VOLENTI NON FIT INJURIA: A STUDY OF RESIDENTIAL EVICTION OF TENANT WITHOUT COURT ORDER

BY

MR. SITTIPHOL BOONCHAN

AN INDEPENDENT STUDY SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF
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ENTITLED

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ABSTRACT

The *Volenti non fit injuria* doctrine is grounded on the legal concept that a person who knowingly and willingly runs into harm or a risky situation cannot sue based on any resulting injuries because the act was one to which he voluntarily consented.

In the Thai legal system, the court, apart from applying the injured person's consent to discharge the defendant from tort liability, uses the judgments as their opportunity to lay down new rules and limitations in an effort to expand the scope of *Volenti non fit injuria* to provide justice to the parties.

However, there are some other issues remain entirely untouched by the court, not to mention the existence of contradictions and inconsistencies among the Supreme Court rulings. These led to the legal problems with consented residential evictions of tenants without a court order on which the Supreme Court decisions diverged. Namely the series of the Supreme Court decisions from B.E. 2480 to 2556 and the Supreme Court Decision No. 3379/2560. The inconsistency arising from the two established trends of the Supreme Court led to the highlighted issues of this independent study. First, whether the tenant's consent for the recovery of possession, is expressly prohibited by law or contrary

to public order and good morals. Second, when the lease terminates or expires and the tenant refuses to leave the premises, whether the landlord's self-help eviction would be a tort that results in liability for compensation if he acted on the tenant's consent.

In responding to the above question, this independent study will examine the historical background of the *Volenti* principle and studies such legal issues in terms of comparative law. This independent study mainly stands on documentary examination from studying textbooks, articles, journals, academic opinions, information on the internet, judgments, and government publications both in Thai and English.

This independent study concludes that the tenant's consent for the recovery of possession is consent to an act that is contrary to public order and good morals and ineffective under Section 9 of Unfair Contract Terms Act B.E. 2540 (1997). This is because it is consent that allows private persons to enforce each other's obligations by means other than the use of the State's authority. Should the landlord carry out self-help eviction, the landlord will incur tort liability under the law of torts.

Lastly, the court shall deem any consent or agreement, which permits private persons to enforce their own rights and obligations, contrary to public order and good morals. In addition, the Thai justice system should be improved and further enhanced. Observations may be made from the most developed nations, such as America, England, or Germany, to serve as model solutions for the problems Thailand is currently faced with.

Keywords: *Volenti non fit injuria*, Self-help eviction, Arbitrary eviction, Residential eviction of tenant

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Mr. Sittiphol Boonchan

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LIST OF ABBREVIATIONS

Symbols/Abbreviations	Terms
BGB	German Civil Code (Bürgerliches Gesetzbuch)
CCC	Civil and Commervial Code
StGB	German Criminal Code (Steafgesetzbuch)
UCT	Unfair Contract Terms Act 1977
ZPO	German Code of Civil Procedure (Zivilprozeßordung)

CHAPTER 1

INTRODUCTION

1.1 Background and Problems

In Thailand, the most familiar and popular type of lease is the lease of residential property,[1] whether it be a lease of land, lease of a house, lease of a townhouse, or lease of a condominium. Such prevalence is because a place of residence is a basic need essential for human life. Not to mention, it is in human nature to search for a stable, safe, and suitable place for living. However, due to the unequal economic status among the people in society and the rapidly changing social and economic conditions, many people may find themselves constrained by these pressing limitations: whether it is difficulty to allocate time for browsing houses, as they may need to spend the majority of their time working to maintain their family or a financial limitation in regards to the increasing price of land, which makes it difficult for ordinary people to buy it for construction or as a residence. As a result, the only way any person can enjoy the benefit of proper residential premises without needing to consider or bear the burden of said limitations is to rent them from another person. Naturally, a lease of residential property is a type of lease agreement under which the tenant has the right to possess and use the leased property without having to pay the price of that property in full.[2] Having stated that, the lease does not give the tenant the ownership of that property, and the tenant is obliged to return such property to the landlord upon termination of the contract.

For the lease of residential property, one of the most unrelenting issues lies at the stage where the contract terminates or expires, but the tenant refuses to leave the

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[1] Pathaichit Eagjariyakorn, *คำอธิบาย เช่าทรัพย์ – เช่าซื้อ* (พิมพ์ครั้งที่ 19, วิญญูชน 2559) 11. *(Kham Athibai Chaosap-Chaoseu* [Guidance on Hire of Property - Hire Purchase] (19 edn, Winyuchon 2016)) 11.

[2] Aubrey L. Diamond, *Commercial and Consumer Credit: An Introduction* (Butterworths 1982) 9.

premises. In this respect, the landlord's general course of action is to initiate legal proceedings in court to evict the tenant. However, in some cases, the landlord neglects to go through eviction procedures in court. They may see that such an eviction method is time-consuming and may be drawn out intentionally by the tenant. Not to mention that such a delay is likely to prompt the landlord to incur more losses pending the court's decision, such as an increase in the legal expenses and the inability to use the property to generate more profit by renting the property out to others. Therefore, the landlord who thinks this way tends to solve the problem by himself, disregarding the procedural requirements prescribed by the law. For example, the landlord may resort to using the method of self-help eviction, which may include changing the door locks, removing the tenant's property from the leased premises, or acting in any other manner that prevents the tenant from possessing and benefitting from the use of the premises. In any event, under the Thai legal system, the landlord's method of self-help eviction is regarded unlawful. Thus, the landlord who evicts his tenant without a court order, aside from being criminally liable, shall also be liable in tort to compensate for any damage that the tenant suffers as a tortfeasor.

Nevertheless, despite the previous statement that the landlord's self-help eviction is considered unlawful, many landlords still attempt to circumvent the law due to the drawn-out court proceedings and the inadequate protection of their rights, hoping that they will be able to escape from criminal and civil liabilities for their non-compliance. Such an attempt involves reliance on certain situations admitted by law to reject tort liability, called "the consent of the injured person" or "*Volenti non fit injuria*".[3] The term "*Volenti non fit injuria*"[4] is a Latin maxim that means, "to a willing person, no injury is

[3] Richaed Kidner, *Casebook on Torts* (3 edn, Blackstone Press 1994) 229.

[4] *Volenti non fit iniuria* is a Latin spelling, whereas *Volenti non fit injuria* is an English one which the Thai legal practitioners are familiar with.

done," or "no wrong is done to one who consents".[5] The aforementioned legal principle on par with principles such as *Pacta sunt servanda*.[6] The *Volenti* doctrine is considered a defense to tort claims well-known in common law jurisdictions.[7] A person who knowingly and willingly runs into harm or a risky situation[8] cannot sue for any resulting injuries because the act was one to which he voluntarily consented.

Prior to entering into a lease contract, the landlord tends to request the tenant's consent, allowing him to evict the tenant arbitrarily once the end of tenancy under the principle of Volenti non fit injuria. The consent tends to appear in the form of a written contract term that reads, "upon the end of tenancy, the tenant allows the landlord shall be able to the recover the possession of the leased property," or which the author calls "consent for the recovery of possession." Under this consent, when the lease contract terminates or expires and the tenant refuses to leave the premises, the landlord may recover the possession of the leased property immediately by referring to the consent rendered. From these facts, a question that arises is whether the landlord's act still constitutes a tort under the principle of *Volenti non fit injuria*. Here, the answer to this highlighted question lies in the two trends established by the Thai Supreme Court in its decisions:

In the first trend, the court ruled that this kind of consent or agreement between the parties to a lease is not expressly prohibited by law nor contrary to public order or good morals. Therefore, it is legally binding on the parties, and the landlord's act that relies on the said consent does not qualify as a tort.

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[5] Markus D. Dubber and Tatjana Hörnle, *the Oxford Handbook of Criminal Law* (Oxford University Press 2014) 642.

[6] Gregor Bachmann, 'Review Essay - "Volenti non fit inuria" - How to Make a Principle Work' (October 2003) 4 German Law Journal 1033.

[7] William Lloyd Prosser and W. Page Keeton, *Prosser and Keeton on Torts* (5 edn, West Publishing Co. 1985) 112.

[8] Eric E. Johnson, *Torts: Cases and Context*, vol 1 (eLangdell Press 2015) 380.

In the second trend, the court held that even with the tenant's consent, the landlord's act remains a violation of the law. The landlord must file a petition to the court for enforcement of the said right. It shall be noted that, in this case, the court did not mention whether the consent is contrary to the law or public order and good morals.

In consideration of the apparent contradiction between the two trends, it can be seen that the tenant's consent, which allows for the landlord's recovery of possession once the end of lease contract, is in nature consent that permits private persons to enforce one another's obligations without the need for governmental authority. This leads us to the critical issues in this independent study: whether the tenant's consent, which allows private persons to enforce one another's obligations without the need for governmental authority, contrary to the law or public order and good morals, and whether the landlord, who carries out self-help eviction under the consent above, is deemed to commit a tort against the tenant.

If the author studies the above legal issues in terms of comparative law, the author may be able to understand the legal concept of the *Volenti non fit injuria* principle more precisely and resolve conflicts between the two trends as established by the Supreme Court decisions above. Furthermore, the study may prove helpful to Thai lawyers in developing their legal knowledge and understanding regarding the application of the *Volenti non fit injuria* principle and lease agreements in the future.

1.2 Hypothesis

In the Thai jurisdiction, the consent of the injured is not mentioned clearly in the Civil and Commercial Code but appears in various Supreme Court decisions. In many cases, the court not only applies the consent principle to exempt the defendant from civil liability, but the court also relies on its own court decisions in establishing new rules and limitations to expand the original scope of *Volenti non fit injuria*. This is to afford justice to the parties to the most significant degree. Nevertheless, because court decisions

in Thailand are not considered a source of law, the court in the following cases is not bound by the decisions in its previous cases, as evidenced by many contradictory Supreme Court decisions despite sharing the same sets of facts. Such inconsistency has, in turn, created a legal uncertainty towards the juristic position of the rules of *Volenti non fit injuria* which the Supreme Court had attempted to lay down. Eventually, this also led to the conflict between the Supreme Court decisions demonstrated in the trends above.

Therefore, as a preliminary step, the author hypothesizes that the tenant's consent, which allows the landlord to enforce his right to recover possession of the leased premises by himself, or self-eviction, is contrary to public order and good morals under Section 9 of Unfair Contract Terms Act B.E. 2540 (1997). Should the landlord carry out self-help eviction, the landlord will incur tort liability under the law of torts.

1.3 Objective of study

The objectives of this independent study are:

1. To study the legal concept, criteria, and various limitations of *Volenti non fit injuria* in civil law, including the legal status of the principle in its application to tort cases.

2. To study the existing Thai and foreign laws and the Supreme Court's decisions regarding the principle of *Volenti non fit injuria* on the landlord's self-help eviction.

3. To study the legal effect of consent for the recovery of possession when fallen under the limitation of *Volenti non fit injuria* in civil law and the tort liability of the landlord who carries out a self-help eviction under the tenant's consent.

1.4 Scope of study

The scope of this independent study is to study the legal concept, legal status, criteria, and various limitations of the *Volenti non fit injuria* principle in tort cases. The independent study will mainly focus on the problems concerning tenants' residential evictions without a court order. The study aims to analyze whether the tenant's consent, which allows the landlord to evict him without the need for governmental authority, contravenes the Thai law or public order and good morals. Besides, whether the landlord who carries out a self-help eviction under such consent incurs any liability under tort law.

1.5 Methodology

This independent study mainly stands on documentary examination from studying textbooks, articles, newspapers, journals, academic opinions, information on the internet, judgments, and government publications both in Thai and English, including related Thai laws and foreign laws.

1.6 Expected results

1. To understand the legal concept, criteria, and limitations of the *Volenti non fit injuria* principle in civil law, including the legal status of the principle regarding its application to tort cases.

2. To understand the legal effect of consent for the recovery of possession when fallen under the limitation of *Volenti non fit injuria* in civil law and the tort liability of the landlord who carries out a self-help eviction under the tenant's consent.

CHAPTER 2

TORT AND VOLENTI NON FIT INJURIA IN THAI LAW

2.1 Introduction

In general, if any person who unlawfully causes an injury another person, either through his intention or negligence, shall be considered as a tortfeasor and thus liable to compensate for any damage the injured person has inflicted. Despite the general rule, there are some situations of which the tortfeasor may avail in an attempt to reject his liability: such is called "the consent of the injured" or "*Volenti non fit injuria*."

In this chapter, the author would like to explain the underlying concept, the criteria of tort and *Volenti non fit injuria* (consent) in the Thai legal system. In addition, an issue regarding the problems with residential eviction of tenant without due process in Thailand will be discussed in the latter part of this chapter.

2.2 Tort in Thai Law

A 'tort'[9] is considered as a source of debt (*Source de I' obligation*)[10] as, before a person suffers damage, he does not qualify as a creditor of the tortfeasor. However,

[9] The word "tort" is derived from the Latin "*tortus*" or "twisted", it came to mean "wrong"; see S.I. Strong and Liz Williams, *Tort Law Text, Cases, and Materials* (2 edn, OxFord University Press 2011) 6 ; and it is still so used in French: "*J' ai tort*"; "I am wrong"; see Vivienne Harpwood, *Modern Tort Law* (7 edn, Cavendish Publishing Limited 2009) 1; originally, a tort was simply called as "a civil wrong action" but, nowadays, in the modern law era, a civil wrong action is popularly known as "tort" by normal people.

[10]Chit Setthabut, *หลักกฎหมายแพ่งลักษณะละเมิด* (พิมพ์ครั้งที่ 6, โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2550) 34. *(Lak Kotmai Phaeng Laksana Lamoet* [Civil Legal Principle

when an unlawful act occurs and the person incurs damage in consequence of the act, the tortfeasor becomes legally liable for paying compensation to the injured person. [11] By such illustration, it is apparent that tort law is a significant basic concept due to its broad application to various forms of unlawful acts.[12] This helps those who have suffered damage from unlawful acts to receive appropriate forms of remedy.[13] The law also aims to control the behavior of people within a society so that they pay more attention to exercising certain levels of care to prevent or stop the harm which may potentially occur.

As previously discussed, the illegal act which causes damage to others creates a type of debt which shall be remedied by the tortfeasor (defendant) by means of paying compensation.[14] In the Thai jurisdiction, the general rule of tortious liability is provided for in Section 420 CCC. As for other circumstances which also constitute a tort, namely the liability arising out of defamation, joint liability between an employer and his employee, liability of an animal owner, and liability concerning dangerous objects, all of which have been divided into various specific provisions of law.[15]

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on Tort] (6 edn, Khrongkan Tamra Lae Eka San Prakop Karn Sorn, Faculty of Law, Thammasat University 2007)) 34.

[11] ibid, 35.

[12] This concept encompasses only those civil wrongs independent of contracts. It is normal to understand that the word "tort" is concerned with a civil wrong act, whether intentionally or negligently committed, which causes injury to other person and which leads to civil liability on the part of the "tortfeasor".

[13] Wari Nasakun, *คำอธิบายกฎหมายลักษณะ ละเมิด จัดการงานนอกสั่ง และลาภมิควรได้* (พิมพ์ครั้งที่ 5, กรุงสยามพับลิชชิ่ง 2563) 19. *(Kham Athibai Kotmai Phaeng Lae Phanit Laksana Lamoet Chatkarn Ngan Nok Sang Lae Lap Mi Khuan Dai* [Guidance of Civil and Commercial Code on Tort, Management of Affairs without Mandate and Undue Enrichment] (5 edn, Krungsiam Publishing 2020)) 19.

[14] Setthabut (n 10) 35.

[15] Paijit Punyaphan, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ลักษณะละเมิด* (พิมพ์ครั้งที่ 14, สำนักพิมพ์นิติบรรณการ 2557) 2. (*Kham Athibai Pramuan Kotmaiphaeng Lae Phanit Laksana Lamoet* [Guidance of Civil and Commercial Code on Tort] (Nitibunnagarn Publishing House 2014)) 2.

2.2.1 Structure of general tort liability

According to Section 420 CCC, a person who illegally causes damage to another's right, such as the right to life, body, health, liberty, property, or any rights, whether willfully or negligently, shall be liable to make compensation to the person whose right has been so injured. There are essentially five elements of general tortious liability which can be broken down into five elements as follows:

1) Existence of an act
2) By will or negligence
3) Unlawfulness of act
4) Damage to others
5) Causation

(1) Existence of an Act

"Act" refers to the voluntary movement of a person carried out with awareness.[16] Therefore, it follows logically that any physical movements when people sleep, sleep-walk, or perform other tasks without any such awareness (e.g. cases of chorea and insanity) will not be regarded as an "act" within the meaning of the law.[17] An act also includes an "omission" which underlies inaction in circumstances where the person has a duty to prevent the occurrence of a certain result.[18] This duty may be a duty prescribed in the law or may arise from work regulations, contracts, professions or one's previous

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[16] ibid, 7.

[17] Pitikun Chiramongkhonphanit, *กฎหมายลักษณะละเมิด จัดการงานนอกสั่ง ลาภมิควรได้* (พิมพ์ครั้งที่ 1, สำนักพิมพ์เดือนตุลา 2562) 53. *(Kotmai Laksana Lamoet Chat Karn Ngarn Nok Sang Lap Mi Khuan Dai* [Law on Tort, Management of Affairs without Mandate and Undue] Enrichment] (1 edn, Rongpim Duen Tula Publishing 2019)) 52.

[18] Chitti Tingsaprat, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์เรียงมาตราว่าด้วย จัดการงานนอกสั่ง ลาภมิควรได้ ละเมิด (กองทุนศาสตราจารย์จิตติ ติงศภัทิย์ 2557) 91. *(Kham Athibai Pramuan Kotmai Phaeng Lae Phanit RiangMattrra Wa Duai Chat Karn Ngan Nok Sang Lap Mi Khuan Dai Lamoet* [Guidance of Civil and Commercial Code as Collated Section on Management of Affairs without Mandate, Undue Enrichment and Tort] (Kongthun Sattrachan Chitti Tingsaprat 2014)) 91.

actions.[19] For instance, a person who decides to walk a blind person across the road assumes the duty to safely send him to the other side and shall be held accountable, should he fail to procure such a result. It must be emphasized, however, that the term omission in the eye of law does not include failure to comply with one's moral duties.[20]

(2) By Will or Negligence

The key principle of tort is to determine whether one's illegal act has been accomplished either by will or negligence. If the act was not carried out willfully nor negligently, the person would not have any tortious liability for the damage resulting from his action at all.

"Will" refers to the knowledge and intention of a person and the awareness that the action will cause damage to others[21] without paying consideration to them. In other words, the severity of the damage that follows is not one of the factors that determines whether an act has been carried out by will or negligence.

As for negligence, there is not a definition for the term in the Civil and Commercial Code. Despite the absence, the definition of negligence in the Thai Criminal Code may be borrowed for the purpose of interpreting the law of torts. Section 59 paragraph 4 of the Criminal Code states that "to commit an act by negligence is to commit an offence unintentionally but without exercising such care as might be expected from a person under such condition and circumstances, and the doer could exercise such care but did not do so sufficiently".[22]

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[19] ibid.

[20] Chiramongkhonphanit (n 17) 62.

[21] Sanunkorn Sotthibandhu, *คำอธิบายกฎหมายลักษณะ ละเมิด จัดการงานนอกสั่ง ลาภมิควรได้* (พิมพ์ครั้งที่ 5, วิญญูชน 2557) 70. *(Kham Athibai Kotmai Laksana Lamoet Chat Kan Ngan Nok Sang Lap Mi Khuan Dai* [Guidance of Law on Tort, Management of Affairs without Mandate and Undue Enrichment] (5 edn, Winyuchon 2014)) 70.

[22] Criminal Code s 59 para 4.

To exemplify, a banker paying the check he receives without checking the signature on it is considered to be acting with negligence.[23] Another example of a negligent act is where a doctor, who specializes in laser surgery, has the duty to exercise special care as necessitated by his profession, but fails to do so and, as a result, has to perform the same surgery three times.[24]

(3) Unlawfulness of Act

Unlawful act means an act that contravenes law. [25] In this case, the term "law" includes all of the rules, principles and all applicable laws of the country; whether civil or criminal. Unlawful acts include not only those expressly prohibited by law, but also those contrary to the law which cannot claim legal legitimacy under any legal basis.[26] On the other hand, acts which are supported by legal bases, privileges,[27] or excuses accepted by law would qualify as lawful acts;[28] for instance, acts done under contractual rights, an official performing his duties in accordance with the law, the execution of court judgments, and acts which are accompanied by the consent of the victim (*Volenti non fit injuria*).[29]

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[23] Supreme Court Decision No. 598/2535.

[24] Supreme Court Decision No. 292/2542.

[25] Phattalasak Wannasaeng, *คำอธิบายกฎหมายละเมิด* (พิมพ์ครั้งที่ 9, วิญญูชน 2560) 38. *(Kham Athibai Kotmai Lamoet* [Guidance on Tort Law] (9 edn, Winyuchon 2017)) 38.

[26] Punyaphan (n 15) 16.

[27] Peng Pengniti, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยละเมิด* (พิมพ์ครั้งที่ 10, 2560) 55. *(Kham Athibai Wa Duai Lamoet* [Guidance of Civil and Commercial Code on Tort] (10 edn, 2017)) 55

[28] Punyaphan (n 15) 16; see also Nasakun (n 13) 89.

[29] Sak Sanongchart, *คำอธิบายกฎหมายว่าด้วย "ละเมิด"* (พิมพ์เป็นอนุสรณ์ ในงานพระราชทานเพลิงศพ ศาตราตราจารย์ศักดิ์ สนองชาติ ณ เมรุวัดมกุฎกษัตริยาราม กรุงเทพมหานคร วันอาทิตย์ที่ 13 กันยายน พ.ศ. 2563) 55. *(Kham Athibai Wa Duai "Lamoet"* [Guidance on Tort Law] (Printed as a memorial for The Royal Cremation Ceremony of Professor Sak Sanongchart was held on September 13, 2020, at Makut Kasattriyaram Ratchaworawihan temple, Bangkok)) 55. See also Tingsaprat (n 18) 77; Pengniti (n 27) 55; Nasakun (n 13) 120.

It must be noted, however, that even though the act carried out under a legal right is lawful, it may still be a tort if the exercise of that right causes disproportionate damage to others,[30] as consistent with Section 421 CCC which provides that "the exercise of a right which can only have the purpose of causing injury to another person is unlawful".[31]

(4) Damage to Others

From the offender's view, damage is the key consideration in determining whether a person is liable for his tort. In light of Section 420 CCC, the main intention of the law is to hold a tortfeasor liable for any damage caused by his illegal actions.[32] In other words, a person cannot be held liable on the ground of tort if his action does not produce damage to another. [33] In this regard, such damage may be damage to one of the rights protected and affirmed by the law, such as the right to life, body, health, freedom, property, or any other right.[34] In addition, the damage incurred may be monetary or non-monetary. It also includes damage that may arise in the future, meaning that the unlawful act done willfully or negligently by a person may still qualify as a tort even without immediate present damage.[35] In any event, the plaintiff has the burden to prove to the court the existence of such damage; the violator can only claim for compensation in case the damage has actually occurred.

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[30] Seni Pramoj, ประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและหนี้ เล่ม 1 (ภาค 1-2) (พิมพ์ครั้งที่ 4, กองทุนศาสตราจารย์ ม.ร.ว. เสนีย์ ปราโมช คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2561) 454. *(Pramuan Kotmai Phaeng Lae Phanit RiangMattrra Wa Duai Nitikam Lae Ni* [Civil and Commercial Code on Juristic Acts and obligations] vol 1 (Part 1-2) (4 edn, Kongthun Sattrachan Mom Rachawong Seni Pramoj, Faculty of Law, Thamaasat University 2018)) 454.

[31] Civil and Commercial Code s 421.

[32] Sotthibandhu (n 21) 90.

[33] Nasakun (n 13) 129.

[34] Supreme Court Decision No. 404/2555.

[35] Tingsaprat (n 18) 102.

(5) Causation

Causation is a legal principle which underpins the causal relation between action and result.[36] This principle, although does not appear in either the Civil and Commercial Code or the Criminal Code, can be considered as a crucial principle in determining whether the damage to one's right is in fact brought about by another person's action. Despite the fact that his action constitutes an illegal act and that there is an injury to a person's right, the injured person or the plaintiff still has the burden of proof to demonstrate that it is the act of the tortfeasor which produced the injury. If the illegal action of offense is not causally related to the damage, the tortfeasor may not be liable for the damages that have occurred.[37]

To determine the causal relation between action and result, the jurist has established the criteria for this matter which were divided into two important theories: namely 'the condition theory' and 'the theory of adequate causation'.[38]

(A) Condition Theory

For the condition theory, one would consider only one factor: if there is no such action of the defendant, the damage also will not occur.[39] The question which arises with the condition theory is whether the damage occurs directly from the action of the tortfeasor. In case the damage arises from many events with combinations of actions, the tortfeasor would still be liable for all of the damages that eventually occurred without any concern as to which event exactly produced it. This is because it is deemed that every event all contributes to the final damage and are thus inseparable. Without all of these events combined, it would not lead to the damage incurred by the plaintiff.[40] In the other words, all of the actions are interrelated. For instance, the injured

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[36] Chiramongkhonphanit (n 17) 120.

[37] Sanongchart (n 29) 73.

[38] Nasakun (n 13) 154.

[39] Wannasaeng (n 25) 75.

[40] Pengniti (n 27) 108.

person's car was negligently hit by the tortfeasor 's car and was pushed to the side of the road to be hit by another car, which was neither due to intention nor negligence. As a consequence, it can be implied that all the damage was the direct result of the tortfeasor's actions.[41]

(B) Theory of Adequate Causation

The underlying principle of this theory is that, although there are many events that may contribute to the final damage, the reason that the tortfeasor shall be liable must be the reason which derives from an ordinary cause that can naturally bring about such a result.[42] In this case, the cause and the result must be considered together in terms of whether or not they correspond to each other.[43] In addition, one must also consider the intervening circumstances: whether a person of reasonable prudence may reasonably foresee or expect such an outcome to be produced as a result of that circumstance in an ordinary setting. If the person can do so, the tortfeasor may then be held accountable for the tort committed.[44] For instance, in a Supreme Court case, the defendant's trailer which carried explosive materials flipped over due to his negligence and caused the explosives to escape the container onto the road. Once a hundred of villagers came to the accident site and played with the explosives, the explosives exploded and injured many villagers as well as damaged their property. Although it is clear that the explosion was caused by the villagers' actions, any person with ordinary prudence may reasonably expect that whenever there is a car accident, nearby people will come to aid the injured. As a result, it can be concluded the explosion was proximately caused by the negligent driving of the defendant.[45]

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[41] Supreme Court Decision No. 3008-3009/2527.

[42] Punyaphan (n 15) 39.

[43] Chiramongkhonphanit (n 17) 121.

[44] Tingsaprat (n 18) 145.

[45] Supreme Court Decision No. 7973-7975/2548.

In contrast, if the explosion was unforeseeable by a reasonable person, the defendant would not have been held responsible for the outcome of such circumstance. For example, if A hit B in the head and paid compensation to B already, due to B's own negligence he later added caustic soda to the wound which caused more damage to it. In this regard, A is not liable for the more severe injury on B's head since it is beyond what ordinary people can expect.

In Thai law, the condition theory has an advantage in the sense that it is similar to the fact of nature.[46] At the same time, there are some disadvantages as well: tortfeasors may be held liable for any kind of damage without time limitations, or even damage that they cannot expect will ever arise from their actions.[47] Fortunately, the Thai court always utilizes the condition theory as the default rule when assessing causation, and employs the theory of adequate causation as an exception in order to limit one's liability. In other words, the theory of adequate causation is often adopted in situations where there is an intervening cause between the action of the tortfeasor and the adverse outcome sustained by the injured person so as to analyze whether there is a disconnection in the causal link.[48]

Thus, if the damage occurred (result) that has a close relationship with the defendant's action, the condition theory will be applied for determining causation. On the contrary, if there are some activities (intervening causes) that occur between the cause and the result and it perhaps breaks the connection between the action and the result, the Court may have to use the theory of adequate causation alongside the condition theory to determine the element of causation in this circumstance.

As systematically discussed above, it can be concluded that when the action of any person fulfills all of the five elements (*i.e.* an act which is carried

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[46] Tingsaprat (n 18) 134.

[47] Chiramongkhonphanit (n 17) 121.

[48] Nasakun (n 13) 158.

out either willfully or negligently, unlawfully caused an injury to another person's right and there also is the causal relation between action and result), the action will amount to a tort for which the tortfeasors must be liable.

2.3 Volenti non fit injuria in Thai law

As discussed previously**,** *Volenti non fit injuria* is one of the several defences that can exempt the tortfeasor from being liable under the law of torts. This principle was adopted for the purpose of exempting one from civil liability (damages) and criminal liability. Although this principle of consent has never been codified, the Thai courts often refer to this principle so as to give justice to the parties in various cases.

2.3.1 Definition of Volenti non fit injuria in civil law

Evidently, the definition of *Volenti non fit injuria* has not been provided expressly in any legislation or code. Nonetheless, there have been many academics who try to define this principle which the author has concluded and wishes to present them as follows:

Paijit Punyaphan stated that "*Volenti non fit injuria*" means "the person who agrees to do something or the person who puts themselves at risk and accepts the damage cannot bring such damage to a lawsuit".[49]

Sak Sanongchart expressed that "if a person consents to receive damage, there is no damage incurred".[50]

Peng Pengniti mentioned that, "consent may not be invoked as an excuse to escape from one's criminal liability, but such may be possible with regards to tortious liability".[51] Furthermore, it was described that "consent does not in fact give rise

[49] Punyaphan (n 15) 23.

[50] Sanongchart (n 29).

[51] Pengniti (n 27) 3.

to a legal right to commit a tort, but it merely exempts the act from being treated as a tort, as in line with the principle of consent."[52]

Chitti Tingsaphat clarified on "Volenti non fit injuria", saying that "consent obtained voluntarily from the injured person renders the injurious act not a tort... and that this principle of consent is what causes the act to be missing in damage; hence, the defendant is not liable."[53]

Susom Suphanit asserted that "consent does not give rise to damage, which is a principle that exhausts the consenting person's right to claim for compensation, even though he has incurred actual damage".[54]

Sanunkorn Sotthibandhu stated that "if there exists a consent, there is no damage".[55]

Saiket Wattanaphan affirmed that "if there is a consent, it is deemed that there is no damage".[56]

PhattalaSak Wannasaeng interpreted "Volenti non fit injuria" to mean "the injured person who has previously consented to a tort is not legally entitled to claim compensation from the tortfeasor".[57]

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[52] ibid, 68.

[53] Chitti Tingsaprat, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 2 มาตรา 241 ถึงมาตรา 452* (โรงพิมพ์ไทยพิทยา 2503) 468-469. *(Kham Athibai Pramuan Kotmaiphaeng Lae Phanit Bap 2 Mattra 241 Thueng Mattra 452* [Guidance of Civil and Commercial Code Book II; Sections 241 to 452] (Thai Pittaya Publishing 1960)) 468-469.

