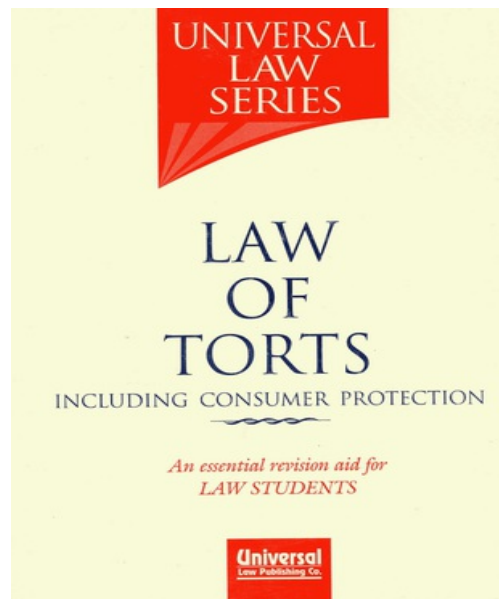
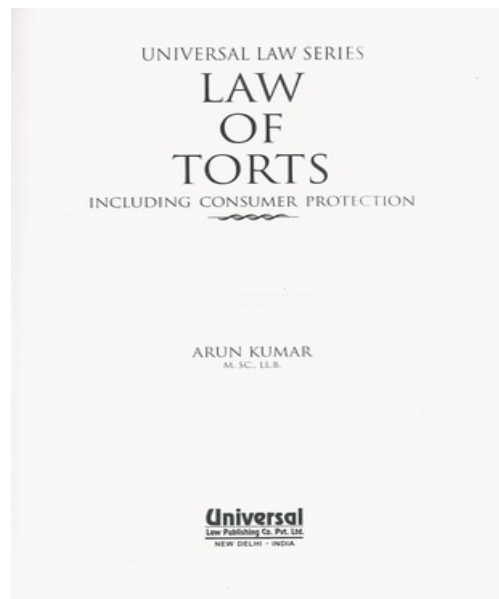


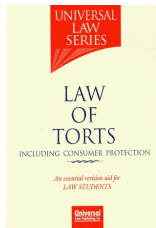
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CHAPTER 1

LAW OF TORTS

TORT: MEANING AND DEFINITION

What is the meaning of tort?

In common parlance the tort is an injury or wrong independent of implied contract, as by assault, libel, malicious prosecution, negligence, slander or trespass or seduction.

The term 'tort' is French in origin which is synonym to 'wrong' in English version. This word has originated from the Latin word 'tortus' which means to twist and implies conduct which is tortious or twisted. The Roman word 'delict' and Sanskrit word 'Jimha' depict same the meaning. The concept of tort appears when a breach of some duty is caused which is independent of implied contract giving rise to a civil cause of action and for which compensation can be claimed and a damage is recoverable.

1. Definition of Tort

Many authors have defined the term 'tort' but so far, its definition is still in a growing stage and it would be difficult to accept any single definition which could define tort in wholesome manner. There are shortcomings in each of the definitions but we will try here to find those missing links and bridging the gaps with our own suggestions.

A workable definition of tort may be as:-A civil wrong which is independent of implied contract for which the appropriate remedy is an action for unliquidated damages.

Salmond and Heuston

A tort is a 'civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation'.¹

Clerk and Lindsell

'A tort may be described as wrong independent of contract, for which the appropriate remedy is common law action'.²

Sir Fredrick Pollock

'The law of torts in civil wrongs is a collective name for the rules governing many species of liability which, although their subject-matter is wide and varied, have certain broad features in common, are enforced by the same kind of legal process and are subject to similar exceptions'.³

1. Law of Torts (1992), 20th Edn., pp. 14, 15.

2. Clerk & Lindsell, Torts, 8th Edn., p. 1.

3. Pollock, Law of Torts, 11th Edn., p. 15

Winfield and Jolowicz

Define Tort in the words of Winfield and Jolowicz.

'Tortious liability arises from the breach of duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages'.¹

It would not be out of place to mention here that none of the above definition gives a wholesome information on torts which can be accepted in its totality. However, the definition given by Winfield has more substance compared to those of other authors and if we examine here some of its shortcomings then certainly we can try for a definition near to perfection by adding some more teeth to it.

Important points of Winfield definition are:

- (a) duty primarily fixed by the law,
- (b) duty is towards persons generally; and
- (c) action for unliquidated damages.

