lawful surgical operation. Explaining the maxim Salmond[4] observed:

> "Consent may deprive a plaintiff of a right of action in trespass which he would otherwise have had for an injury inflicted accidentally. So spectators at Cricket, Football, Hockey and Polo matches, at Motor races and Flying meetings take upon themselves the risk of such perils as may reasonably be expected to occur at such meetings as well as the risk of improbably accidents, So again he who goes upon a golf course, whether as player, caddie or spectator, takes upon himself the risk of harm from the dangers naturally incidentalto presence on a golf course, but not the risk of injury by the negligent acts of other persons playing there."

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4. Salmond on law of torts - p.39.

This maxim needs some qualifications. It is more appropriate in respect to personal injuries to say that the consent is to the risk of harm for the cases must be few in which a person voluntarily assents thereto. He does it in a surgical operation but with a view that if the operation is successful, he would enjoy better health than he did before. Indirectly he does not assent to the injury. Simply he subjects hemself to the risk of the operation being unsuccessful. Similar is the position in lawful games. No player can prefer to be hurt but if he is hurt as a legitimate incident in the game, he recognises it as a risk. Thus it does not create any right of action in the person injured.

Again the risk is to be construed in the light what a man of ordinary prudence would understand.

Further, the maxim is of a general application. But at least a presumption is to be drawn that the defendant has committed a wrong against the plaintiff. Then only the defendant is to rebut the argument by showing that the plaintiff was volens.

So far the consent is concerned, it may be express or implied. Where it is 'express' it may be by spoken words or in writing and 'implied' may be inferred from the conduct of the plaintiff.

Thus judging the qualifications and assuming that the assent may be express or implied, we find that this maxim is further subjected to several limitations such as (a) Process must not be unlawful; (b) Consent must be free; (c) Knowledge does not necessarily imply assent; and (d) Rescue cases. We will examine each limitation separately.

a) Process must not be unlawful:

Process for which an assent has been given by the plaintiff should be such which is not prohibited by law. In other words, game or any operation to which a person has assented must not be illegal. If such a process is contrary to law, the maxim volenti non fit injuria would be inapplicable. However, according to Dr. Winfield [5] "there is no

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5. Winfield on Tort - sixth edition, p.29.

definite test for deciding what the law will prohibit in this connection. It certainly does not turn upon the act being criminal as well as tortious, for every assault is criminal, and so are somelibels and yet it is possible, by assent, to negative tortious liability for many kinds of assault and libel. Perhaps it would be correct to say that whatever the act is contrary to public policy, volenti non fit injuria is inapplicable, but 'public policy' is such a vague conception that this does not help much'. For example boxing is lawful, but fighting with bare fist is not.

It is also difficult to determine how far the maxim applies to occupations or processes which are notiriously dangerous. Here we mean the circumstances in which the risk is much greater than in the normal occupations. In attempting to solve these questions, a distinction should be taken between injury to the person primarily concerned in the dangerous process and injury to some third person.

A contract to commit a tort is unlawful. If the risk has been undertaken in pursuance of contract, nothing is recoverable by the injured person. But this proposition, as Dr. Winfield points out, is too wide and requires some qualifications. "In the first place, a contract whereby A agrees that B shall commit an injury to A, which would otherwise be a tort, is often perfectly lawful: e.g., many acts which would otherwise be trespasses or nuisance are frequently permitted by a contract. Secondly, it is always ture that, even if A and B agree between themselves to commit a tort against a third party, the agreement is unlawful; if they agree to trespass on C's land in order to decide a disputed right of way."[6] Dr. Winefield further explains[7] that 'probably the law is best stated by saying that where the conduct contemplated is likely to menace public morality or safety, or (more broadly) is contrary to public policy, any contract to pursue such

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6. Winfield, Tort-pages 30-31.
7. Winfield, Tort-page 31.

conduct is lawful, and generally nothing is recoverable in contract by the injured party."[8] (Exturpi causa non oritur actio.) Thus, contracts for dangerous experiments in physiology are much more doubtful. However, there is no fixed time for determining what is public policy. At any diven time it is the sense of the community as interpreted by the Courts".[9]