[54] Susom Suphanit, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยละเมิด* (พิมพ์ครั้งที่ 6, สำนักพิมพ์นิติบรรณการ 2550) 46. *(Kham Athibai Pramuan Kotmai Phaeng Lae Phanit Laksana Wa duai Lamoet* [Guidance of Civil and Commercial Code on Tort] (6 edn, Nitibunnagarn Publishing 2007) 46.

[55] Sotthibandhu (n 21) 154.

[56] Saiket Wattanaphan, *คำบรรยายเนติบัณฑิต ภาค 1 สมัยที่ 72 เล่ม 1* (เนติบัณฑิตยสภา ในพระบรมราชูปถัมภ์ *2562) 203. (Kham Banyai Netibandit Phak 1 Samai Thi 72* [Description of the Bar Association Semester 1; Session 72], vol 1 (The Thai Bar Under the Royal Patronage 2019)) 203.

[57] Wannasaeng (n 25) 65.

Wari Nasakun explained in regards to "*Volenti non fit injuria*" that "consent in civil law clears a tort of any unlawfulness, as it is deemed that once the victim consents to a tort, there can be no damage incurred."[58]

Pitikun Chiramongkhonphanit also indicated that "a person who consents to an act or assumes a risk of injury may not file a lawsuit based on that act or injury."[59]

From the above mentioned, it is apparent that many legal academics are concordant about the core meaning of the term, which shares the common baseline of a person who consents to harm is deemed to not have been harmed at all. This is because, when a person gives consent to another to injure his right, it is considered that he voluntarily accepts the damage that follows as well as that which he knows could perhaps be caused by the defendant's act.

2.3.2 Who is entitled to give consent?

With respect to Section 420 CCC, whether the damage incurred is damage to life, body, health, or freedom, all are damage to absolute rights, which are inherent to every individual human being since birth. Not to mention, such rights are fundamental human rights recognized by international law, as well as the domestic laws of various countries. Thus, it is only logical that if anyone wishes to waive their legally protected rights by allowing others to violate them, the person entitled to consent to such effect shall be none other than the one solely entitled to those rights himself.

There may be cases in which an absolute right holder is an incapacitated person with limited legal capacity, be it a minor, a person of unsound mind, or an incompetent person. These individuals are persons who cannot consent to what would otherwise be a violation of their rights of their own volition, as the consent of such people constitutes to an incomplete consent that carries little credibility as a result of the impaired state of mind.

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[58] Nasakun (n 13) 120.

[59] Chiramongkhonphanit (n 17) 113.

Kiatkhachon Vachanasvasti has stated that “the consent of an underaged girl to sexual intercourse with a man is incomplete due to her incompetence; therefore, even if she is voluntarily consenting to it, the act would still be injurious all the same."[60]

For that reason, common law jurisdictions are of the general view that it must be the legal representatives or the guardians exercising parental power over the incapacitated persons who shall give the consent or make the decision on their behalf. Regardless, there are some exceptions to this general rule which the author would like to explain in the next chapter.

Focusing on the Thai jurisdiction, although the Civil and Commercial Code does not prescribe a minimum criterion on the age of the person entitled to give consent, this does not mean that he or she must first be sui juris for the consent to be valid. This is because a person of any age may also give his or her consent for the purpose of managing their own affairs insofar as they possess the capability to comprehend and be aware of the contents of the matter to be consented. Noteworthily, this position has been taken by, among other legal academics, Sawaeng Boonchaloemwiphat, who expressed that “...the consent given to a physician does not create a juristic act. The consenting patient is therefore not required by law to be sui juris. Any patient at any age with the capability to understand the treatment that they are to receive, is entitled to give a valid consent for such treatment.”[61]

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[60] KiatKhachon Vachanasvasti, *คำอธิบายหลักกฎหมายวิธีพิจารณาความอาญาว่าด้วย การดำเนินคดีในขั้นตอนก่อนการพิจารณา* (พิมพ์ครั้งที่ 7, สำนักพิมพ์วิญญูชน 2558) 80. *(Kham Athibai Lak Kotmai Withee Phicharana Kwam Aya Wa Duai Karndamnern Kadee Nai Khanton kon Karn Phicharana* [Guidance of Criminal Procedure Law on Litigation in the Pre-Trial Stage] (7 edn, Winyuchon 2015)) 80.

[61] Sawaeng Boonchaloemwiphat and Anek Yomchinda, *กฎหมายการแพทย์: วิเคราะห์ปัญหากฎหมายจากการเริ่มต้นของชีวิตในครรภ์มารดาถึงภาวะแกนสมองตาย* (พิมพ์ครั้งที่ 2, วิญญูชน 2546) 77. *(Kotmai Kan Phaet: Wikhro Panha Kotmai Chak Kan Roemton Khong Chiwit Nai Khan Manda Thueng Phawa Kaen Samong Tai* [Medical Laws: Analysis of Legal Issues from a Person’s Birth to the State of Being Brain Dead] (2 edn, Winyuchon 2003)) 77.

Additionally, as evidenced by the series of consistent medical practices under Clause 9 of the Declaration of Patient's Rights issued by the Medical Professional Organizations, [62] patients above the age of 18 have the right to independently give their consent to medical treatment without the need for parental consent. On the other hand, if the patient is below the age of 18, or is a person who is physically or mentally handicapped who is unable to exercise their own rights, the parents or the legal representative may exercise the patient's rights in their place. Furthermore, in the event that the patient is below the age of 18, but has gained maturity, possesses a good conscience, and the matter to be consented is not complicated, the consent may still be rendered for that particular treatment as an exception.[63]

Thus, it could be said that an individual's legal capacity is irrelevant in relation to rendering one's consent. That is, a minor may still give his consent to another as long as he is at an age where he has the capability to understand and be aware of the contents of his affair to which he aims to give consent. Despite that, it is important to consider this issue on a case-by-case basis, taking into consideration both the complexity of the matters to be consented and the ability of the minor to fully grasp the situation they are consenting to in light of the minor's age and maturity.

2.3.3 Characteristics and criteria of Volenti non fit injuria in civil law terms

As mentioned above, when a person gives consent, it is deemed that no damage has ever occurred to the consenting person. Since torts are illegal acts which cause damage to other people, in light of the preceding sentence, the consented act which would otherwise be tortious would not be a tort. The injured person, therefore, has

[62] Note that to help the patient receive the most benefit from the medical procedure, The Medical Council of Thailand, Thailand Nursing and Midwifery Council, The Pharmacy Council of Thailand, Thai Dental Council, Physical Therapy Council, The Medical Technology Council and the Committee of Healing Arts Practices jointly issued a Declaration of Patient's Rights as of 12 August 2015.

[63] Boonchaloemwiphat (n 61).

no right to claim any damages, for there was no damage resulting from the act in the first place.

Nonetheless, to bring the *Volenti nonfit injuria* to complete use for exempting one's tortious liability, it is necessary to preliminarily consider a number of elements. In the Thai jurisdiction, the defence of consent to deny one's tortious liability must fulfill the following:

1) Must be given consent;
2) Consent must exist before or during the tort occurs;
3) Must understand and be aware of the condition and content of that consent;
4) Voluntary;
5) Must not be contrary to law or against public order or good morals

(1) Must be given consent

Normally, consent can be given expressly or implicitly. An express act, or direct consent, [64] can be completed by many methods such as verbalization, writing, or doing anything which expresses one's willingness to accept harm from others' actions[65] such as hand signal.

While implicit consent cannot be seen clearly, ordinary people can understand that such behavior is an act of giving consent. In addition, the consenting person must understand the content of that consent as well. For example, voluntary participation in sporting events like boxing and football, [66] nod or teasing each other or allowing others to enter and leave their homes multiple times without ever prohibiting them are considered as acts of giving implicit consent.[67]

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[64] William L. Prosser, *Handbook of The Law of Torts* (2 edn, West Publishing Co. 1995) 83.

[65] Chiramongkhonphanit (n 17) 116.

[66] Pengniti (n 27) 76.

[67] Supreme Court Decision No. 1656/2493. See also Supreme Court Decision No. 2620/2552.

On the contrary, stillness should not be considered as an act of giving consent in regards to *Volenti nonfit injuria*, unless there is a socially acceptable circumstance that it is consent. [68] For example, allowing others to enter and leave his home multiple times without ever prohibiting them, which is held that normal people in the society can understand that this action is the consent of the homeowner.

(2) Consent must be given before or at the time the tort occurs

The consent must be given before or at the time the tort is taking place. Prior consent can be given as early as before and must be maintained throughout the commission of the tort.[69]

As can be seen in the decision of the Supreme Court No. 231/2504 where a construction encroached on the plaintiff's room upon his consent. Although this was not considered to be a tort, it was not a situation where the consented encroachment would remain lawful forever. When the room was transferred to the defendant without the right of encroachment from the plaintiff, the defendant had to remove such constructions. Since the defendant failed to remove the constructions as per the plaintiff's request, the act which was previously not a tort became a tortious act for which the defendant was liable.[70]

In the decision of the Supreme Court No. 74/2507, the owner of the land located near the river had the right to sue the person who built the house at the river bank, which blocked the front of the land, for its removal even though the land on which the house was built was the public domain. The seller of the land whose house was located at the bank, after obtaining a one-year consent from the buyer, was entitled to stay at the bank for exactly one year; after which he would have to remove the house. The said consent exempted the seller's act of staying at the location from being a tort.

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[68] Tingsaprat (n 18).

[69] Pengniti (n 27) 73.

[70] Supreme Court Decision No. 231/2504.

When the buyer notified the seller of his wish to have the house removed and the seller resisted, however, the buyer may exercise his right to sue the seller for an eviction.[71]

As for the case where one's consent is given after a tort has been committed, the relevant governing law would be the law of compromise, which appears from Section 850 to Section 852, rather than the *Volenti non fit injuria* principle. This is simply because the consent obtained after cannot possibly amend the unlawfulness of what was already established as an illegal act.[72]

Normally, the consent to be given can be discharged at any time either to a present act or a future act, and as long as that consent has not been withdrawn, the consent still exists. Once the consent has been withdrawn, subsequent actions are considered to be a tort. For instance, in the case where a person gives consent to others for the collection of personal information, the data subject still has the right to withdraw such consent at any time. Importantly, the process of withdrawal must be as easy as giving consent. [73] If a person continues to do anything after the consent has been withdrawn, he will be committing a tort against the data subject.[74]

In the Supreme Court Decision No. 4490/2542, although the defendant has received a consent from the owners to construct a fence, which encroaches on the land, and is thereby exempted from tortious liability, the mentioned consent loses its effect once the land was sold and transferred to other persons. The two plaintiffs have the right as the owners of the land on the basis of Section 1336 CCC to prevent the defendant or any other person from unlawfully interfering with their land. Since the plaintiff wished for the fence to be removed and informed the defendant of his intention, the defendant had to remove the fence. The defendant, instead of removing the whole fence, left some parts of it behind. This is a tort committed against the plaintiff, as it

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[71] Supreme Court Decision No. 47/2507.

[72] Tingsaprat (n 18).

[73] See Personal Data Protection Act B.E. 2562 (2019) s 19.

[74] Pengniti (n 27) 74. See also Supreme Court Decision No. 1656/2493.

caused difficulties for the plaintiff to fully utilize his land. Even though the damage is rather small as it is just a small part of the land, the damage still exists. Compensation for such damage may be determined based on the nearby land.[75]

(3) Must understand and be aware of the condition and content of that consent

The consenting person must understand and be aware of the contents of the consent he is giving out. In other words, he must, from his reasonable thought process prior to his decision-making, realize the potential or definite outcome which would arise from the act to which he consents.[76] For instance, if a person voluntarily joins an association with the knowledge that the association has regulations to punish members for their wrongdoing by way of beating, it is viewed that the person has already realized and consented to such method of discipline.[77]

(4) Voluntary

The consent must be obtained voluntarily and free from fraud, duress, force, or mistake,[78] as consistent with the maxim, "Nothing is so contrary to consent as force and fear". To illustrate, the plaintiff's husband often returned home late at night and in the one night the neighbors impersonated the plaintiff's husband. As a result, the plaintiff who was the wife understood that her husband had returned and then agreed to have sexual intercourse with the defendant. It was held that the consent was given by mistake and the defendant must be liable in tort.

(5) Must not be contrary to the law or against public order or good morals

Originally, the Thai courts have always adhered to this guideline to decide cases regarding consent. In brief, if there is a case where an illegal act has been

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[75] Supreme Court Decision No. 4490/2542.

[76] Chiramongkhonphanit (n 17) 116.

[77] Supreme Court Decision No. 616/2482.

[78] Nasakun (n 13) 75.

committed under the injured person's consent, it will never be a tort because the act is deemed to have caused no real damage upon being consented thereto by the injured person.[79] In one case, the plaintiff challenged the defendant to test his incantation, which he believed made his body as strong as steel. The plaintiff voluntarily allowed the defendant to harm his own body; thus, it was not the case where the plaintiff had been damaged and the plaintiff cannot therefore sue the defendant for compensation for damages.[80] In another case, the plaintiff and the defendant married according to tradition but did not affect the registration thereof. However, there was an agreement that if the defendant had graduated, the defendant will register their marriage as well. Once the defendant had graduated, the defendant refused to register their marriage. The plaintiff, who was the wife, cannot claim for damages from the defendant as she lived with him of her own free will.[81] In another case, a man deceived a woman into sexual relations by claiming he would accept her as a legal wife. Later, the woman gestated, but the man refused to support her.[82]

Those cases, in the past, were generally decided by the Thai Supreme Court as not being cases of torts because, under the principle of the sacredness of declaration of intention, even though there is a person who has an advantage over the other person, the state will not interfere in this matter although such an action is palpably prohibited by law or is contrary to public order and good morals.[83] Nonetheless, with the current social nature constantly changing and developing all the time, persons who possess stronger bargaining powers in the economic field show a higher tendency to

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[79] Chiramongkhonphanit (n 17) 118.

[80] Supreme Court Decision No. 673/2510.

[81] Supreme Court Decision No. 1971/2517.

[82] Supreme Court Decision No. 564/2518.

[83] Charan Phakdithanakun, 'สรุปสาระสำคัญพระราชบัญญัติว่าด้วยข้อสัญญาไม่เป็นธรรม พ.ศ. 2540' (มกราคม-มิถุนายน 2541, ดุลพาห) 131. ('Sarup Sara Samkhan Phrarat Cha Banyat Wa Duai Kho Sanya Thi Mai Pen Tham B.E. 2540 [Summary of the Unfair Contract Terms Act B.E. 2540])' (January - June 1998) 45 Dunlaphaha 131.

willfully take advantage of others who possess weaker bargaining power. This leads to unfairness and unrest in society, which necessitated the enactment the Unfair Contract Terms Act B.E. 2540 (1997).[84]

After the Unfair Contract Terms Act BE 2540 (1997) was enacted since 14 November B.E. 2554, [85] it can be seen that the law does not cancel the *Volenti non fit*

[84] The remark of the Unfair Contract Terms Act B.E. 2540 (1997).

[85] Please note that although the Unfair Contract Terms Act B.E. 2540 (1997) has entered into full force and effect, the refusal by the Thai courts to apply Section 9 of the Unfair Contract Terms Act to cases unrelated to unfair contract terms where the consent rendered is not in a contractual clause is noteworthy. In an elaborative manner, the Supreme Court displays an unparalleled tendency to invoke Section 9 of the Unfair Contract Terms Act solely when the victim's consent is given as a contract clause that results in a direct juristic act between the parties in regards to their bargaining power in the economy; see Supreme Court Decision No. 6679/2557; nevertheless, this express inclination of the Thai courts shall not be misconstrued that when it comes to general consent to torts, there exists no limitation to the *Volenti non fit injuria* principle. This is because the Supreme Court has acknowledged the gap and in turn borrowed the underlying concept of Section 9 of the Unfair Contract Terms Act to establish similar legal criteria to limit the scope of *Volenti non fit injuria* in cases of general consent unrelated to unfair contract terms. That is, if the injured person's consent has been rendered in acceptance of an act contrary to the law or public order or good morals, the act will be a tort regardless of the consent rendered, and the injured person is still entitled to compensatory damages; see Supreme Court Decision No. 9797/2560; In the author's view, which coheres with those of many other legal academics and torts textbooks, the author disagrees with the Supreme Court's ruling in regards to its refusal to apply Section 9 of the Unfair Contract Terms Act to the case of general consent to torts. The common baseline of these views is that Section 9 of the Unfair Contract Terms Act shall be applied to all cases involving consent and with complete disregard to whether the consent constitutes an unfair contract term or not. This is so that such provision of law applies as the general rule in limiting the scope of freedom of the consent provider when declaring their intention which may potentially be contrary to the law or public order or good morals. In addition, Section 9 of the Unfair Contract Terms Act was modelled after England's Unfair Contract Terms Act 1977. This caused the adopted legal provisions to also be influenced by the English legal views. That is, albeit the essence of the Unfair Contract Terms Act is to primarily address contractual unfairness, the law still aims to empower

injuria principle but only prohibits the degree of freedom of the injured person in giving the consent to activities which are expressly prohibited by law or is contrary to public order and good morals.[86] By virtue of this Act, tortfeasors can no longer refer solely to consent to escape liability. Any agreement or consent which is contrary to Section 9 shall not be able to raise as a defense to exclude or restrict the tortious liability. [87]

The agreement or consent which contravenes Section 9 can be divided into two cases as follows:

(A) The agreement or consent is expressly prohibited by law

The first case concerns situations where the act that has an object contrary to 'express law'.[88] The term "law" can be defined as any laws such as the Civil and Commercial Code, the Criminal Code, or other laws. In simple terms, it includes acts that are contrary to the written laws which can be seen and accessed by the whole public.

As in the Supreme Court case No. 9797/2560, even if the victim was a child of less than fifteen-years of age, who allowed the defendant to sexually assault her, the act of the defendant was expressly prohibited by Section 277 of the Criminal Code which has a significant goal to protect a child under fifteen years of age irrespective of the consent of the victim. Thus, the defendant must be liable for the tort he committed under Section 420 even though the victim had consented to such act.[89]

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the Court to engage the unfairness arising out of other areas similar to contracts, such as a prior declaration to exclude one's liability or the victim's consent in a tort case, as well; see Phakdithanakun (n 83) 77-80 and 131-134. See also Sutheera Chinayon, 'Application and Interpretation of the Unfair Contract Terms Act B.E. 2540' (LL.M. Thesis, Thammasat University 2007) 107-114.

[86] Chiramongkhonphanit (n 17) 114.

[87] Unfair Contract Terms Act B.E. 2540 (1997) s 9: "An agreement made or consent given by the injured person to an act expressly prohibited by law or contrary to public order or good morals shall not be invoked for excluding or restricting tortious liability".

[88] Tingsaprat (n 18) 72.

[89] Supreme Court Decision No. 9797/2560.

Following the commencement of the Unfair Contract Terms Act, several Supreme Court decisions remained adhered to the principle that, in a criminal case, consent by the injured person cannot be raised as a defense if it was contrary to the law or public order and good morals, whereas in a civil case the same consent would create a basis for a fully valid defense. With this in mind, in light of the Supreme Court Decision No. 9797/2560, the author wishes to make an observation that despite the omission by the Court to state a clear reason that would amount to a reversal of its previous trends, the author firmly believes that this Supreme Court decision has sufficiently demonstrated an apparent shift in the previously established trend that the Thai court are no longer lenient when it comes to allowing the tortfeasors to avail themselves of consent which appear to be illegal or contrary to public order or good morals in nature.

(B) Agreement or consent is contrary to public order or good morals.

Public order and good morals are a significant topic and are recognized by various foreign laws as well as Thai law.[90] Public order and good morals have their source from actual facts. It is explained that all people living together as a society desire peace for personal safety.[91]

In Thailand, the terms “public order and good morals” have not been clearly defined by any law. For that reason, the absence of their definitions has raised much uncertainty when there is a need for their interpretation. Nonetheless, there have been many academics who try to define these broad terms which the author has concluded and wishes to present them as follows:

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[90] Farshad Ghodoosi, 'The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements' (2016) 94 Nebraska Law Review 687.

[91] Sakon Hansutthiwarin, 'Khwam Sa ngop Riaproi Lae Sinlatham An Di Khong Prachachon' 28 December 2016) <https://www.bangkokbiznews.com/blog/detail/639842> accessed 6 June 2020.

Chit Setthabut defined "public order" as "...a prohibition that society uses in order to regulate a private individual, to show that the advantage of society is above that of any private person. Besides, this is so that the society can exist to give protection to private individuals within it".[92]

Seni Pramoj defined "public order" as "acts that are not purely related to a private individual, but may affect the interests of other people".[93]

Sak Sanongchart defined "public order" as "the action that is against the general interests of the nation or the people, or that which affects the stability of the nation, economy, societal peace, and family institution". [94]

In contrast with public order, one may find attempting to define the scope of meaning of good morals rather difficult, as it is an abstract term with an innately wide meaning which is often reflected in each individual's mind differently. Not to mention, interpretations of good morals are subject to constant change depending on the time and social conditions. Regardless, some scholars have tried to give meaning to this term, which can be seen below:

Sak Sanongchart defined "good morals" as "acts that are in violation of the tradition of people in the society, including principles in a particular religion".[95]

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[92] Chit Setthabut, *คำอธิบายนิติกรรมและหนี้* (พิมพ์ครั้งที่ 3, คณะกรรมการสัมมนาวิจัยและห้องสมุด, คณะนิติศาสตร์,มหาวิทยาลัยธรรมศาสตร์ 2524) 16. *(Kham Athibai Nitikam Lae Ni* [Guidance on Juristic Acts and Obligations] (3 edn, Khana Kam Ma Karn Sammana Wichai Lae Hongsamut (Library and Research Seminar Committee), Faculty of Law, Thammasat University 1981)) 16.

[93] Pramoj (n 30) 116.

[94] Sanongchart (n 29) 57.

[95] ibid.

Sanunkorn Sotthibandhu gave the definition of “good morals” as “actions with objectives contrary to the principles of ethics that are accepted by honest people in society”.[96]

As shown above, the vagueness and uncertainty surrounding the scope of the terms public order and good morals are clear. Because the distinction between the two terms is quite a difficult task, the terms were incorporated into the law together as "public order and good morals". Thus, in order to mitigate the problem regarding the two indeterminate terms, the court solely became tasked with the role of interpreting and determining actions which are contrary to the express law, public order or good morals.[97]

For example, a contract clause which allows lessors to specify the amount of rental fee to be lower than it actually has to be in order to avoid paying income tax is contrary to public order and good morals, as such is a duty of Thai citizens to pay under the Revenue Code, as consistent with the decision of the Supreme Court No. 4899/2551.

Next, in the decision of the Supreme Court No. 2065/2527, it was held that sending women to the upper-class society in Hong Kong was a contractual obligation which was contrary to public order and good morals of the people.[98]

In the decision of the Supreme Court No. 1584/2555, the lawyer’s retainer agreement, which specifies that all nine defendants will pay to the lawyer, as remuneration, 10 per cent of the total money won from the case, (including compensatory interest and others of the payment of the land) causes the lawyer to be

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[96] Sanunkorn Sotthibandhu, *คำอธิบายนิติกรรมสัญญา* (พิมพ์ครั้งที่ 18, วิญญูชน 2557) 80-81. *(Kham Athibai Nitikam Sanya* [Guidance on Juristic Acts and Contracts] (18 edn, Winyuchon 2014)) 80-81.

[97] Praphon Satamarn, 'ความสงบเรียบร้อยหรือศีลธรรมอันดีของประชาชน' (2518, วารสารสมาคมธรรมศาสตร์) 134. ('Khwam Sa ngop Riaproi Rue Sinlatham An Di Khong Prachachon [Public Order or Good Morals])' (1975) Journalism Alumni Association 134.

[98] Supreme Court Decision No. 2065/2527.

directly involved with the result of the case. Such conduct is not appropriate according to the professional and ethical rules of lawyers. This was held to be contrary to public order and good morals.[99]

All things considered, it can be seen that, although there have been many instances where the Thai Supreme Court held the parties' acts to be contrary to public order and good morals, the Court consistently omitted to define the precise meaning of the two terms. Instead, the Court merely declared certain acts to be against public order and good morals based the results of the case at its final stage.

According to a subsequently published Thai thesis that made an effort to compile and categorize a number of Thai Supreme Court Decisions, an act that may be contrary to the rules of public order and good morals may have one or more characteristics of the following 6 cases: [100]

The first case is where an act results in an impact on the political administration and the national interest and benefit of the country. In other words, it is an act that deprives or causes the country to lose a certain benefit, such as the act of paying a government official to abuse the authority of his position by unlawfully assisting an individual[101] or the act of entering into a contract with a private entity by a government department without giving sufficient consideration to whether the contract is worth the payment. Since the latter involves the national expense, it naturally affects the interest of the nation.[102]

Secondly, an act that exerts an impact on the justice system. It can be said that any act that hingers or interferes with the justice system is inevitably an act that contravenes public order. For instance, an agreement that allows private entities to enforce against each other's property without intervention by the court is an act

[99] Supreme Court Decision No. 1584/2555.

[100] Aphisit Teirahunt, 'Public Order' (LL.M. Thesis, Thammasat University 2013) 36-63.

[101] Supreme Court Decision No. 499/2479.

[102] Supreme Court Decision No. 7910/2553.

contrary to public order. Other examples include, but not limited to, an agreement to settle a public offence, an agreement for the victim to commit perjury in respect of the defendant's innocence, or a juristic act or contract that instigates lawsuits between persons.[103]

Thirdly, an act that affects the customs, traditions, and religion. In simple terms, it is the act that affects the customs, traditions, and religion, and induces a negative emotion from the majority in the society. It is also an unacceptable act. For example, a loan of money for paying off debt under a contract for murder[104] or an agreement to deliver money to be held as gambling property by a middleman.[105]

Fourthly, an act that impacts the family institutions. This is because family institutions are the foundation that has a role of educating individuals who will enter into society in the future. Therefore, in general, if there is an act committed against family institutions, such an act would not be acceptable. Examples for this are a married man's declaration of intention to take another woman under him[106] and an agreement to transfer ownership of a person (a minor son) to another.[107]

Fifthly, an act that affects the economic system, such as the bid rigging agreement between auction bidders in order to enter into a contract with the government at the agreed price as well as sharing benefits between the colluding parties.[108] A contract clause that limits the rights of an employee post-employment, such as a non-competition clause with no time limit, [109] is also a prime example for an act that violates public order and good morals.

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[103] Supreme Court Decision No. 1160-1161/2494.

[104] Supreme Court Decision No. 358/2511.

[105] Supreme Court Decision No. 83/2481.

[106] Supreme Court Decision No. 95/2484, 1913/2505.

[107] Supreme Court Decision No. 2076/2497.

[108] Supreme Court Decision No. 2022/2519.

[109] Supreme Court Decision No. 2548-2549/2533.

Lastly, the sixth case includes other instances which the court held to be contrary to public order and good morals, such as an act that attempts to prevent the creditor from receiving the performance of an obligation pursuant to his rights. By way of illustration, the defendant who colludes with his colleagues to enter into a fictitious loan of money, sues on the basis of the loan and executes the compromise judgment so as to prevent other creditors from enforcing against their property.[110]

From all of the definitions of "public order and good morals" as provided by the legal academics and the Supreme Court decisions mentioned above, the author is of the opinion that the term "public order and good morals" may be broadly defined as "the basic rules in the legal system which incorporate the Thai political administration, justice, societal, moral, and economic values, as well as guidelines or principles underlining governmental policies that are established for purposes of justice on the basis of the rule of law and legal states, which share the common aim to prohibit or restrict any actions that perhaps affect or are extensively hostile to the rights of most private individuals within a society or the stability of the institute of government, society, justice, economy, or family of Thailand".

All things considered, if any consent is expressly prohibited by law or contrary to public order and good morals, such consent will be not able to become an effective defense under Section 9, causing the defendant or tortfeasor to not be able to refer to the sole consent he receives for the exemption of his liability. On the other hand, if any consent that is not expressly prohibited by law and is not contrary to public order and good morals, the defendant or tortfeasor will be able to refer to the *Volenti non fit injuria* principle for denying the damage resulting from his act.

2.3.4 Legal status of consent from a contractual perspective

Owing to the absence of a method for giving consent in the Civil and Commercial Code, consent, in light of its nature, may generally be given either explicitly

[110] Supreme Court Decision No. 701/2553.

or implicitly.[111] Explicit consent may appear in written form, such as a written consent to medical treatment which the patient gives to his physician prior to a medical procedure.[112] On account of this, it is no surprise that if consent in the present day would frequently be included in various sorts of contracts. Especially since contract documents, which are permanent in nature, are widely recognized as the primary crucial evidence for establishing and proving the facts of a case for any lawsuit.

However, the mere fact that a consent is expressly provided as part of a written contract by no means signifies that it has taken on the status of an agreement. This because Section 3 of Unfair Contract Terms Act B.E. 2540 specifies a definition for "contract terms" which means terms, agreement and consent, including announcement and notice excluding or restricting the liability. [113] From this definition, it is obvious that, although agreement or consent are both part of contract terms, the law still unambiguously distinguishes between the two. This distinction serves as affirmation that it is not possible that consent in the form of a contractual term would transform into an agreement.

For the issue regarding the language of the contractual term and whether it expresses a given consent or an agreement between the parties, this is, in the author's view, a problem with interpreting the intentions of the parties. It falls upon the parties themselves to prove in court whether the contract term in question/shown in the contract was intended to be a consent or an agreement originally.

Thus, when considering the consent appeared in written form, the consideration has to be divided into two cases; first, a consent given in a normal written form and second, a consent is provided as a part of a written contract term.

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[111] Chiramongkhonphanit (n 17) 116.

[112] Please noted that according to Section 21 of Mental Health Act B.E. 2551 (2008), the law provides that the patient's consent shall be made in writing and signed by the patient; see Mental Health Act B.E. 2551 s 21.

[113] Unfair Contract Terms Act B.E. 2540 s 3.

Firstly, in the case where a consent is given in a normal written form. The characteristics of a consent, in general, do not make up a juristic act,[114] nor does the act of giving consent have the immediate purpose of establishing a juristic relation in order to create or modify the rights of another.[115] That is to say, the consent given does not bind the giver of such consent forever,[116] rather, it is a one-sided declaration of intention[117] that does not legally bind the consent provider to the other contractual party (i.e. no offer and acceptance). The intention declared is essentially an intention to waive the absolute rights protected by law and, by extension, an intention to voluntarily accept the risk of injury which may be incurred.[118]

Secondly, the case where consent is expressly provided as part of a written contract term. Under this case, even if the consent will not be deemed as an agreement, such consent is still being considered as a term in a contract and forms a part of, or is a component part of the main content of a contract. Accordingly, such giving consent is similar, very closely, the characteristic of a juristic act. As a result, the consent provider, or the contracting party will be bound by the overall effect of an entire contract. Unlike consent that is given in general cases, any person or the consent provider who give a consent that forms a part of a contract will not be able to freely withdraw his/her consent, unless the withdrawal of a consent is provided for under the law, or other contract terms.

