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**NECESSITY AS DEFENCE UNDER LAW OF TORTS****ABSTRACT**

*By way of this research paper, I shall be giving my inputs on the fascinating topic of “defence of necessity” as used under law of torts, sharing case laws responsible for bringing it into existence, its implications on the aggrieved parties as well as the accused, the application of its cause-and-effect mechanism on various day to day legal scenarios and so on and so forth.*

*With the help of this research paper, I have attempted to exhibit the pivotal role “necessity” as a defence has always had in the past as well as current legal system specifically under law of torts. This paper shall deal with as to how a person becomes eligible to plead for their defence under this exception after commission of a tort and under what circumstances such justification is accepted as a valid defence .*

*With a few exceptions, the law of torts recognises necessity as a defence. It acknowledges that there may be some instances when a person's life could be in jeopardy or an overwhelming urgency that could require the person in question to respond to such situations by resorting to breaching of the law to prevent an even greater harm and this defence provides for the same.*

*This defence is also recognized under section 81 of the Indian Penal Code. This paper shall seek to analyse factors which are involved in pleading this defence and the burden of proof that needs to be met. It shall also delve in depth to understand the two kinds of necessity available to public in large, namely- ‘Private and Public Necessity’ and its various implications in the law of torts.*

**KEY WORDS**

Defence, Law of Torts, Public Necessity, Private Necessity, Burden of Proof

**INTRODUCTION**

Taking a cue from the abstract, some of the questions that must be arising in one's mind must indeed be something along the lines of

'What exactly is this defence of necessity being talked about?' or

'Under which circumstances can it be used under law of torts?'

This is exactly the clarity this paper strives to achieve.

The Black's Law Dictionary defines the word 'necessity' as 'Controlling force; irresistible compulsion; a power or impulse so great that it admits no choice of conduct.'

Going by definition, Section 81 of the IPC defines necessity as,

*"Act likely to cause harm, but done without criminal intent, and to prevent other harm.— Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property."*<sup>1</sup>

The basic rule seems to be that one shall not unreasonably interfere with someone else's rights or property; nevertheless, if an individual is in a situation where he is compelled to interfere with another's right in order to protect a person(s) or property, such interference is permitted.

Whenever a case is brought against the defendant for the commission of a tort and all the essential elements of that wrong are present, the defendant is held liable for the same. However even in such cases, the defendant can avoid his liability by taking the plea of the certain defences as available under tort law also popularly known as the "General Defences under law of torts." And although multiple defences come under torts, this paper particularly shall be focusing on only 'necessity' as a defence under law of torts.

"Salus populi suprema lex" an infamous legal Latin maxim roughly translating to 'welfare of the people is the supreme' is actually the rudimentary base on which this defence is rooted upon. In simple words the defence of necessity arose to define such an act that has to be carried out to prevent an even greater harm and even if such act is done intentionally, it is not actionable per se and serves as a good defence. Such kind of defence is only capable of being used by defendants in situations where the act/crime committed by them had to be done in order to prevent a greater evil/harm created by natural forces.

However one important condition that differentiates necessity from other defences is the presence of intention. For one to plead this defence, one has to have intentionally committed a crime unlike inevitable accident where the mishap takes place despite taking all foreseeable precautions and not just this, but when it comes to necessity, the infliction of harm needs to be upon an innocent and the defendant himself shouldn't be the wrongdoer like in case of private defence.

## **ELEMENTS AFFECTING DEFENCE OF NECESSITY**

Tort or more simply understood as a civil wrong is a form of law in which compensation is awarded in the form of unliquidated damages and there is no exception for the defendant even

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<sup>1</sup> Section 81 Indian Penal Code 1860

in case of necessity unless he/she is able to justify their unlawful acts and manages to succeed in which case the matter is simply closed then and there.