Thus the question whether a person can meet successfully by the defence volenti non fit injuria or not is difficult to answer at a first look. Test applied is quite indefinite. Instead of assisting in clear cut decisions on disputed issue, it has deterred and discouraged an action. Further the "reported cases and dicta[10] are scanty and the text books are not in agreement." A more acceptable rule is that "a plaintiff can sue for, and recover, damages in tort, unless allowing him to do so would be against public policy in general, or would be the condonation of a breach of public morals or public safety in particular."[11] The example of boxing match, where the plaintiff commits inadvertantly the breach of the rules which provokes the defendant and in retallation gives a deliberate foul blow, may give rise to an action for assault. The dfeendant cannot take the plea of volenti non fit injuria. None can deny the plaintiff to claim nominal damages for such a deliberate foul act. For justifying the plaintiff's action, the blow must not have been a lawful incident to such a game. Nothing in such an action would be contrary to public policy. But if the whole process is illegal, like a fight with bere fists, it would be deemed against public policy. Thus it is obvious that different results are possible even for the same tort and this is because of the vagueness of criteria - "public policy". Legal requirement has rather deterred than encouraged tort action in India.

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8. Danu v. Curzon (1910) 104 L.T. 66
9. 42 Harv. L. Rev. (1928) 96-100. reprinted in Winfield select legal Essays, 241-265.
10. Clerk's case (1596) 5 Rep.64a; Matthew v. Olleston (1964) Comb.218.
11. Pollock, Tort, 15th ed., 113-5. Salmond, Torts, 11th ed. 42. Clerk & Lindsell, Torts, 11th. ed. 264 et seq.

As regard the injury to 'third person, here again the authority is scanty, "but the principle would appear to be that he can recover unless he fully appreciated the risk and nevertheless decided to encounter it."[12] A person can do so certainly if the harm arose from some act occuring in a lawful game but which was not a lawful incident in it. This principles has not rendered any encouragement to an action for law of torts in India.

b) Consent must be freely given:

The plea of volenti non fit injuria would be validly considered where it is established that the consent was freely given. In achieving the consent of the plaintiff neither was the fraud committed nor any duress was used. Because such a consent is equivalent to no consent. Thus it is a felony of rape for a singing master to reduce a female pupil aged sixteen years, by fraudulently making her belief that this would improve her voice,[13] yet it is no criminal offence for a husband to inject his wife with veneveal disease, even though she would never have consented to the connection if she had been aware of his condition.[14] This distinction of criminal also applies to the tort of Battery and that no action for it is maintainable where the victims' mistake is as to the consequences of the act done, and not as to its real nature;[15] but there is no English decision on the point and the law must be regarded as uncertain. In Hegarty v. Shine, the plaintiff was infected by her paramour with a vinereal disease the existence of which he concealed. She sued him for assault. The Court of appeal dismissed the action, partly on the ground that mere concealment was not such a fraud as to vitiate consent, partly because exturpi

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12. Mckee v. Malcolmson (1925) N.I. 120, supports this. A spectator of some motor-cycle races was killed by a cycle which wobbled and hit him. The contest was a nuisance and therefore, unlawful. Held, an action was maintainable against the rider of the cycle on behalf of the spectator's relatives under Lord Combell's Act, 1846.

13. R.V. Williams (1923) 1 K.B.340.
14. R.V.Clarence (1888) 22.Q.B.D.
15. Clerk & Lindsell, Torts-11th ed. 265-6.

causa non oritur actio.[16]

Consent must be real and free consent. Fraud negative real or free consent. Thus "a man cannot be said to be willing unless he is in a position to choose freely"; and freedom of choice predicates the absence from his mind of any feeling of constraint interfering with the freedom of his will.[17] If such a consent lacking the defence of volenti non fit injuria would have no validity. Thus this real and free consent is also an healthy sign which may encourage tort action in India because this is further subjected to certain qualification.