As systematically discussed above, it can be concluded that there are many levels of consents. If a consent is given in a general case, the consent provider will be able to freely withdraw his/her consent at any time, save for when the law or a contract term prohibit such withdrawal. On the contrary, if a consent is given in a form of a written

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[114] Boonchaloemwiphat (n 61).

[115] Suphanit (n 54) 41-42; Pengniti (n 27) 68.

[116] Punyaphan (n 15) 26.

[117] Sotthibandhu (n 21) 157.

[118] ibid.

contract term that is part of the main content of a contract, the consent provider will not be able to freely withdraw his/her consent as if the consent is given in other generic cases. An exemption of such limitation to the ability to withdraw consent lies in the availability of law, contract terms, or agreement terms that will allow the consent provider to withdraw his/her consent.

2.3.5 Legal status of Volenti non fit injuria from a tortious perspective

As mentioned previously, the Thai legal system unquestionably accepts the principle of the victim's consent, or Volenti non fit injuria, as one of the defenses against tort liability. Nevertheless, there is still much ongoing debate in regards to what legal status the principle is applied as, in tort. In the beginning, the Supreme Court Decision No. 1403/2508 rendered in a criminal case ruled the *Volenti non fit injuria* principle as a general principle of law.[119] The author understands that this particular decision of the Supreme Court had influenced the views and understanding of some legal academics and most legal practitioners by prompting them to believe that, in the same way as the criminal case, the principle of *Volenti non fit injuria* in a tort case serves as a general principle of law which may be applied to exempt the tortfeasor from tort liability under Section 420.[120]

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[119] Supreme Court Decision No. 1403/2508, consent allowing for an illegal act as a general principle of law and a criminal defense pursuant to Deeka 616/2482 and 787/2483, which state that the innocent consent of the injured person that allows another to commit an act prohibited by law, as long as it is not contrary to good morals, and stands until the commission of the prohibited act, the consent shall serve to except the prohibited act from constituting a criminal offense.

[120] Please note that, despite Sak Sanongchart's comment that, "The principle of law that exempts an act from being a tort upon consent of the injured is a principle called 'Volenti non fit injuria,' which means once consent has been given, there is no injury. Since a tort is an unlawful act that inflicts damage onto another person, the consensual act that caused no injury would not be a tort. The injured person thus has no right to claim damages from an act that resulted from his action.", The author understands that, in this respect, Sak Sanongchart probably wishes to only explain that the *Volenti non fit injuria* principle is a general principle of law recognized by civilized countries. As to how each country

In contrast, through research of a number of Supreme Court decisions to civil cases, the author has not found one instance where the Court applied the principle of *Volenti non fit injuria* as a general principle of law in the same way the above criminal court did, evidenced by the decisions in the following:

In the Supreme Court Decision No. 673/2510, the Court held that the plaintiff's challenge for the defendant to injure his body in an attempt to test the power of his own superstitious beliefs constituted an act of voluntarily allowing the defendant to harm himself as well as accepting any damage that may follow. As such, the law does not deem the plaintiff damaged; the plaintiff thus cannot sue for compensation from the defendant.[121]

In the decision of the Supreme Court No.713/ 2512, the plaintiff voluntarily consented to the defendant's blockade of a water path. This means that the plaintiff willingly accepted the consequences of the path being blocked. The defendant cannot be deemed to have committed a tort against the plaintiff. For this reason, the plaintiff had no standing to sue for compensation nor a specific action to unseal the disputed water path.[122]

In the decision of the Supreme Court No.248/ 2523, Mr. M. voluntarily engaged in a fight in which he used a firearm against the defendant, making it a case of Mr. M.'s voluntary acceptance of any potential damage that he himself might suffer. When the defendant shot Mr. M. to death, the defendant cannot be held liable as he was deemed not to have committed a tort against Mr. M.[123]

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applies the principle in question is a matter of individual legal systems. The Professor most likely did not mean to convey that the principle of *Volenti non fit injuria* shall apply as a general principle of law under Section 4 paragraph 2 CCC to a tort case to negate tort liability which has been prescribed as written law within Section 420 CCC; see Sanongchart (n 29).

[121] Supreme Court Decision No. 673/2510.

[122] Supreme Court Decision No. 713/2512.

[123] Supreme Court Decision No. 248/2523.

In the decision of the Supreme Court No. 1508/2531, the fact that the plaintiff voluntarily fought with the defendant that the plaintiff himself sustain serious injuries entails that the plaintiff was willing to accept the potential risk of injury. Therefore, it cannot be deemed that the defendant committed a tort against the plaintiff and the defendant is not liable to pay damages.[124]

In the Supreme Court Decision No. 10294/2546, the plaintiff and the defendant voluntarily engaged in a fight and caused physical injuries to each other. Both sides each willingly risked and exposed themselves to danger. Although the plaintiff suffered injuries, this was not a tort which would otherwise entitle the plaintiff to compensation from the defendant.[125]

In light of the abovementioned court cases, it is evident that the Thai Supreme Court fails to point out clearly whether the *Volenti non fit injuria* is applied as a general principle of law in regards to civil cases. The Court merely provides that, if the facts appear to indicate that the injured person (plaintiff) allows the tortfeasor (defendant) to harm himself, or willingly risks and exposes himself to danger, the tortfeasor's act, despite being damaging, shall not be deemed as a tort and the injured person shall have no standing to sue.

Certainly, the uncertainty regarding the legal status of *Volenti non fit injuria* under civil law prompts several questions. First, if the principle *Volenti non fit injuria* is indeed a general principle of law, can the principle operate as an exception to the general rule of tort liability under Section 420 which qualifies as written law?[126] Further, if

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[124] Supreme Court Decision No. 1508/2531.

[125] Supreme Court Decision No. 10294/2546.

[126] There are some certain legal academics, such as Associate Professor Sanunkorn Sotthibandhu, also expressed their view based on their observation that "the principle of *Volenti non fit injuria* does not carry the status of a general principle of law because, if it did, due to the hierarchy of law under Section 4 CCC, which dictates that written law be applied in preference of the other sources of law and in conjunction with the exception of the same rank, the general principle of law as a secondary source

the principle should not be applied as a general principle of law, how should legal practitioners explain its legal status so that the principle may be applied to civil cases in the most reasonable and appropriate way possible?

From the light of the abovementioned court cases, the author believes that in terms of civil cases, the lack of a clear explanation regarding the legal status of *Volenti non fit injuria* is likely because, in the early period of law and justice system reforms as necessitated by the need to be comparable with other countries, most of the judges graduated from the United Kingdom. As a result, it cannot be denied that in practice, the Thai courts often adopt legal principles from England, a common law system, to apply to its cases. It may be said that initially, the Thai Supreme Court might have failed to consider what legal status it would apply the consent principle as, or with what explanation as regards its legal basis. The Court only realized the need to adopt the principle of *Volenti non fit injuria* from English law as a means to afford the best protection in service of justice to the parties in a case. Hence, it explained the consent principle in conjunction with the provisions of Section 420 CCC for the purpose of rejecting tort liability in its decisions. Eventually, the principle emerged in the form of a legal reasoning contained in various Thai Supreme Court decisions as previously stated.

Therefore, in light of the trend of the Supreme Court decisions and the elements of general tort liability under Section 420 CCC,[127] the author believes that the Thai Supreme Court only wishes to convey that once the injured person himself voluntarily accepts any harm that may be done to him by the tortfeasor or exposes himself to a risk of injury, it is considered that the injured person has not received any injury at all. This is because one of the elements of tort liability under Section 420 CCC

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of law would fail to exempt the rule of Section 420 CCC, which has the status of written law."; see Sotthibandhu (n 21) 156.

[127] The structure of general tort liability under Section 420 CCC consists of: 1) Existence of an act 2) By will or negligence 3) Unlawfulness of act 4) Damage to others 5) Causation.

clearly specifies that there must be an injury to a person's rights. Thus, where an unlawful act has been committed, and the injured person has previously consented to the injury he suffers, the law shall regard this as if no damage had been caused to the injured person. In other words, the injured person's consent is a factor that exhausts the element of "injury" (i.e., the existence of damage), which constitutes a part of the tort. This, in turn, prevents the tortfeasor's act from being a tort and causes the injured person to lose any standing in respect of a tort claim.

Later, Paijit Punyaphan had given his view on the legal status of *Volenti non fit injuria* that, "the Supreme Court does not hold that the principle is used as a general principle of law under Section 4 paragraph 2 CCC because such principle has already been incorporated into Section 420 CCC as a written law. Thus, it can be applied under Section 4 paragraph 1 CCC. This is because, a tort would be a tort if it is unlawfully committed against another, causing damage to the body, health, liberty, property, or other rights of such person. It follows that if such an injurious act was consensual, there is no damage and thus no tort at all. Therefore, Section 420 CCC applies directly to this scenario as opposed to the principle *Volenti non fit injuria*, which is a general principle of law, being applied as a general principle of law."[128] From this view, the author understands that Paijit Punyaphan sees that the Thai Supreme Court applies *Volenti non fit injuria* as a firmly established law under Section 420 CCC. Therefore, when applying the principle, Section 420 CCC may be applied directly without having to refer to Section 4 paragraph 2 CCC. Additionally, it can be seen that Paijit Punyaphan's view coheres with that of Sanunkorn Sotthibandhu, who reasons that, "even though there is a concrete injury, once the right owner allows others to harm his rights, the consent will serve as an affirmation that the right owner is not so injured. Consent, therefore, prevents a tort from being a tort as a result of the lack of the element of injury, which may be explained by *Volenti non*

[128] Paijit Punyaphan, 'ข้อคิดเห็นเกี่ยวกับความยินยอมของผู้เสียหาย' (ปีที่ 20; ฉบับที่ 1,ดุลพาห 2516) 29-30. ('Kho Khit Hen Kiao Kap Khwam Yinyom Khong Phu Sia Hai [Comments on the Consent of the Victim])' (1973) 20 Dunlaphaha 29-30.

fit injuria or understood as an inverse implication of Section 420 CCC itself. As such, it is not necessary to consider whether the principle of *Volenti non fit injuria* is a general principle of law or not."[129] These legal opinions are also in line with that of PhattalaSak Wannasaeng, who commented that "although *Volenti non fit injuria* is not mentioned in Section 420 CCC, it is widely accepted in the law society that this principle, in a compromising manner, arises from an interpretation of Section 420 CCC pertaining to the element of 'injury to others.' That is, if the injured person accepts the injury, he is deemed not to have been injured."[130]

In the author's view, the author agrees with Paijit Punyaphan's opinion because, apart from its consistency with the opinions of Sanunkorn Sotthibandhu and PhattalaSak Wannasaeng, the Volenti non fit injuria's literal translation is 'consent does not cause injury.'[131] In a reiterating manner, it is the rule under Section 420 CCC that, for an act to be a tort, "there must be an injury." Interpreting the law using the 'inverse' inference, it may be understood that "if there is no such injury, the act may not be deemed as a tort." This demonstrates that even though the provisions of Section 420 CCC do not specify the term "consent," it becomes certain when the law is interpreted inversely that the principle of *Volenti non fit injuria* has been established firmly under Section 420 CCC already. Therefore, it shall be applied as written law in accordance with Section 4 paragraph 1 CCC. Moreover, the explanation that *Volenti non fit injuria* applies as written law is consistent and in line with the Supreme Court decisions the author mentioned earlier. Especially, suppose the Supreme Court intended for *Volenti non fit injuria* to be applied as a general principle of law. In that case, the Court should have expressly stated so, as it did in the Decision No. 1403/2508. Moreover, considering the hierarchy of sources of law under Section 4 CCC, written law shall be applied first in all

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[129] Sotthibandhu (n 21) 165.

[130] Wannasaeng (n 25) 65.

[131] The term "Volenti" means will or intention, and the term "injuria" means harm or injury; see Sotthibandhu (n 21) 154. See also Punyaphan (n 128) 27.

cases that come within the spirit and letter of its provisions. Where no provision is applicable, local customs may apply. In the absence of applicable customary law, the case shall be decided by analogy to the written law most nearly applicable. However, when the existing provisions of law and local customs remain inapplicable, the law allows the general principles of law to be applied as a last resort.[132] Since the principle of *Volenti non fit injuria* is established as written law under Section 420 CCC, the Court may no longer apply said principle as a general principle of law.

Thus, as mentioned earlier, the author sees that, although *Volenti non fit injuria* is deemed a general principle of law, because the principle has been firmly established in the provisions of Section 420 CCC, it shall be applied first as written law pursuant to Section 4 paragraph 1 CCC rather than as a general principle of law under Section 4 paragraph 2 CCC.

2.4 Problems with residential eviction of tenant without due process in Thailand

Lease of immovable property is a type of lease agreement in the form of reciprocal agreements. Both parties, namely the landlord and the tenant, have a set of duties owed towards each other.[133] While, the landlord is obliged to deliver the possession of the leased property as specified in the lease agreement to the tenant, the tenant has the right to make use of, or benefit from, the leased property for the agreed time and, in turn, must pay the rent to the landlord. [134]

In general, the lease terminates when the specified period of tenancy comes to an end. Such termination or expiration of tenancy prompts the tenant to lose his status

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[132] Somyot Chueathai, ความรู้กฎหมายทั่วไป (พิมพ์ครั้งที่ 25, วิญญูชน 2562) 172. *(Khwamru Kotmai Thuapa* [Introduction to Law] (25 edn, Winyuchon 2019)) 172.

[133] Sanunkorn Sotthibandhu, *คำอธิบายเช่าทรัพย์ เช่าซื้อ* (พิมพ์ครั้งที่ 6, วิญญูชน 2558) 21. *(Kham Athibai Chaosap Chaosue* [Guidance on Hire of Property, Hire Purchase] (6 edn, Winyuchon 2015)) 21.

[134] Civil and Commercial Code s 537.

of a tenant and all of the rights associated with it. Interestingly, where the end of tenancy and the tenant continues to reside in the premises and refuses to leave, the landlord's primary course of action would be to rely on the court to issue an order or judgment to give effect to the tenant's eviction. Nonetheless, in some case the landlord neglects to go through eviction procedures in court. They may see that such an eviction method is time-consuming and may be delayed intentionally by the tenant. Should this happen, the landlord would be put at a huge disadvantage, as he is bound to incur loss as time progresses. Therefore, a landlord who thinks this way tends to solve the problem by himself. To elaborate, the landlord may attempt to change the door locks, nail the door, remove the tenant's property from the leased premises, or arbitrarily act in any other manner in order to deny the tenant access to, or the use or benefit of the leased premises without a court order (Self-help eviction). As for the consequence of said acts, not only do these acts incur criminal liability, [135] but they also incur civil liability according to the following court decisions, as well:

In the decision of the Supreme Court No. 1063/2475, the tenant breached the lease agreement by refusing to move out of the leased premises. The Court, however, held that the landlord, by locking the door and consequently causing the tenant's pigs to disappear, had committed a wrongful act.[136]

In the decision of the Supreme Court No. 1415/2513, the landlord disrupted the tenant's possession of the leased premises by preventing his access thereto. The act of the landlord thus contravened the law and was held to be a tort. The Court reasoned that once the tenant had assumed his right of possession under the lease, any act against it would constitute a tort, even though the act is done by the owner himself.[137]

In the decision of the Supreme Court No. 4207/2551, it was specified that, upon termination of the lease agreement by the landlord, the tenant had to move out of

[135] Supreme Court Decision No. 1/2512, 1980/2514, 363/2518, 4477/2531 and 5588/2537.

[136] Supreme Court Decision No. 1063/2475.

[137] Supreme Court Decision No. 1415/2513.

the premises. In the event that the tenant refused to do so, the landlord was entitled to file a claim to the court under the Civil Procedure Code Section 55 on the ground that the tenant's action disputed the landlord's rights. The landlord's right to evict the tenant must be granted and enforced by the Court only; the landlord is not allowed to trespass or perform any act which would deny the tenant his access to the premises. As a consequence, the defendants, by entering and locking the premises, committed a tort against the plaintiff under Section 420 CCC.[138]

From the decisions of the Supreme Court above, there is a clear trend that if the landlord re-enters the leased premises without the consent of the tenant, such re-entry for the purpose of eviction will amount to a tort under Section 420 CCC irrespective of whether the re-entry was done by reasonable, peaceful means. The landlord must therefore exercise his right to file the claim to the court on the ground that the tenant's action disputed the landlord's rights under the Civil Procedure Code Section 55. If the landlord refuses to bring an action to the court under the law and willfully retake his possession by entering into the premises without the consent from the tenant, the action of the landlord will be considered as a tort.

As seen from above examples, the law places a huge restriction on the landlord's right as the owner of the leased property in regards to eviction. In a reiterative manner, the landlord is unable to proceed to repossess and arbitrarily evict the tenant from the leased premises without a proper eviction order by the court, since any act to the contrary will result in criminal and civil liabilities. Nonetheless, there exists a number of landlords who wish to circumvent the law by relying on the principle of 'Volenti non fit injuria' and 'the principle of freedom of contract'[139] to help them from their criminal

[138] Supreme Court Decision No. 4207/2551.

[139] This is a legal principle that gives freedom to the contracting parties to agree on how their contractual relationship should be governed; such as the scope of the contract, the purpose, or the contents of the contract. As long as these agreements are within the bounds of law, public order and good morals, the agreements shall be legally binding on the parties.

and civil liabilities for unlawful eviction. This freedom of contract principle is grounded on the concept that, when the contracting parties conclude a contract, such a contract shall be deemed just and fair. Once the contract is in effect and fully binding, no contracting party shall be able to claim that they are being treated unfairly because of the contract they created, since they were not forced to be bound by it. Simply, if the contracting party views the contents to be unfair, he is not obliged to enter into it. However, once he chooses to enter into the contract, it shall be deemed that the contract is fair for both sides; no party can claim contractual unfairness against the other. Thus, in the context of residential eviction, it is no surprise if the landlords rely on the principle of *Volenti non fit injuria* and the principle of freedom of contract to arrange an agreement or request the tenant's consent in the lease in order for allowing him to evict the tenant arbitrarily once the end of tenancy. One example of those circumstances is an event where the tenant enters into a lease contract with the landlord providing a consent clause that reads, "upon the end of tenancy, the tenant allows the landlord shall be able to recover the possession of the leased property". Considering this contract term, if the tenant fails to return the possession of the leased premises to the landlord when the contract terminates or expires, the landlord is entitled to enforce his right to recover his possession immediately by himself by way of, for instance, withdrawing utility services, removal of property, or changing locks.

Noticeably, it can be seen that the essence of the agreement, or the tenant's consent, lies in the permission for the landlord to proceed to evict the tenant and vacate his property upon termination or expiration of the term. In addition, the landlord is permitted to immediately recover his possession of the premises without having to conform to the necessary court procedures. This type of consent or agreement which has the contents of accepting an arbitrary eviction by the landlord and allowing the landlord to bypass the eviction procedures may be called the "consent for the recovery of possession."

With reference to the above tenant's consent, a problem may arise when the tenant refuses to move out of the leased premises once the contract has been terminated or expired. The legal issue at hand is whether or not the landlord's act of recovering his possession of the leased property by merely invoking the consent in lease condition qualifies as a tort under Section 420 CCC. Should it do, could the landlord then refer to the tenant's consent under the lease in order to escape from his liability? For the answers to these questions, there are many decisions of the Thai Supreme Court which are presented below:

In the decision of the Supreme Court No. 724/2480, the defendant's act of possessing the power plant without the plaintiff's consent is a wrongful act. However, the clause in the powerplant lease agreement specified that if the tenant breached of contract, the landlord would be entitled to terminate the contract and to repossess the property. Therefore, if the fact appeared that the tenant had breached the contract, the landlord would have had the right to repossess the property without having violated the tenant's right. Such clause in the agreement is not against public order and good morals.[140]

In the decision of the Supreme Court No. 985/2513, the clause specifies that, "If the tenant failed to comply with any clauses in this agreement, the landlord shall have the right to terminate the contract immediately and the landlord is permitted to occupy the premises and all the property as the tenant is at fault." When the landlord rightfully terminated the contract, the tenant no longer had the right to occupy the premises. Due to the existence of this clause, the landlord had the right to repossess the premises without prior authorization from the tenant. Any third person act for the landlord shall not constitute a violation of the possessory right of the tenant.[141]

In the decision of the Supreme Court No. 2494/2553, the lease agreement made between the plaintiff and the defendant specified that in the event that the tenant is at fault, the tenant allow the landlord shall have the right to repossess the property.

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[140] Supreme Court Decision No. 724/2480.

[141] Supreme Court Decision No. 985/2513.

Although the plaintiff's act of removing the coconut tree from the premises was a wrongful act against the defendant, such action arose from the clause of the lease agreement which gave the right to the plaintiff to repossess the premises. Therefore, the act of removing the tree was entirely in accordance with the clause in lease agreement. Even if the defendant was injured by the act, the defendant cannot claim compensation from the plaintiff.[142]

In the decision of the Supreme Court No. 12265 - 12266/2556, a clause in the lease agreement stated, "Upon termination of the agreement for any reason whatsoever, the tenant must immediately move out of the premises and the landlord shall have the right to repossess the property and the right to remove any property of the tenant from the premises and shall not be responsible for any loss or damage to the property of the tenant." Since the aforementioned clause is not in conflict with the law or public order and good morals, it can be lawfully enforced. Hence, the landlord's acts of using an object to block access to the premise and removing the tenant's property from the area while announcing that the lease agreement had been terminated and that whoever claimed to be the owner may reclaim the removed property are acts in accordance with the clause in the agreement. The landlord was not liable for trespassing nor mischief.[143]

In contrast, in the decision of the Supreme Court No. 3379/2560, the Court ruled that the wrongful act in this case is caused by the defendant, (the landlord) who evicted the tenant by closing the store, repossessing the premises and removing all of the tenant's goods and property from the premises. The facts were that, upon expiration of the lease term and the period of grace for the plaintiff to move the property out of the premises, the plaintiff refused to do so. The plaintiff's action was thus in dispute with the rights of the defendant as the landlord. Although the clause in the lease agreement granted the defendant the right to repossess the premises and the right to remove the plaintiff's property, in the case where the dispute arose, to force the parties through an

[142] Supreme Court Decision No. 2494/2553.

[143] Supreme Court Decision No. 12265 - 12266/2556.

eviction or remove the parties' property from the premises, the defendant must file with the court an application by making a motion for an order appointing the executing officer to procure the judgement as prescribed by Section 296bis Civil Procedure Code. Nevertheless, the defendant failed to file the motion to the court, proceeded to evict the plaintiff, and removed the plaintiff's property on his own will. This caused damage to the plaintiff, thereby amounting to a tort under Section 420 CCC for which the defendant was responsible.

The fact also shows that the plaintiff had used a battery as an electrical tool for light and power and purchased cooling ice to preserve his goods even though the defendant who was the landlord had already shut off the electricity. The act of the plaintiff was inconsiderate and indicative of his reluctance to leave the leased property despite the fully binding clause between the parties in the agreement.

Even though all of the defendant's acts above constitutes a wrongful act, the acts were derived from the clause in the agreement. As for the goods and property in the plaintiff's store, the defendant had already given the plaintiff an advance notice of removal. As for the plaintiff's property which were removed, the fact appears that the defendant had sold them through the public auction in an open manner, but the plaintiff never contacted the defendant in order to redeem it nor did the plaintiff show any involvement in the auction in any way. One the defendant sold the property, it was held to be a case of damage arising from the fault of the plaintiff in accordance with Section 442 CCC and the provisions of Section 223 CCC shall apply mutatis mutandis.[144]

To briefly sum up, it is apparent that, in light of the series of consistent decisions of the Thai Supreme Court since B.E. 2480-2556, there was a tendency as regards the court rulings that, where the landlord re-enters leased premises for the purpose of retaking possession, referring to the consent or agreement in the lease term would exempt such action from being ruled as a tort. Besides, such a consent is not prohibited by express law and contrary against public order and good morals, as a result, that consent does not

[144] Supreme Court Decision No. 3379/2560.

become ineffective and can bind the contracting party legally. Once the agreement binds the tenant and landlord legally, the landlord has the right to repossess the premises without prior or subsequent authorization from the tenant. The act of the landlord shall not constitute a violation of the right of possession of the tenant and would thus not be liable for any tort under Section 420 CCC.

Furthermore, there is a significant note that if the agreement or consent of the tenant specifies, "Once the end of tenancy, the tenant allows the landlord shall be able to return into the possession of the leased property", this means the landlord would be entitled to, on his own, retake the possession of the leased premises and evict the tenant without a court order. Such an agreement or consent is effective and is fully and legally binding on the parties. In other words, there is an established trend that the Thai Supreme would rule that such an agreement or consent which give a right the landlord can evict the tenant without a court order is not expressly prohibited by law or contrary to public order and good morals.

Nonetheless, when considering the decision of the Thai Supreme Court No. 3379/2560, it can be seen that, even with similar sets of facts, the aforementioned "trend" was departed from. In the earlier cases, if the landlord wished to retake the possession of his leased premises and exercise his right of eviction, such action must be granted and enforced by the court, unless the landlord could refer to the tenant's consent which may be stipulated in the lease. On the contrary, in the Supreme Court Case No.3379/2560, the Court held that even with reference to the consent of the tenant, the landlord's act is still considered as a tort under Section 420 CCC. Regardless of the means or force used upon retaking possession, the landlord must still file a case to the court in accordance with the Civil Procedure Code to legally evict the tenant. The landlord has no power to re-enter the leased premises nor to remove the tenant by himself. When the landlord failed to file the motion to the court, proceeded to evict, and removed the plaintiff's property out on his own, the landlord became responsible for the damage he caused under Section 420 CCC. But, since the unlawful act of the landlord was prompted by the

tenant's breach of contract and was in compliance with the clause of the agreement, the circumstances of this case were considered as a case of damage arising partially from the fault of the tenant in accordance with Section 442 CCC and the provisions of Section 223 CCC shall apply mutatis mutandis.

From the Supreme Court Decision No. 3379/2560, it is noteworthy that the court has not mentioned clearly as to whether the agreement or consent of the tenant which permits the landlord to bypass all court proceedings is expressly prohibited by law or contrary to public order and good morals. The Court also did not touch upon the legal effect of the consent clause: whether it was ineffective. Instead, it merely ruled that the action of the landlord was, despite both parties' agreement on the consent clause, still a tort against the tenant.

Since the issues with residential eviction of the tenant without due process in Thailand is rather an interesting issue, the author wishes to provide a more in-depth explanation, analysis, and commentary in great detail in chapter 4.

2.5 Summary

As systematically discussed above, it can be concluded that when a person willfully or negligently, unlawfully causes an injury to another person's right and the damage occurred has a close causal relationship with the action of the tortfeasor, such conduct will amount to a tort for which the he must be liable as a defendant.

However, the defendant will be able to refer to the consent of the injured person, the plaintiff, as a defence for denying the damage arising from his act if such a consent is not expressly prohibited by law and is not contrary to public order and good morals.

Even so, when considering and comparing between the series of consistent decisions of the Thai Supreme Court since B.E. 2480-2556 and the Supreme Court Decision

No. 3379/2560, it can begs some questions: firstly, whether the landlord has the right to retake his possession of the premises upon termination of the contract and tenant's refusal to leave; and secondly, whether the tenant's consent, which allows the landlord to enforce his right personally without a court order, is expressly prohibited by law or contrary to public order and good morals.

In order to seek the actual answer to the legal issues presented, it is necessary to study foreign laws for their comparative concepts and applications regarding *the Volenti non fit injuria* principle, which will be presented in next chapter.

CHAPTER 3

TORT AND VOLENTI NIN FIT INJURIA IN GERMAN AND ENGLISH LAW

3.1 Introduction

In the previous chapter, the author had discussed the overall concept of general tort liability and the principle of *Volenti non fit injuria* under Thai law, as well as the application of *Volenti non fit injuria* in cases of residential eviction of tenants without due process of law in Thailand.

In this present chapter, the author would like to examine the historical development of *Volenti non fit injuria* in civil and common law jurisdictions, the comparative study of the concept of general tort liability and *Volenti non fit injuria* in German law and English law, and the legal issue arising from arbitrary evictions of tenants without due process of law in Germany and England.

3.2 Historical development of Volenti non fit injuria in civil and common law systems

Consent has been with human society for a long time. It was standing on the principle of estoppels, which can be seen from the Roman law that accepts citizens' rights to sell themselves as slaves.[145] Since slaves in the former era, whether they wished to be or not, were considered the property of their masters.[146] Such masters have the right to do anything with the slaves, such as killing or giving them to another person.

Due to the unconfirmability and uncertainty of fact, the author cannot inform exactly as to when the *Volenti non fit injuria* principle conceptually emerged in the realm

[145] Mauro Bussani and Marta Infantino, 'Tort Law and Legal Cultures' (2015) 63 American Journal of Comparative Law 14.

[146] Tassapa Umavijani, 'Ideological Polemics in the Historiography of Ancient Slavery' (April - September 2014) 1 Thammasat Journal of History 16.

of law. Nevertheless, from historical data, the principle of *Volenti non fit injuria* obviously appeared and was stated in the *lex Aquilia*. The *lex Aquilia* took away the force of all earlier laws which dealt with unlawful damage, the Twelve Tables, and others alike, and it is no longer necessary to refer to them.[147] In the digest of Justinian, Book 9.2.7.4, the *lex Aquilia,* an account of causes of actions relating to compensation for unjustly inflicted damage, specifically provided:

"*Si quis in colluctatione vel in pancratio vel pubgies dum inter se exercentur, alius alium occiderit, si quidem in publico certamini, cessat Aquilia; quia gloriae causa vel virtutis non injuriae gratia videtur damnum datum. Hoc autem in servo non procedit, quoniam ingenui solent certare: in filio familias vulnerato procedit. plane si cedentem vulneraverit, erti Aquiliae locus, aut si non in certamine servum occidit, nisi si domino committente hoc factum sit: tunc enim Aquilia cessat*."[148]

The above can be translated as "if a man kills another in the *colluctatio* (wrestling) or in *the pancratium* (a hybrid form of wrestling and boxing) or in a boxing match (provided the one kills the other in a public bout), the *lex Aquilia* does not apply because the damage is seen to have been done in the cause of glory and valor and not for the sake of inflicting unlawful harm; but this does not apply in the case of a slave, because the custom is that only freeborn people compete in this way. It does, however, apply where a son-in-power is hurt. Clearly, if someone wounds a contestant who has thrown in the towel the *lex Aquilia* will apply, as it will also if he kills a slave who is not in the contest, except if he has been entered for a fight by his master; then the action fails."[149]

As mentioned above, it can be seen that although Digest 9.2.7.4 did not directly mention the *Volenti non fit injuria* principle, it can be understood that the principle of Roman law impliedly contains a fundamental aspect of the contemporary

[147] Alan Watson, *The Digest of Justinian*, vol 1 (University of Pennsylvania Press 1998) 277.

[148] Digest 9.2.7 s 4.

[149] Watson (n 147) 279.

debate on the legality of boxing and consent.[150] In brief, the spirit of the principle of *Volenti non fit injuria,* which appeared in the Roman era, arose from the law respecting the decisions of those who had voluntarily put themselves at risk or in dangerous situations, whether participating in boxing events or surrendering to slavery.

