THE INDIAN LAW INSTITUTE

Seminar

on

The Problems of Law of Torts

Mt. Abu - May 1969

VOLUNTARY ASSUMPTION OF RISK: MASTER-SERVANT RELATIONSHIP

by

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It is common knowledge that a person is generally answerable for his wrongful acts. But in civil cases, on some occasions, law itself provides protection to the person committing something which would otherwise have been a wrong. One of the reasons why there is no remedy for the person who has suffered as a result of the act is that he has given his consent for it, or at least has assented to the doing of the act. A concise expression as regards the effect of such consent or assent is the Latin maxim 'volenti non fit injuria'. To illustrate, let us suppose a workman offers his services to his employer and the work to be done by him is risky. Then, if the workman is injured in its performance and it is proved to the satisfaction of the court that he had voluntarily encountered the risk, the employer will get the benefit of the maxim, and the workman's suit for compensation will be dismissed.

> "The idea underlying it has been traced as far back as Aristotle, and it was also recognised in the works of the classical Roman jurists, and in the canon law. In English Law, Bracton in his De Legibus Angliae (C. A.D. 1250-1258) uses the maxim, though not with the technicality that attached to it later, and in a Year Book case of 1305 it appears worded exactly as it is now."1

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1. Winfield, The Law of Tort, (1967), p.740.

This maxim is limited in its application neither in any particular relationship such as master and servant cases or between contracting parties, nor does it signify any separate or irregular rule of law. It is of universal application whenever there is a voluntarily assumed relationship - contractual or not. Furthermore, the maxim is not concerned with harm to the person only and is as well applicable to injury to property.

A fully documented study of this subject would be a considerable undertaking in itself, for the topic itself is full of ambiguities and opinions vary to a very large extent. So, a detailed discussion on whole of its area is not the aim of this paper, and the energy has been restricted only towards a fixed tract - the much-talked about master-servant relationship. Moreover, the main controversy in this field clusters around the statement; 'Knowledge of the risk does not necessarily imply consent to run the risk'; and the lawyer's question as to 'when knowledge becomes consent' has not been answered in one manner. Therefore, a try on this particular aspect of the problem is the object of the present article. In this limited extent, a full discussion on the question is the fundamental idea keeping always in mind, of course, the social structure in our country. But, since our law is fundamentally based on the English common law, a couple of very important English cases have been included in the discussion.

In England, prior to the middle of nineteenth century, in every case where the plaintiff had knowledge of the risk, he could not maintain an action against the master because the courts did not regard any distinction between knowledge of the rick and its assumption. As soon as it was proved that the injured servant had knowledge of thr risk, it was taken for granted that he had voluntarily encountered the risk. This approach of the courts, however, caused much hardship on the plaintiff many times and slowly it began to be realised that some line of distinction must be drawn somewhere in between knowledge and assumption. Parliament also started passing some Acts in this direction by that time. Beside these protective legislations, courts also began to realise the acuteness of the problem, and a change towards this direction started through judicial decisions.

To assess this changing attitude of the courts, the topic can be considered in two different phases[2]- situations where the plaintiff does not assume the risk and situations where the pliantiff does assume the risk.

SITUATIONS WHERE THE PLAINTIFF DOES NOT ASSUME THE RISK

A renowned case on the point is Smith v. Baker[3] where the facts were that the plaintiff was employed by the defendants who were railway contractors, to drill holes in a rock cutting near a crane worked by men in the employ of the contractors. The crane lifted stones and at times swung them over the plaintiff's head without warning him. One day a stone having fallen from the crane injured the plaintiff, for which an action was brought against the defendants.

The question of knowledge and assumption was for the first time considered by the House of Lords in this case and they held by a majority, reversing the decision of the Court of Appeal, that the mere fact that the plaintiff undertook and continued in the employment with full knowledge and understanding of the danger arising from the systematic neglect to give warning did not preclude him from recovering. The defendant could not succeed in his plea of volenti non fit injuria though the plaintiff was fully aware of the danger to which he was exposed by this working near the crane without any warning being given, and had been thus employed for months.