C) Knowledge does not imply consent:

The maxim is volenti non fit injuria; it is not scienti non fit injuria. Knowledge is not a conclusive defence in itself. It does not follow that a person always assents to a risk merely because he knows of it. Bowen L.J., while delivering judgement in 'Thomas v. Quartermaine'[18] have declined to identify, as a matter of course, knowledge of a risk with acceptance of it. The facts of the case were that the plaintiff was employed in the defendant's brewery. He worked in the cooling room. The distance between cooling vat and boiling vat was of three feet. The board served as a lid to the boiling vat was removed by him but it was slipped and he was fallen in the cooling vat which was full of scalding liquid, and greatly injured. He moved the Court for redress against his employer. A majority of the Court of Appeal held the action not maintainable. The defendant had not been declared as guilty of negligence. He had not been in breach of the duty which he as an occupier of premises owed towards a person lawfully on the premises.

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16. The Home Lords doubted whether the maxim applied to an action in tort in National Coal Bd. v. England (1954) 2.w. L.R.400,408, 411, 416.
17. Boneater v. Rowley Regis Corporation, 1944, K.B. 476 479.
18. Q.B.D. 683.

Bowen L.J., who was one of majority observed:[19]

> "The danger was one which was incident to a perfectly lawful use of the defendant's premises, that it was visible, that it was appreciated by the plaintiff and that he voluntarily encountered it."

This judgment has been subjected to criticism but no expection has been made to Bowenn L.J.'s opinion that "mere perception of the existence of a danger is not the thing as comprehension of it."

In Smith v. Baker, this doctrine was approved by the House of Lords. It was held that:

> "Volenti non fit injuria had no application to harm sustained by a man from the negligence of his employers in not warning him of the moment of a recurring danger, although the man knew and understood that he personally saw risk of injury if and when the danger did recur."

Lord Herschell in this case admitted that:[20]

> "When a person undertakes to do work which is intrinsically dangerous, notwithstanding that reasonable care has been taken to render it as little dangerous as possible, he no doubt voluntarily subject himself to the risks inevitably accompanying it, and cannot, if he suffers, be permitted to complain that a wrong has been done to him, even though the cause from which he suffers might give to others a right of action;" but he added, where.....
> a risk to the employed, which may or may not result in injury, has been created or enhanced by the negligence of the employer, does the mere continuance in service, with knowledge of the risk, preclude the employed, if he suffers from such negligence, from recovering in respect of his employer's breach of duty?

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19. Winfield, Tort p.36.
20. Winfield, Tort p.36-37.

> I cannot assent to the proposition that the maxim, 'volenti non fit injuria', applies to such a case, and that the employer can invoke its aid to protect him from liability for his wrong."

This decision embraces a more modern view and removes the controversey as to the principle that "a man who enters on a necessarily dangerous employment with his eyes open takes it with its accompanying risks."21

Further the distinction between sciens and volens has been well explained in Danu v. Hamilton,[22] where it was held that A, a passenger in the Car of a friend, B, who was driving it and who, to the knowledge of A, was under the influence of drink, could nevertheless recover damages against B for injuries sustained from an accident caused by B's negligent driving. However, this case has been criticised by Prof. Goodhart on the ground that defendant may be imputed with the contributory negligence and hence the maxim 'volenti non fit injuria' is not applicable.

Prof. Glanville Williams rightly sums up that "in almost every negligence action of modern times the defence of volens has failed, for the cases where a person truely consents to run the risk of another's negligence are exceptional, and even in those rare cases where judges have been prepared to allow the defence, it has usually been unnecessary, either because no case of negligence was made against the defendant, or on the ground of remoteness of damage, contributory negligence, common employment (now abolished) or the limitation of duty towards invitees and licensees. He suggests that to constitute a defence there must have been an express or implied bargain between the parties whereby the plaintiff gave up his right of action for negligence."

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21. Cockburn C.J., in Woodley v. Metropolitan Distt. Ry. (1877) 2. Ex.D.384, 388.