In addition, in the digest of Justinian, Book 47.10.1.5, the law clearly stated, "*Nulla iniuria est, quae in volentem fiat.*",[151] which means " No injustice is done to someone who wants that thing done" [152] or "No injury is committed against one who consents", and was usually quoted as *Volenti non fit injuria.*[153] According to this legal principle, a person who has voluntarily run into a risky circumstance has no grounds to complain by appealing to the injury suffered.[154]

It can be concluded that the purpose of the *Volenti non fit injuria* principle in the Roman time is accepting and respecting the sacredness of the person's intentions. In other words, when a person decides to do a certain task or is willing to accept anything while possessing the knowledge of the possible danger, such a person must accept the consequence of their decision; the law will no longer protect people who give consent but will aim to protect those who act in accordance with such consent.

3.2.1 Volenti non fit injuria in civil law system

Although *Volenti non fit injuria* is a legal principle that originated from Roman law, its subsequent application has not been limited only to civil law countries. Rather, the use and development of *Volenti non fit injuria* were widespread in common law countries as well. Bearing this in mind, it comes as a surprise that the mention of the

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[150] Jack Anderson, *The Legality of Boxing: A Punch Drunk Love?* (1 edn, Birkbeck Law Press 2007) 5.

[151] Digest 47.10.1.5

[152] Susan Ratcliffe, *Concise Oxford Dictionary of Quotations* (6 edn, Oxford University Press 2011) 384.

[153] Michael Bohlander and Alan Reed and Nicola Wake and Emma Smith, *Consent: Domestic and Comparative Perspectives* (1 edn, Routledge 2020) 400.

[154] Jussi Varkemaa, *Conrad Summenhart's Theory of Individual Rights* (Brill 2012) 100.

said principle in civil law countries is rather scarce.[155] In some countries, the principle is incorporated into a provision of law; others, however, abstain from mentioning it completely.

In terms of clear reference, Germany applies *Volenti non fit injuria* to both civil and criminal cases. As for Italy, the principle is grounded in Section 92 of the Italian Code of Criminal Procedure. Nonetheless, despite the codification, the mention of *Volenti non fit injuria* is still thoroughly lacking from the Italian legal texts.[156] Correspondingly, the same applies to France,[157] where the law of torts is regarded as jus cogens. Owing to this legal status, the consent principle cannot be invoked in a court proceeding to discharge one from liability in the context of French law. [158] Notwithstanding the previous statement, the only 2-3 instances where the defense of *Volenti non fit injuria* may be invoked include those events of boxing and competing in a sport that is dangerous in nature.[159] Albeit, it shall be emphasized that in the said events, the defense is not invoked on a standalone basis but alongside a custom that allows for such action to be possible.

3.2.2 Volenti non fit injuria in common law system

Assumption of risk is a well-known defense in the area of torts, which originates from the Latin maxim *Volenti non fit injuria* in Roman law.[160] This principle reflects the individualism of early common law, drawing from the principle that ‘one is

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[155] Sotthibandhu (n 21) 146.

[156] ibid, 150.

[157] ibid, 146.

[158] Rongphon Charoenphan, 'การใช้หลัก Volenti Non Fit Injuria เป็นข้ออ้างไม่ยอมชดใช้ค่าเสียหายในคดีละเมิด' (ปีที่ 9; ฉบับที่ 3, วารสารนิติศาสตร์ มหาสิทยาลัยธรรมศาสตร์ 2524) 95. ('Kan Chai Lak Volenti Non Fit Injuria Pen Kho ang Mai Yom Chotchai Khasiahai Nai Khadi Lamoet' [Using the Principle of Volenti non fit injuria as an Excuse not to Compensate for Tort Cases]) ' (1981) 3 Thammasat Law Journal 95.

[159] ibid.

[160] Joe Greenhill, 'Assumed Risk' (1966) 20 Southwestern Law Journal 3.

free to work out one's own destiny.'[161] In comparison between civil law and common law, *Volenti non fit injuria* is more widely known in common law jurisdictions. The reasons for this are the high degree of flexibility the principle allows for and its broad scope of application. This suitability to a wide range of facts and circumstances prompted the common law courts to apply the principle in place of the original English customs more frequently and more easily. As a result, it is no surprise that many in the past and present alike have mistaken *Volenti non fit injuria* to be a common law principle. Especially because, besides having been mentioned numerous times in the legal texts of common law countries, the said principle has been developed and expanded in terms of scope to the extent that it became widespread internationally, being applicable to unfamiliar sets of facts occurring worldwide in any time and age.

In any case, to correctly sum up the historical development aspect, the principle of *Volenti non fit injuria* is a principle rooted in Roman law that was later adopted into the English legal system. The principle was exposed to constant development that it became internationally prevalent, prompting the legal systems of countries such as Thailand and Japan,[162] among others, to be influenced greatly by common law concepts in respect of the Volenti non fit injuria.

3.3 Tort and Volenti non fit injuria in German Law

3.3.1 Tort in German law

3.3.1.1 Structure of general tort liability

The structure for general tort liability in German law are stipulated in Section 823 paragraph 1 of the German Civil Code (also known as "*Bürgerliches*

[161] Marel Katsivela, 'The Volenti Defence under Australian and Canadian Law: A Comparative View' (2014) 8 Journal of Comparative Law 322.

[162] See Makoto Tadaki and Shogoro Yano, 'Einwilligungsfähigkeit und Wirksamkeit der Einwilligung – die Lage in Japan' (2017) 5 Ceza Hukuku ve Kriminoloji Dergisi (Journal of Criminal Law and Criminology) .

Gesetzbuch: BGB"). This Section provides that "a person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property, or other rights of another person is bound to compensate him for any damage arising therefrom." As clearly shown, the contents of Section 823 paragraph 1 BGB visibly resemble those of Section 420 CCC. This is the result of Section 823 BGB being used as the model law for Section 420 CCC. [163] For that reason, it should not come as a surprise that the criteria and related concepts of German tort law would operate in a similar direction as the law of tort in Thailand.

German structure for general tort liability consist of:

1) Act
2) By will or negligence
3) Unlawfulness of act
4) Damage to another's right(s)
5) Causation

(1) Act

A person's act is the first key element in tort liability.[164] In tort law, an act means the conduct of a person, which is controlled by the mind and the person's will and is thus controllable.[165] An action that is uncontrollable (e.g., actions during insensitive sleepwalking) cannot be considered as an act and thus does not give

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[163] Anan Chantaraopakorn, *โครงสร้างพื้นฐานกฎหมายละเมิด ใน หนังสือรวมบทความในโอกาสครบรอบ 60 ปี ดร. ปรีดี เกษมทรัพย์* (พี.เค.พริ้นติ้งเฮ้าส 2531) 97. *(Khrongsang Phuenthan Kotmai Lamoet* [The Fundamental Structure of the Law of Tort] *ed. Nangsue Ruam Bot Khwam Nai Okat Khrop Rop 60 Pi Dr. Preedee Kasemsup* [Collection Article in the 60th Anniversary of Dr.Preedee Kasemsup] (P.K. Printing House 1988)) 97.

[164] Erwin Deutsch and Hans-Jürgen Ahrens, *Unerlaubte Handlungen, Schadenersatz, Schmerzensgeld.* (4 edn, Carl Heymanns Verlag 2002) 15.

[165] Karl Larenz, *Lehrbuch des Schuldrechts*, vol 2: Special Part. (Beck 1981) 589–590.

rise to civil liability[166] because only a person who has acted with the awareness of the mind shall be liable in tort.[167]

In the same way as Thai and English laws, the injury caused by a tortfeasor could derive from an act or an omission.[168] An act can be easily identified because it involves a physical body movement of a person that is aimed to produce a certain result, which immediately appears in the obvious view and could be understood by any person. For example, the acts of kicking, punching, speaking, writing, or other physical movements.

On the other hand, an omission refers to inaction or a failure to act, which is naturally devoid of any manifest bodily movement. A tortfeasor would be held accountable in tort for his omission only in the circumstance in which he has a duty to act but fails to do so accordingly. Such a duty could, for instance, result from a contractual agreement. By way of illustration, a babysitter under a contract of hire would be under the contractual duty to ensure the safety of the child. Another source of duty is a statutory law: a clear example of a so-called legal omission is the case of Section 323 c (1) of the German Criminal Code, which penalizes the omission of any person who does not render assistance to someone in the case of an accident or a common danger or emergency.[169]

Aside from the contractual and statutory duties, there is another type of duty developed by the court (factual position duty). It is also known as "*Verkehrssicherungspflichten*"[170] and is grounded on the concept that any person who creates or maintains a source of danger has a duty to take the necessary precautions to

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[166] Volker Emmerich, *BGB-Schuldrecht, Besonderer Teil* (CF Müller 2003) 255.

[167] Bernard Berofsky, *Free Will and Determinism* (Harper & Row Publishers 1996) 59–63.

[168] Raymond Youngs, *English, French and German Comparative Law* (1 edn, Cavendish Publishing 1998) 242.

[169] See German Civil Code s 323 c.

[170] Youngs (n 168) 242.

protect others against the risks caused by his activity or his property.[171] The scope of this type of duty depends on the specific circumstances. For example, the innkeeper has a duty to ensure that his guests who are playing billiards at the inn do not harm one another. The owner of a hotel has a duty to ensure that the hotel chairs are safe for use, regardless of whether the user is a hotel guest. In a similar manner, the cinema owner has a duty to ensure that their advertisement billboard would not fall on not only their customers but any person who passes by. This is because the owner would be still liable in tort, should the billboard fall and harm an individual whom he does not have a contract with (not a customer), as he is also under another duty resulting from his factual position as the person who commissioned the setting up of the billboard.

As can be seen, the concept of *Verkehrssicherungspflichten* in German tort law seems to be the closest to the English concept of duty of care.

(2) By will or negligence

In German law texts, the term "*Vorsätzlich*" is literally translated into English as *intentionally* or *willfully,*[172] depending on each translator. Correspondingly, when the term is translated into Thai, "*Vorsätzlich*" refers to an act done with the knowledge of the consequences.[173] Therefore, if a person desires to cause harm and knows about the consequences of his act, it is sufficient to establish his intention.[174] The term "*Vorsätzlich*" here has a similar definition to the term "willfully" or "จงใจ" in the Thai legal system.

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[171] Joachim Zekoll and Gerhard Wagner, *Introduction to German law* (3 edn, 9 Kluwer Law International 2019) 277.

[172] Keith Purvis, *English Insurance Texts Words for the Week* (Verlag Versicherungswirtschaft GmbH Karlsruhe 2010) 48-49.

[173] Norbert Horn, *German Private and Commercial Law: An Introduction* (Oxford University Press 1982) 147.

[174] Youngs (n 168) 238.

As for "*Fahrlässig*" or negligently, it is expressed in Section 276 paragraph 1 sentence 2 of the BGB that "a person acts negligently if he does not have regard to the care necessary in the affairs of life." In other words, if a person does what the reasonable man would not have done or not do what they would have done, this is regarded as an act of negligence.[175]

Moreover, German law texts further expand on the definition of negligence that it refers to "the necessary level of care required for any act as expected of a person in any ordinary society, which could be used as a benchmark to determine a negligent act, with which one considers how an imaginary reasonable person would act or omit to act so as to avoid potential damage when placed under the same circumstances as the wrongdoer."[176]

Accordingly, it could be observed that German law also regards a negligent act in a similar fashion as Thai law. That is, to act negligently is to not act willfully, but to act without the appropriate care or with a level of care below that which a person of ordinary prudence would have exercised in the same circumstance in order to avoid causing harm to others.

(3) Unlawfulness of act

Unlawfulness in an act committed is the third important element that gives rise to tort liability. For an act to be held in court as a tort, the act must be unlawful. In simple terms, damage coming from conduct can only be compensated for if the conduct in question has infringed a law.[177] The term "unlawfully" (*Rechtswidrigkeit* or *Widerrechtlich*) means any act which is contrary to statutory law or injurious to the absolute rights of a person that has been carried out without any special privilege or legal

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[175] Basil S Markesinis and Hannes Unberath, *The German Law of Tort: A Comparative Treatise* (4 edn, Hart Publishing 2002) 84

[176] Horn (n 173) 148.

[177] Martín García-Ripoll, 'Unlawfulness in Western European Tort Law' (June 2015) 2 Open Access Library Journal 5.

basis to support its legitimacy. These absolute rights include the rights to life, body, health, liberty, property, and other rights.[178] Hence, it can be seen that unlawful acts include not only acts that are contrary to the law but also those injurious to the absolute rights protected under Section 823 BGB as well.

As explained above, the lack of a special privilege, among other things, makes an act unlawful. Therefore, it follows that if the act that injures the absolute right of another was committed under a special privilege, the wrongdoer might rely on such privilege as a means to escape their liability in tort.[179] For instance, acts empowered by law, including an arrest by the police, acts of self-defense and acts arising out of necessity. In the same way, rights under contracts and the victim's consent (Volenti non fit injuria) [180] are also considered special privileges in this regard, such as entering another person's land on the basis of a lease agreement and giving permission to others to enter and leave the house freely.

Interestingly, it is observed that German law regards the consent of the victim as a rule of exception that discards the 'unlawfulness' of the tort committed. This causes the act to be lawful and thus not fulfill all of the requirements under Section 823 BGB to be qualified as a tort.[181]

(4) Damage to the rights and interests protected by law

As same as Section 420 CCC, damage incurred under Section 823 BGB must be damage to absolute rights only,[182] such as the right to life, body, health,

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[178] Ernest J. Schuster, *The Principles of German Civil Law* (Clarendon Press 1907) 388.

[179] Wagner (n 171) 278.

[180] Markesinis (n 175) 80.

[181] Chakaphong Leksakunchai, 'ความรับผิดฐานละเมิดตามกฎหมายเยอรมันเปรียบเทียบกับคอมมอนลอว์ : มาตรา 823 BGB' (ปีที่ 25; ฉบับที่ 1, วารสารนิติศาสตร์ มหาสิทยาลัยธรรมศาสตร์ 2540) 96. (Khwam Rapphit Than Lamoet Tam Kotmai German Priap Thiap Kap Com Mon Law :Mattra 823 BGB [Tort Liability under German Law comparing Common Law])' (1997) 25 Thammasat Law Journal 96.

[182] E.J. Cohn, *Manual of German law* (2 edn, Oceana Publications 19682) 125.

liberty, property, or other rights of the same characteristics. Thus, contractual rights do not fall within the scope of Section 823 paragraph 1 BGB.

To understand each of the protected rights more easily, the author wishes to elaborate on each of them as follows:

Firstly, the right to life. There exists only one act that violates another person's life: the act of murder.[183]

Secondly, the right to body and health. A tort against the body is the tort that injures the external organs or parts of another person's body, such as the acts of breaking a person's finger, cutting off a leg, causing a head injury, or any act that leads to external injury to the body. In contrast, a tort against health is one that causes the internal bodily systems to function abnormally, including but not limited to internal infections, gastro-enteritis, bacterial infection, and inhalation of poisonous fumes.[184] As regards the scope of this right, the German Federal Court of Justice (*Bundesgerichtshof*, BGH) deems the transmission of HIV to be an injury to health even when it has yet to develop into AIDS. Therefore, causing someone to become HIV positive is actionable as interference with health, even though the infection "does not produce obvious effects on the plaintiff's physical condition." This is because HIV contaminated blood is known to be devastating for the person affected and those who come into close contact with him.[185] With this in mind, injury to health also extends to acts that produce psychological effects on the mind such that the person affected may no longer function normally in life. An example of this may be an experience of shock after witnessing or hearing a gruesome accident.[186]

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[183] Markesinis (n 175) 44.

[184] ibid, 45.

[185] BGH NJW 1991,1948.

[186] Markesinis (n 175) 47.

Thirdly, injury to liberty refers to any interference with the others' freedom of movement.[187] An act that infringes on one's liberty, aside from being a tort, may also constitute a criminal offense. For instance, misinforming the police and causing the police to arrest and hold the wrong suspect in confinement is deemed as an injury to the person's liberty, thereby constituting a tort.[188]

Fourthly, the right to property is an important right protected under Section 823 paragraph 1 BGB. Property in this regard could be movable or immovable. For example, an accident causing loss or damage to the property, dumping the plaintiff's engagement ring into the river, or raising a pet on a person's land without authorization. Additionally, the use of another person's property or the act of taking the property away from the owner without permission are also acts that qualify as a tort.[189] Noteworthily, it may be observed from the German Constitutional Court decision (*Bundesverfassungsgericht*: BVerfG) that the right to property extends to the tenant's right of possession.[190]

Lastly, the other rights to be protected against violations must be absolute rights under the law. The state of being absolute means that one may invoke the right against all others. Examples of these include a possessory right, [191] patent rights, copyright, trademark rights, physical names, official names, right in his statue or photographs, among others.[192] Personal rights, such as rights under contracts, are excluded from the scope of other rights. Therefore, breaches of contractual duties do not generally entitle the other party to a tort claim. Remarkably, the BGH is of the opinion that rights pertaining to familial relationships, such as delictual protection, are also protected under

[187] Wagner (n 171) 275.

[188] Markesinis (n 175) 49.

[189] Leksakunchai (n 181) 90.

[190] BVerfG 1993, 1 BvR 208/93.

[191] Leksakunchai (n 181) 91.

[192] Markesinis (n 175) 69.

this Section. In essence, an injury suffered by the child entitles the parents to compensation from the tortfeasor.[193] The father who loses his parental power and refuses to hand over the child to the mother may incur liability under Section 823 paragraph 1 BGB.[194] Interestingly, the wife who is cheated on by her husband may also claim compensation from him through the law of torts.[195]

(5) Causation

A causal relationship between an act and damage is the final significant element of the tort, which stands on the perception that a person should be liable only for damage and to such an extent caused by his acts. If damage exists, but the damage is not caused by the tortfeasor's act, or the relationship between the act and the outcome is not connected, the tortfeasor would not be liable to pay damages. To determine the causal relationship between action and result, the German lawyers have established the criteria for this matter, which can be divided into a number of theories:

(A) Equivalence Theory

The starting point for causation under German law is the *Äquivalenztheorie*, translated as the theory of equivalence or equivalence theory (*conditio sine qua non* theory).[196] This is more widely known to Common lawyers as the "but-for" test[197] and is used to determine whether the tortfeasor's conduct is a direct cause for the person's injury. That is to say, if the defendant had not acted in such a way, the damaging outcome would not have arisen.[198] For example, a punch to the face causes the nose to break. If there had not been any punch, his nose would not have been

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[193] Kwame Opoku, 'Delictual Liability in German Law' (1972) 21 The International and Comparative Law Quarterly 233.

[194] RGZ 141, 319.

[195] BGHZ 6,630

[196] Cees Van Dam, *European Tort Law* (Oxford Universirt Press 2006) 103.

[197] Markesinis (n 175) 103.

[198] Bettina Heiderhoff and Grzegorz Zmij, *Tort Law in Poland, Germany and Europe* (Sellier. European Law 2009) 7.

broken.[199] Thus, according to this theory, even when the eventual damage is caused by many contributing factors, as long as the tortfeasor contributed to the cause, he shall be liable for the injury regardless of the proximity of the damage to the tortfeasor's own conduct. In other words, all contributing acts are considered to be of equal weight.[200] The eventual damage would not have occurred as it has if the tortfeasor had not initiated the chain of events or taken part in it. By way of illustration, Mr. A threatened Mr. B to back off using a firearm, causing Mr. B to fall off the first-floor window, the height of which was 1 meter from the ground. Although 1 meter is not high enough to be dangerous, it appeared that there was a deep pond near the exact window Mr. B fell off of. Mr. B, who fell into the pond, later died of drowning. In this respect, Mr. B's death is a result of Mr. A's act, regardless of the fact that Mr. A was not aware of the deep pond in which Mr. B could have drowned and died. Mr. A shall be liable for Mr. B's death according to this theory.[201]

(B) Adequacy theory

One of the problems with relying solely on the equivalence theory is that it would lead to an almost infinite number of causes making the identification of a relevant cause impossible. Hence, the theory must be checked and balanced to a certain extent by the "Adequacy theory."[202]

At the turn of the century, German lawyers put forward what was to become the a*däquanztheorie*, translated as the "adequacy theory" or the "adequate cause theory".[203] This theory lies on the perception that the injuring party shall not be

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[199] Eugen Klunzinger, *Einführung in das Bürgerliche Recht* (13 edn, Vahlen 2007) 232.

[200] Walter Van Gerven and Jeremy Lever and Pierre Larouche, *The Common Law of Europe Casebooks: Tort Law* (Hart Publishing 2000) 397.

[201] Punyaphan (n 15) 39.

[202] Edward I Hyslop, 'European Causation in Tort Law: A Comparative Study with emphasis on Medical Law in the United Kingdom, Germany and France and Luxembourg' (LL.D. Thesis, Luxembourg University 2015) 156.

[203] Gerven (n 200) 397.

legally responsible for circumstances which, according to the normal view of an observer who is a third party, lie completely outside of experience and expectation.[204] The German court adopts this theory in its adjudication of tort cases whereby the court considers all circumstances seen by the optimal observer at the time the incident occurs. Additionally, the surrounding circumstances in addition to the tortfeasor's act must also be analyzed by an experienced person as to whether such circumstances contribute to the damage.[205] Aside from the tortfeasor's act, if the surrounding circumstances that contributed to the eventual damage constitute an ordinary cause in light of the optimal observer's view and the manner in which the damage manifested, the tortfeasor shall be liable for his action.[206]

In one German court decision, the plaintiff's husband received a gunshot wound on his arm from a policeman who mistook him for a criminal as he stepped out of a tram. The plaintiff's husband was sent to the hospital. Shortly after, he was infected with influenza viruses and immediately died from the infection. As a result, the plaintiff (wife) brought the action against the government for compensation. The defendant denied and claimed that at the time of the incident, the virus was widespread in Germany; therefore, whether or not the husband was hospitalized did not matter, as he was exposed to equal risks of being infected in any case. That is to say, even if he had not been shot and hospitalized, he still would have been infected with the disease from outside the hospital. The plaintiff then argued that her husband ended up being infected due to the wound caused by the police in the first place. While it might be true about the epidemic, her husband was healthy, and it cannot be said for certain that he would get the infection from outside the hospital. The fact that he was admitted to the hospital, a place full of diseases, made him much more likely to be infected. In the end, the court agreed with the plaintiff, viewing that the defendant's act and the plaintiff's husband's

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[204] Markesinis (n 175) 107.

[205] Leksakunchai (n 181) 104.

[206] Janno Lahe, *Fault in the Three-Stage Structure of the General Elements of Tort ed. 15 Years of the Estonian Constitution* (Juridica International XII/2007). 158

death were adequately connected. The hospitalization of the injured person was an unobjectionable, appropriate, and normal consequence of the injury. Thus, the defendant was adjudged to pay damages.[207]

Regardless, this theory remains subject to much controversy and debate. The theory begs the question as to how wide the scope of knowledge and the ability to predict must the optimal observer possess. For instance, the victim sustains little damage from the tortfeasor's act, but he later dies of pre-existing heart disease. From these facts, a question arises as to whether the observer must know of the heart disease, and if he did not know, but from a medical perspective, he could have known of such fact. Or in another case, should the observer be aware that a building pillar was already fragile before it was clashed by a truck, leading to the collapse of the whole building. This is because only a construction expert would have this kind of knowledge. Ordinary construction workers should not.[208] Therefore, the main problem with applying this theory lies in the perspective of the observer, in that in some cases, the observer is able to see an event happening, even when it is not an ordinary event that would normally occur as a result. This problem often causes the theory of adequacy to fail to limit the liability of the wrongdoer.[209]

(C) Scope of the rule theory

In the following years, German lawyers developed the theory of *Schutzzweck der Norm*, translated as the "scope of rule theory."[210] Similar to the adequacy theory, this theory was created with the aim to help limit the scope of liability of the wrongdoer.[211] According to this theory, damage can be recovered only when it is

[207] RGZ 105, 264.

[208] Markesinis (n 175) 107- 108.

[209] ibid.

[210] Dam (n 196) 272.

[211] Heiderhoff (n 198).

within the scope of the norm which has been infringed.[212] As for the damage that lies outside of such scope, the tortfeasor is not liable. This theory can correctly be called a "legal policy theory."[213]

(D) Sphere of risk

In 1991, the German court established a new line of reasoning based on the concept of *Risikobereich*, translated as the "Sphere of risk."[214] This principle is not yet a full-fledged theory, but it is an analysis (also known as *Risikobereich* analysis) based on the concept that every person has to bear a certain amount of risk, and some risk may come from within one's internal sphere of risk. If the occurrence of damage represents no more than the realization of a risk which was within the sphere of risk of the injured person, the damage or fault cannot be imputed to the tortfeasor.[215]

In one of the cases, the plaintiff was an owner of a pig farm in which a large number of pigs were crammed in a small area. When the defendant's car crashed into a nearby street corner with a loud bang, the noise caused panic among the pigs, resulting in many deaths among them. The plaintiff applied for a declaration that the defendant was liable to pay damages in respect of the plaintiff's loss. The court rejected the pig owner's claim because he had created the risk that had materialized in the first place when he operated his farm under conditions that made the pigs extremely sensitive to noise.[216]

In summary, an act must consist of, among other things, a causal connection between the violation of the injured person's rights and the corresponding damage in order to qualify as a tort. In essence, the tortfeasor's act must be the cause of the injured person's injury, and the injured person's injury must be coherent with the

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[212] ibid.

[213] Tony Honoré, *International encyclopedia of comparative law: Chapter 7*, vol 11 (Mohr 1971) 60.

[214] Dam (n 196) 274.

[215] Gerven (n 200) 398.

[216] BGHZ 115, 84.

damages claimed. To determine the causal relationship between cause-and-effect using solely the Equivalence Theory (the but for-test) is insufficient. Definitely, without the act of the tortfeasor, the injured person would not have been injured. Hence, the tortfeasor's act is normally considered the cause-in-fact of the harm suffered by the victim. In addition, the defendant would still be liable for all of the damages that eventually occurred without any concern as to which event exactly produced it. This is because it is deemed that every event all contributes to the final damage and are thus inseparable.

Nevertheless, like most other legal systems, the German system is infused with value judgments designed to filter out distant events considered irrelevant in terms of contribution to the final damage due to the remoteness of said events. The Adequacy Theory was developed to narrow the excessively wide scope of the cause-in-fact test. Essentially, this test was created based on probability and foreseeability: a victim's harm would only be attributable to the tortfeasor if, according to the experience and expectation of the optimal observer, his conduct significantly increased the probability of the injury. Moreover, apart from the Adequacy Theory, there is another theory aimed at narrowing the Equivalence Theory’s excessively wide scope of liability. This is known as the Scope of the rule theory, which provides that damage can only be recovered if it lies within the scope of protection of the norm that has been infringed. In addition, the court later established another principle called the 'spheres of risk' for assessing the balance of causal link between the risk-bearing of the injured person and damage that he suffered.

In any event, it can be concluded that general tort liability in German law comes into existence upon the fulfillment of all of the five elements (i.e., there must be an unlawful act that is carried out either willfully or negligently, and the said act must cause an injury to a person’s right, thereby resulting in damage). Once the aforementioned five elements are satisfied, the act will amount to a tort for which the tortfeasor must be liable in accordance with Section 823 paragraph 1 BGB.

3.3.2 Volenti non fit injuria in German law

In Germany, the principle of *Volenti non fit injuria* is widely referred to as "*Einwillingung*" and is known in the name "*Die Einwillingung im Privatrecht*" (Consent in private Law) in the realm of civil law.[217] The principle is grounded on the concept that consent leads to the lawfulness of the tort, and the consenting party may no longer claim any legal protection of his rights under civil law.[218]

As for criminal law, the principle of *Volenti non fit injuria* appears in writing in the German Criminal Code (*Steafgesetzbuch*: StGB) wherein Section 228 StGB provides that, "whoever inflicts bodily harm with the victim's consent is only deemed to act unlawfully if, despite that consent, the act offends common decency."[219] In other cases, the principle also makes its appearance in specific bodies of law. For instance, a physician who performs testicle removal surgery on a patient would not be liable, as long as the surgery has been consented to and is for the purpose of treating or alleviating abnormalities relating to the patient's sexual drive. In this case, the patient must also be older than 25 years of age, and the method of surgery shall not have dangerous effects on the body or mind of the patient and, most importantly, shall be correct pursuant to medical guidelines.[220]

3.3.2.1 Application of Volenti non fit injuria in German tort cases

As mentioned above, the principle of *Volenti non fit injuria* in criminal law is used as written law as a means to exempt the offender from criminal liability. On the other hand, the principle does not have the same status as written law in regards to the law of torts. Nonetheless, the fact that German law does not prescribe the principle as a legal provision alongside the provisions of torts in no way implies that the

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[217] Bachmann (n 6) 1034-1035.

[218] Georg von Zimmermann, *Die Einwilligung im Internet* (GmbH 2014) 4.

[219] German Criminal Code s 228.

[220] See Gesetz über die freiwillige Kastration und andere Behandlungsmethoden 1969 s 2. See also Kamonchai Rattanasakawong, 'Consent in Criminal Law' (LL.M. Thesis, Thammasat University 1980) 160-161.

said principle is inapplicable to tort cases. This could be evidenced by many German court decisions and legal texts, which describe the method of using *Volenti non fit injuria* as a legally acceptable defense (*Rechtfertigungsgrund*) for the purpose of denying a tortfeasor's liability under tort law.[221]

Through research on German court decisions and legal texts, it can be seen that, in general, a person who willfully or negligently, unlawfully injures the life, body, health, liberty, property, or other rights of another must be liable for his tort under Section 823 paragraph 1 BGB as a tortfeasor. However, when considering the element of unlawfulness (i.e., the term "unlawfully"), which refers to acts contrary to statutory law or injurious to the absolute rights of a person without any special privilege or legal basis to support its legitimacy, it logically follows that if the injurious act in question is done with a special privilege or legal basis, then the wrongdoer may raise this as a defense to deny his tort liability. Acts carried out under special privileges or legal bases include acts empowered by law, such as self-defense and necessity, acts empowered by contracts and acts done in response to the victim's consent (*Volenti non fit injuria*).[222]

In one German court decision, the defendant in a football match intercepted the plaintiff's dribbling, causing the plaintiff's leg to fracture in the process. The open wound on the leg later got infected by bacteria, which the plaintiff got treated numerous times at the hospital. As a result, the plaintiff sued the defendant for damages. The court held that normally football is a sport where physical collision is to be expected when the players "fight for the ball," which may inevitably lead to injuries. Thus, when the match started, every player was deemed to have consented to these possible injuries. The players may not use any actual injury suffered as a basis for a claim of compensation.[223]

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[221] Markesinis (n 175) 80.

[222] Wagner (n 171) 278.

[223] BGH NJW 1975, 109.