(a) In tortious liability, the duty must be fixed by the law from the beginning and not by undergoing an agreement between the parties. So, parties can neither create nor negotiate the tortious liability by contract. Tort arises from the duty which has been fixed by the law and has been infringed by the party. From the above definition it is clear that liability arises from the breach of duty by a person but it has been seen that even though a person not committed a breach of duty himself, is held liable. Vicarious liability cases fall under the category where a master is held liable for his servant's wrong. In our country, it is the legal duty of every person who drives a vehicle to drive it carefully obeying traffic rules and guidelines. For example A appoints B as his car driver and one day A asks B to fetch his relative from railway station to A's residence. In course of performing his duty B travels to station at excessive speed and hits a pedestrian causing him grievous injury. Here B has committed a breach of duty primarily fixed by the law, but his master A will also be held liable in civil action under the rule of vicarious liability. This definition doesn't give space for such kind of cases to come within its ambit.

(b) The duty in tort is always general and it is an important constituent of tort. In maximum cases, it is workable but in some cases, it becomes difficult to say who exactly are 'persons generally' hence it can be said that these words are ambiguous. In any case, this ambiguity of tortious liability serves to keep it distinct from the contractual liability, quasi-contractual liability and the liability arising from bailment where the duty is towards specific persons.

(c) Liquidated and unliquidated damages - where the plaintiff in an action sues for a pre-determined and inelastic sum of money - it is a claim for liquidated damages. But if he sues for a sum which court, in its discretion, is at liberty to award, then he is said to have a claim for unliquidated damages even though he has mentioned a particular (fixed) sum of money in his pleadings.

The action for unliquidated damages is a litmus test of tortious liability since the award of damages is under the discretion of courts.

1. Winfield and Jolowicz on Tort by W.V.H. Rogers, 12th Edn., 1984, p. 3.

In case of *Laxmi Devi v. State of Madhya Pradesh*, MANU/MP/0063/2010 : AIR 2011 MP 47 the Court going through the veracity of tortious liability observed that negligence on part of treating Doctor or operating surgeon has to be necessarily established as "negligence" or "gross negligence". Because it is expected from professional medical doctors and surgeon that they would perform their duty well and upto best of their ability. In absence of culpable negligence, no doctor or surgeon could be penalised or declared guilty of committing negligence. Apparently if the plaintiff has suffered an injury for which, apart from the contract, he could have recovered damages, it is a tort, although it may also be a breach of contract and not less, if the tort has been suffered in the execution or purported execution of contract, *Turner v. Stallibrass*, (1898) 1 QB 56. Hence the distinction between "tort" and "contract" is not a logical one and it is sometimes different to say whether a particular thing is a wrong or a breach of contract.

In the case, *State of Rajasthan v. Vidyawati*, MANU/SC/0025/1962 : AIR 1962 SC 933: (1962) Supp 2 SCR 989, the plaintiff had claimed a damages for Rs. 25,000, but the court awarded only Rs. 15,000. Considering such element of tort, it can easily be distinguished from contract and bailment where the amount of loss is always pre-determined and inelastic. This definition also lacks other remedies viz. (a) self-help (b) injunction; and (c) actions for specific restitution of property.

* Self help can be availed by a person without going into a court of law. For example, if A finds a drunken

stranger 'B' in his room then A is entitled to get rid of him without force but if he does not succeed then he can use as much force which is required to evict the stranger from his room. So, in Winfield's definition, an action for unliquidated damages is not necessarily the primary remedy for a tort.

* Injunction is the order or judgment given by the court to restrain the commission or continuance of some wrongful act or omission. For example, in case of nuisance, the first remedy that would suggest itself is injunction and an action for damages would then follow. Thus, here injunction is the primary remedy and not the unliquidated damages which comes later.

* Actions for specific restitution of property are the alternative remedies in law of torts. When the plaintiff has been dispossessed of his land, chattels or goods by wrong means then only such remedies are granted. It can be said here that an action for damages is not essentially the primary remedy.

By incorporating nature, scope and characteristic of torts in the Winfield's definition it can be read as:

"Tortious liability arises from the breach of a duty primarily fixed by law which results in an infringement of private legal right of another and for which, civil action for unliquidated damages, injunction, specific restitution of property or even self-help, as the case may be, can be maintained."¹

2. Essentials of Tort

What are the essentials of tort?