22. (1939) I.K.B. 509.

In Secretary of State v. Rukhmini Bai,[23] this doctrine of common law was invoked. Rukhmini Bai's husband was a servant in G.I.P.Rly. During his course of employment he met with an incident which resulted in his death. The death was caused in consequence of the negligence of the another employee of the said Rly. Co. The Court observed that the maxim of volenti non fit injuria is not applicable in this case. Where a servant is acting under orders of his employer this principle of volenti non fit injuria would not be a valid defence.

But in a case where a woman was attended at the child birth by an unqualified mid wife, with her knowledge and of her own free will consented to be so attended, it was held that the principle of volenti non fit injuria would be applied and suit for claiming damages would not be entertainable.[24]

In South Indian Industrials Ltd., Madras v. Alamelu Ammal it was held that to succeed under the maxim, "it is necessary for the defendant to prove that the person injured knew of the danger, appreciated it, and voluntarily took the risk. That he had some knowledge of the danger is not sufficient. A man cannot voluntarily undertake a risk the extent of which he does not appreciate." Thus phrases "mere perception of the existence of a danger is not the thing as comprehension of it," "acting under orders of his employer, "a man cannot voluntarily undertake a risk the extent of which he does not appreciate, have not encouraged much for tort action in India.

d) Rescue cases:

Rescue cases invite separate consideration. They straddle three branches of the law - volenti non fit injuria, remoteness of consequence and contributory negligence. Simple examples are the death or injury caused in rescuing or

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23. AIR 1937 Nag. 354.
24. Maung Sein v. Emperor, AIR 1935 Rang. 471.

endeavouring to rescue another from an emergency of danger to life or limb created by the negligence of third person. In such case would the third person be liable? Or could be plead successfully. (1) Volenti non fit injuria, or (2) that the injured person's conduct is a novus actus interveniens which makes his injury too remote a consequence of the thurd person's negligence; or (3) that injury was caused due to the contributory negligence on his part.

Dr. Goodhart,[25] in summarising the American cases observes:

> "The American rule is that the doctrine of assumption of 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 of death, whether the person endangered is one to whom he owes a duty of protection or is a mere stranger to whom he owes a duty of protection or is a mere stranger to whom he owes no such special duty."

Haynes v. Harwood,[26] is a case accurately represents the English law on the point. In this case a Policeman was injured instopping some runaway horses with an van in a crowded street. The horses and van were left unattended on a high way by the defendant. The horses bolted. The policeman on duty, not in the street, but in a police Station ran towards the running horses and while stopping was crushed by one of the horses which fell upon him. It was held that defence seemed to be irrelevant in the present case. It can be conceded that the risk run by the Policeman was incidental to his employment as a Constable.

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25. Winfield, Tort p. 42 (5 Camb. L.J. (1934) 196).
26. (1935) I.K.B. at pp. 156-7 applied in the Gusty (1940) p. 159, and Morgan v. Aylen (1942) I All. E.R. 489.

Further the injury which the Policeman suffered was the direct consequence of the defendant's unlawful act and was also normally of a courageeous man in a like circumstances, therefore the injury suffered was not too remote. "The reasonable man here must be endowed with wualities of energy and courage, and he is not to be deprived of a remedy because he has in a marked degree a desire to save human life when in peril." Thus it would not only cover the case of a police man but even of by-stander who had attempted to stop the horses.27

Law does not sanction any foolhardy or unnecessary risk. To stop a run-away horse on a desolute country road is an example exhibiting such a rule. The simple test applied in judging the validity of such a principle is: "what is reasonable?" Thus it is unreasonable to assist a driver on his call for help to pacify a restive horse which has bolted into a field but endangers the life of none.28

Apart from the pleas of volenti non fit injuria and remoteness of damages, contributory negligence was also argued in defence but was not much pressed. Actually the case of Brandon v. Obsorue, Garrett & Co. Ltd., had made it improbable that it would have met with any success. Here in this case where a person X and his wife were in a shop as customers. Shop roof was under repair. Due to the negligence of the defendants, some glass fell from a sky light and struck X. The wife was saved. No harm was caused to her. But the believed that her husband was in danger so she clutched his arm and tried to pull him from the spot, and thus injured her leg. It was held that no contributory negligence could be alleged against her. She had done no more than any reasonable person would have done.