From the explanation above, it can be seen that, although there is an attempt to describe the legal status of *Volenti non fit injuria* as a general principle of law, the author has not found any explanation in terms of legal methodology as to how this general principle of law can be invoked as an exception to the rule of the written tort law.[224] In addition, in consideration of German court decisions, the author has never found a case where the German court describes its usage of the consent principle as a general principle of law. Nonetheless, what appears to be clear is the fact that, in any tort case, the principle of *Volenti non fit injuria* operates as an exception to the element of unlawfulness in general tort liability under Section 823 paragraph 1 BGB. The court deems that Volenti non fit injuria, or the victim's consent, is one of the legally accepted defenses of the tortfeasor, [225] which has a status equal to those of self-defense and necessity. As long as the defendant acts within the scope of the injured person's consent, the act which would otherwise be regarded as unlawful would be deemed lawful under the law. In other words, the consent of the victim legitimatizes the state of being unlawful of the act, exempting the act from constituting a tort and the tortfeasor from liability in accordance with Section 823 paragraph 1 BGB.

3.3.2.2 Capacity

Fundamentally, humans possess the freedom to act independently, as long as their conduct does not interfere with others. Thus, it is natural that every person has the right to consent to conduct which may be injurious to their absolute rights.[226] For instance, prior consent to a surgical procedure.

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[224] Sotthibandhu (n 21) 155-156.

[225] Markesinis (n 175) 80.

[226] Lotta Westerhall and Charles Phillips, *Patient's Rights: Informed Consent, Access and Equality* (Nerenius & Santérus Publishers 1994) 240.

Having established so, a minor aged 16 and over[227] may be able to give fully binding consent independently without their parent's approval[228] only if they are capable of assessing the implications and consequences and weighing the advantages and disadvantages of the consent.[229] For example, drawing blood, treating a cold[230] , or harmless cosmetic surgery. It also includes agreeing to be photographed; otherwise, the need for parental permission would amount to an unnecessary restriction of the minor's rights.[231] Nonetheless, for treatment that perhaps has irreversible adverse effects, such as tattooing or piercing, the minor is required to obtain their parent's permission.[232]

3.3.2.3 Consent must be given by free and sufficient knowledge on information

Apart from the *Volenti* principle being applied in tort cases related to sports, such a principle also has a significant role in the medical field.[233] In principle, a person who willfully or negligently, unlawfully injures the life, body...of another person, shall be liable as the tortfeasor. Thus, when a doctor undertakes an operation of the patient, it is considered as an act of "injuring the body of another" (*Korperverletzung*).[234] This is because any act that interferes with the body of another raises a presumption of unlawfulness under Section 823 paragraph 1 BGB.[235]

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[227] ibid, 241; see also NJW, 1971, 233- 235.

[228] Bachmann (n 6) 1040.

[229] Westerhall (n 228).

[230] NJW 1989, 2309-2313.

[231] Bachmann (n 6) 1040.

[232] Westerhall (n 228) 241.

[233] Youngs (n 168) 310.

[234] Both the common law and the civil law recognise that for a doctor to touch a patient's body is unlawful without consent; see Josephine Shaw, 'Informed Consent: A German Lesson' (1986) 35 The International and Comparative Law Quarterly 865 and 872- 873.

[235] Horn (n 173) 147.

Regardless, the tort (specifically the "presumed unlawfulness" of the act) may be removed by demonstrating that the patient has consented to the medical procedure prior to receiving it. This is, however, conditional upon the fact that the consent has been given freely and voluntarily[236] based on adequate information about the risks associated with the consented matter.[237] Alternatively, if a doctor undertook the surgery without the prior informed consent of the patient or had provided insufficient information to the patient, he would be obliged to pay damages in respect of the patient's loss as a result of the wrongs committed by him.[238]

3.3.2.4 Limitations of Volenti non fit injuria in German law

Because the consent principle is not passed as written law but is used by the court to exempt wrongdoers from tort liability under certain instances only, it is rather difficult for one to determine what is the factor responsible for defining the scope of the principle in this German law context.

Nevertheless, through extensive research, the author found that the status of *Volenti non fit injuria* in civil law or "*Die Einwillingung im Privatrecht*" is still being debated upon among German legal academics. In particular, the German courts display a tendency to avoid answering this particular issue.[239] On the one hand, the victim's consent is viewed as a " juridical act" or "act of legal significance" (*Rechtsgeschäft*),[240] whereas the other views such consent to be an act that amounts to a waiver of rights under the law (*Rechtsschutzverzicht*).[241] In the present day, it seems that

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[236] Dam (n 196) 234.

[237] Markesinis (n 175) 80.

[238] BGH NJW 2001, 2798.

[239] Bachmann (n 6) 1035.

[240] ibid, 1034.

[241] Reka Pusztahelyi, 'Assumption of Risk and Ecpress Consent From the Viewpoint of Liability for Highly Dangerous Activities' (2017) 13 European Integration Studies 26; see also Ansgar Ohly, *Volenti non fit iniuria:Die Einwilligung im Privatrecht* (Mohr Siebeck 2002) 59. Note that the debate in regards to the legal status of consent which consists of 2 differing views are grounded on the legal question that, if

the former view that regards consent as a type of juridical act receives more acceptance and affirmation from German jurists compared to the latter.[242]

Therefore, if consent is deemed to be a juridical act, such consent would certainly fall under the scope of Sections 134 and 138 BGB. That is, if the consent of the victim is concerned with a matter in contravention of a statutory prohibition or public policy, such consent becomes void under Section 134[243] or Section 138[244] BGB, respectively.[245]

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consent is regarded as a type of juridical act according to the first view, why does consent have no need for compliance with the capacity provisions under the BGB? Alternatively, if consent is not a juridical act and thus does not fall within the scope of juristic acts and contracts law, there is also a question of what would be the applicable legal criteria or legal bases to regulate the use of the consent principle, or should the method of analogy be relied on in this case?; see Zimmermann (n 218) 9-10.

[242]See Bachmann (n 6) 1034; Zimmermann (n 218) 8-22; Sotthibandhu (n 21) 149.

[243] German Civil Code s 134: "A juridical act that violates a statutory prohibition is void, unless the statute leads to a different conclusion".

[244] German Civil Code s 138:

"(1) A juridical act which is contrary to public policy is void.

(2) In particular, a juridical act is void by which a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance".

[245] If one is in support of the second view, which deems the act of rendering consent to be a one-sided declaration of intention for the purpose of waiving rights protected by law, it would lead to the results that consent does not constitute a juridical act and therefore lies outside the scope of Sections 134 and 138 BGB. In any event, the author is certain that in German law, even though consent is not deemed as a juridical act, but this should not denote that people may give consent freely without being subject to any kind of legal regulations. In other words, the author views that, at least, the minimum criteria that operates as a rule of limitation towards the scope of rendering consent is the rule of public policy. This is because, consent contrary to public policy cannot make the unlawful act consented lawful; see Chantaraopakorn (n 163) 99 – 100. See also Supatcharin Asvathitanonta,

Noteworthily, the aim of statutory prohibition is not to directly bar certain types of contracts. Rather, it is to bar certain types of behavior or to prevent the occurrence of certain incidents.[246] In addition, a statutory prohibition shall be in the form of express provisions of law which may easily be understood from the language used on plain reading. Statutes prescribing certain acts to be illegitimate or stating that they cannot be exercised[247] are prime examples of a statutory prohibition within the meaning of Section 134 BGB. In some other cases, it may be a legal provision that expressly provides that any juristic acts contravening the statute shall be void.[248] In contrast, if a legal provision is merely *ius corgens* or relates to public policy or uses terms such as 'ought not,' these are not to be regarded as statutory prohibitions within the meaning of the law.[249]

Turning to the issue of juridical acts that are contrary to "public policy", it is evident that the law lacks a definition for the term. Nonetheless, the author understands that such avoidance by the law is intentional due to its abstract nature and constant change according to social dynamics. For this reason, it is rather difficult to accurately define the term and be inclusive of every act that concerns public policy.[250] Having mentioned so, the author has gathered some examples of juridical acts that are in violation of public policy, which may be relied on as guidelines by the court. These include acts through which one contracting party exploits the other's physical impairment or

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'Development of the Principle of Volenti Non Fit Injuria: A Study of Its Transplantation in Thailand' (LL.M. Thesis, Chulalongkorn University 2008) 32-35.

[246] Basil S Markesinis and Hannes Unberath, *The German Law of Contract: A Comparative Treatise* (Hart Publishing 2006) 242.

[247] Youngs (n 168) 381.

[248] Markesinis (n 246) 243.

[249] ibid, 241. See also Youngs (n 168) 381.

[250] Note that even if public policy had been defined by law, it would still be doubtful as to whether such definition reflects the true meaning of public policy, because the meaning of public policy inevitably changes through the passage of time; Markesinis (n 246) 248.

economic status, thereby causing the other party to bear more burden than the benefits receivable under the juristic act or contract.[251] In any case, apart from the juridical acts prescribed under paragraph 2, there are also other acts decided by the German court to be contrary to public policy. These may be categorized into 4 types according to a consistent series of German court decisions,[252] which the author wishes to touch upon briefly. Firstly, juristic acts in violation of the interests of one of the parties. Secondly, juristic acts in violation of the interests of the community at large. Thirdly, those violating the interests of a third party. Fourthly, other juristic acts which do not fall into any of the first three categories, but the German court does not allow for them to be legally binding as they may give rise to public disorder.

In conclusion, the principle of *Volenti non fit injuria* in German civil law may be limited. Nevertheless, the facts of each case must be considered thoroughly in order to determine whether the matter consented is prohibited by any relevant law, and in the instance that there is no express legal prohibition, whether the matter consented contravenes public policy. If any consent contravenes the express laws or public policy, such consent is deemed to be void and is thus prevented from being relied upon by a tortfeasor as a defense to discharge himself from liability.

3.3.3 Problem with consented residential eviction of tenant without due process in Germany

Under the German law on the hire of property, a lease agreement imposes on the lessor a duty to grant the lessee use of the leased property for the lease period. The lessor must deliver the leased property to the lessee in a condition suitable for use in conformity with the contract and maintain it in this condition for the lease

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[251] German Civil Code s 138 paragraph 2: "...In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance."

[252] Markesinis (n 246) 254 – 262; Teirahunt (n 100) 144-150.

period. On the other hand, the lessee is obliged to pay the lessor the agreed rent.[253] In addition, after the leased contract has been terminated, the lessee is obliged to return the leased property.[254] If the lessee, upon the end of the tenancy, rejects to return the leased property, the lessor has a right to claim damages from the lessee.[255]

In the case of a lease of immovable property, what legal measures can be taken by the landlord if the tenant rejects to leave the leased premises after termination of the lease? Could the landlord re-possess the property immediately by himself if, as same as Thailand, the landlord enters into a lease contract with the tenant stipulating a clause that reads, "upon the end of tenancy, the tenant allows the landlord shall be able to recover the possession of the leased property"? These facts raise a couple of questions: firstly, does the landlord have the right to retake his possession of the premise without a court order upon the end of the contract and the tenant's refusal to leave; and secondly, to what extent could the landlord rely on the tenant's consent allowing the landlord to personally enforce his right to evict the tenant without conforming to the due process of law?

For this particularly complicated issue, German law does an excellent job in answering the highlighted questions. Although Section 229 BGB generally affirms the right of any person to help himself (self-help) in certain situations, [256] the person must still use caution in enforcing said right because self-help, according to its nature, is deemed to involve the use of violence or force. While acting under self-help is not unlawful, nor does

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[253] German Civil Code s 535.

[254] German Civil Code s 546.

[255] German Civil Code s 571.

[256] German Civil Code s 229: A person who, for the purpose of self-help, removes, destroys or damages a thing, or a person who, for the purpose of self-help, arrests an obliged person who is suspected of flight, or overcomes the resistance to an act of an obliged person who has a duty to tolerate that act, does not act unlawfully if help cannot be obtained from the authorities in good time and there is a danger, without immediate intervention, that the realisation of the claim will be prevented or be considerably more difficult.

it incur any civil liability, a person may only exercise his right of self-help under the circumstance in which he is faced with peril, and help from the government cannot be reached.[257] Thus, it naturally follows that the use of force in the enforcement of one's rights without the authority or right to use it is unconditionally unacceptable.[258] Regardless of the landlord's reliance on the contract clause or the tenant's consent, or whether any of these facts actually exists, the landlord has no right to recover his possession of the leased property without filing a case to the court (also known as 'self-help' evictions), because in the German jurisdiction 'self-help' evictions are illegal.[259] It is also noteworthy to mention that another reason for the law to take such a legal position lies in Article 14 (1) of the German Constitution, which guarantees the right to property and the right of inheritance for all persons, so long as such rights are not limited by the laws.[260] Since it is interpreted by the German Constitutional Court (*Bundesverfassungsgericht*: BVerfG) that this right to property extends not only to the right of ownership but also to the tenant's right of possession,[261] it may be deduced that the tenant's possession of the premises shall be maintained and protected from the landlord's arbitrary recovery of possession of the premises.

In regards to the eviction process, the German Code of Civil Procedure (*Zivilprozeßordung*; *ZPO)* has laid down a set of procedural requirements to force the landlord to bring a case into the justice system, with the intent to preserve the tenant's rights.[262] In short, the landlord cannot simply evict the tenant out of the leased premise by himself, according to the due process of law. Rather, he or she must comply with a

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[257] Note that Section 299 BGB is considered as the provision relating to public policy (jus cogen); see Harm Peter Westermann and others, *BGB: Kommentar* (Verlag Otto Schmidt 2014) 662.

[258] ibid.

[259] BGH NJW 2010, 3434.

[260] See The Basic Law of the Federal Republic of Germany Article 14 (1).

[261] BVerfG 2019, 1 BvL 1/18.

[262] Wolfgang Wurmnest, *Introduction to German Tenancy Law*, (Max-Planck-Institut für ausländisches und internationales Privatrecht, Hamburg) 16.

number of procedural requirements under the law. By way of illustration, in the event that the tenant disputes the contract's end or simply does not move out of the leased premises within the vacating time, the landlord may only request the local court (*Amtsgericht*) to issue an eviction order. The court will examine whether the end of the lease complies with the substantive and procedural requirements. In this respect, the landlord must prove to the court that the tenant has legal reasons for vacating from the premises.[263] If the court views that the lease's termination or expiration is justified, an eviction order will be issued.

According to Section 721 ZPO, the court is entitled to allow the tenant a reasonable eviction period in a maximum of one year. This is clearly a fairly generous provision and demonstrates high levels of social protection available to German tenants. Within this period, the tenant has the opportunity to find adequate alternative accommodation and make other provisions as they deem necessary.[264] In determining the eviction period, the court will again balance the interest of the landlord and the interest of the tenant. The court has to pay attention to all the circumstances of the case, namely the availability of suitable accommodation,[265] the tenant's physical and mental impairments,[266] the terms of the tenancy agreement,[267] the tenant's conduct after the termination of the lease agreement,[268] and the seriousness of the anti-social behavior.[269]

In addition to Section 721 ZPO, Section 765a ZPO is equally worth mentioning in terms of protection from the execution of a court order. Under this section, the tenant is given a right to submit a request to the court to suspend, prohibit or withdraw

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[263] Knut Unger, *Housing Rights and Real Estate Violence in Germany*, Witten Tenants Association (2006) 5.

[264] German Code of Civil Procedure s 721.

[265] Amtsgericht Berlin-Pankow/Weißensee 2010, BecksRS 30713.

[266] Amtsgericht Heidelberg 2011, BecksRS 09687.

[267] Amtsgericht Karlsruhe 2012, Application No 6 C 387/12.

[268] Amtsgericht Bremen 2004, BecksRS 08315.

[269] Amtsgericht München 2005, Application No. 461 C 18919/05.

the enforcement of the eviction order following the analysis of evidence and the court's decision to evict the tenant. Particularly, the court has displayed a tendency to accept a request for temporary suspension of the eviction order under the very special circumstances that the eviction will result in unreasonableness that violates public morals (*contra bonos mores*).[270] Such special circumstances may be, for instance, where the tenant threatens to commit suicide,[271] or where the eviction is several weeks before the end of the academic year,[272] or where the eviction will result in the homelessness of disabled children,[273] among others.

Therefore, it can be concluded that whether or not the landlord obtains the tenant's consent carries no weight, as he has no right to evict the tenant without an eviction order from the court either way. If the landlord wishes to repossess the leased premise, he must conform to various procedural requirements under Civil Procedure law by requesting the court to issue an eviction order. Setting this aside, the landlord may also claim damages if the tenant refuses to leave the premises and continues to occupy the area after the lease contract has been terminated or expired.

Where the landlord fails to file a petition to the court and proceeds to remove the tenant and his property by himself without a proper eviction order, the landlord would be committing a tort under 823 paragraph 1 BGB, and such an illegal act may subject him to a substantial claim for damages.

In one German court decision, the tenant disappears from his apartment room for a long time without paying many months' rent. In response, the landlord exercised his right under the contract to terminate the lease and proceeded to re-possess the room arbitrarily by himself. The court concluded that, even though the tenant could not be found and was out of reach, the landlord cannot evict the tenant by himself.

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[270] German Code of Civil Procedure s 765 a.

[271] BGH 2010, BecksRS 27194.

[272] Oberlandesgerichts Köln 1995, Neue Juristische Wochenschrift-RR 1163.

[273] Landgericht Magdeburg 1995, BecksRS 3094661.

Instead, he must file a petition to the court for the issuance of an eviction order. The landlord's conduct was unlawful, and the landlord himself shall be liable to pay damages to the tenant.[274]

Turning to the question of "to what extent can the landlord rely on the tenant's consent, which allows the landlord to bypass the due process of law on eviction, to discharge himself from tort liability?" As previously mentioned, the principle of consent in tort has no regulatory body of legal provisions of its own but is only seen applied as an exception to tort liability in some cases by the court. Nonetheless, since consent is deemed as a juristic act in German law, consent shall be within the confines of Sections 134 and Section 138 BGB. To reiterate, the consent of the victim shall be for a matter which is not contrary to statutory prohibition or public policy. Otherwise, such consent is void and cannot be relied on by the tortfeasor in his attempt to discharge himself from tort liability.

Regarding the statutory prohibition, German law does not have a specific branch of law that pertains to unlawful eviction like the United Kingdom's Protection from Eviction Act 1977. As far as the author's research is concerned, no legal provision that expressly prohibits any act which amounts to an unlawful eviction has been found. Aside from this, a theoretical explanation for a void act under Section 134 BGB in respect of the tenant's consent for the landlord to bypass the necessary proceedings for eviction is also absent from German law texts, theses, law articles, and even court judgments. For these aforementioned reasons, the author is of the view that, in Germany, consent from the tenant is not contrary to any statutory prohibition, as no legal provision that expressly prohibits any act which amounts to an unlawful eviction has been found. All things considered, it is safe to conclude that the tenant's consent cannot be void under Section 134 BGB.[275]

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[274] BGH 2010, Az. VIII ZR 45/09.

[275] Please note that while Section 229 BGB exists as ius cogen and is concerned with public policy, as mentioned earlier, provisions of law that are ius cogens, relating to public policy, or those containing

At the same time, whether or not the consent may be void under Section 138 BGB is another issue altogether. As previously emphasized, this section of law concerns juristic acts that have become void as a result of their contrariness to German public policy. Besides the juristic acts containing the characteristics of one contracting party exploiting the physical impairment or economic status of the other, thereby causing him to bear more burden than the benefits receivable under the juridical act or contract as prescribed under paragraph 2, there are also other acts decided by the German court to be contrary to public policy, including juristic acts that violate one party's interests, or the interests of the community at large, or the interests of a third party, and other juristic acts which do not fall into any of the aforesaid types, but the German court does not allow for them to be legally binding due to their possibility of causing public disorder. An example of these other acts is any juristic act that has a tendency to jeopardize the foundation of political administration and economy of Germany.[276]

So, if we consider Article 14 (1) of the German Constitution and procedural rules prescribed in the German Code of Civil Procedure, together with the previously discussed German court decisions, from the prohibition of arbitrary eviction, the procedural requirements that enforcement of eviction be done through court proceedings, the hearing of evidence from both parties, or the 1-year eviction period which

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soft language like 'ought not,' are not considered to be at the level of a statutory prohibition within the meaning of Section 134 BGB. According to its interpretation, a statutory prohibition must clearly express the acts to be prohibited or considered unlawful or those that cannot be carried out. Additionally, such a provision may state clearly that acting in contravention with its foregoing provisions will render the act void. Due to the absence of these qualities, Section 229 BGB does not constitute a statutory prohibition: see Youngs (n 168) 381; Markesinis (n 246) 241 and 243.

[276] Kent Murphy, 'The Traditional View of Public Policy and Ordre Public in Private International Law' (1981) 11 Ga J Int'l & Comp L 598.

gives the tenant an opportunity to find alternative accommodation[277] to the authority of the court to suspend the execution of an eviction order when such an eviction leads to a very special circumstance in violation of public morals (*contra bonos mores*), we would see that these legal measures implemented for protecting the rights of the tenants reflect clearly the intent and purpose of German law that derived from the right to housing. To be more exact, the intent of the law reflects the concept of human rights in tenancy, which is affirmed in the Constitution of the country, for the protection of tenants against unlawful and arbitrary evictions, as well as homelessness that may be faced by those wrongly evicted.[278] Essentially, it is to prevent the landlords from easily committing torts against the rights of the tenants. That is, the human rights of the German tenants are guaranteed by the justice system of the country, making this kind of human rights protection the most effective. This particular aspect of German law resembles the objects and purpose of the Protection from Eviction Act 1977 of the United Kingdom, which will be explained later on in this study.[279]

On top of the protection of human rights in a tenancy, which has been explained in terms of legal concepts already, another reason that the court does not allow for arbitrary evictions by the landlord without due process of law is the reason of the economy. This is because the German rental real estate market possesses a substantial economic value.[280] As evident in 2018, Germany was a member country of the European

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[277] Michel Vols and Julian sidoli del ceno, 'Human Rights and Protection against Eviction in Anti-social Behaviour Cases in the Netherlands and German' (2015) 2 European Journal of Comparative Law and Governance 177.

[278] Padraic Kenna and Sergio Nasarre-Aznar, *Loss of Homes and Evictions across Europe: A Comparative Legal and Policy Examination* (Edward Elgar Publishing 2018) 122.

[279] Vols (n 277).

[280] The high percentage of a rented property can be explained on various grounds: Firstly, it seems that a large number of people prefer to rent rather than to buy accommodation. Secondly, despite rent control regimes and notice protection, private investments in the housing market still seem to pay off

Union that displayed the highest number of people residing in rental houses; almost one half of the total population (49%) were residential tenants.[281] On account of this, if the government allowed for the landlord to evict the tenant arbitrarily without the court's intervention, this would certainly have had a negative impact on the confidence of the consumers in the market, as well as placing unnecessary worries on the tenants that they might wake up one day to find themselves in a situation that might be dangerous to themselves, their property, and their family as a resulting of the unlawful eviction by the landlord. Eventually, said events would have led to a large-scale devastating impact on the national economy.

Hence, the author is of the opinion that, even though the tenant's consent allowing the landlord to personally enforce his right to evict the tenant without an eviction order is not contrary to a statutory prohibition pursuant to Section 134 BGB, such consent is still deemed to be in violation of public policy. Precisely, consenting to an unlawful eviction constitutes a consent that goes against the human rights of the tenant, that is, the right to housing, which is an important right under the German Constitution and the procedural rules under the German Code of Civil Procedure. At the same time, such consent also destroys the trust and confidence of the consumers, as well as causing a feeling of unease to the tenants in the rental market, ultimately leading to a negative impact on the German rental housing market. In light of these events, the author views that perhaps this kind of consent is adjudged contrary to public policy by the German courts because it is consent that has a tendency to jeopardize the foundation of society and economy of Germany as a whole. Consequently, the consent becomes void by virtue of Section 138 BGB. Once the consent is rendered void by operation of the law,

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and, therefore, many investors offer the house for rent; see Johann Eekhoff, *Wohnungspolitik [Housing Policy]* (Mohr Siebeck 2002) 41.

[281] Statistisches Bundesamt, '14% of Population Living in HouseholdsOoverburdened by Housing Costs' (*Statistisches Bundesamt,* 2019) <https://www.destatis.de/Europa/EN/Topic/Population-Labour-Social-Issues/Social-issues-living-conditions/HousingCosts.html> accessed 2 February 2021.

the landlord may not possibly rely on such consent of the tenant as a defense to deny his own liability in tort. The landlord shall therefore be liable to make compensation to the tenant for the damage arising from his unlawful eviction pursuant to 823 (1) BGB.

Further, it may be noticed that another imperative reason for which the law affords more attention to the protection of the tenant's rights than it does the landlord's lies in the Theory of Eviction Control. The theory perceives that, even though the landlord suffers damage to some degree when the tenant continues to reside in the premises, the expenses that may be incurred from being arbitrarily evicted would still be more substantial that it topples over the damage suffered by the landlord. Hence, eviction control is deemed necessary by the law.[282]

3.4 Tort and Volenti non fit injuria in English law

3.4.1 Tort in English law

Unlike the Thai system, since the legal system operating in England is a common law system, most laws of torts were entirely developed by the common-law courts through established series of precedents. Although written law, such as statutory acts, does exist, they are very little in number and are only applied to specific cases. As a result, in order to fully grasp the concept of tort law in England, the study of the English court decisions is vital.

In the English jurisdiction, there exist two kinds of torts: general liability and strict liability torts. General tort liability is divided into negligent torts and intentional torts. The in-depth explanation for these types of torts is provided in greater detail in the following paragraphs. When it comes to the full understanding of the core concept of English tort liability, the concept of negligent torts is a necessity. However, this does not mean that intentional torts are not. In fact, intentional torts are also important in that

[282] Stefan Homburg, 'An Analysis of the German Tenant Protection Law' (Jun. 1993) 149 Journal of Institutional and Theoretical Economics (JITE) 465.

they are extremely specific to a certain set of facts. For this reason, it could be said that negligent torts have a broader, more general scope of application. Nevertheless, the tort of negligence is not to be mistaken for Thai's or German's general tort liability. This is because, even though they are quite similar in some ways, the tort of negligence is regarded as its own category of tort under English law.

In brief, intentional torts were divided into many sub-categories, each suitable for different instances. Intentional torts include, *inter alia*, defamation, trespass, nuisance, liability for animals, employers' liability, and product liability. Both intentional torts and negligent torts require some fault on the part of the tortfeasor. In the case of strict liability, however, the law sometimes requires the tortfeasor to compensate for the damage caused even in events where the tortfeasor had not acted in negligence nor with intention.

Like the Thai system, in order to prove general tort liability, there are a set of basic legal elements that the injured person or victim in a tort suit must acquire evidence for to be presented to the court. These elements are presented in the following structure:

Act (or omission) + Causation + Fault + Protected interest + Damage = Liability.[283]

Factually, it is safe to state that the basic structures for general tort liability of most countries are similar to the one above. Even the general public could know and understand that the structure of tort liability, at the bare minimum, consists of the defendant's act or omission. Besides the act, there must be some sort of damage to the Plaintiff, which must be attributable to the tortfeasor's conduct, and must be a kind of damage that would impose legal liability on the wrongdoer.

Moreover, as same as the purpose of Section 420 CCC, which is to protect the life, body, health, liberty, property, or any right of a person, the English tort law also has a purpose of protecting personal security and property interest, as well as

[283] John Cooke, *Law of Tort* (9 edn, Pearson Longman 2009) 3.

against economic loss. The only difference is the aforesaid purpose of English tort law is not expressly specified in an express legal provision the way Section 420 CCC is.

Therefore, to easily understand the concept of tort liability under English law, the author wishes to explain the concept of general tort liability, namely negligent torts and the tort of trespass (one part of the intentional torts),[284] briefly in this independent study.

3.4.1.1 Negligent torts

As mentioned above, negligent tort, also known as the tort of negligence, is considered a significant part of studying the core of the tort liability concept. Throughout the 19th century, the English court attempted to find and establish a liability base in novel contexts to apply with various cases that arose from the rise of industrial and urban society, causing there are many interesting principles regarding tort liability that were created by the court. Besides, some principle on the tort of negligence was brought or borrowed to apply with other tort liability cases. Therefore, it is not a surprise that the tort of negligence will be popularly explained in the first chapter by various law books of England.

Generally, if the tortfeasor negligently commits a tort, he shall be liable to compensate for the damage suffered by the injured person. However, before the injured person receives such legal remedy from the tortfeasor, the injured person has a

[284] Please note that since the legal system operating in England is a common law system, the responsibility of establishing various legal liabilities lies primarily with the court. When a person has been injured by a tortfeasor in any manner and brings an action against the tortfeasor, the court has the power to impose legal liability on the defendant based on the circumstances surrounding the case. Therefore, it is no surprise how the principal liability of the intentional torts gave rise to many court decisions, or sub-categories, to be more exact. To put it simply, intentional torts have been divided into a number of sub-categories depending on different facts and circumstances. These include the tort of defamation, the tort of trespass, the tort of nuisance, tortious liability for animals, employers' liability in tort, and product liability in tort. Due to a number of limitations, however, the author wishes only to elaborate on the tort of trespass for answering the main issue in this independent study.

duty to first prove to the court that, on the basis of certain elements having been satisfied, the tortfeasor shall be liable in accordance with the injured person's claim. Fundamentally, there are three elements to the tort of negligence. Each of these must be presented before the court in order to successfully establish the tort of negligence:

1) Duty of care
2) Breach of the duty
3) Causation and Remoteness of damage

(1) Duty of care

Firstly, it must be proven that the tortfeasor has a duty of care. In the renowned *Donoghue v. Stevenson*,[285] the court introduced the concept of duty of care by embracing the idea of a general duty to take reasonable care to avoid acts or omissions which one could reasonably foresee would likely injure their neighbor. Such a principle was known as the "Neighbour Principle", which later became law. The essence of the said principle is the idea that you are to love your neighbour and must not injure your neighbor; because good neighbours do not harm each other. The principle rules that one who fails to take reasonable care and consequently causes an injury to another, who are so closely and directly affected by his negligent act, would be liable in tort.

Despite the previous statement, the principle does not impose the duty of care on every person. To answer the question as to who would have the duty of care, the court in *Anns v Merton London Borough Council*[286] set up "a two-stage test", originally consisting of the proximity principle and the foreseeability principle in order to solve the legal issue. Later, the two-stage test was expanded by the court in *Caparo Industries plc v. Dickman*,[287] resulting in a new rule called the "three-fold test" being established. The three-fold test requires that the tortfeasor must be able to reasonably foresee that his act or omission would be likely to injurious to another and that there is

[285] [1932] AC 562.

[286] [1978] AC 728.

[287] [1990] 2 AC 605.

sufficient proximity between the person injured and the tortfeasor. In simpler terms, the person injured must be proximate to the tortfeasor in the sense that the tortfeasor can contemplate that such person injured would be directly affected by his conduct. In any event, the application of this rule must be within the bounds of fairness and reason: whether the law should impose a duty of care on such person given the circumstances he was under.

For instance, in *Ross v. Caunters*,[288] the defendant was a lawyer hired to draft a will and deliver it to his client. However, the defendant forgot to inform his client of a law that prohibited the spouse of the beneficiary from being a witness to the will. Later, the will was complete and was sent back to the lawyer, wherein one of the witnesses' signatures was that of the spouse. The lawyer failed to detect this error. Two years later, his client passed away. The beneficiary sued the lawyer for damages from the will. The defendant contended that he did not owe a duty of care to the beneficiary, who was the third person. However, the court held that a lawyer assigned to carry out a transaction for the benefit of a third person owes a duty of care to that third person as well. This is because the third person was likely to be affected closely and directly by the act or omission of the lawyer, and the lawyer, due to the proximate relationship shared with the beneficiary, could have reasonably foreseen that the beneficiary would have been so affected.