For a defendant to successfully plead this defence it becomes important for him/her to justify certain elements or factors that help to provide the required burden of proof to indicate that resorting to breaching of law was the only available /favourable option namely;

- > They were presented with choice of evils or harm and they opted for the lesser evil;
- > Acted keeping in mind the impending harm;
- > Reasonably defining a direct relationship between their conduct and the danger that needs to be averted;
- > Being put in a situation where there is absolutely no alternative of avoiding the harm except by breaking the law.

Justifying these elements does not only help the defendant in escaping his/her liability but also helps them to justify their actions for committing an unlawful activity considering the commission had to take place in order to prevent an even greater evil from taking place.

This defence can be much better understood by discussing case laws where this defence has been pleaded successfully and/or cases where this defence cannot be pleaded.

## **CASE LAWS PERTAINING TO DEFENCE OF NECESSITY**

### **Regina v Dudley and Stephens (1884)**

This landmark judgement was the first and foremost case law responsible for establishing a precedent that stated that the doctrine of necessity cannot be used as a defence to a charge of murder. In the given case four men, while at sea, had been struck by a storm that led up to them being stranded in the middle of the sea far away from any sort of land and resources needed for survival which then eventually led them to resorting to killing the youngest and weakest boy of the group as they assumed his chances of survival would anyway be the lowest and hence they ended up killing him and surviving on his flesh for the next 4 days until they were rescued. Although the remaining 3 men repeatedly claimed that they did this out of necessity, however in the facts of this case, the court still decided that killing the boy was in fact pure commission of murder and cannibalism and could not be considered as a ground for defence of necessity. It must however be pointed out that their death sentences were reduced to life imprisonment.<sup>2</sup>

### **Baender v Barnett (1921)**

In the given case, a fire broke out in one of the maximum security prisons and due to the fear of death, the inmates ended up breaking out of their cells. Although this was both legally and morally wrong, they couldn't be considered guilty of the crime of escaping jail as the circumstances forced them to do so in order to protect their lives, hence creating a premise for pleading the defence of necessity.

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<sup>2</sup> Regina v Dudley and Stephens (1884) 14 QBD 273 DC

**Leigh V Gladstone**

In the given case a lady prisoner who was carrying out a hunger strike was forcibly fed despite her protests. It was held how this could serve as a good defence of necessity against tort of battery.<sup>3</sup>

**Carter V Thomas, 1976**

In the abovementioned case a huge fire had started in the plaintiff's house, due to which the defendant in the adjoining house committed trespass in order to help and stop the fire from spreading even further and his actions were carried out in good faith. If one reasonably looks at the facts, when the plaintiff charged him for trespass using necessity as a defence should've been viable, yet he was still held guilty of trespass as the firemen had already reached to set out the fire and it was held that his interference was not required.<sup>4</sup>

**Dhaniah Dhaji, (1868)**

In the facts of this case, the defendant had been putting poison in his teddy pots being fully aware of the fact that if it was to be discovered by any human it was capable of causing real injury. He placed the poisoned pots in hopes of catching the thief that had been stealing the toddy. However, it ended up causing injury to some soldiers who had purchased it from an unknown vendor. Hence in this case it was held by the court that necessity could not be used as a defence and instead the person was held guilty under section 328 of Indian Penal Code.<sup>5</sup>

**TYPES OF NECESSITY****1. PRIVATE NECESSITY**

Private Necessity usually refers to situations where a person trespasses or interferes with another person's property in order to protect or defend himself or his property. This defence is more focused on self-interest rather than benefit of society as large. It provides that a person who is trespassing another's property can keep doing so only until the emergency is ongoing. However they are still to be held liable for any harm caused to the plaintiff's property due to the trespass but since he won't be liable for any punitive or nominal damages therefore this type of necessity is more often considered as a partial defence.