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27. Morgan v. Aylen, (1942) I All. E.R. 489.
28. Cutter v. United Dairies (London) Ltd. (1923) 2.K.B. 297.

This doctrine of Haynes v. Harwood is applicable in cases of rescue to property as well as to rescue of the person and the Court is to consider the degree of danger, the relationship of the rescue to the property in danger, or to the person in danger.

It is also to be noted, in general, that the mere fact that the plaintiff is a wrongdoer is no is no defence in tort. If we accept otherwise the rule would become absurd. If a person steals a bottle of whisky belonging to another, it would not be just, as he could not be allowed to sue the thief because of the fact that he bought it during hours prohibited by licencing Act. The rule probably is that a wrongdoer is not barred from suing in tort "unless some unlawful act or conduct on his own part is connected with the harm suffered by him as part of the same transaction."

The doctrine of novus actus intervenious and contributory negligence are not so simple. Each is to be construed in the light of facts of each case, and this has also not encouraged tort action in India.

2) Statutory Authority

The statutory authority also negatives liability in tort. When a statute authorises the commission of what would otherwise be a tort, then the party injured has no remedy apart from the compensation which the statute allows. However, to refer Dr. Winfield, "Statutory powers are not charters of immunity for any injurious act done in the exercise of them. In the first place, the Courts shall not impute to the legislature any intention to take away the private rights of individuals without compensation, unless it be proved that there was such an intention; and the burden of proving it is on those who exercise the statutory powers. Next, when the Legislation confers such powers, it may do so in one of two ways:

(1) It may, in effect, order a particular thing to be done regardless of whether it inflicts an injury, upon another person. Then authority covers not only harm which must obviously occur, but also that which is necessarily incidental to the exercise of an authority.

(2) It may permit a particular thing to be done, provided it can be done without interfering with private rights."

In metropolitan Asylum District v. Hill,[29] it was held that a small-pox hospital is a nuisance because, although the statute enabled the managers of the district to purchase land and to erect buildings on it for the care of the sick and the inform poor, yet it conferred this power only subject to the managers obtaining by free bargain and contract the means of doing so; much less did it condone the commission of any nuisance by them. This case may be compared with Att.Gen. v. Nothingham Corporation,[30] there the corporation proposed to use a building as a small-pox hospital, and the court declined to issue a quia timet injunction to prevent them from doing so, because they did not regard the theory of the aerial discrimination of small-pox as unequivocally established.

However, a distinction in the two cases, in fact is a question of time, place and circumstances whether there is an actual nuisance or not.

Some Indian cases may also be noted here. In Ramachandraram Nagaram Rice & Oil Mills Ltd., Gaya v. Municipal Commissioners of Puralia.[31] In this case the act of the Municipality though were not actuated by malice or as a result of conspiracy against the plaintiff, was certainly unreasonable and negligent. It was observed by Verma J., that if a person is exercising his right, under a statute he is not liable unless it is proved that he acted unreasonably and negligently.

In Faiyaz Hussain v. Municipal Board of Amroha,[32] Shia Mohammandans of Amroha contended that they had a right to take our in procession of Tazias which are up to 27 feet in height in the public streets of Amroha by certain fixed routes and that defendant, must raise the elective wire to such a height as not to cause interference in the exercise of that right.

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32. AIR Pat. 408. AIR 1939 All. 280.

It was held by Iqbal Ahmed, J., that "when according the true construction of a statute the legislature has authorized certain act and the authority given is merely permissive and not imperative, the Legislature must be held to have intended that the execution of work permitted must be done in such a way as not to prejudices the Common law rights of others. It was observed by the learned judge that there is nothing on the record of the present case from which it could be argued that the fixing of the wires at the height of 27 feet was an impossibility or that some other arrangements could not have been made so that the inherent right of the plaintiff was not to be interferred with," and hence appeal was allowed.