It was observed by Lord Herschell:

> When, then, a risk to be 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? 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.

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2. The author has followed the division of the topic as made by Glanvillel. Williams in Joint Torts and Contributory Negligence, (1951) Ch.12, omitting the third category which is irrelevant for the purposes of this article.

3. (1891) A.C. 325

4. Ibid.. at p.362.

It becomes evident, therefore, from the above judgment that the element that plaintiff did protest against the jibbing of stones over his head was of not much importance. Following remarks were made by Glanville Williams about the decision:

> The decision is therefore authority for the proposition that one who continues in employment having come to know that his employer or fellow-servants are indulging in a negligent course of conduct and without taking any energetic steps for his own protection is not deemed in law to assent to the negligent conduct, or more widely that anyone who enters upon or persists in an operation knowing of a risk is not by that mere fact deemed in law to assent to it.[5]

In the Indian case of S.I.Industrials Ltd. v. Alamelu[6] the facts were that the defendants for the purposes of their own business used a method of breaking up cast-iron by dropping a heavy weight from a height on pieces of iron resting on iron-bed. As a result of it, iron pieces generally flew to some distance and for safety, therefore, a screen was put at a distance. The workmen near were warned of the danger, but those working at a distance were given no warning. The deceased was working at a distance of seventy to ninety feet and was fatally injured when hit by iron pieces.

There was a breach of duty to take care on the part of the defendants and the court did not allow the defendants to take shelter behind the maxim. Rejecting the defence of voluntary assumption of risks, Schwabe C.J. observed:

> .....for this (defence) to succeed, it is necessary for the other party to prove that the person injured knew of the danger, appreciated it, and voluntarily took the rick... That he appreciated the risk of pieces striking him is impossible to find in view of the fact that the skilled European Manager swore that he himself did not appreciate that there was any risk. Of course, a man cannot voluntarily undertake a risk the extent of which he does not appreciate.[7]

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5. Op.cit., at p.300 .
6. A.I.R. 1923 Mad. 565.
7. At p.566.

The above passage clearly reveals that voluntary assumption of risk cannot be imputed to a man who does not appreciate the extent of the risk, and when the trained manager himself could not think of the probability of the risk at such a distance, how is it that the layman plaintiff could voluntarily assume it? Knowledge of the risk, therefore, does not necessarily imply consent to run the risk.

In another Indian case Secretary of State v. Rukhmini Bai[8] the problem was a little different - whether a plaintiff can succeed in an action against his master for an injury caused by a fellow servant? The question is covered under the 'doctrine of common employment'. But since volenti non fit injuria was also raised, it becomes relevant to consider it.

The facts were that the deceased and his immediate boss were employees of G.I.P.Railway. Both of them, including some other servants of the railway, were moving on a trolley when they were overtaken by a train in a tunnel. All jumped before the train collided with the trolley and the deceased's head struck the wall of the tunnel and he was instantly killed. Rukhmini Bai, his widow, sued the owner of the railway.

It was held that volenti non fit injuria is not applicable where a person is bound to carry out the orders of his superior, both being in the employment of the same master.

Niyogi A.C.J. observed that though the courts in India, in the absence of any express provision of law applicable to any particular case, are empowered to invoke the aid of Common Law on considerations of justice, equity and good conscience, yet this can refer to the common law which is actually enforced by the courts in England. Any Court in India which takes recourse to Common law of England and seeks to apply its principles in our country cannot afford to ignore the extent to which the Common law stands abrogated by statute.

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8. A.I.R. 1937 Nag. 354.

SITUATIONS WHERE THE PLAINTIFF DOES ASSUME RISK

The following lines deal with the positive aspect of the problem, i.e., what is the extent of liability when the plaintiff voluntarily undertakes the risk.