When the interest is protected, it gives rise to a legal right which in turn gives rise to a corresponding legal duty. Some legal rights are absolute and its mere violation leads to the presumption of legal damage. To constitute a tort or civil injury following ingredients are necessary:

1. S.P. Singh, Law of Tort, 4th Edn., p. 6.

- (a) A wrongful act or omission on the part of a person;
- (b) That wrongful act or omission must result in legal damage to another; and
- (c) The wrongful act must be of such a nature as to give rise to a legal remedy in the form of an action for damages.

(a) Wrongful act or omission

What is wrongful act or omission?

A wrongful act or omission is said to have been committed by a person who has not performed his duty like a reasonable and prudent person or has broken it intentionally.

In the case, *Rogers v. Rajendra Dutt*, (1860) 8 MIA 103 (136): 13 Moore PC 209, it was observed that 'the act complained of should, under the circumstances, be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will, however directly, do him harm in his interest is not enough'.

Legal right in words of Austin is a 'faculty' which resides in a determinate party or parties by virtue of a given law, and which avails against a party other than the party or parties in whom it resides. For example, 'A' erects a wall on his land which obstructs the light to B's house. Although it is undoubtedly a lawful act to erect a building on one's own land but since the neighbour has enjoyed uninterrupted light for years, he has acquired the legal right to have this enjoyment, so erection of construction by A on his own land is an invasion of the right of B hence, not only damage but it is also unlawful and injurious.

A wrongful act may be a positive act or an omission which can be committed by a person either negligently* or intentionally** or even by committing a breach of strict duty.***

For instance, if a person drives his car at an excessive speed and with his rash and negligent driving injures any person on the road or keeps a dog on his land which escapes and bites a person in the neighbourhood then such act of the said person is a positive wrongful act or omission and he can be held liable for this.

It would be pertinent here to mention that a breach of merely moral or religious duty can't be considered under this head but it must be a duty primarily fixed by the law.

Example: Moral Duty

A, a lady who falls ill and requests her neighbour B to look after her since she is all alone. B takes care of 'A' and extends all types of help like giving food and medicines to her and making her comfortable with his presence at the time of need. A recovered after sometime. Once B fell ill, he requested A to help him during his illness but A never acceded to B's request and B due to lack of proper care and help became disabled. Here, it was A's moral duty to look after B

* Negligence means when a person does not act with care and caution and said to be careless while performing his duty without applying prudence.

** Intention signifies full advertence in the mind of the defendant to his conduct which is in question and to its consequences, together with a desire, for those consequences.

*** Breach of strict duty speaks about liability of person even though he is not at fault. In *Rylands v. Fletcher* it was laid down "if a person brings or accumulates on his land anything which, if it escapes, may cause damage to his neighbours, he does so at his peril, if it escapes and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent damage".-(1868 LR 3 HL 330).

during his illness and this duty cannot be held as legal duty. Since, this moral duty has not been fixed by law itself, B cannot take any legal action against the lady 'A'.

Example: Religious Duty

In the case *Dhadphale v. Gurav*, (1881) 6 Bom 122, Dhadphale was a servant in the temple and had a right to get the food offered to the idol and Gurav was under obligation to offer the food to idol but he failed to do so and the servant Dhadphale brought a suit against Gurav for damages. It was held by the Court that Gurav was not under legal obligation to give the food to the servant of the temple, failure to offer the food to idol was a breach of religious duty and not the legal duty hence, the plaintiff was not entitled for damages.

Damage to wall by water

In the case *Anand Singh v. Ramachandra*, AIR 1953 MP 28, the defendant built two pucca walls on two sides of his house on his land resulting in damage to walls situated between the defendant's and plaintiff's houses. The flow of water in the lane damaged the plaintiff's walls. The plaintiff had not acquired any right of easement. The Court was of the view that the defendant by building the wall on his land had not in any way violated the plaintiff's right therefore, no right of action was accrued to the plaintiff.

(b) Legal Damage

Describe legal damage. Discuss absolute and qualified damage with the help of relevant cases.

Legal damage is second important ingredient in constituting a tort. Damage means the harm or loss suffered or presumed to be suffered by a person as a result of some wrongful act done by another person. The sum of money which is awarded by the Court to compensate 'damage' is called "damages".

On the basis of presumption of damage rights are of two types: (i) absolute and (ii) qualified.

In case of violation of absolute right, the law conclusively presumes damage although the person wronged may have

suffered no pecuniary loss whatsoever. The damage so presumed is legal damage. In qualified rights, there is no presumption of legal damage and the violation of such right is actionable only on proof of actual or special damage. In this case injury or wrong is not complete unless and until actual damage has been caused by violating the rights.