**Vincent v. Lake Erie Transp. Co (1910)**

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<sup>3</sup> Baender v Barnett, 255 US 224 (1921)

<sup>4</sup> CARTER v. THOMAS 1935 OK 653 46 P.2d 460 172 Okla. 558

<sup>5</sup> Dhaniah Dhaji, (1868) 5 BHC (CrC) 59

The defendant was present at the dock of the plaintiff to unload cargo from his steamship. However due to a violent storm erupting, the defendant was unable to leave in time and instead tied his ship to the dock. Some violent winds erupted that threw the defendant's ship over the plaintiff's dock thus causing substantial damage to the dock for which the court finally held that even his defence of private necessity was applicable the defendant would still have to pay compensation for the damage caused to the plaintiff's dock as it could have been avoided if he had only untied his ship from the dock which he didn't as he anticipated that would've caused greater harm to his own ship.<sup>6</sup>

## 2. PUBLIC NECESSITY

Public necessity refers to any action taken by the public authorities/officials or private individuals in order to avert a public calamity which has the potential to harm the public at large. The application of this comes in to place when trespass is committed by a person for the greater good of the community rather than focusing on self or personal interest. Also unlike private necessity public is a form of necessity which is considered as an absolute defence instead of a partial one as the trespassers are not required to pay any sort of compensation to the owners of the property and such personnel generally include public employees like police etc.

### **Surocco v. Geary (1853)**

In this case the city of San Francisco was hit by a major fire and the plaintiff Sirocco was attempting to retrieve goods from his home while the fire raged nearby, the mayor Geary i.e. the defendant however had no option but to demolish the plaintiff's building for preventing the fire from spreading further to the nearby buildings for which the plaintiff sued him. However, considering the demolition had to be done in order to prevent the fire from causing much more harm and that the defendant acted in good faith for greater good of the community at large, he was not held liable for paying any of compensation and his act fell under the defence of public necessity.<sup>7</sup>

## **ANALYSIS AND CONCLUSION**

From the given facts in the above mentioned case law, it can be seen that "Necessity" incorporates a sense of flexibility into laws that would have otherwise been resulted in unjust results if had it been applied mechanically. Although it can be said that necessity as a defence has helped us keeping our judgements moral in facts where it is morally permissible for a person to harm others. One however, cannot deny that by its very nature, the defence of necessity challenges and contradicts the notion and that the present situation demands a choice

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<sup>6</sup> Vincent v. Lake Erie Transp. Co. - 109 Minn. 456, 124 N.W. 221 (1910)

<sup>7</sup> Surocco v. Geary - 3 Cal. 69 (1853)

between two evils. It implies that breaking a particular rule is positively desirable, effectively converting it into a norm.

Hence, one can come to the conclusion that necessity takes into account conditional morality and allows one to be spared from his situational offence. Other than being a new defence, necessity is also an emerging doctrine, as evidenced by the Vincent case and R v. Dudley and Stephens, which clarified several key points.

The evolution of this defence will be determined by how the judiciary interprets it in future cases especially in context of our country. There is no doubt that it has elicited some pertinent criticism, some of which makes sense, as stated in ratio decidendi in R v. Dudley and Stephens, where it was held that not every form of necessity can be the premise for the defence of necessity, otherwise, there will be absolute anarchy and nothing else.



However despite the drawbacks this defence might suggest, from the in depth analysis of the case laws it is evident that this is one of the most crucial defences under law of torts. Not only has it provided a mechanism for the defendants to escape liability that may have befallen them due to the unlawful acts they were compelled to perform but it has helped the society understand the legal reasoning behind the same. It has helped the society as a whole in comprehending that how in certain situations people are faced with no choice but to resort to an unlawful activity in order to prevent something worse from happening. It has taught us the value of the actions performed by an individual and then the consequences one has to live with accordingly. Arguments can be made on how this defence is gravitating towards focusing on the community rather giving any thought to the smaller harm so caused. However it is equally important to keep in mind that the entire base on which this defence is based is rooted upon says “welfare of the people is the supreme law” and this is precisely what necessity strives to attain. This defence teaches us the prominence of how welfare of the community triumphs over everything else and how any person committing an illegal act with the intention of avoiding an even bigger harm from happening deserves to be given a chance at redemption.