Thomas v. Quartermaine[9] is the most important decision on the point. The plaintiff was employed in a cooling room in the defendant's brawery. In the room were a boiling vat and a cooling vat, and between them ran a passage which was in part only three feet wide. While tugging at a board from under the boiling vat, he fell back under the cooling vat because the lid came away suddenly, and was, therefore, injured. Bowen and Fry L.JJ. in the Court of Appeal held that the volens maxim applied and the plaintiff was not entitled to recover. Bowen L.J. observed as follows:

> It is no doubt true that knowledge on the part of the injured person which will prevent him from alleging negligence against the occupier must be a knowledge under such circumstances as leads necessarily to the conclusion that the whole risk was voluntarily incurred. The maxim, be it observed, is not "scienti non fit injuria", but "volenti".[10]

> Elaborating the difference, he further stresses the point that, "Knowledge is not a conclusive defence. But when it is a knowledge under circumstances that leave no inference open but one, viz., that the risk has been voluntarily encountered, the defence seems to me complete."[11]

The main question, therefore, to be decided was whether the knowledge imputed to the plaintiff was such as inferred comprehension of the risk and of its nature and extent, in circumstances which would justify the contention that the risk had been voluntarily encountered. Knowledge, therefore, is not conclusive where it is consistent with the facts that, from its imperfect character or otherwise, the entire risk, though in one sense known, was not

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9. (1885) 18 Q.B.D. 685.
10. At p.696.
11. At p.697.

voluntarily encountered. But here, on the plain facts of the case, knowledge on the plaintiff's part could mean only one thing - that he voluntarily assumed the risk because, for many months the plaintiff, a man of full intelligence had seen this vat - known all about it - appreciated its danger - elected to continue working near it. This all pointed only to one direction - that he himself was willing to take the risk.

CONCLUSION

From the above discussions it becomes apparent that the main point of controversy lies in the fact as to when the plaintiff actually assumes the risk voluntarily. Will the defence of *volenti non fit injuria* succeed if a person who has been knocked down by a truck on the highway, brings an action against the driver? The judges in this case will definitely take into consideration the fact that in the present machine era, in big cities at least, everybody takes his life on his hands whenever he moves out of his house on the road. Does that mean that he has voluntarily encountered the risk of being run over by some vehicle? The answer to the problem is definitely not in the affirmative. So, whenever there is something in the nature of risk and the plaintiff decides to take a chance (because he has to take it, there being no other practical alternative) the maxim cannot be applied. For a valid defence, there should be a clear understanding between the plaintiff and the defendant that the plaintiff will have no right to question the conduct of the defendant.[12]

12. See Glanville Williams, *op.cit.* He makes a distinction between physical and legal risk and observes that till the plaintiff has not consented to run the legal risk, the defence of *volenti non fit injuria* cannot succeed. He ably analyses the point thus (at p.309) by citing two illustrations: 'A wishes to cross the Channel by air. A charter company informs him that the only machine that it has available is one in poor condition which it cannot guarantee as airworthy. A, however, is in a hurry and insists upon being flown in this machine. If there is an accident resulting from the conditionof the aeroplane A can be met by the plea of *volens*. It is reasonable implication from the conversation between the parties that A was to have no right of action in respect of the deficiencies in the machine that were indicated to him.

F.n.contd...

The above elaboration of the topic clearly reveals, therefore, that a clear line of demarcation between knowledge and consent is not possible and every case has to be considered on its own merits. Some situations may arise when an express contract between the parties even may not be able to waive the plaintiff's right of action.[13] The courts should see to it that when the plaintiff gave his claim over his right of action, was he doing so on compulsion, not necessarily physical. Was he accepting the demands of the master only because otherwise he would loss his employment, and was there no chance of getting another job which might pull on his family? Was there some moral force on him for which he was sacrifising himself? In other words, true nature and character of each case should be the guide-line and when the judges are fully, with open mind, convinced as to the reasons and basis of a fact, only then should they pronounce accordingly.