In *Ashby v. White*, (1703) 2 Lord Raym 938, the plaintiff's legal right to vote in the parliamentary election was maliciously violated by the defendant and the defendant was held liable although the plaintiff not incurred any pecuniary loss. Lord Holt, C.J.; observed-"Every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right".

In another case, *Marzetti v. Williams*, (1830) 1 B&AD 415, the banker refused to honour the cheque of the customer although the banker had sufficient funds in his hand. Here the customer did not sustain any actual loss or damage, the banker was held liable.

In the words of Ihering - 'Rights are legally protected interests'. Right may be divided into two types: Private and Public. Private rights are those rights which vest in a person by virtue of law. Right to reputation, right to bodily safety and freedom, right to property etc. fall under this category. So, if a person has legal (private) right others have a duty towards him not to violate his rights. If his legal right is infringed without lawful excuse, he has a right of action against the person who infringes or violates it.

Public rights are those rights which belong to everyone as common people or it belongs in common to the members of the State generally. In case of violation of public rights, State takes action against the offender. For example, public peace, it is a right of everyone and if someone breaks it then he would be held liable and will be punished under law.

(c) Legal Remedy

In tort, the wrongful act must come under the category of wrongs for which the remedy is a civil action for damages. Legal remedy is the third essential for an action in tort. A tort is a civil injury, but all civil injuries are not torts. The essential remedy for a tort is an action for damages but there are other remedies also for example injunction may be obtained in addition to damages in certain cases of wrongs or an action by the plaintiff himself without going to the court i.e. self-help.

Mathematically tort can be summarised as follows:

Wrongful act +	Legal damage +	Legal remedy =	Tort
(a breach of legal duty)	(infringement of private legal right of another person)	(there must be at least 1 out of 4 remedies recognised by law i.e. damages, injunction, specific restitution of property and self help.)	

3. Ubi Jus Ibi Remedium

The law of torts has developed from the maxim "ubi jus ibi remedium" i.e. there is no wrong without a remedy, Jus, means 'the legal authority to do or to demand something' and 'remedium' signifies the right of action or the means given by law for the recovery or assertion of a right. We can also look upon this maxim which says-'Where there is a right, there is a remedy'. In the case, *Ashby v. White*, Holt, C.J., laid down that 'if the plaintiff has a right he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise of enjoyment of it, and indeed it is a vain thing to imagine a right without a remedy for want of right and want of remedy are reciprocal'.

4. Foundation of Tortious Liability

Explain the two competing theories of tortious liability given by Winfield?

Jurists are not having same opinion as to what constitutes the foundation of tortious liability. Winfield has given two competing theories:

- (i) All injuries done to another person are torts, unless there is some justification recognised by law.
- (ii) There are a definite number of torts outside which liability in tort does not arise.

The first theory has got support from Sir Fredrick Pollock as well as from eminent judges. Winfield says that - if I injure my neighbour he can sue me in tort whether the wrong happens to have a particular name viz. assault, battery, deceit, slander or even in absence of such names and I shall be liable if I fail to prove lawful justification. On this view, the law of tort/torts consist not merely of all those torts which have acquired specified names but also includes the wider principle that all unjustifiable harms are tortious. In the case, *Chapman v. Pickers*, (1762) 2 Wills 145 (146), Pratt, C.J. held that 'Torts are infinitely various, not limited or confined. Bowen, L.J. in the case *Skinner & Co. v. Skew & Co.*, (1893) 1 Ch 413 (422), observed that "at common law there was a cause of action whenever one person did damage to another wilfully and intentionally without just cause or excuse."

The second theory is also known as pigeon-hole theory. According to this theory the law of torts consists of a net-set of pigeon-holes, each containing a specific tort. For example, assault, battery, deceit, slander or any other tort. If the wrong committed by defendant does not fit in any of these pigeon-holes, then he has committed no tort. Sir John Salmond, an ardent supporter of this theory says, "Just as the criminal law consists of a body of rules establishing specific offences, so the law of torts consists of a body of rules establishing specified injuries. Neither in the one case nor in the other is there any general principle of liability. Whether I am prosecuted for an alleged offence or sued for an alleged tort, it is for my adversary to prove that the case falls within some specific and established rule of liability, and not for me to defend myself by proving that it is within some specific and established rule of justification or excuse."