(2) Breach of duty

Turning to the second element, this element is the heart of negligence litigation because it shows a fault on the part of the tortfeasor. Upon successful substantiation by facts that the tortfeasor owed the injured person a duty of care, the injured person must prove that the tortfeasor breaches his duty. To determine a breach, the court has laid down two steps: first, the court considers whether the conduct of the defendant is in accordance with the proper standard of care, and second, whether the conduct breaches his duty or not.

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[288] [1979] 3 ALL E.R. 580 (Ch.D.).

In regards to the first step, the court generally considers a standard commonly referred to as the standard of care of the "reasonable man" (once known as the "reasonable person"),[289] which had been laid down in *Blyth v. Birmingham Waterworks Company,* [290] where the court described the standard of the reasonable man in the following terms:

"...Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

Accordingly, if the tortfeasor is adjudged that he failed to act reasonably given his duty of care, it means he did not act in the same way as the reasonable person would have if given the same situation.[291]

As for the second step, although the tortfeasor has a duty to be subject to the standard of care of a reasonable man, the courts will often consider other factors in order to assess the balance between the risk level and the breach of duty of the defendant.[292] These factors are the probability[293] and seriousness of harm occurring,[294] the utility of the tortfeasor's activity, [295] and the cost of precautions of the tortfeasor.[296]

It is important to note, however, that even though the standard of care will be brought for analysis of a breach of duty in every negligent tort case, it is

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[289] John Gardner, 'The Many Faces of the Reasonable Person' (2015) Law Quarterly Review 1.

[290] [1856] 11 Ex Ch 781.

[291] FindLaw's team, 'Negligence and the 'Reasonable Person' (November 30, 2018) <https://www.findlaw.com/injury/accident-injury-law/standards-of-care-and-the-reasonable-person.html> accessed 6 June 2020.

[292] *Bolton v Stone* [1951] AC 850.

[293] The reasonable man is not expected to guard against unknown risk.

[294] *Roe v Minister of Health* [1954] 2 WLR 915.

[295] *Watt v Hertfordshire County Council* [1954] 1 WLR 835.

[296] *Latimer v AEC Ltd* [1953] AC 643.

not necessarily always the case that every person would be subjected to the same reasonable person standard. Precisely, the reasonable man standard is not applied by the courts in all cases, as this could lead to unfairness. To solve such problems, the law specifies special standards that situate levels of care differently from that of the reasonable man standard. These so-called special standards are reserved for certain categories of persons, such as “a reasonable child standard” or “a reasonable professional standard.” This is owing to the disparities between each type of person’s capability, age, intelligence, and experience. A reasonable man should not be expected to exercise the same standard of care as an expert when managing or doing skilled work.[297] Children are probably expected to be less careful than adults but will be judged based on a reasonable child of the same age, intelligence, and experience.[298] This is because children are limited in experiences and are yet to be conscious of the ramifications of their actions as adults. In addition, persons who are sick and incompetent would not be expected to be as prudent as those who are well and healthy and thus would not be judged on the basis of the same standard of care.[299]

In the case of the professionals, all professionals who possess certain special skills or expertise, including those who are still in training[300] and those who had finished training, are expected to exercise the high standard of care as same as others at a similar level within the same field.[301] This standard is also known as "a reasonable professional standard”. In practice, the courts display a strong tendency to refer to the standards and guidelines as specified by the profession and supported by a responsible body of opinion.[302] The tendency entails that as long as a professional act in compliance

[297] *Phillips v Whitely* [1938] 1 All ER 566.

[298] *Mullin v Richards* [1998] 1 ALL ER 920.

[299] Harpwood (n 9) 139.

[300] *Nettleship v Weston* 1971 3 All ER 581 CA.

[301] Harpwood (n 9) 143.

[302] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 583.

with the common practice of their own profession, it would serve as strong evidence that they are negligent in carrying out their tasks.[303]

To conclude on this point, the general principle regarding the duty of care obliges a person to exercise a reasonable level of care as expected of them in the conduct of their activity.[304] As previously mentioned, this level of care that is to be exercised could be different for each person, depending on their various circumstances. Essentially, the law expects the tortfeasor to exercise the same standard of care as others who are in the same circumstance or field of work as them. If the tortfeasor fails to do what is necessary to be carried out in order to prevent harm to the injured person, and such a task is expected of him in light of his duty of care, the tortfeasor would then be breaching his duty of care.

(3) Causation and Remoteness of damage

Causation is the last element in negligent tort and is an element that is common to all three kinds of torts (i.e., strict liability, negligence, and intentional wrongs). In this regard, the injured person must demonstrate that his loss, damage, or personal injury was caused, whether directly or indirectly, as a result of the tortfeasor's wrongful act. In order to determine the existence of a causal relationship between the act of the tortfeasor and the eventual damage suffered by the injured person, there are two significant types of "causes" that the court considers in its assessment.

If the damage that the injured person suffered is a direct result of the tortfeasor's act, this is regarded as "a direct cause" or "*causa causans*".[305]

In some scenario, it is also possible that the incurred damage may not be the result of the tortfeasor's negligence alone due to the occurrence of several

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[303] Andrew Grubb and Judith Laing and Jean Mchale, *Principles of Medical Law* (3 edn, Oxford University Press 2010) 197.

[304] Lawteacher.net, 'Breach of Duty Lecture' (May 2020) <https://www.lawteacher.net/modules/tort-law/negligence/breach-of-duty/lecture.php?vref=1> accessed 2 February 2021.

[305] An immediate cause without which the event would not have occurred.

other intervening causes in the facts, such as a third person's act, force majeure, or other surrounding circumstances that led to the eventual damage. A clear illustration for this could be an instance where the tortfeasor's negligent act and another contributing but unrelated event combine to worsen the victim's losses. This contributing event or cause is known as an "intervening cause" or "*novus actus interveniens*".[306] In the case where there is such an intervening cause, it may be possible for the tortfeasor to sever the causal link between their action and the effect incurred by the injured person. By successfully proving that an intervening cause was an important major part in causing the injured person's eventual damage, the tortfeasor would not be found liable even if he had acted negligently. Such a situation is referred to as "breaking the chain of causation."[307]

Generally, the court will adopt the principle of "but-for test" to determine whether the act of the tortfeasor and the damage suffered by the injured person are related in terms of cause-and-effect. This 'but-for' test is the standard test for factual causation. The test asks, "but for the existence of the tortfeasor's wrongful act, would the damage have occurred?" In simpler terms, would the injured person have suffered the harm or damage anyhow if the act in question had not occurred? If the answer is yes, then the tortfeasor did not cause the person's injury and will not be held liable in tort. Noteworthily, the but-for test is known in another name in the Thai legal system as "the Condition Theory".[308]

In the event that the damage is a direct and normal result of the defendant's act, the court would have no problem finding causation. For example, Mr. A shot Mr. B, and later Mr. B died. In this scenario, when applying the 'but-for' test, it is relatively easy to answer that Mr. A must be the one who is responsible for Mr. B's death. This is because if Mr. A had not shot Mr. B, Mr. B would not have died. The test denotes that the act of shooting Mr. B by Mr. A is the direct cause for Mr. B's death.

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[306] There are new intervening causes which may contribute to the damage.

[307] Harpwood (n 9) 165.

[308] Vachanasvasti (n 60).

On the contrary, if there were intervening causes apart from the defendant's act, which later combined and caused the eventual death of the victim, the court would certainly find it difficult to consider whether the tortfeasor shall be liable for all of the damage that occurred in the end. Originally, it was held in *Re Polemis & Furniss, withy & Co.*[309] that, if the damage was a consequence of the culpable act, the tortfeasor would be liable for all damage, irrespective of whether the extent of the damage was foreseeable. In this context, it is apparent the English court merely applied the 'but-for' test for deciding the defendant's liability. The defendant was held to be liable for all of the incurred damage, despite the eventual damage being unforeseeable and contributed towards by other intervening causes as well.

Later, the judgment of *Re Polemis & Furniss, withy & Co* received much criticism from many parties. As a result, the court introduced a new rule in *The Wagon Mound (No.1)*[310] that a person shall only be liable in tort for damage resulting as a reasonably foreseeable consequence of his negligent act.[311]

It is important to note that not only does the injured person need to consider the but-for test when proving causation, but the injured person must also look at the remoteness of the damage caused by the tortfeasor, which is known as the remoteness of damage principle. The principle imposes a duty on the injured person to prove that the damage he suffered is not too remote from the tortfeasor's negligence. Otherwise stated, the injured person is required to prove to the court whether the damage he suffered was foreseeable and why. If he fails in doing so, the tortfeasor who began the chain of events may no longer be considered responsible for the damages to the injured person because the tortfeasor's original action is no longer the proximate cause of the damage. Such failure would ultimately lead to the breaking of the chain of causation

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[309] [1921] 3 KB 560.

[310] *Overseas Tankship (UK) Ltd v Morts dock and Engineering Co Ltd.* [1961] AC 388.

[311] Roger ter Haar QC and Marshall Levine and Anna Laney, *What are 'Intervening' and 'Superseding' Causes in a Personal Injury Case?* (3 edn, Informa Law 2016) 64.

between the tortfeasor's act and the damage suffered by the injured person, thereby discharging him from any liability.

Noteworthily, the Causation principle and the Remoteness of damage principle as adopted by the English legal system bear similar concept and adapting guidelines to the rule of causation in the Thai legal system.

3.4.1.2 Tort of trespass (Intentional Torts)

The torts of trespass are different from negligence acts in that they involve direct and intentional actions. The word "trespass" is defined as "an unlawful act committed on the person or property of another person; in particular, unlawful entry into the immovable property of another person."[312] In short, a trespass is an unlawful act committed against the absolute right of another. It is an area of criminal law or tort law broadly divided into three types, namely trespass to the person, trespass to land, and trespass to goods that can be presented:

3.4.1.2.1 Trespass to the person

Liability for trespass to a person is founded on the idea of personal security and the interest to defend people's freedom from every kind of violence and bodily injury. As a result, there are three main wrongs for this particular type of trespass, including battery, assault, and false imprisonment.

The battery is defined as an unlawful and physical touch or act, such as physical abuse. For example, a person who pushes his friend's back, causing his friend to get hurt,[313] or a person who kisses a woman without her voluntary consent.[314]

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[312] Trespass shall apply to relatively gross invasions by tangible objects namely, persons, cars, buildings, or the like but not include to indirect and intangible interferences such as noise, odor, smoke, or so forth. This because those shall be subjected to the Tort of Nuisance; see Thomas W. Merrill, 'Trespass, Nuisance, and the Costs of Determining Property Rights' (1985) 14 The Journal of Legal Studies 14.

[313] *Wilson v Pringle* [1986] 2 All ER 440.

[314] *R v Chief Constable of Devon and Corn well* [1982] QB 458.

In contrast, assault in tort law refers to situations in which a person "causes another person to apprehend or fear the infliction of immediate, unlawful force on his person."[315] Thus, a mere word or threat may constitute an assault because assault is based around communication. Even silence may also constitute an assault.[316]

As regards false imprisonment, such refers to the restraint of others without lawful justification, thereby restricting his freedom of movement. The essential element of false imprisonment, as evidently stated, includes loss of freedom. More importantly, the victim is not legally required to be aware they are being falsely imprisoned.[317]

With these in mind, it is apparent that trespass to the person is a group of tort liabilities that significantly aims to protect the life, body, mind, and freedom of people.

3.4.1.2.2 Trespass to land

Trespass to land is an unjustifiable and wrongful interference with the possession of the land. The principle of the "trespass to land" originated from the dictum "*cuius est solum, eius est usque, and coelum et ad infernos*", which means that any person who owns the land owns it all the way up to heaven and down to hell.[318] For determining the liability of trespass to land, there are four important elements which are presented in the following:

1) Direct interference
2) Voluntariness

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[315] *Collins v Wilcock* [1984] 1 WLR 1172.

[316] *R v Ireland* [1998] AC 147.

[317] *Murray v Ministry of Defence* [1988] 1 WLR 692.

[318] This principle is a principle of property law that was established on the concept that property owners have rights to not only to the plot of land itself, but also the air above and the ground below. This principle is often referred to in its abbreviated form as the "Ad Coelum" doctrine; see Yehuda Abramovitch, 'The Maxim "Cujus Est Solum Ejus Usque Ad Coelum as Appled in Aviation' (1962) 8 McGill Law Journal 247-248.

3) Awareness is not necessary

4) No harm is required

(1) Direct interference

Firstly, there must be some direct interference. Encroaching on land by leaning on a wall[319] or walking across the field as well as refusing to leave when permission to be there has been withdrawn [320] are all instances of direct interference.

(2) Voluntariness

Importantly, the interference must be voluntarily committed by the alleged tortfeasor. The alleged person would not be held liable if he was involuntarily carried into another person's land by force.[321] In this context, the individual who carried the alleged person over will be the one who incurs liability for trespass.

(3) Awareness is not necessary

Although trespass to land is an intentional tort, it does not mean that such liability always requires the defendant's intention to trespass. To be more precise, trespass caused by the mistake of the tortfeasor who enters the injured person's land under the false belief that entry is authorized, or even believing honestly and reasonably that the land belongs to him, is still regarded as an act of trespass for which the tortfeasor shall be liable.[322]

(4) No harm is required

As same as trespass to the person, trespass to land has the purpose of protecting the rights of others. This type of trespass is actionable without the

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[319] *Gregory v Piper* [1829] 9 B & C 591.

[320] Harpwood (n 9) 232

[321] Smith v Stone [1647] Style 65.

[322] *Conway v George Wimpey & Co Ltd* [1951] 2 KB 266.

requirement to prove any damage exists.[323] In precise terms, the very unlawful entry onto another's property itself is a trespass, irrespective of whether any harm has been done to the property. Alternatively, even a person who has a right to enter the land of another may become a trespasser by committing wrongful acts after entry.

In addition, in England, only a person who has exclusive possession (actual possession) of the land at the time of the infringement can sue for trespass.[324] Therefore, if the landlord has delivered his possession over the land to his tenant, the landlord would lose his standing to sue, provided that the trespass itself is not injurious to his reversionary interest.

To sum up the above points, trespass to land involves a direct and intentional act, such as wrongful entry into the land possessed by someone else, an act of remaining on one's land without permission or when the permission granted is later withdrawn,[325] an act of placing an object on the land,[326] including throwing any object on the land as well as constructing a building in the air space over the land of another,[327] digging a tunnel under the land[328] or doing anything on the land without lawful justification. It is thus clear that the tort liability for trespass to land is essentially determined from a violation of one's possessory right as opposed to the right of ownership over the land.

3.4.1.2.3 Trespass to the goods

Lastly, trespass to goods is defined as "direct and immediate interference with personal property belonging to another person". Most of its elements are the same as the trespass to land and are covered in the Torts (Interference

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[323] Kirsty Horsey and Erika Rackley, *Tort Law* (3 edn, Oxford University Press 2013) 525.

[324] David Elvin and Jonathan Karas, *Unlawful Interference With Land* (Sweet&Maxell 1995) 7.

[325] *Hey v Moorhouse* [1839] 6 Bing NC 52.

[326] *Holmes v Wilson* [1839] 10 Ad & El 503.

[327] *Kelsen v Imperial Tobacco Co* [1957] 2 QB 334.

[328] *Bulli Coal Mining Co v Osborne* [1899] A.C. 351.

with Goods) Act 1977. This interference comprises, *inter alia,* taking the goods from another, damaging them, breaking them, and even simply moving them from one place to another.

All things considered, the above makes up the general guideline of tort liability in England. Noticeably, each tort liability base has different rules and elements. Despite such differences, all of the tort liabilities all have the common purpose of protecting the interests of the injured person and recovering damage that the plaintiff suffered from the tortfeasor's wrongful act.

3.4.2 Volenti non fit injuria in English law

As reiterated several times, it is the general rule of tort law that the tortfeasor's wrongful act gives the injured person the right to bring an action to court for compensation or restitution. Nevertheless, certain situations will discharge the tortfeasor from any liability arising from his action. These situations are known as "the defense of the tortfeasor" or "general defense", which may be invoked against tort liability. In the English legal system, there are a number of exceptions or defenses that the tortfeasor can plead to the court. These include Volenti non fit injuria, Plaintiff the Wrongdoer, Private Defense, Necessity, Inevitable Accident, Vis Major i-e- Act of god, Mistake and Statutory Authority.

The *Volenti non fit injuria* or the defense of consent is one of the many general defenses in tort. This doctrine is a rule of law that pertains to the injured person (the plaintiff)'s own act of consenting to the wrongful act of the tortfeasor (the defendant). The defense reflects the normal people's common-sense notion that "one who has accepted or assented to an act being done towards him cannot, when he suffers from it, complain about such an action as a wrong thing."[329] It is only sensible that one who knows of a hazardous consequence arising from the act or omission of the tortfeasor, and realizes

[329] Donal Nolan and Mark Lunney and Ken Oliphant, *Tort Law: Text and Materials* (6 edn, Oxford University Press 2017) 288.

the risk therefrom, and voluntarily put himself to it, is precluded from recovering for damages which result from such voluntary action. In simple terms, anybody who voluntarily accepts a risk has no right to bring a case against his wrongdoer because the law takes it for granted that there is no damage caused.

3.4.2.1 Application of Volenti non fit injuria in English tort cases

In a tort case, the principle of *Volenti non fit injuria* will be invoked as a defense once the court concludes the tortfeasor's act to be a tort. When the injured person brings an action against the tortfeasor for a violation of his legal right, and the injured person (the plaintiff) successfully proves the essential elements of a tort, [330] the tortfeasor (defendant) who wishes to defend himself may invoke the *Volenti* defense for escaping his liability. It is important to note, however, that the tortfeasor who invokes such a defense would bear the burden of proof in showing that his *Volenti* defense factually exists.[331]

Most importantly, in order for the tortfeasor to avail himself of *Volenti non fit injuria*, the tortfeasor must first consider whether the consent given by the injured person meets its requirements. Even upon the fulfillment of said requirements, the court considers additional legal limitations that may prohibit the tortfeasor from calling upon and benefitting from the consent granted.[332]

3.4.2.2 Requirements under Volenti non fit injuria

In the defense against tort liability, the tortfeasor bears the duty to prove three essential elements under the law. These include:

1) Agreement
2) Voluntariness
3) Knowledge

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[330] ibid.

[331] *Freeman v Home Office* (No.2) [1983] 3 All E.R. 589.

[332] Noticeably, this view towards the principle of *Volenti non fit injuria* under English law closely resembles the concept of justifiable acts in the Civil and Commercial Code.

(1) Agreement

Consent can be granted either expressly or impliedly. Express consent refers to explicit forms of consent, such as an explicit agreement between the injured person and tortfeasor (contract terms). On the other hand, implied consent is, as its name suggests, inferred from a person's action. These methods of giving consent were affirmed in the judgment rendered in *Nettleship v. Weston*[333] through which the court stated:

"...The plaintiff must agree expressly or impliedly to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant..."[334]

In *Imperial Chemical Industries Ltd v. Shatwell*,[335] the plaintiff was an employee of the defendant (employer) and suffered an injury at the employer's workplace. The plaintiff tried to test the electric circuit while disobeying the order and mandatory regulation of the employer. As a result, he sustained the injury from such a test. The court held that the defendant could refer to the *Volenti non fit injuria* rule as a defense to reject his tort liability since the plaintiff neglected and disobeyed the employer's instructions. The plaintiff knew and was aware of the associated risks. Therefore, the defense of *Volenti non fit injuria* was applicable, thereby discharging the defendant from his liability.

From the above court decision, it can be seen that consent can be given without verbal or written communication. The tortfeasor's act of willingly running into danger by himself is regarded as consent in and of itself. Therefore, in the context of this case, it is sufficient to hold that consent has been impliedly given.

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[333] [1971] 3 WLR 370.

[334] ibid.

[335] [1965] AC 656.

(2) Voluntary

Apart from the existence of an agreement, it is also crucial for the tortfeasor to prove that the injured person or victim's consent to the tortfeasor's tort is given freely and voluntarily. If the consent of the injured person has been obtained by fraud or under duress or some mistaken intention, such illegitimate consent cannot be invoked as a defense, and the defendant would still be held liable as a result.

As portrayed in the case of *Lakshmi Rajan v. Malar Hospital Ltd.*,[336] the old aged woman as the plaintiff had a lump on her breast and went to the hospital for its removal. During the surgical operation, her uterus was removed without justification by the doctor. The court held that the patient only consented to the removal of the lump, and there was not a fact which implied that the plaintiff voluntarily consented to the removal of her uterus. Thus, the hospital was liable for improper service.

Alternatively, in *R. v. Williams,* [337] The defendant was a singing coach. He raped one of his students, who was a 16-year-old minor girl, under the plea that it was a technique to improve her voice. The court found that the plaintiff's consent was obtained by fraud and therefore did not constitute a legitimate ground for the defendant coach to invoke the defense of Volenti non fit injuria.

(3) Knowledge

Lastly, the consent provider must have knowledge and understanding of the existence of the risk and its nature and extent prior to agreeing to suffer the harm.[338] A key of this requirement is "*Scienti non fit injuria*" which means that knowledge of the risk of injury is not enough to imply that the consent provider or injured person voluntarily consents to accept any damage or harm that might occur.[339] Simply

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[336] III [1998] CPJ 586 (TN SCDRC).

[337] [1923] 1 KB 340.

[338] Cooke (n 283) 204.

[339] Jenny Steele, *Tort Law: Text, Cases,and Materials* (4 edn, Oxford University Press 2017) 742.

put, the injured person's understanding of the risk alone is insufficient and in no way implies that the injured person consents to suffer the risk upon acquiring such knowledge.

As appears in *Smith v. Baker & Sons,*[340] the plaintiff was an employee of the defendant for drilling rock. During work, there were stones that were being conveyed from one place to another over the plaintiff's head. The stones fell on the plaintiff's head and caused an injury to him. The defendant claimed that the plaintiff quite knew that this risk might occur, given the work he signed up for. The court, however, held that although the plaintiff acknowledged or continued working with the full knowledge that there might be harm arising out of his place of work, it is not enough to present that the doctrine *Volenti non fit injuria* could be applicable.

In *Morris v. Murray*, [341] the plaintiff and the defendant had been drinking all day together. The defendant, who had a pilot license, persuaded that they took the aircraft for a flight. The plaintiff agreed and followed the pilot to the airfield and helped him start the engine and tune the radio. Shortly after the take-off of the aircraft, the plane crashed, causing the pilot to die immediately. Later, the plaintiff brought an action against the pilot's estate, arguing that he did not accept the risk of flying. However, it was considered that the plaintiff's action in accepting a ride in an aircraft operated by an intoxicated pilot was so conspicuously dangerous. In this case, the plaintiff had voluntarily accepted the risk by willingly running into harm, thereby waiving his own right to claim damages from the defendant.

In conclusion, to avail oneself of the defense of *Volenti non fit injuria*, the consent itself, either express or implied, must be voluntarily given under the knowledge and understanding of the nature of the risk associated. In addition, the illegal act of the tortfeasor must be within the scope of the consent rendered.[342] Otherwise, the tortfeasor will not be protected under the law.

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[340] [1891] AC 325.

[341] [1990] 3 ALL ER 801(CA).

[342] *Nash v Sheen* [1953] CL Y 3726.

3.4.2.3 Limitation of Volenti non fit injuria

Even on successful compliance with the requirements of *Volenti non fit injuria*, the degree of protection of the defense of *Volenti non fit injuria* may still be limited by the following factors:

1) Rescue cases
2) Capability
3) Shall not be contrary to the law

(1) Rescue cases

The rescue doctrine in English law holds that "if the tortfeasor commits a tort against a victim, he is not only liable for the harm caused to the victim, but also for the harm caused to any person injured in an effort to rescue that victim.

Many years ago, rescuers were denied tort recovery on the ground that they had voluntarily assumed the risk of injury.[343] The volunteer idea was invoked to deny compensation to rescuers, and the court refused to impose liability since the rescuer was acting "solely as a volunteer" and with a "full comprehension of danger".[344] In *Anderson v. Northern Railway of Canada (1876)*,[345] the plaintiff jumped in front of a train to try to save a woman, but he was killed. This case was dismissed on a split decision because the cause of the injury to the deceased was his own conduct.

However, such an idea began to change over time, beginning first from Canada. In *Seymour v. Winnipeg Electric Railway*,[346] Justice Richards, after recognizing that "the promptings of humanity towards the saving of life are amongst the noblest instincts of mankind", expressed that "The trend of modern legal thought is toward holding that those who risk their safety in attempting to rescue others who are put in peril

[343] Allen M. Linden, 'Rescuers and Good Samaritans' ((1971) 34 The Modern Law Review 252.

[344] *Kimball v Butler Bros* [1910] 15 O.W.R. 221 (C.A.).

[345] 25 U.C.C.P. 301.

[346] 13 W.L.R. 566 (1910) (Man.C.A.).

by the negligence of third persons are entitled to claim such compensation from such third persons for injuries they may receive in such attempts".[347]

This was the first-ever case where the rescuer plaintiff had the right to claim any tort compensation from the tortfeasor.[348] In that regard, Canada was truly a pioneer in changing the deep-rooted theory of voluntariness to give birth to this modern legal doctrine.

In England, the history of the "rescue" cases began with *Brandon v. Osbome, Barrett & Co,*[349] where a wife tried to help her husband get away from glass falling from a skylight, leading to a leg injury. The court held that she was entitled to recover damages.

Moreover, the rescue doctrine was given steady recognition by the famous decision in *Haynes v. Harwood*, [350] where a policeman tried to stop a herd of horses to save a woman and children. In his attempt to do so, the police officer was injured. The court held that, since this was a rescue case, the defense of *Volenti non fit injuria* did not deprive the policeman of his right to recover damages from the defendant.

In the case between *Baker v. T.E. Hopkins & son,* [351] the defendant's employees went down a well filled with poisonous fumes and were poisoned in the process. Later, Dr. Baker, who was called to rescue the employees, went down the well fully aware of the risk. Eventually, he died of carbon monoxide poisoning on the way to the hospital. It was held that the defendant was liable to compensate for damages, and the claimant's action was not defeated by *Volenti non fit injuria*.

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[347] ibid.

[348] Glenda Hanna, *Outdoor Pursuits Programming Legal Liability and Risk Management* (The University of Alberta Press 1990) 173.

[349] [1924] 1 K.B. 548.

[350] [1935] 1 K.B. 146.

[351] [1959] 1 W.L.R. 966: (1959) 3 All E.R. 255.

In light of the above court decisions, it can be seen that the rescue doctrine is applied as an exception to *Volenti non fit injuria*. When a person voluntarily runs into danger to save others from a perilous situation caused by a wrongful act, the rescuer remains entitled to claim compensation from the tortfeasor despite the existence of Volenti non fit injuria.

(2) Capability

Normally, every person enjoys freedom in regards to giving consent. The law believes that, as long as people understand and are aware of the matters they are consenting to, they can make an informed decision based on the truthful information they receive. Therefore, when adults make voluntary decisions to give consent upon acquiring full knowledge of what action they are consenting to and the risks involved with such action, their decisions must be respected. This line of reasoning upholds the legal presumption that all adults have the capacity to properly and reasonably manage their property and affairs until they are proven otherwise.[352]

Conversely, if the consent provider is a child, then the same privilege exercised by adults could no longer apply. This is owed to the simple fact that, unlike adults, children possess a capability and understanding of the standard of children. [353] They may have insufficient understanding and intelligence to fully comprehend what is being presented to them. Thus, the consent of a child should normally be complemented by the approval of his parent. However, this does not mean that all consenting children always have to seek permission from their parents. Like adults, people at the age of 16 or over are presumed by law that they have the capacity to give consent by themselves.

In certain circumstances, the child under the age of 16 may give consent in their own rights without the approval of their parents. In the case of *Gillick v.*

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[352] *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889, [2003] 1 WLR 1511.

[353] *Gough v Thorne* [1996] 3 all er 398.

West Norfolk & Wisbeck Area Health Authority,[354] Mrs. Gillick was a mother to five daughters, one of whom was under the age of 16, and sought contraceptive advice from a local doctor. This advice was provided according to the guidance issued by the Department of Health and Social Security. Mrs. Gillick argued that the Department's guidance was unlawful because it interfered with parental rights and duties. In other words, the doctor had no power to recommend contraceptives to girls under 16 years of age without her approval or consent. To the court's disagreement, the court held that there were a number of circumstances that a minor might independently give their consent without the need of their parents' approval. That is to say, if they demonstrate sufficient understanding and intelligence to fully understand what is proposed. Nowadays, this test is often called "Gillick competence" which has become an important aspect of medical and family law.[355]

Later, in 2017, the 'Gillick competence' test was expanded by the court in the case of *In Re S.*[356] This case concerned a mother, who was a child under 16 years of age, and her baby in which the mother wanted nothing to do with her baby. The mother provided consent for her baby to be adopted. The court applied the 'Gillick competence' test and Mental Capacity Act 2005 together to consider the decision-making competence of the child under 16 years of age. The child must demonstrate that he or she:

a) Understands the nature and implication of the decision and the process of implementing that decision;
b) Understands the implications of not pursuing the decision;
c) Retain the information long enough for the decision-making process to take place;

[354] [1985] 3 All ER 402.

[355] Ruth Lamont, *Family Law* (Oxford University Press 2018)Ruth Lamont, *Family Law* (Oxford University Press 2013) 393.

[356] [2017] EWHC 2729.

d) Be of sufficient intelligence and maturity to weigh up the information and arrive at a decision; and

e) Be able to communicate that decision.

As evidenced by the extension from the ordinary meaning of "understanding and intelligence to understand fully what is proposed" to the criteria set out in *In Re S*, it is apparent that the 'Gillick competence' test was increasingly expanded by the court. By introducing clear and elaborate requirements, the court was able to create a consistent measurement for testing the capability of the child under 16 years of age for future cases.

In light of the above, it can be concluded that children under the age of 16 are generally not presumed by law to give consent unless such consent is accompanied by the approval of their parents.[357] Nevertheless, in the event that they display sufficient intelligence and proper decision-making through the Gillick competence test, the child may independently give their consent without the need for their parents. Regardless, it is still necessary to further consider related laws, such as family law or other laws, in order to appropriately determine the capability of the child or the insane person.

(3) Shall not be contrary to the law

As has been emphasized, tort liability in English law consists of many sub-categories, each varying in characteristics and legal requirements. For this reason, it is only natural that the application of *Volenti non fit injuria* to each type of tort differs accordingly.

In the past, limitations to the defense of *Volenti non fit injuria* had not been expressly laid down in civil proceedings.[358] Nevertheless, the English courts have shown a consistent tendency to not apply the principle of consent to cases where the consent rendered was contrary to express laws. Therefore, a clear rule could be

[357] S.P. Singh, *Law of Tort Including Compensation under the Consumer Protection Act* (5 edn, Universal Law Publishing 2010) 33.