In the light of these discussions, we now proceed to analyse the causes as to why the first two cases considered under the first head were decided in favour of the plaintiff[14] while in Thomas v. Quartermaine the defence of voluntary assumption of risk succeeded.

The reason why the plea of volenti non fit injuria was rejected by the court in Smith v. Baker was that the plaintiff did not really waive his right to maintain an action against the defendant in case he suffered injury. All he did was that he continued to be in the employment only because he feared that he would not get other job. The position

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..... Now suppose, by way of contrast, that A wishes to cross the Channel by a regular air service. Before the start he perceives that the aeroplane is defective, and having knowledge of these things realizes that it will be risky to travel in it; however, being anxious to go, he says nothing and boards the aeroplane. In this cases the plea of volens will not avail the air company, for A merely has knowledge of the risk which is not equivalent to consent. Even if A can be said deliberately to have assumed the physical risk of injury (from which no legal action can protect him), there is no transaction between the parties from which it can be inferred that he has given up his right of action for negligence. Although he did decide to run the risk physically, he did not agree to run the risk legally. A one-sided secret determination to run the risk is not enough; there must be evidence of a bargain'.

13.. For example, a rule is conceivable that consent may be given by a child (who may be just short of age of majority) in any case, though such a contract is not binding on him.

F.n. 14 on next page.

might have been otherwise had the employers at the time of engaging him clearly made known to him the practice of the so-called 'jibbing' of stones over his head.

Similarly, in S.I. Industrials v. Alamelu, the fact that the plaintiff was working within a radius of 90 feet in spite of his knowledge that pieces of iron might hit him to such a distance does not imply that he risked himself for that in case of an injury. When the manager himself did not expect that iron would fly in such a large area, how could it be that the plaintiff should have assumed the risk.

But the author feels that the case is wrongly decided. The manager himself did not foresee that iron pieces would hit a person working so far away from the main spot. He was quite qualified a man possessing reasonable prudence in the eye of law, and when even he could not foresee the flying of the iron pieces to such a distance, should the law regard him answerable for that which he, with all his prudence, could not foresee? A better course would have been to decide the case from some other angle.[15]

Thomas v. Quartermaine can be criticised because the danger to the plaintiff did not arise from the circumstance that he had to pass from one part of the premises to the other, in proximity to the vats, even if this would have justified the conclusion arrived at. The accident actually arose from an operation being performed by him in the neighbourhood of the vats, namely, getting a board which served as a lid from under one of them.

Lord Herschell also criticises the decision thus:

> .....if it was assumed that there was a breach of duty on the part of the employer in not having the vats fenced, as it obviously was, since if there had been no breach of duty, it would not have been necessary to enquire whether the maxim Volenti non fit injuria afforded a

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14. The third case is left out as it contained the defence of common employment as well as that the case was different from other cases in so far as the plaintiff was doing something under the orders of his officer.

15. For 'what is the other angle' see at p.18.

> defence, it seems to me that it must have been a questionof fact, and not of law, whether the plaintiff undertook the employment with an appreciation of the risk which arose on the occasion in question from the particular nature of the work he had to perform. If the effect of the judgment be that the mere fact that the plaintiff after he knew the condition of the premises continued to work and did not quit his employment, afforded his employer an answer to the action, even though a breach of duty on his part was made out, I am unable to concur in the decision.16

It has become quite clear now from what have been studied above that though in modern times the defence of voluntary assumption of risk is not generally allowed, yet no unambiguous line of demarcation between knowledge of the risk and its assumption has been drawn. The line in between these two is so thin that any fact where plaintiff had knowledge of the risk seems to imply that he voluntarily incurred it.

D.M. Gordon[17] remarks that in every case, there are two questions to be determined - how far does knowledge of danger created by another bar complaint by a man who injures himself by his own acts, and how far does knowledge of danger bar complaint by a man who is injured by another's dangerous acts.