5. Conclusion

The first theory has got reinforcement by the court by repeatedly extending the domain of the law of tort by creating new torts i.e. torts to which specified names have been given. For example, tort of malicious prosecution, deceit, absolute or strict liability etc. So, it is evident from such instances that the law of tort is steadily expanding and that the idea of its being cribbed, cabined and confined in a set of pigeon-holes is not tenable. The first theory has got support from Lord Mansfield in *Gardiner v. Creasdale*, (1760) 2 Burr 905, in the year 1760 and in 1762, Pratt C.J. in the case *Chapman v. Pickers*, gave his favour to this theory. It also got positive remark by Bowen, L.J. and Holmes J., in the cases *Skinner & Co. v. Skew & Co.* and *Aikens v. Wisconsin*, 191 (195) US 194, respectively. There is still some controversy regarding second theory and different authors have varied views. Dr. Jenks finds that new torts can be created and this is perfectly consistent with this theory because new torts cannot come into being unless the courts regard them as substantially similar to torts which they have already recognised.¹

Both the theories have their own merits and shortcomings and it depends upon the viewers who looks upon the theories from the angle he chooses.

1. Journal of comparative legislation, Vol. CIV, (1932), p. 210.

CHAPTER 2

TORT COMPARED WITH OTHER LEGAL LIABILITIES

To understand the law of torts it's essential to differentiate tort with other kinds of legal liabilities. Other legal liabilities viz. crime, breach of contract, breach of trust and bailment have same similarities with that of tort but even then, there are some points on which tort stands apart from these legal liabilities. In this chapter, we will try to find out the true position of tort at legal forum.

1. Tort and Crime

Q. Distinguish between tort and crime.

Since the time immemorial, it was a rule of primitive communities that the injured were compensated through pecuniary reparation. Private compensation was also allowed in crimes like homicide and serious bodily injury.

Henry Maine, observed that the penal law of primitive communities was not the law of crimes but the law of torts.¹

In the Anglo-saxon law, mostly pecuniary punishments were in vogue for different kinds of injuries viz. WER - price for causing death; BOT for personal injuries; WITE or fine - it was payable to the King. During the reign of rulers like Henry II, the crime was separated and the concept of Tort came into being and it was separated from crime.

Holdsworth².-Only certain lines of distinction are to be found in the nature of remedy given, and the nature of the procedure to enforce the remedy. If the remedy given is compensation, damages, or a penalty enforced by a civil action, the wrong so redressed is a civil wrong. If the remedy given is punishment of the accused which is enforced by a prosecution at the suit of the Crown, the wrong so redressed is a crime...

Blackstone³.-The distinction of public wrongs from private, of crime and misdemeanours from civil injuries, seems practically to consist in this: That private wrongs or civil injuries are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanours, are a breach and violation of the public rights and duties due to the whole community, considered as a community in its social aggregate capacity.

1. Maine, Ancient Law, p. 379.

2. Sir William Holdsworth, History of English Law, p. 7.

3. Blackstone Commentary, p. 5.

Distinction between a Tort and a Crime

Tort

1. A tort is an infringement of private rights belonging to an individual.
2. In tort the civil action is brought by the injured party himself. The wrongdoer has to pay damages to the injured party.
3. In tort, the intention of wrongdoer is of secondary importance.

Crime

1. A crime is an invasion of public rights or duties affecting the whole society/community.
2. In crime, the wrongdoer is prosecuted/punished by the State and if he is proved guilty and fined then the fine (money) will go to Government treasury.
3. In crime, the intention is one of the main factors.

4. Tort is considered as a private wrong.

4. Crime is regarded as a public wrong.

Some more facts:

- * A liability in tort may co-exist with criminal liability.
- * Most of the crimes are also torts e.g. assault, libel, theft etc.
- * Sometimes an injury may be regarded as a crime but not a tort e.g. public nuisance by obstructing traffic on a public road.

2. Tort and Contract i.e. Breach of Contract

Q. Do you agree with the appraisal 'an action for wrongful dismissal of an employee is a breach of contract and not a tort' if your answer is in affirmative then explain it with the help of relevant cases?

With the growth of civilization, necessities of people grew manifold and thus trade and commerce started growing day-by-day. When the trade increased, litigation could not lag behind, since the interests of the people clashed and it started taking ugly shape, then the concept of contract came into being i.e., laying down the terms and conditions between the parties on which both are agreed. It was done to avoid the litigation arising out of differences of opinions later on.