[358] Mark Lunney and Ken Oliphant, *Tort Law Text and Materials* (3 edn, Oxford University 2008) 85.

deduced from this vast number of English judicial precedents that, in the event where the consent given is contrary to the law, the principle of *Volenti non fit injuria* may not be applicable.

For instance, in *R v. Donovan*,[359] the court held that it is prohibited by law to hurt or injure a person's body. Thus, despite the victim's prior consent, the defendant's tort remains unlawful.

In *Pitts v. Hunt*,[360] the plaintiff caught a ride on the defendant's motorcycle. At the time, the plaintiff was aware that the defendant's motorcycle was not insured and that the defendant had been intoxicated. Knowing these facts, the plaintiff warned the defendant to drive slowly. However, an accident occurred, causing the plaintiff to be injured. After the action was brought to court, the defendant argued the plaintiff himself voluntarily consented to become the defendant's passenger despite the knowledge. The court dismissed this and held that the defendant might not invoke the plaintiff's consent as a defense, as it contravened the Road Traffic Act 1988. Thus, the defendant was obliged to remain liable.

Alternatively, in *R v. Brown,*[361] the plaintiff was a member of a homosexual group wherein the consensual act of whacking each other's body to increase sexual pleasure was the main activity. During consensual homosexual sadomasochist activities, the plaintiff sustained multiple injuries. In the defendant's defense, the defendant claimed that the plaintiff was fully aware of the activities and objectives of the group and still joined the group voluntarily. This meant that the plaintiff realized the risk and agreed to accept the damage himself. The court, however, held that since the defendant committed an offense under the Offenses Against the Person Act 1861, the consent of the victim was no longer applicable.

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[359] [1934] 2 KB 498.

[360] [1991] 1 QB 24.

[361] [1993] 2 All ER 75.

In the past, prior to the Unfair Contract Terms Act 1977 (UTCA)'s entry into force, there was no clear limitation to the scope of protection of the defense of *Volenti non fit injuria*. The use of *Volenti non fit injuria* by the English courts was rather boundless. Only under a few instances where the consent contravenes express laws that the tortfeasor becomes unable to rely on the consent he receives. In any case, with respect to the above court precedent, the author views that not only was the consent for others to harm his own life and body contravened the law, but the consent itself was also against the principles of public order and good morals (Public policy).

Following the enactment of the Unfair Contract Terms Act 1977 (UCTA),[362] the contractual clauses stipulating prior consent for various actions as a means to exclude or restrict a person's liability for negligence became limited. This limitation is provided for under Section 2 of the UCTA.[363]

According to Section 2 (1) of the UCTA, the law imposes that a person cannot refer to any contract term or notice for excepting his liability for death or personal injury (physical injury) resulting from negligent acts.[364] By way of illustration, an injured person enters into an unsafe place, having read a notice by which the occupier specifies that any person may enter at their own risk. While this should normally operate as an exclusion of the occupier's liability, the occupier may not refer to this particular notice in an effort to escape from his liability by virtue of Section 2(1) of the UCTA. Likewise, even though the injured person or victim's voluntary entry is regarded as his agreement to accept the risk, which amounts to a waiver of any compensatory claim

[362] Please note that the reason the UCTA, which is intended to regulate unfair contracts, incorporates the concept of consent of the injured (*Volenti non fit injuria*) into the Act is: both the victim's consent and a contract term have similar characteristics and tend to be utilized unfairly against the consent provider. Not to mention, sometimes the injured person's consent is even incorporated as part of the contract itself. Due to these very reasons, the English legal practitioners view that the limitations to *Volenti non fit injuria* should be added into the Act; see Chinayon (n 85) 92.

[363] Lunney (n 358) 139.

[364] UCTA s 2 (1).

against the occupier, his agreement to waive this claim is non-binding by virtue of the law.[365] In addition, Subsection 2 further restricts exclusion clauses relating to liability for negligence: for losses other than death and physical injury, [366] liability cannot be excluded unless the contract term or notice fulfills the requirement of reasonableness.[367]

As can be seen, following the entry into force of the Unfair Contract Terms Act 1977, prior consent, whether in the form of a clause or a notice, not only has to abide by express statutory provisions, but it may also be limited by Section 2 of the UCTA.

3.4.3 Problems with residential eviction of tenant without due process in England

As previously emphasized, trespass to land involves an unjustifiable and wrongful interference with an individual's possession of the land. In terms of trespass lawsuits, the sole person who has standing to sue on this ground is the person who has exclusive possession of the land at the time the interference occurs. Generally, once the lease agreement between the landlord and the tenant is concluded and the possession over the residence has been delivered to the tenant, the tenant then becomes the current actual possessor and assumes the right to sue wrongdoers for their unlawful conduct committed against the owner's residence.[368] Noteworthily, this right also extends to an action against the landlord where he becomes a wrongdoer himself.[369] To illustrate, if the landlord enters the leased premise without the tenant's consent, the landlord would be guilty of trespass. [370] Should any person enter into the leased premise without

[365] A. J. E. Jaffey, 'Volenti Non Fit Injuria' (1985) 1 The Cambridge Law Journal 95.

[366] Richard Lawson, *Exclusion Clauses and Unfair Contract Terms* (10 edn, Sweet & Maxwell 2011) 165.

[367] UCTA s 2 (2).

[368] Karas (n 324) 12.

[369] ibid, 13.

[370] Raymond Harrison Harkrider, 'Tort Liability of a Landlord. Part II. Obligations to Tenants and Their Invitees during the Term' (Feb., 1928) 26 Michigan Law Review 409

authorization, even by merely stepping a part of his foot into the premise, the law deems it as much of trespass as if the trespasser had walked half a mile on it,[371] and the person must be liable therefor.[372]

In contrast, if there occurred a change of circumstance where the lease contract had been terminated or expired prior to the trespass, a question arises as to whether the landlord would have the right to arbitrarily evict the tenant without going through a proper eviction process. In the more precise terms, should the landlord be liable for trespass in the event that the contract has ceased and the tenant refuses to exit the premise? In this respect, the English court rules that the landlord may re-enter his land and forcefully remove the trespasser, his or her property, by using reasonable force without resorting to violence.[373] This rule was echoed in the case of *Hemmings v. Stoke Poges Golf Club*,[374] in which the landlord had re-entered the leased premise in an effort to remove the tenant and his family, as well as their property using reasonable force. It was held the landlord had the right to repossess the premise as soon as the tenant's right to stay in the leased premise expired. In this regard, the tenant had no right of action against the landlord. The court specified that, although the landlord's act constituted a criminal offense, in terms of civil law, the defendant was not liable in trespass since reasonable force was exercised.

From the *Hemmings* case above, it is obvious that the English court originally regarded the landlord's right of re-entry (i.e., eviction by the landlord without a court order) as one of the remedy methods used by the landlord to recover the incurred damage or to cease the action of trespass.[375] Although the said manner of eviction

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[371] *Per* Lord Coleridge C.J. in *Ellis v Loftus Iron Co*. [1874] L.R. 10 C.P. 10 at 12.

[372] *Ellis v Loftus Iron Co*. [1874] L.R. 10 C.P. 10.

[373] Sue Hodge, *Tort Law* (3 edn, Routledge 2011) 121.

[374] [1920] 1 KB 720.

[375] Harpwood (n 9) 241.

amounts to a crime under criminal law, the landlord will not incur liability under tort as long as he uses reasonable force without resorting to violence.

In the following year of 1950, the European Convention on Human Rights (ECHR) was drafted and later entered into force on 3 September 1953, during which all member states of the Council of Europe were State parties to the Convention. The ECHR was created upon the concept that human rights and fundamental freedoms of the people of Europe shall be preserved and guaranteed. It has had a significant influence on the law in Council of Europe member countries ever since[376] and is considered as one of the most effective international human rights treaties.[377] Importantly, after the ECHR was put into force, the court's position in regards to the right of re-entry, as discussed above, began to shift. Previously, English landlords had the right to re-enter their leased residence and evict the tenants who refused to leave after the lapse of their tenancy period without the need for court orders. However, upon the ECHR's entry into force, this legal position became overturned by a new legal concept known as "the right to housing," which is a common right enshrined in many international human rights treaties, including the ECHR. Under the ECHR, this right can be seen within Article 8, which affirms that "everyone has the right to respect for his private and family life, his home and his correspondence".[378] The right to housing markedly embodies the idea that every person has the right to peacefully and safely inhabit or reside in a place without having to roam the streets.

In 1977, in an implementation of the state's obligations under the right to housing, the Parliament of England enacted the Protection from Eviction Act 1977, which entered into force on 29 August 1977. The Act aimed to protect tenants against

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[376] Stelios Andreadakis, 'The European Convention on Human Rights, the EU and the UK: Confronting a Heresy: A Reply to Andrew Williams' (November 2013) 4 European Journal of International Law, 1189. In England, there is the Human Rights Act 1998 which came into force on 2 October 2000.

[377] Lawrence R. Helfer, 'Consensus, Coherence and the European Convention on Human Rights' (1993) 26 Cornell International Law Journal 133.

[378] ECHT a 8.

illegal evictions[379] and to impose criminal punishment on those who contravened its provisions.[380] The extent of said protection became greatly enhanced in the 1980s. Precisely, not only will the landlord incur criminal liability in the event of unlawful eviction, but he will also be liable under the law of tort[381] by virtue of the Housing Act 1988.[382] The civil remedy was included so as to deprive the landlord of any financial gain which he may receive from the unlawful eviction. It is to act as a deterrent to illegality and a legal remedy for any damage suffered by the tenant in the process.[383]

In respect of the Housing Act 1988, the landlord shall pay damages to the former tenant who has given up his possession over the leased premises as a result of an unlawful attempt by the landlord, or any person acting on his behalf, to deprive the tenant of the leased premises, whether in whole or in part. This liability also extends to an event where the landlord carries out conduct that is likely to interfere with the peace or comfort of the tenant and his family, such as persistently withholding or withdrawing services reasonably required in residence, which the landlord knows or has reason to believe that such is likely to cause the tenant to give up his possession of the premises or to abstain from exercising any right or pursuing any remedy in respect thereof.[384] In short, it can be summarized that an unlawful eviction under English law refers to an instance where the landlord ultimately causes his tenant, whether directly or indirectly, to leave the leased premises without first complying with the necessary legal procedures.[385] Examples of unlawful evictions include, but in no way limited to, the act

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[379] Christoph U. Schmid and Jason R. Dinse, *My Rights as Tenant in Europe*, (TENLAW 2014) 217.

[380] S.H. Goo, *Sourcebook on Land Law* (1 edn, Cavendish publishing 1994) 441.

[381] Mark P. Thompson, *Modern Land Law* (4 edn, Oxford University Press 2009) 397.

[382] The Housing Act 1988 came into force on 15 January 1989.

[383] Susan Bright and Geoff Gilbert, *Landlord and Tenant Law: The Nature of Tenancies* (Oxford University Press 1995) 636.

[384] See the Housing Act 1988 s 27 (1) and (2).

[385] Dianne L. Martin, 'Civil Remedies Available to Residential Tenants in Ontario: The Case for Assertive Action' (June 1976) 14 Osgoode Hall Law Journal 70.

of changing locks in the tenant's absence,[386] the use of force or threats,[387] the act of luring out the tenant,[388] the act of withdrawing gas and electricity,[389] the act of offering the tenant money to leave, and the act of depriving the tenant of access to certain parts of the premises which he may rightfully use.[390]

In *Tagro v. Cafane and Another,*[391] the plaintiff is a tenant in an apartment who, upon returning to her room on the 3rd of August, found that it was locked and that the original locks had been changed by the defendant who intended to evict her. When the plaintiff was able to enter the room, she found her property either stolen or damaged. The facts also appear that the landlord once came to collect rentals from her at 2 A.M., which is an inappropriate time, and while she was in the bathroom, the agent of the defendant kicked the bathroom door as the agent called her "black bastard." In this case, the court found the defendant guilty of unlawful eviction and ordered the defendant to pay the plaintiff a sum of £30,100 under Section 27 and 28 of the Housing Act 1988.

Likewise, in *Lee v. Lasrado*,[392] the plaintiff was a private tenant who rented a place in the summer of 2008. She claimed that the lock to the place had been changed and also saw a notice of eviction. Following this event, the plaintiff filed the case to the court, seeking compensation. The court held that the acts of the defendant constituted an unlawful eviction and ordered £24,600 to be paid to the plaintiff as damages.

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[386] *R v Yuthiwattana* [1984] 16 HLR 49, Smith v Khan [2018] EWCA Civ 1137.

[387] *R v Mohammed Qureshi* [2011] EWCA Crim 1584.

[388] *Maio v Adams* [1970] 1 Q.B. 548.

[389] *Perera v Vandiyar* [1953] 1 W.L.R. 672.

[390] Martin (n 385) 66.

[391] [1991] EWCA Civ 1.

[392] [2013] EWHC 2302 (QB).

In the same fashion, in *London Borough of Lambeth v. Loveridge,*[393] the plaintiff was a tenant in a residential flat who, on 9 July 2009, left his room for Ghana and did not come back until 5 December 2009. Owing to the plaintiff's long period of absence, the defendant who was not notified of the dates suspected that the plaintiff might have died. With that assumption in mind, the defendant proceeded to enter the plaintiff's room, cleared out all of his property, and readied the room for it to be rented out to a new tenant. Once the plaintiff came back and found the new tenant in his room, he tried to contact the defendant to reclaim his tenancy rights. But his effort was in vain. The plaintiff then decided to file an action against the defendant on the ground of unlawful eviction and sought a relief for the damage arising from the loss of his property. The court declared that trying to regain possession without a court order may not be worth it. The defendant's acts were held to be an unlawful eviction pursuant to Section 27 of the Housing Act 1988, and the defendant was adjudged to pay legal damages to the plaintiff.

Recalling the highlighted issue of this independent study: whether the landlord can, by relying on the tenant's consent clause in the lease agreement, lawfully regain possession of the leased premise and evict the tenant without a court order upon the termination of the rental agreement. To answer this issue in the context of English law, the important questions here are whether such an act incurs liability under the English tort law and, if so, can the landlord rely on the tenant's prior consent to deny his liability? English law addresses this issue clearly through Section 3 (1) of the Protection from Eviction Act 1977. That is, the landlord cannot rely on the tenant's consent even if the tenant gives his consent and permits the landlord to re-possess and evict the tenant from the premises without a court order. In consideration of Section 3 (1) of the Protection from Eviction Act 1977, the law clearly prohibits any recovery of possession of the leased premises, otherwise than through court proceedings, if premises are let as a residence under a tenancy and such tenancy period has come to an end, but the tenant continues

[393] [2013] EWCA Civ 494.

to reside in the premises. [394] Moreover, Section 3 (2a) of the Protection from Eviction Act 1977 specifies further that unlawful eviction, as prohibited by the law, also includes an act of creating a contract term or a license allowing the landlord to evict the tenant without compliance with due process of law.[395]

In cases of torts involving land or immovable property, tortfeasors generally tend to rely on the licenses[396] granted to them by the landlords or the actual possessors in an attempt to deny their tort liability. The tortfeasors tend to argue that they are not liable due to having been permitted to act accordingly by the landlords. It can be said that, in the context of English law, the principle of a license is specific to torts involving land or immovable property, as it is more frequently cited and applied than the principle of consent.

In addition, if we shift our perspective to that of the intent of the law, we would undoubtedly see that the consent for the landlord to arbitrarily bypass court procedure in regards to residential eviction is consent which contravenes the express, statutory laws and thus goes against the very purpose for which the law was created. Specifically, Section 2 and 3 of the Protection from Eviction Act 1977 and Section 27 of the Housing Act 1988. The two Acts were enacted in light of the right to housing, which reflects England's public policy in promoting the protection against unlawful evictions, which may lead to a social problem such as homelessness. In other words, English law aims to guarantee the tenant's rights by imposing a set of procedures on the landlord,

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[394] See Protection from Eviction Act 1977 s 3 (1).

[395] See Protection from Eviction Act 1977 s 3 (2A).

[396] Please noted that a "licence" is refers to the permission of the owner or occupant of any premises is given to another person in order that he or she can enter into or take possession of such a premise that is under the possession of the owner or occupant without liability. Without the licence the occupier would be a trespasser and he shall be responsible for civil liability from his wrongful act. Besides, a licence also can be made by written or verbal; see Mark Davys, *Land Law* (Palgrave Publishing 2015) 29 -36.

who wishes for an eviction, to follow unconditionally. That is, the landlord shall send a prior notice to the tenant and stipulate a period of time as prescribed by the law.[397] Should the tenant continues to reside in the premises after the period of time specified has elapsed, the landlord may bring a case to the county court[398] in the proximity in which the immovable property is located in order to obtain a warrant of possession. During the proceedings, the court will allow both parties to present evidence to support their case. If the court views, in light of the evidence presented, that the tenant shall be evicted, the court will issue a warrant of possession, allowing the landlord to legally re-possess his land. After which, the tenant is to leave the premises within the time specified in the warrant. Under certain special circumstances, however, the tenant may ask the court for an extension of the time within which he or she has to leave the premises.[399]

Additionally, the fact that the purpose of the law is not to allow for an arbitrary eviction by the landlord is because such manner of eviction is considered extremely dangerous to all of the parties involved, including the tenant, his family, and their neighbors. Even in an instance where the arbitrary eviction is proportionate and reasonable, it is nevertheless deemed as a risk factor that may escalate into serious violence unexpected by the landlord. For example, the landlord, who wishes to evict the tenant after the contract expires, sees the tenant's absence as an opportunity to evict the tenant. He proceeds to evict the tenant by changing the door lock so as to prevent the tenant from entering the premises. As he changes the lock, he was caught red-handed by the tenant. As a result, a fight breaks out, causing either party injuries. Ultimately, the

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[397] Note that the time specified in the notice depends on the type of the notice being sent, for instance, a notice where there has yet to be a breach of contract, and a notice after there has been a breach of contract of lease; see Puriwat Raksuwan, 'The Issues Relating the Eviction of the Eviction of the Tenant from the Rental; Property; the Case Study on the Commercial Property Rental' (LL.M. Thesis, Thammasat University 2016) 90-98.

[398] Please noted that this courts deal with civil (non-criminal and nonfamily) cases where an individual or a juristic person believes their rights have been infringed.

[399] See the Housing Act 1980 s 89.

parties would bring a case to the court for compensation, thereby unnecessarily increasing the number of cases for the court. Originally, it was not the landlord's intention to fight either. Therefore, to mitigate and bypass all of these needless events, English law forces all cases of eviction to be carried out through the justice system only. As Lord Templeman had described in *Billson v. Residential Apartments Ltd*: [400]

"The method of enforcing a right of forfeiture by re-entry without due process of law, it is held as the 'dubious and dangerous' method. A tenant should not be at risk of returning home to discover that, unbeknown to him, he and his family have been locked out and are homeless. If they are to be evicted, the eviction should be conducted in an orderly fashion, upon at least some prior notice, by officers subject to court direction…"

Therefore, at present, Section 2 and 3(1) and (2A) of Protection from Eviction Act 1977 and Section 27 of the Housing Act 1988 answers the highlighted questions with the most accuracy. At the same time, the said Acts help protect and guarantee the rights of the tenant to stably reside in his place of residence and to defend against unlawful evictions by the landlord. That is to say, even upon the end of the lease and the tenant's refusal to exit the premises, it remains unlawful for the landlord to evict the tenant by any means other than court proceedings; be it direct re-possession or reliance on the tenant's consent or the consent clause in the contract. This is because the right of re-entry can only be enforced through the court, and by extension, a warrant of possession.[401] If the landlord violates the law by neglecting the due process of law,[402] the landlord shall be guilty of a criminal offense for unlawful harassment or eviction.[403] Not to mention, since the landlord's unlawful eviction and harassment constitute a tort

[400] [1992] 1 AC 494.

[401] See Protection from Eviction Act 1977 s 2.

[402] Goo (n 380).

[403] See Protection from Eviction Act 1977 s 1 (2) and (3).

or a civil wrong, [404] the landlord shall also incur civil liability, entitling the tenant a claim for compensation against the landlord in respect of his loss of the right to occupy the premises under Section 27 of the Housing Act 1988.

It is noteworthy to mention that lawsuits on the basis of illegal evictions are cases of tort under Section 27 of the Housing Act 1988, which is a specific law on committing torts by way of unlawful evictions. The tenant does not sue the landlord for compensation on the basis of general tort law, such as the tort of trespass, in any way.

3.5 Summary

Under both German and English law, a tort is regarded as a source of debt because the essence of tort law is legal accountability – the imposition by the law of the duty to pay damages on the tortfeasor in order to compensate for the injury suffered by the injured person. If a person commits an act against another unlawfully, causing an injury to the other, he shall be liable to compensate for the damage incurred from his own illegal act as a tortfeasor. Nonetheless, like the Thai legal system, the German and English legal systems also lay down instances where the tortfeasor may invoke the victim's consent as a defense against tort liability. In any case, it does not mean that the tortfeasor may rely on the victim's consent in all circumstances unconditionally. That is to say, in some circumstances, the principle of consent may be limited by certain principles or rules that will prevent the tortfeasor from using the consent as a defense to discharge himself from liability. The limitations to *Volenti non fit injuria* vary depending on the legal system of each country, such as Germany or England, as previously mentioned.

Regarding the issue of whether or not the landlord may rely on the tenant's consent stipulated in the lease as, "The tenant allows the landlord to recover his possession of the leased premises and evict the tenant as soon as this Lease terminates or expires." In this respect, both German and English law have solved the issue in the

[404] David Cowan, *Housing Law and Policy* (1 edn, Macmillan Press 1999) 424.

same fashion: the landlord may not rely on the tenant's consent to escape his civil liability incurred from his unlawful eviction. This is because both legal systems aim to protect the tenants from unlawful and arbitrary evictions, as well as homelessness that could come as a result thereof, which may lead to a negative impact on those around the tenant and those in the same society, ultimately escalating into a social problem that is difficult to be fixed in the end.

CHAPTER 4
ANALYSIS OF THE PROBLEM OF TENANT'S RESIDENTIAL EVICTION WITHOUT A COURT ORDER IN THAILAND

4.1 Introduction

Having studied the concept and structure of general tort liability, the overview of the *Volenti non fit injuria* principle, and the relevant issues regarding the residential eviction of tenants without due process in Thailand, Germany, and England in Chapter 2 and Chapter 3, the author would like to discuss the problems associated with the issue of the tenant's consented residential eviction without a court order in Thailand. The current chapter will aim to analyze and resolve the questions as to whether the tenant's consent, which allows the landlord's self-help eviction, is contrary to the law or public order and good morals, and whether the landlord who carries out unlawful eviction under the tenant's consent incurs any civil liability. For the first part of the discussion of each issue, the author will compare the law between the three countries, including Thai, Germany, and England, in light of the respective issues to clearly illustrate any similarities and differences between the laws of the countries in question. Then, the author will proceed to examine the issues in the context of Thai law. Such a framework is necessary for the precise understanding of the subjects and the most thorough analysis possible.

4.2 Analysis of the problem of consented residential eviction of tenants without a court order

4.2.1 Limitation to the principle of Volenti non fit injuria in Thailand, Germany, and England

In Thailand, after the Unfair Contract Terms Act BE 2540 (1997) was enacted, the scope of the principle of the *Volenti non fit injuria* became limited by Section

9. Any consent of the injured person to an act which is expressly prohibited by law or is contrary to public order and good morals shall not be applicable as a defense to exclude or restrict the tortious liability of the wrongdoer.

In Germany, since consent is considered a type of juridical act, it shall be subject to the confines of Sections 134 and 138 BGB. If the injured person's consent involves an act that contravenes a statutory prohibition or public policy, such consent will become void under Sections 134 or 138 BGB as the case may be.

As for England, prior to the Unfair Contract Terms Act 1977's entry into force, there was no explicit limitation to the scope of protection of the injured person's consent. In other words, the use of *Volenti non fit injuria* by the English courts was relatively boundless. Only under a few instances where the consent contravened express laws that the defendant became unable to rely on the consent he received in denying his tort liability. However, after the entry into force of the Unfair Contract Terms Act 1977, the injured person's consent became subject to more transparent limitations, for instance, by Section 2 of the UCTA, which imposes that a tortfeasor cannot refer to any contract term or notice for excepting his liability for death or physical injury resulting from negligent acts. Nevertheless, if the consent or notice was for other matters uninvolved with death or physical injury, such as loss of property, the tortfeasor may rely on such consent or notice to except his liability for loss or damage resulting from negligent acts, as long as his reliance is within the bounds of reason. To sum up, after the entry into force of the Unfair Contract Terms Act 1977, not only is the principle of *Volenti non fit injuria* subject to the legal restriction of Section 2 of UCTA, but the consent of the injured must not be a permission for the defendant to act in violation of the express laws as well.

4.2.2 Comparison among problems related to tenant's consented residential eviction without a court order in Thailand, Germany, and England

In Thailand, in the event where the lease terminates or expires, and the landlord arbitrarily recovers his possession of the premises upon the tenant's refusal to leave without regard for the due process of law. In this case, the Thai Supreme Court has

always been firm in its decisions that, even the lease contract terminates or expires and the tenant refuses to exit the premises, the landlord is entitled to exercise his right to sue on the ground of the tenant's disputing his right as the landlord under Section 55 of the Thai Civil Procedure Code. Notably, the landlord's right to evict his tenant is a right that must be enforced by the Court only. In other words, the landlord has no right to evict the tenant by himself. If the landlord refuses to bring an action to the Court under the law and arbitrarily recovers his possession by entering into the premise without the tenant's consent, the landlord will be committing a tort against the tenant.[405]

However, in another case wherein the tenant renders his consent prior to entering into the lease, or concludes an agreement with the landlord that reads, "upon the end of tenancy, the tenant allows the landlord to recover his possession of the leased property", otherwise known as "consent for the recovery of possession". Later, the lease terminates or expires and the tenant refuses to vacate the premises. By relying on the consent or the agreement above, the landlord proceeds to arbitrarily retake the premises and evict the tenant without an eviction order. For this particular case, the Supreme Court decisions have diverged and established 2 differing trends:

In the first trend, the series of consistent court rulings from B.E. 2480 to 2556 indicates that the landlord's re-entry into the leased premises to recover possession upon the tenant's consent or prior agreement in the lease does not constitute a tort. The Court also explained that such an agreement or consent is not prohibited by any express law or contrary to public order and good morals. As a result, the consent is effective and legally binds the contracting parties. Due to this binding effect, the landlord has the right to repossess the premise without prior or subsequent authorization from the tenant. The landlord's actions shall not constitute a violation of the tenant's right to possession, and thus the landlord is not liable under Section 420 CCC.[406]

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[405] Supreme Court Decision No. 1063/2475, 1415/2513, 4207/2551.

[406] Supreme Court Decision No. 724/2480,985/2513,2494/2553, 12265 - 12266/2556.

Furthermore, regarding the above trend, it is imperative to note that even though such consent or agreement allows the landlord to evict the tenant without the need to comply with the due process of law, it is still valid and fully binding on the parties. In the alternative, there is an established trend that the Thai Supreme would rule that this type of an agreement or consent, which confers the landlord a right to evict the tenant without a court order, is not expressly prohibited by law or contrary to public order and good morals in the future.

The second trend appears in the decision of the Supreme Court No. 3379/2560, this can be seen that, although the facts in this case are similar to or headed in the same direction as those in the first trend, the final results are surprisingly the opposite. In the earlier cases, the landlord's recovery of possession and arbitrary eviction of the tenant after the termination of the lease was not ruled as a tort, provided that the landlord was able to rely on the tenant's consent. On the contrary, in the Supreme Court Decision No. 3379/2560, the Court held that even with reference to the consent or agreement of the tenant, the landlord's act was still considered as a tort under Section 420 CCC. Regardless of the means or force used upon recovering possession, the landlord must still file a case to the Court in accordance with the Civil Procedure Code to legally evict the tenant. The landlord had no power to re-enter the leased premise nor to remove the tenant by himself. When the landlord failed to file the motion to the Court, proceeded to evict and remove the plaintiff's property on his own, the landlord became responsible for the damage he caused under Section 420 CCC. Nevertheless, since the unlawful act of the landlord was prompted by the tenant's breach of contract and was in compliance with a clause in the agreement, the circumstances of this case were considered as a case of damage arising partially from the fault of the tenant in accordance with Section 442 CCC, and the provisions of Section 223 CCC shall apply mutatis mutandis.[407]

[407] Supreme Court Decision No. 3379/2560.

In addition, from the Supreme Court Decision No. 3379/2560, it is noteworthy to mention that the Court did not explicitly answer to whether the agreement or consent of the tenant, which permitted the landlord to bypass all court proceedings, was expressly prohibited by law or contrary to public order and good morals. The Court also did not touch upon the legal issue on the effect of the consent: whether it can be referred to as an effective defense by the landlord. It merely ruled that the action of the landlord was, even while acting upon the tenant's consent or agreement, still a tort against the tenant.

As for Germany, as discussed in Chapter 3, it is irrelevant whether the landlord relies on the contract clause or the tenant's consent, or whether such fact actually exists. The landlord has no right to recover the possession of the leased property without filing a case to the Court. This is because in the German jurisdiction, 'self-help' evictions are illegal. In short, if the landlord wishes to repossess the leased premises, he must comply with various procedural requirements under the Civil Procedure law. If the landlord fails to file a motion to the Court and proceeds to evict the tenant and remove his property arbitrarily without a proper eviction order, the landlord would be committing a tort under 823 paragraph 1 BGB.

Next, concerning the issue as to the extent to which the landlord may claim his right under the tenant's consent, in denying his tort liability arising from the unlawful eviction. From the author's research and understanding, the author may summarize that the tenant's consent, which allows the landlord to evict the tenant by himself without a court order, contravenes public policy and is therefore void under Section 138 BGB. This is because not only is the consent contrary to the human rights of the tenant, namely the 'right to housing,' which is a significant right under the German Constitution, and many requirements under the German Code of Civil Procedure, but it is also consent that exhibits a tendency to jeopardize the societal and economic foundation of Germany as a whole.

In England, Section 2, Section 3 (1), and Section (2A) of the Protection from Eviction Act 1977, as well as Section 27 of the Housing Act 1988, unambiguously specify that an eviction which does not conform to the requirements under the law constitutes an unlawful eviction, which is prohibited under English law. Even upon the lease's termination and the tenant's refusal to leave the premises, the law leaves no room for the landlord to go around. Be it the tenant's consent or the agreement that permits the landlord to evict the tenant arbitrarily, the landlord still has no right to recover his leased premises and evict the tenant by himself. This is because such a right can only be enforced with an eviction order from the court. Should the landlord evict the tenant himself and disregard the due process of law, the landlord will incur civil and criminal liabilities.

In addition, under Section (2A) of the Protection from Eviction Act 1977, the law expressly provides that an unlawful eviction by the landlord, as prohibited by law, includes any agreement or license which has the characteristics of allowing the landlord to evict the tenant without initiating any court proceeding as well.