He maintains that in the first type of cases, the defendant has no need to invoke the maxim because here the injury has been caused by the act of the plaintiff himself and, therefore, he has no claim. In the second case, the defendant cannot take recourse of the maxim for to be volens a plaintiff must prove sciens, and he can seldom be sciens as to an act not yet done.

Of course, it cannot be challenged that Gordon has suggested at least a scientific way of looking at the problem of volens and sciens, but the logic is unsound as it is not pragmatic.[18] He was forced to conclude, on the basis of his theory, that a large number of cases were decided wrongly by the courts after Smith v. Baker.[19]

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16. (1891) A.C. 325, at pp.366-367.
17. Wrong Turns in the Volens Cases (1945), 61 L.Q.R 140, at p.141.
18. See Glanville Williams, op.cit., at p.307. He mentions as many as five lacunae in Gordon's theory.
19. But the author thinks that most of them were decided rightly and were in accordance with the principles of justice.

To point out a grave defect in his theory let us take an illustration. Suppose a master promises to repair or fence a dangerous machine but breaks his promise. The servant, who works on that machine is injured when one of his hands slips into the interior portion of the machine. Here, according to Gordon's theory the servant's claim will be dismissed because he himself was negligent as he did not take proper care to see that his hand did not slip. But justice, on the other hand, decides the case in favour of the workman,[20] This is how Gordon's theory lacks practicality and so his suggestions cannot form a solid base on which the future decisions on the subject could rest.[21]

Our entire discussion, therefore, forces us to conclude that English law has no strong foundation on which the defence of voluntary assumption of risk in master-servant cases can be based. This is one of the prime reasons why there is no clear distinction between knowledge of the risk and its assumption. The question is still open and every judge in England decides a particular case on its own merits and according to the best of his jusgment, And, these considerations have forced the English judges to restrict the defence in the modern times and today this defence is allowed only in extreme cases.

On the other hand, the position of the applicability of the maxim in America is entirely on the opposite side as against the English position. The mere relation of master and servant can never imply an obligation on the part of the master to take mere care of the servant than he may reasonably be expected to do of himself. He, however, is bound to provide for the safety of his servant in the course of his employment to the best of his judgment, information and belief. A servant has always the option to refuse any service in which he reasonably expects injury to himself.

The theory upon which the servant is debarred from recovery if he continues to work with knowledge of the risk is that, he being free to remain or leave, his relation to the master is purely voluntary, and, therefore, one in which there is no legal compulson. The master is, therefore, free to attach any conditions he pleases.

So, the position in America is just the reverse and the master can always take the help of volenti non fit injuria except in extreme cases.

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20. Many cases of such type have been decided in favour of the work in England.

21. For an exhaustive discussion on America law on the subject see Bohlen, Studies in the Law of Torts, Ch.VIII.

This brings us to decide as to which of the above views is suitable to our country which has an entirely different social structure. Or, is it essential that we should decide the problem in the light of some new approach keeping well in mind that ours is a country whose cultural and social values differ from those of Western countries to a very large extent?

Considering first the relevancy of the English law in relation to the much different social pattern of ours, it can be said that English law in this regard is of not much help. Why should we pursue a particular doctrine of England when we ourselves are not certain about its validity under Indian conditions? There is no use giving extra-ordinary arbitrary powers to the judges to decide till what time a particular state of mind is knowledge and when does it become assumption. Every court will specify its own views, and in such a big country like ours, much uncertainty about law in any sphere will unnecessarily shake public opinion.

Coming next to examine the suitability of the American law on this point, in a much different social pattern like ours, it can be concluded without much difficulty that it is not at all favourable in our state of affairs. India is a poor country with the burning problem of unemployment. Once a person gets into any service, he does stick to it until someday he luckily gets a better offer from somewhere else. Therefore, he is prepared to take quite a heavy amount of risk even to keep his family going. He is not in a position to do what his counterpart in America does, namely, as soon as some risk is apparent he throws away the employment and joins another. Such is not the case in our country because neither there is innumerable number of chances of employment here, nor is there any opportunity for taking chance in this regard because of poor economic conditions. In America supposing even that a person leaves one of his employments and has to wait for a month to get another (which eventuality is too remote), yet he can maintain himself anyhow as he is not in such an economic distress as to be unable to maintain his family for such a short time. On the other hand, can this happen in India where an ordinary person is always thinking about sticking to his job at any cost because of derth of new employment?