Professor Winfield said about the distinction between contract and tort as-"At the present day, tort and contract are distinguished from one another in that the duties in the former are primarily fixed by the law, while in the latter they are fixed by persons themselves. Moreover in tort the duty is towards persons generally, in contract it is towards specific persons or a specific person".¹

Differences between Tort and Contract as observed by Judges in various cases:

Addis v. Gramophone Co. Ltd., 1909 AC 488.-

".....by entering into a contract, the parties to it create for themselves rights and obligations and a breach of duty arising out of those obligations is actionable as a breach of contract, and when it is necessary in order to establish the existence and enforceability of the duty, prove and rely upon the contract, the only action that can be brought is an action for breach of contract, and the breach of a duty of this kind is not a tort. Thus an action for wrongful dismissal of an employee is a breach of contract and not a tort. So also, is perhaps, a wrongful expulsion from school."

1. Winfield, Law of Tort, 6th Edn., p. 40.

Jarvis v. Mary Davies, (1936) 1 KB 390.

"the distinction in the modern view for this purpose between tort and contract may be put thus: Where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is tort and it may be a tort, even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligation undertaken by the contract."

Austin v. G.W. Rly, (1867) 36 UQB 201.-

"..... the right which a passenger by railway has to be carried safely does not depend on his having made a contract but the fact of his being a passenger casts on the company a duty to carry him safely. The child was taken into the train and received as a passenger by the railway company's servants with their authority. Under these circumstances, does not the law require those who were carrying the child to take reasonable care that

he should come to no damage."

Distinction between a Tort and a Contract

Q. Describe the distinction between tort and contract.

Tort	Contract
1. In tort, the duty is fixed by the law itself e.g. A commits battery against B or damages B's property without lawful cause or excuse, it is a tort. Here, duty violated is a duty imposed by law itself.	1. But, in contract, the duty is fixed by the parties themselves. e.g. A agrees to sell goods to B for a price but A fails to do so. A has committed a breach of duty what he had agreed to perform under a contract with B. Here, the duty has been fixed by the parties themselves and not by law.
2. In tort duty is towards every person of the community or society.	2. In contract, the duty is toward specific person or persons.
3. Motive is one of the essentials of tort.	3. Motive is not of paramount importance in case of contract, it is virtually immaterial.
4. A tort may be committed against or without consent.	4. A contract is done on the basis of consent given by both the parties.
5. No privity is needed in tort.	5. In contract, there is a privity between the parties.
6. A tort is a violation of a right in rem (i.e. of a right vested in some determinate person and available against the world at large).	6. A breach of contract is an infringement of a right in personam (i.e. of a right available against some determinate person or party).
7. Measure of damages differs in different circumstances.	7. Damages are awarded in the form of compensation for pecuniary loss suffered* in case of breach of contract
8. In tort, a third	8. The question does not arise since

party can sue for

tort even though the third party does not come
there was no

contract between the under the purview of being
wrongdoer

and the person covered for any compensation.
injured.

* There are instances/cases viz. breach of promise of marriage or when a banker refused to honour the cheque even when the funds were available with banker cases are - *Jogendernath v. New Bengal Bank*, 1939 Cal 63; and *Groom v. Crocker*, (1939) 1 KB 194 CA.

3. Tort and Quasi-contract

Quasi-contract is based on the principle that if a person unjustly gets something (wrongly delivered by someone) then he must inform/return it to the rightful owner then and there. If a person has received an advantage for which he is not entitled, then he should return it back to the rightful owner.

Tort and Quasi-contract, both have duty as imposed by law.

Distinction between Tort and Quasi-contract

Tort

1. Tort gives right to damages as well as also grants other remedies.
2. In tort, the claim is always for unliquidated damages.
3. Duty is towards persons generally and not to a definite person.
4. Duty under torts arises due to breach of primary duty.

Quasi-contract

1. Quasi-contract gives right only in respect of money.
2. Claim under quasi-contract is for liquidated sum of money.
3. Rights arisen from quasi-contract is against particular person or persons.
4. In Quasi-contract, there is no such concept of primary duty.

4. Tort and Breach of Trust

Trust is a relationship which is established through mutual understanding. It has got some similarities with that of law of contracts but forms a different branch from contract as well as tort.

* Damages claimed in tort are unliquidated while these are liquidated in case of the breach of trust.

* In breach of trust compensation is not termed as damages.

* Whole law of trusts is regarded as a division of the law of property which is fairly detachable from other parts of law.

5. Tort and Bailment

Sir William Jones, in 'Treatise on the Law of Bailment' has described bailment is a delivery of goods on a condition, express or implied, that they shall be restored to the bailor or according to his directions, as soon as the purpose for which they are bailed has been completed.

Bailor - who delivers the goods.

Bailee - to whom the goods are delivered.