These cases clearly point out that, no doubt, Statutes generally negatives liability in tort but each Statute is to be construed keeping in view the time, place and other circumstances. This leads to difference of decisions. For the same torts, in different circumstances, place and time, different decisions are given and this process in no way encourage torts actions in India.

III

(1) In summation it can be concluded from the above assessment of general defences of volenti non fit injuria and statutory authority available to an action for law of torts in India that the proof and other ingredients of each defence have deterred the development. In the absence of any statutory law, ingrdients of the defences have been construed by Indian Judges in the light of English decisions which hardly suit Indian conditions. They do not provide proper guidance to the bench and the bar and often culminating into unfair trials. People appreciate this risk and generally avoid going to courts. This adherence to English precedents has marred the development of this branch of Law in India.

(2) The proof that the risk is to be construed in the light what a man of ordinary prudence would understand or to draw a presumption that the defendant has committed a wrong against the plaintiff has generally led to conflicting decisions.

(3) To determine how far the maxim applies to occupations or processes which are notoriously dangerous is not easy. An attempt to solve these questions is subjected to certain qualifications, e.g., a distinction should be made between injury to the person primarily concerned and injury to some third person. This often leads to conflicting views and does not give any impetus to an action for law of torts in India.

(4) To succeed in a tort action where volenti non fit injuria has been pleaded, the plaintiff is the examine the presumption of risk which is not so easy to establish. Mere perception of the existence of a danger is not the thing as comprehension of it. This ingredient requires explanation and leads to contrary views and conflicting decisions. Knowledge does not imply consent. It requires more than that. The danger must be visible, appreciated and voluntarily encountered. These requirements do not encourage tort action in India.

(5) It is necessary to prove, when the volenti non fit injuria is a defence, that the consent was free. There should not be any fraud. Mistakes as to the consequences of the act done and not as to its real nature is confusing. There is no definite decision on the point and law is required as uncertain.

(6) Exturpi causa non oritur actio also deters the development of law of tort in India. Where an act contemplated is likely to menace public morality or safety, any contract to pursue such conduct is unlawful and generally nothing is recoverable in contract by the injured party. This is also not a happy sign and often resulted in divergence of opinions.

(7) In rescue cases, the criteria of reasonable restriction, to consider the degree of danger, the relationship of the rescuer to the property in danger, or to the person in danger, has also deterred the development in India.

(8) In cases of statutory authority the liability is negatives generally. But to prove that the person acted unreasonably and negligently is often difficult.

(9) As we have adopted the English Common Law Courts system, it is to be found that the system of court-fee, lawyers fee and other expenses, are so high that a poor person could hardly seek justice from the court. Inspite of the fact that they have the knowledge that their rights have been violated but they forgo them and avoid any tort action.

(10) The delay in the disposal of the cases of this country is so a common feature that litigant parties mostly are discouraged to go even to the High Court level. Delays in court proceedings are delays in justice and consequently people set up their own machinery for dealing with their own disputes.

(11) There are many wrongs pertaining to tort are also remediable under criminal law. Thus litigant prefer to get protection under penal provisions of the country and avoid to put into gear civil machinary for the redress of their grievances. This is also of the factor responsible for meagre development of law of torts in India.

(12) It is also argued that there are so many cases which are decided at a lower level but due to the want of proper reportings of the decisions, we hardly come across with such cases. Such cases are hardly heard in appeals. Hence the law of torts could not be appreciated by the profession properly.

This system of law requires urgent evaluation and scrutinising of English rules applied to India. We must give our due consideration to the study and remodelling of the whole system of law in the light of the changed Indian social, economical and ethical values. The law requires codifications. The ambiguities, uncertainties and confusions which prevail in decisions can best be checked by passing proper statute by the Legislature. Unless this branch of law receives the due attention of the lawyers and the Legislators, development of it in India cannot be expected.