All these considerations force us to adopt only one alternative - to search some new device which is suitable and practicable according to norms and values of our society.

A help in this direction could have been taken from the following remarks of Lord Watson observed in Smith v. Baker:

> In its application the questions between the employer and the employed, the maxim as now used generally imports that the workmen had either expressly or by implication agreed to take upon himself the risks attendant upon the particular work which he has engaged to perform, and from which he suffered injury. The question which has most frequently to be considered is not whether he voluntarily and rashly exposed himself to injury, but whether he agreed that, if injury should befall him, the risk was to be his and not his master's.22

But again the controversy starts as to 'when' the courts will infer an agreement between the master and servant exempting the master from liability. This again will mean arbitrary discretion.

A different foundation can be laid in the light of the following two suggestions:

Firstly, until a presumptive tort has been committed, there is no question of volens at all. This means that first, a case against the defendant must be made and only then he should be called upon to defend himself (in our case, only with the help of the plea of volenti non fit injuria). This may help to bridge the gap between knowledge and assumption.

Secondly, there is no divergence of opinion as to the fact that where the plaintiff definitely wished or otherwise gave his full assent to the effect that would otherwise be a tort to him, the maxim clearly comes into play. But the mere fact that the plaintiff knows that the defendant intends to do the act that amounts to a tort is not in law consent to the act, though the plaintiff has failed to take necessary steps to keep himself out of the danger.

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22. (1891) A.C.325, at p.355; underlined added by the author.

But these propositions also do not fare better in our social set up and we shall consider now the remaining possibility that the volens maxim in master-servant cases should be totally done away with.

This is a conclusion which is in line with the principles of justice, equity, and good conscience. We have already discussed at length that the defence of voluntary assumption of risk in master-servant gives rise to many intricate problems the solutions of which do not lie in legal and social value-judgments but which are decided in accordance with the individual ability of the judges. This is proper, therefore, that to do away entirely with these lacunae in law, the defence of volenti non fit injuria should never be allowed in cases between employer and employee and in course of time, it will have the same fate automatically as the 'Rule of Last Opportunity' in contributory negligence cases.23

What should be the remedy then, if this defence is totally discarded? A very good replacement can easily be found under the law of negligence. The area of the tort of negligence is quite large and such cases justify themselves to be decided according to that law because the main consideration in such cases is the negligence of the master. Why should there be then any difference in the principles of law to cases which are alike? Such cases should, therefore, be decided on the settled principles of law of negligence and, whenever there is negligence on the part of the employer as a result of which the employee suffers an injury, master should always be answerable. If, on the other hand, the master's duty towards his servant is statutorily provided, then the case should be decided in accordance with the law in that field.

Again, in situations where master and servant both are negligent, it is easy to decide the case on the principle of contributory negligence and damages should be apportioned keeping in mind the extent of their negligence.24

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23. Rule of Last Opportunity is no more a valid principle for determining liability of a person for negligence.

24. In the above-discussed case of S.I.Industrials v. Alamelu, therefore, the proper course should have been apportionment of damages according to their degree of negligence.

This type of approach does not need to draw the much talked-about line of demarcation between knowledge and assumption and, thereby a great confusion in the law is removed.

These suggestions have been put forward only with a purpose that they shall be of some help at least to the persons concerned with law and administration of justice, and the author will think himself successful in his task if they bring out at least something out of the suggestion: "Put an end to the defence of voluntary assumption of risk in master-servant cases, and substitute it by a much developed law of negligence".