Examples of Bailment-

Hire of goods, gratuitous loan of goods and pawn or pledge.

Prof. Winfield opines that the bailee's liability is not tortious because the duty arises from a relation i.e. in between bailor and bailee created by the parties. He has further expanded in these words-"if the bailor's claim is necessarily founded upon some specific provision in a contract, then no doubt, the bailee's liability is no tortious but contractual, but if the bailor's claims rest upon a breach by the bailee of one of the bailor's common law duties, then his liability is as much attributable to the law of tort as is the claim of a visit or against the occupier of premises under the Occupiers' Liability Act."

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CHAPTER 3

DAMNUM SINE INJURIA & INJURIA SINE DAMNO (DAMNUM)

1. Meaning

Winsmore v. Green Park, 1745 Wills 577 (581).

Damnum-damage in terms of substantial loss of money, comfort, health, service etc. as it was observed in the case.

Injuria-it means a breach of legal right or infringement of legal right. But it should not be wilful or malicious. When the breach or infringement of legal right is tortious then only the question of action arises. If, the law has conferred some right on a person and it has come across some unauthorized interference then it is termed as injury.

Ist Maxim:-Damnum Sine Injuria

Q. The decision in the case Mogul Steamship Co. v. McGregor, Gow & Co., establishes the principle that competition with deliberate infliction of harm afford no ground of action, unless it is done unlawfully. In light of these observations, explain the maxim 'Damnum sine injuria'.

No action lies for damage or loss, even when it is substantial in nature but has been caused by an act which does not breach/infringe some legal right of the plaintiff. The maxim damnum sine injuria has thus a meaning which says - damage/loss without breach or infringement of legal right.

We can understand this maxim with the help of following cases:

Gloucester v. Grammar School, 1441 YB 11 Henry IV, 47, p. 21.

In this case, plaintiff was running a school, defendant had also set up a school for children. Plaintiffs had to reduce the tuition fees for children by a substantial margin since children of plaintiff's school were running away and joining the defendant's school. It was held that even though the plaintiff has suffered substantial loss due to rival school but plaintiffs had no cause of action against the defendant on the ground that bona fide competition cannot afford ground for action, whatever damage it has caused to plaintiff.

Justice Hankford delivering the verdict remarked as 'damnum' may be (obsque) injuria, as, if I have a mill and my neighbour puts up another mill whereby the profit of my mill is diminished. I shall have no action against him, although I am damaged'.

Mayor of Bradford v. Pickles, 1895 AC 587.

In this case, the defendant was unhappy when the Bradford Corporation refused to purchase his land in connection with the scheme of water supply for the inhabitants of the town. With a vengeance, the defendant sank a shaft on his land resulting in diminishing underground water which also turned discoloured flowing to the land of plaintiff.

The plaintiff i.e. corporation brought a suit against the defendant that the conduct of later is of evil design, and it was unlawful. But, the contention of the plaintiff was rejected on the ground that the act of defendant upon his own land was not actionable when he was very much within his legal rights, although his motive was to prejudice his neighbour. Lord MacNaghten stated that "the real answer to the claim of the corporation is, that in such a case motives are immaterial. It is the act, not the motive for the act, that must be regarded. If the act, apart from motive, gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element."

Mogul Steamship Co. v. McGregor, Gow & Co., 1892 AC 25.

Here, A, B, C & D, defendants were the shipowners, who were in trade of shipment of tea from China to England offered special concession to customers to oust their rival E from the business. E in this circumstances suffered loss and sued A, B, C & D that they have conspired against his business.

The Court of Appeal and the House of Lords held that defendants had done nothing unlawful. The House of Lords observed that the defendants have done so to extend their trade to increase their profits, although with the intention of injuring plaintiff.

The plaintiffs were not entitled to recover the damage they had suffered by the defendant's acts. "The defendants have done nothing more against the plaintiffs than pursue to the bitter end a war of competition waged in the interest of their own trade. Nor there is any element of illegality in the fact of combination among the defendants, as long as it was for the purpose of trade and competition."

The decision in this case establishes the principle that with deliberate infliction of harm affords no ground of action, unless it is done unlawfully.

Anand Singh v. Ramachandra, AIR 1953 MP 28.