Therefore, in regarding the issue of whether or not the landlord may rely on the tenant's consent stipulated in the lease as, "The tenant allows the landlord to recover his possession of the leased premises and evict the tenant as soon as this lease terminates or expires". In this respect, both German and English law have solved the issue in the same fashion: the landlord may not rely on the tenant's consent to escape his civil liability incurred from his unlawful eviction. This is because such a right can only be enforced with an eviction order from the court. More specifically, both legal systems aim to protect the tenants from unlawful and arbitrary evictions, as well as homelessness that could come as a result thereof, which may lead to a negative impact on those around the tenant and those in the same society, ultimately escalating into a social problem that is difficult to be fixed in the end.

However, under Thai legal system, such problem remain unanswered because the Thai Court of justice has laid a legal ground through series of decisions from

B.E. 2480 to 2556 that such consent which is provided as a part of a contract term allows the landlord to evict their tenants without the need to comply with the due process of law, such consent is not expressly prohibited by law or contrary to public order and good morals. Further, the landlord who arbitrarily evicts their tenants shall not be liable under Section 420 CCC. Contrastingly, in the decision of the Supreme Court No. 3379/2560, the Supreme Court does not accept the concept of arbitrary evictions of the landlord's method, decides that it is against the law, and causes the landlord to be liable for the unlawful eviction. It can be noticed that, the Supreme Court's decision in this case is in line with the legal consequences under both German and English law which aimed to protect the rights of tenants from encountering an unlawful eviction. Nonetheless, it is disappointing that the Supreme Court, in this case, did not clearly explain the legal reasons as to why the actions of the landlord is considered to be a tortious act. This is because, in considering if the arbitrary eviction of the landlord under the consent of a tenant is unlawful or not, the court must first explain whether the consent or agreement allowing the landlord to evict their tenant without the need to comply with the due process of law is effective or not, and to what extent can the landlord uses such consent to avoid the legal implication of a tortious act. When the Supreme Court in this case neglects to explain the aforementioned issues, the outcome of the decision of such court lacks the ability to reasonably describe the liability of the landlord on the basis of an infringement of the law and leads to the key issue of this independent study which is whether an agreement or the tenant's consent that allows the landlord to personally enforce his right, and without the need to obtain court order is expressly prohibited by law of is contrary to public order and good morals or not. The author will analyze this issue in great details under the next topic.

4.2.3 Analysis

The contradiction in the two Supreme Court trends, as established by the series of decisions from B.E. 2480 to 2556 and the Supreme Court Decision No. 3379/2560, has led to two legal questions: firstly, whether the agreement or the tenant's

consent, which allows the landlord to enforce his right personally without a court order, is expressly prohibited by law or contrary to public order and good morals, and secondly when the end of tenancy and the tenant refuses to leave the premises, whether the landlord's self-help eviction would be a tort that results in liability for compensation if he acted on the tenant's consent. The author would now analyze each of these issues in the following manner:

4.2.3.1 Analysis of tenant's consent to self-help eviction and its legality

To reiterate, under Section 9 of the Unfair Contract Terms Act B.E. 2540 of Thailand, a tortfeasor may rely on the injured person's consent, or Volenti non fit injuria, to deny his tort liability, given that the consent in question is not contrary to law or public order or good morals.

Regarding the consent to an act that shall not be contrary to law, the author views that the term "law" may be interpreted as the express laws only;[408] whether it is civil law, criminal law, or other branches of law.[409] The law must contain an explicit prohibition as to what conduct is prohibited.[410] Since Thailand does not have a specific law related to unlawful eviction like England does, it is safe to say that the tenant's consent to the landlord's self-help eviction is consent to an act that is not contrary to the law.

In contrast, if we consider the side of public order and good morals. As mentioned in Chapter 2, even though the Civil and Commercial Code has not provided a definition for public order and good morals, several definitions may still be drawn from inferences made in light of many Supreme Court decisions. Essentially, acts that tend to impact the country's political administration, national interests, the justice system, traditions and religion, family institutions, or the economic system, or any other

[408] Sotthibandhu (n 96) 67.

[409] ibid, 67- 68.

[410] ibid, 68 – 73.

act that may result in public disorder are all considered contrary to public order and good morals. [411]

Acts that tend to impact the justice system may include those that hinder or interfere with the justice system itself. This is because the provisions of Thai procedural law are all grounded on the concept that all men whose rights are disputed should exercise their rights through the court[412] by bringing their dispute into the justice system.[413] Under the system, both parties can freely and fairly present evidence to guarantee and protect their rights or for the court to enforce their rights under the law. Moreover, each party may rely on the rights prescribed by the law to the justice system to protect their interests during the trial.[414] Even after the court has rendered a judgment guaranteeing the rights of the party that won the case, the system still protects the rights of the party that lost in that enforcement against them shall be carried out by the execution officers in compliance with the judgment or as the law prescribes. If the enforcement is carried out to the contrary, it may be revoked by the court.[415] In light of

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[411] Teirahunt (100) 36.

[412] Please note that the missions of civil procedure law include cessation of self-help, protection of public order and legal development, and the mission to adjudicate and preserve legal institutions; Khanit Na Nakhon, กฎหมายวิธีพิจารณาความแพ่งภาคการดำเนินคดี (พิมพ์ครั้งที่ 2,วิญญูชน 2552) 33-34. (*Kotmai Withi Phicharana Khwam Phaeng Phak Karn Dam Noen Kha Di [Civil Procedure Law, Litigation part]* (2 edn, Winyuchin 2009)) 33-34.

[413] Please note that the exercise of a right through court is a right that belongs to the people, or a security that the State has provided the people so that they may request the court to guarantee respect for their rights and interests. Such protection or method of remedy by the court is not only beneficial to the suing plaintiff, but also to the defendant, who may be protected from baseless lawsuits; see Wanchai BoonBamrung, 'แนวความคิดเกี่ยวกับการใช้สิทธิทางศาลหรือการฟ้องในคดีแพ่ง" (ปีที่ 33; ฉบับที่ 2, วารสารนิติศาสตร์ 2546) 221. ("Naeo Khwam Khit Kiaokap Karn Chai Sitthi Thang Sarn Rue Karn Fong Nai Kha Di Phaeng" [the Concept on Exercising Judicial Rights or Civil Litigation])' (2003) 33 Thammasat Law Journal 221

[414] See Civil Procedure Code s 253, 254 and 264.

[415] See Civil Procedure Code s 295.

this, it is apparent that the power to enforce a person's rights and obligations is the State's absolute authority. Therefore, any act that gives private persons the right to enforce against one another personally without going through the State[416] is an act that creates a hindrance to or interference with the justice system. As the Roman proverb goes, "*Decretum Divi Marci*" no one may enforce their right by themselves but shall conform to the rules and methods of remedy provided for by the State.[417] If the State allowed the private persons to agree or waive their legal protection by permitting other private persons to enforce their obligations, not only would this be a recipe for undermining the justice system's and the court's supreme authority, but the law would blatantly be allowing the private to find ways to circumvent the due process of law without regard for public order. This would result in the justice system's greatest failure and ultimately impacts overall public peace.[418]

In this regard, the author believes that since the tenant's consent is consent that allows the landlord to bypass all necessary legal procedures while he

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[416] Please note that arbitrary enforcement of obligations is a concept that is practiced and developed from the concept of self-help. Other countries also have similar concepts because, before society and law were as developed as it is today, society was originally very narrow in which the only enforcement available was through self-help, and the method of enforcement had one step, which was legal execution. However, as society became more civilized and developed that the societal and legal systems changed, the principle of self-help in the enforcement of obligations, which was within the power of private persons in the past had an effect on the societal stability in regards to public order. Thus, enforcement through legal execution by the state later replaced the private's self-help enforcement. In the present, self-help may only be exercised under a few circumstances only, such as Section 451 CCC; see Sanan Yamacharoen, 'The Offences off Theft: Taking Property of Another to Pay off Debt Problems' (LL.M. Thesis, Thammasat University 2011) 121.

[417] Arwed Blomeyer and René David, *International Encyclopedia of Comparative Law:* , vol XVI Civil Procedure (Ch 4, Types of relief available (judicial remedies), 1982) 4.

[418] Phairoj Vayupaph, *คำอธิบายกฎหมายวิธีพิจารณาความแพ่ง ภาค 1 บททั่วไป* (พิมพ์ครั้งที่ 4, กรุงสยามพับลิชชิ่ง 2559) 3. (*Kham Athibai Kodmai Withee Pijaranakhampang Paak Nueng Bot Thuapai* [Guidance on Civil Procedure Code Volume 1, General Part] (4 edn, Krungsiam Publishing 2016) 3.

recovers possession of the premises and evicts the tenant, it amounts to consent that gives private persons the right to enforce against one another personally without going through the State, which surely has the characteristics of or results in a hindrance or interference with the justice system. This is because such consent impairs the tenant's access to his rights guaranteed by the system itself. For instance, in the case where the lease has yet to terminate, but the landlord understands otherwise that he proceeds to evict the tenant by himself, the tenant may be unable to present evidence to substantiate his claim that the lease has not yet terminated. In other cases, the lease has expired. However, the tenant is still unable to find alternative accommodation, or there exist other special circumstances where one of his family members is sick and thus cannot traverse quickly, or where his children are in the midst of final exams, and immediate eviction thereof would be detrimental. In these cases, the tenant would be unable to request the court to protect their interests temporarily until he finds another accommodation or the special circumstances have passed due to the consent rendered. Eventually, even if the lease terminates or expires and the tenant is to vacate the premises, the tenant will receive no guarantee of rights from the justice system. To illustrate, the tenant may face a risk of being evicted by persons other than the government official. Alternatively, the landlord's method may not conform to the execution procedures prescribed under the law. One day, the tenant may wake up to find himself suddenly evicted by the landlord with no other accommodation to reside in. Further, as mentioned previously, civil procedure law provisions under the Thai justice system aim to compel the citizens to exercise their rights through court and do not accept self-help enforcement of obligations between the private persons. This is because arbitrary eviction without due process of law is considered a method extremely dangerous to the tenant, his family, and their neighbor. Moreover, even where the eviction executed is reasonable, it is nevertheless deemed a risk factor that may escalate into serious violence unexpected by the landlord. As an illustration, the landlord, who wishes to evict the tenant after the lease expires, sees the tenant's absence as an opportunity to evict him. The landlord proceeds to evict the

tenant by changing the door lock to prevent the tenant from entering the premises. As he changes the lock, he is caught red-handed by the tenant. In the end, both parties sustain injuries from fighting, which is against the landlord's original intention. Another highly prevalent case in Thai society is where the landlord takes away the tenant's property as his own upon carrying out self-help eviction by changing the door lock, even when there is no contractual clause to that effect. In other instances, self-help eviction frequently causes damage to the tenant's property. Hence, it can be seen from these real-life examples that self-help eviction and its damaging effect, aside from posing a danger to the occupants and nearby others, ultimately lead to a claim for compensation and unnecessarily increase the number of cases for the court. In the end, self-help eviction may also cause the tenant to become a homeless person who has no other choice but to roam the streets, which is bound to create a problem of public disorder on a wide scale.

Re-examining the Supreme Court Decision No. 3379/2560, it may be observed that even though the Supreme Court was absent on whether the tenant's consent, which allowed the enforcement of obligations between private persons without the court, was contrary to public order and good morals. Nonetheless, the court's statement, "...even acting under the tenant's consent or agreement, the landlord's self-help eviction is still a tort...," is in itself an explicit confirmation that at present, Thai law does not tolerate an eviction without a court order and regards it as unlawful. The author firmly believes that the objective and reason behind this Supreme Court Decision are the same as those mentioned earlier, which are to prevent or prohibit any act that gives rise to the enforcement of obligations between private persons without intervention by the State, because the authority to enforce obligations is absolute and exclusive to the State only.

Due to these reasons above, the author thinks that "consent for the recovery of possession," or the consent allowing the landlord to repossess the premises and evict the tenant without a court judgment or compliance with legal

procedures, is contrary to public order and good morals. In a reiterating manner, such consent gives private persons the right to enforce each other's obligations, which is deemed an act that hinders or interferes with the justice system. Apart from rendering the tenant unable to access his rights or the rights guaranteed by the justice system, the consent is extremely dangerous to people within the society. Ultimately, it is bound to result in the justice system's greatest failure and negatively impact overall public peace on a broader scale.[419]

4.2.3.2 Analysis of the landlord's tort liability arising from consented self-help eviction

In the author's view, the act of the landlord, who re-enters the premises and evict the tenant without enforcing his right through the court after the lease terminates or expires, constitutes an unlawful eviction and causes damage to the tenant, for which the landlord shall be responsible for compensating. Besides, as previously stated, since the tenant's consent allows the landlord to bypass all court procedures in carrying out the tenant's eviction, the tenant's consent is, therefore, consent to an act that is contrary to public order and good morals. On account of these reasons, the tortfeasor or the landlord may not rely on this consent to prevent his act from being a tort under Section 9 of the Unfair Contract Terms Act B.E. 2540. He shall be liable to pay damages to the tenant as a tortfeasor under Section 420 CCC.

Where the landlord's act is indisputably a tort, the court shall have the authority to fix the amount of damages to be paid according to the circumstances

[419] Please note that the author's opinion may be used to describe the case of an agreement that confers the landlord the right to recover possession of the premises and evict the tenant without complying with the law, using the same reasons the author stated. It is certain that such an agreement shall also be contrary to public order and good morals. Additionally, the author is of the view that the reasons that the author provided may be compared or explained in conjunction with other similar cases. For instance, if there is consent or agreement that allows private persons to enforce against each other by themselves, it shall be the case that such consent or agreement be contrary to public order and good morals in the same manner.

and gravity of the wrongful act.[420] In some cases, if the damage arisen is partially attributable to the injured person's wrongs,[421] the court also has the authority to determine the amount of damages in light of the circumstances, especially how far the injury has been caused chiefly by one or the other party under Section 442 CCC in conjunction with 223 CCC.[422] Thus, in some instances, even though the landlord fails to successfully rely on the tenant's consent to deny his own liability, it cannot be denied that in practice, tenants who consent to the landlord's arbitrary recovery of possession do exist. For this reason, the court may exercise discretion in considering the tenant's consent to fix the amount of damages appropriately under Section 438 CCC. Imperatively, the fact that the lease has terminated or expired, but the tenant refuses to leave the premises, prompting the landlord to evict the tenant by himself and commit a tort in the process, shall be considered as falling within the scope of Section 438 CCC as well. This

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[420] Civil and Commercial Code s 438: "The Court shall determine the manner and the extent of the compensation according to the circumstances and the gravity of the wrongful act".

Compensation may include restitution of the property of which the injured person has been wrongfully deprived or its value as well as damages for any injury caused".

[421] Please note that the damage resulting from the fault of the injured person is not limited to the case where the injured is involved in the tort through his negligence, but the case where he is involved through his intention as well; see Punyaphan (n 15) 188-189.

[422] Civil and Commercial Code s 442: "If any fault of the injured party has contributed in causing the injury, the provisions of Section 223 shall apply mutatis mutandis.

Civil and Commercial Code s 223: "If any fault of the injured party has continued in causing the injury, the obligation to compensate the injured party and the extent of the compensation to be made depends upon the circumstances, especially upon how far the injury has been caused chiefly by the one or the other party.

This applies also even if the fault of the injured party consisted only in an omission to call the attention of the debtor to the danger of an unusually serious injury which the debtor neither knew not ought to have known, or in an omission to avert or mitigate the injury. The provisions of Section 220 apply mutatis mutandis".

is because it can be said that the landlord's tort occurred partly because the tenant persisted in residing in the premises. Therefore, when the damage is a product of the landlord's and the tenant's faults combined, the court has the power to determine damages the tenant shall receive in the light of how far the injury has been caused chiefly by either party in accordance with Sections 442 and 223 CCC.

To summarize, the author does not agree with the series of the Thai Supreme Court decisions from B.E. 2480 to 2556 but agrees with the overall outcome of the Supreme Court Decision No. 3379/2560. However, for the issue of whether the tenant's consent for the landlord's recovery of possession is expressly prohibited by law or contrary to public order and good morals left untouched by the Court in this case, the author thinks that the consent in question is contrary to public order and good morals. The reason being the consent involves an act that results in a hindrance to or interference with the justice system. Aside from resulting in the justice system's greatest failure, the consent would ultimately lead to public disorder on a wide scale.

4.3 Proposed solutions

Through research and analysis of various solutions to the problems of Volenti non fit injuria's uncertain legal status in regards to its tort application, and the issues of tenants'consented residential eviction without a court order, the author has a few suggestions that may be presented as follows:

4.3.1 Adjusting the manner of interpretation and adjudication in case of consent for the recovery of possession

Not only shall the consent or agreement that allows the landlord shall be able to recover possession of the leased premises without regard for the law be contrary to public order and good morals, but any consent or agreement that produces the effect of allowing private persons to enforce obligations between themselves shall be

the same. This is because any act which permits the private persons to enforce obligations themselves is an act that hinders or interferes with the justice system. Eventually, this would result in the justice system's greatest failure and negatively impacts overall public peace.

4.3.2 Improving and enhancing the justice system

It is with great difficulty to accept that if the Thai justice system had been as effective, efficient, and proficient in protecting the landlord's and tenant's interests as it should have been, the issues of arbitrary eviction or the landlord's attempt to circumvent the enforcement of rights through the court would not have occurred. The main reason why the landlord does not choose the lawful method of eviction but other means to evict the tenant is because the standard of protection for preserving the parties' interest is not sufficient to protect the landlord's and the tenant's interests in an eviction case. For instance, there few provisions on the temporary injunction in the entire Thai Civil Procedure Code, which are Section 254 (2) and 264, that can be applied to the landlord's eviction lawsuit. Not to mention, the section is broadly worded to cover all cases and lacks any specific criteria to preserve the landlord's and the tenant's interests in an eviction case. Conversely, looking at England and Germany, these countries' justice systems pay much greater attention and significance to the protection of interests of the individuals in discussion than Thailand. To elaborate, the German Code of Civil Procedure prescribes a set of provisions on eviction of tenants separately from the general provisions on judicial adjudication. Additionally, England enacted specific laws in the form of statutory acts for the same purpose, which is to protect landlords and tenants' interests through the country's justice system as best as possible.

Due to these reasons, the author would like to suggest to improve and enhance the Thai justice system, from preliminary proceedings to those after the court accepts the case. As for the methods of improvement and enhancement, we may observe the structure of the American, England, or German justice systems and use them as model solutions for the problems Thailand faces. It is imperative that the justice system create

confidence and guarantee landlords and tenants' rights in an eviction case that their interests would be properly and fairly protected by the system as they should be.

4.3.3 Amending the Civil and Commercial Code by expressly incorporating Volenti non fit injuria into tort law provisions

Although at present, the criteria and limitations of *Volenti non fit injuria* may appear explicitly in and applied through many Thai Supreme Court decisions, Thai law does not regard these as a source of law. Instead, the previous court decisions merely are applications of the law that come in various versions depending on the facts, resulting in a degree of legal uncertainty to the juristic position of the rules and limitations of *Volenti non fit injuria* the Supreme Court formerly attempted to lay down. Moreover, there is also a problem with the interpretation and other aspects of *Volenti non fit injuria* that remain uncertain and thus left completely untouched or vaguely touched by the Court. For instance, the uncertainty of the principle's legal status in its application in tort cases or the limitation that exists independently of the Civil and Commercial Code that appears in the Unfair Contract Terms Act. Besides the author's analysis presented in this Independent Study, a few other legal academics have attempted to explain and suggest interpretation guidelines and how to apply *Volenti non fit injuria* in tort. However, in the author's view, these are insufficient. Although certain groups of people are aware of how to apply and interpret the principle in the ways it should be applied and interpreted, it does not mean that people in general or, at the very least, common legal practitioners would come to know of such things. Therefore, if the consent principle's criteria and limitations were established in explicit terms, the common legal practitioners would understand the principle more efficiently, and it would also reduce any controversy or debate that might ensue from the uncertain aspects of *Volenti non fit injuria* to the minimum.

Further, it is evident that Thailand had adopted the principle of *Volenti non fit injuria* into its legal system through the influence of legal practitioners who completed their legal education in England. In any case, the author deems it inappropriate to take on the principle's English model as guidelines to finding a solution to the problems

of legal uncertainty with respect to *Volenti non fit injuria* in tort cases. Because, not only that Thailand has a different history of tort law, but the disparities in terms of legal systems is the other important reason. In precise terms, England is a common law country, whereas Thailand is a civil law country. It is certain that each of these countries has different approaches to legal methodology in applying the law. For instance, English law sees the injured person's consent as a ground for excusing the defendant from liability, should the defendant's act be proven as a tort. In contrast, Thai courts see that such consent is a ground for canceling out one element of the tort, preventing it from being considered a tort altogether.

For the reasons above, the author would like to suggest a solution to the problem under discussion that should be compatible with Thai law from the author's perspective. The author suggests adding a total of two sections of law, namely Section 420/1 and 420/2. Under Section 420/1, the author sees that, apart from specifying the principle of *Volenti non fit injuria* expressly in the provisions to detach it from Section 420 CCC, the provisions should also comprise the criteria and limitations, which are settled under consistent Supreme Court decisions, in a clear manner. For example, the provisions may specify that the consent shall be voluntary, the person giving consent shall be expressly aware of the material facts concerning the act and its consequences before he gives his consent, or the consent provided may subsequently be withdrawn. This is to serve as a minimum standard as to what characteristics are required in a consent for it to defend against tort liability successfully and what rights do the consent provider has after he has given his consent. By enacting Section 420/1, the problems concerning *Volenti non fit injuria*'s uncertain legal status in its application would also vanish. Regarding Section 420/2, the author thinks it fit that the provisions of Section 9 of the Unfair Contract Terms Act on *Volenti non fit injuria*'s limitation be repealed and adopted into the Civil and Commercial Code. This is so that the general public and legal practitioners may quickly find and understand the principle of consent under tort law without looking into other sources of information. Not to mention, the Unfair Contract Terms Act's main subject lies

primarily in the realm of juristic acts and contracts. However, consent is related to torts, which are legal causes. Thus, combining the two subjects may create confusion and misunderstanding when there is a need to apply the said limitation to a tort case. In any case, the author intends for Section 420/2 to serve as a general provision of law that defines the scope or restrict the freedom to give consent similar to Section 150 CCC, which is a general provision that limits the freedom to enter into juristic acts.

Therefore, the author would like to offer the draft amendment of the tort provisions as follows:

Section 420/1 "Any act which has been committed in reliance on the injured person's consent is not a wrongful act, provided that the injured person gave his consent voluntarily on explicit knowledge of the material facts of the act and its consequences.

Consent under the foregoing provision may be withdrawn at any time by the person who gave it. Such withdrawal of consent shall be as easy as giving consent."[423]

Section 420/2 "Consent given to an act expressly prohibited by law or contrary to public order or good morals shall not be raised as a defense to exempt the act from being a wrongful act."[424]

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[423] Translated as:

มาตรา 420/1 "การกระทำอันใดที่กระทำไปโดยอาศัยความยินยอมของผู้เสียหาย การกระทำนั้นจะไม่ถือว่าเป็นละเมิด หากผู้ที่ได้รับความสียหายได้ให้ความยินยอมไปโดยสมัครใจและรู้ข้อเท็จจริงอันเป็นสาระสำคัญของการกระทำและผลของกระทำดั่งกล่าวโดยชัดแจ้ง

ความยินยอมตามวรรคหนึ่งผู้ให้ความยินยอมจะถอนเสียเมื่อใดก็ได้โดยจะต้องถอนความยินยอมได้ง่ายเช่นเดียวกับการให้ความยินยอม".

[424]Translated as:

มาตรา 420/2 "ความยินยอมสำหรับการกระทำที่ต้องห้ามชัดแจ้งโดยกฎหมาย หรือขัดต่อความสงบเรียบร้อยหรือศีลธรรมอันดีของประชาชน จะนำมาอ้างโดยถือว่าเป็นเหตุให้การกระทำนั้นไม่ถือว่าเป็นละเมิดมิได้"

4.4 Summary

Regarding the issue of the tenant's consented residential eviction without an eviction order, which arises from the contradiction caused by the differing trends of the Thai Supreme Court Decisions B.E. 2480-2556 and the Supreme Court Decision No. 3379/2560. The author is of the opinion that any consent or agreement that allows the landlord to recover possession of his property and evict the tenant without regard for the due process of law is contrary to public order and good morals. The landlord shall not be able to raise such consent as a defense and shall be liable to pay damages to the tenant as a tortfeasor. Nonetheless, it cannot be denied that the tort committed is partly attributable to the tenant's fault. Therefore, the court shall have the power to fix the damages payable in consideration of the circumstances and how far each party contributed to the injury under Section 442 CCC in conjunction with Section 223 CCC. Moreover, to effectively solve the problems of unlawful eviction or landlords circumventing the law, the author deems it fit that the justice system is improved and enhanced in terms of the preliminary proceedings and the proceedings once the court accepts the case to preserve the interests of the parties to the best extent possible. Observations may be made on the basis of the structure of the American, England, or German justice systems as model solutions for the problems Thailand is faced with.

CHAPTER 5

CONCLUSIONS

The term "*Volenti non fit injuria*" is a Latin maxim that means, "to a willing person, no injury is done" or "no wrong is done to one who consents". This doctrine is grounded on the legal concept that a person who knowingly and willingly runs into harm or a risky situation cannot sue based on any resulting injuries because the act was one to which he voluntarily consented. The principle of *Volenti non fit injuria* is one of the legal principles that have a long history, which is traceable to the Roman Empire and is accepted by many countries in the world. Nonetheless, it seems that the principle of *Volenti non fit injuria* is barely mentioned in civil law jurisdictions. In some countries, the principle is incorporated into legal provisions, while in some others, the principle is nowhere to be found. On the other hand, in common law jurisdictions, *Volenti non fit injuria* turns out to be widely known because although the principle originated from Roman law, it was later adopted into the English legal system, where it was continuously applied and developed until it became widespread. The principle of *Volenti non fit injuria* became so widespread that it exerted significant influence on many countries' legal systems, such as Thailand and Japan, among others.

In the Thai legal system, the court first employed the principle of *Volenti non fit injuria* due to the influence of the legal practitioners and judges who completed their education in England in the early days of law and justice system reforms. In many cases, the court, apart from applying the injured person's consent to discharge the defendant from tort liability, uses the judgments as their opportunity to lay down new rules and limitations in an effort to expand the scope of *Volenti non fit injuria* to provide justice to the parties. Due to this effort, the criteria and limitations concerning *Volenti non fit injuria* at present are explicitly laid down and applied in many Thai Supreme Court decisions. However, despite this attempt to clarify the law, certain issues are vaguely addressed.

Some other issues remain entirely untouched by the court, not to mention the existence of contradictions and inconsistencies among the Supreme Court rulings. These led to the problems concerning legal uncertainty in many aspects of *Volenti non fit injuria* under tort law. As can be seen from the problems with consented residential evictions of tenants without a court order on which the Supreme Court decisions diverged. Namely the series of the Supreme Court decisions from B.E. 2480 to 2556 and the Supreme Court Decision No. 3379/2560. The inconsistency arising from the two established trends of the Supreme Court led to the highlighted issues of this independent study. First, whether the tenant's consent, which allows the landlord to enforce his right personally without a court order, is expressly prohibited by law or contrary to public order and good morals. Second, when the lease terminates or expires and the tenant refuses to leave the premises, whether the landlord's self-help eviction would be a tort that results in liability for compensation if he acted on the tenant's consent.

From the comparative study of the foreign laws, it is evident that for Germany, it is irrelevant whether the landlord relies on the tenant's consent or agreement, or if any of these facts actually exist. In any case, the landlord would have no right to recover his possession of the leased property without filing a case to the court. This is because 'self-help' evictions are illegal in the German jurisdiction. Moreover, the tenant's consent to be evicted by the landlord with disregard for the due process of law is contrary to German public policy. Therefore, such consent becomes void.

Correspondingly, England's Protection from Eviction Act 1977 and the Housing Act 1988 maintain the same values as German eviction laws. Even after the lease has terminated and the tenant refuses to vacate the premises, the landlord may by no means arbitrarily evict the tenant. Be it his reliance on the tenant's consent or a contract clause that allows himself to carry out such an unlawful eviction. This is because the right to re-possession can only be enforced with a court order. In the instance that the landlord proceeds to evict the tenant in such an unlawful manner, the landlord would be burdened with civil and criminal liabilities by virtue of English law.

In respect of the Thai jurisdiction, for the issue in discussion, under the scope of limitation to the freedom to give consent under Section 9 of the Unfair Contract Terms Act, the author views that even though the consent or agreement, which allows the landlord to recover possession of the property and evict the tenant without an eviction order, otherwise known as the "consent for the recovery of possession," is consent to an act not prohibited by law due to the absence of express laws to the contrary. Nonetheless, consent to self-help eviction is regarded as consent to an act that is contrary to public order and good morals, since it is consent that allows private persons to enforce each other's obligations by means other than the use of the State's authority. Because such consent precludes the tenants from accessing their rights or from being guaranteed the rights provided to them by the justice system, this consent to eviction shall be deemed a hindrance to or interference with the justice system. To illustrate, the tenant would not have a chance to defend himself in court or present evidence to protect his rights, the tenant would not have the right to request temporary protection from the court while he is searching for another accommodation, or even after the end of tenancy and the tenant is obliged to vacate the premises, the tenant would not have a chance to be evicted by the execution officer, but he must face the landlord's method of self-help eviction instead. Significantly, not only is the self-help eviction awfully dangerous to the tenant, his family, and others in the society, but it also renders the tenant homeless and may escalate into a huge social problem in the future. Thus, in the end, it may be said that the tenant's consent to self-help eviction is bound to bring about the justice system's utmost failure and adversely affect public order and peace of the society at large.

Since the tenant's consent is consent to an act that is contrary to public order and good morals, the landlord is unable to raise it as a defense to exclude his act from being a tort under Section 9 of the Unfair Contract Terms Act. Consequently, the landlord shall be liable to pay damages to the tenant as a tortfeasor under Section 420 CCC. However, because the landlord's tort is partly due to the tenant's fault for refusing to leave the landlord's property when the period of tenancy elapsed, the court shall have

the authority to fix the amount of damages depending on the circumstances and each party's contribution to the injury under Section 442 CCC in conjunction with Section 223 CCC. All things considered, the author does not agree with the series of Thai Supreme Court decisions from B.E. 2480 to 2556 but agrees with the overall outcome of the Thai Supreme Court Judgment No. 3379/2560.

Lastly, the author suggests that the manner of interpretation and adjudication in regards to the consent for the recovery of possession be changed. Precisely, the court shall deem any consent or agreement, which permits private persons to enforce their own rights and obligations, contrary to public order and good morals. In addition, to effectively solve the problem of unlawful eviction or of the landlords' attempt to bypass the due process of law through consent or an agreement, the author considers it appropriate that the Thai justice system be improved and further enhanced, from the preliminary proceedings to those after the court has accepted the case. Observations may be made from the most developed nations, such as America, England, or Germany, to serve as model solutions for the problems Thailand is currently faced with. It is imperative to build confidence and trust in the landlords and tenants and to guarantee their rights during an eviction suit so as to ensure that their interests would be most appropriately protected through the justice system as they should be if they ever decide to go through with the lawful method of eviction as provided by the law.

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