In this case, the defendant built two pucca walls on his land resulting in flow of water through a lane in between plaintiff's and defendant's house. It damaged the walls of the plaintiff's house. The plaintiff brought a suit against the defendant and requested the court that he should be given Rs. 100 as damages by defendant. It was the observation of Madhya Pradesh High Court that the defendant by constructing the walls had not violated any right of the plaintiff hence no cause of action lies against the defendant. So, plaintiff is not entitled to restrain the defendant from constructing walls on his land. It is a case of *damnum sine injuria* a case where damage or loss is inflicted without the act being unlawful. It is an act though harmful to the plaintiff is not wrongful on the part of the defendant, and no right of action accrues to the plaintiff.

Ind Maxim:-Injuria Sine Damno

Q. Illustrate the maxim 'Injuria sine damno' with the help of relevant cases and give your views on the observation _ the person in whom the legal right is vested is entitled to bring an action and may recover damages.

This maxim is just opposite of maxim *Damnum sine injuria*. It means there is breach or infringement of private legal right but no damage has been done. We can say here also as whenever there is an infringement of private legal right, the person in whom the legal right is vested is entitled to bring an action and may recover damages, although there may not be any real/actual loss or harm suffered by him.

Ashby v. White, (1703) 2 Lord Raym 938.

Here, the plaintiff was a genuine voter who had gone to cast his vote but the defendant, a returning officer, wrongfully refused to register his vote. Although the candidate won the election to whom vote was to be given so it made no difference when the plaintiff didn't vote. When the matter came to the court, it awarded plaintiff £ 5 (with costs) on the ground that there was the violation of the plaintiff's legal right was an injury for which he must have a remedy and was actionable without proof of pecuniary damage.

In this case, while delivering the judgment Lord Chief Justice Holt laid down three propositions in favour of plaintiff as follows:

- "(a) That the plaintiff, as burgess of this borough, hath a legal right to give his vote for the parliamentary election,
- (b) That as a necessary consequence thereof, and an incident inseparable to that right, he must have a legal remedy to assert, vindicate and maintain it, and
- (c) This is the proper remedy which plaintiff hath presumed, being supported by the grounds, reasons and principles of common laws of England".

The Chief Justice Holt further held-

"Every injury imports a damage though it does not cost the party one farthing. For a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right so, if a

man gives another a cuff on the ear, though it cost him nothing, not so much as a little plaster yet he shall have his action, for it is personal injury. So, a man shall have an action against another for riding over his ground, though it does him no damage for it is invasion on his property."

Kali Kishen Tagore v. Jadoo Lal Mullick, 61 A 190.

In this case, both the plaintiff as well as defendant were proprietors of opposite banks of a water channel. The defendant had built a wall on his own land for protection. But, the plaintiff sued defendant for an injunction for demolition of a wall. The Calcutta High Court was of the view that the contention of plaintiff was justified that the encroachment might damage thereafter. But this decision was reversed by the Privy Council on the ground, that the water channel bed did not belong to the plaintiff but to the government, the plaintiff had neither claimed nor proved that he was entitled to the flow of the water as it had been accustomed to flow or that flow was seriously and sensibly diverted as to be an injury to his rights, he had failed to show either *damnum* or *injuria* hence the question does not arise for any action. Their Lordships further held, "There may be, where a right is interfered with *injuria sine damno* is sufficient for an action; but no action can be maintained where there is neither *damnum* nor *injuria*".

We can conclude this chapter with this observation that there may be certain moral wrongs, which may cause damage to others but here law offers no legal remedy; and on the contrary, there are certain legal wrongs which may not cause any loss or damage to another person, but the law provides a legal remedy although there is mere a violation of private legal right.

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CHAPTER 4

SOME GENERAL ELEMENTS OF TORTS & ITS RELAVANCE

There are some general elements in torts viz., act and omission, voluntary and involuntary acts and mental elements e.g., malice, intention, negligence, recklessness and motives. Prior to discussing other chapters on tort, it is necessary to study all these essentials which would figure here and there in following chapters.

1. Acts and Omission

Wrongful act is a constituent of a tort and the word 'act' connotes both positive and negative acts viz., acts and omissions. In tort, the wrongful acts which make a person liable are positive acts and sometimes omissions. An omission is failure to do an act as a whole.¹ Acts and omissions must be distinguished from natural phenomenon viz., lightening, earthquake and for such happenings, a person cannot be held liable. They must also be differentiated from mere thoughts and intentions. As Salmond has said in his jurisprudence - 'which are by themselves harmless hard to prove and difficult to discipline.'

The law does not impose liability for mere omissions. [Stovin v. Wise, (1996) 3 All 801 (HL)]. An omission incurs liability when there is a duty to act. In this case, it was further observed that "a duty to prevent harm to others or to render assistance to a person in danger or distress may apply to a large and indeterminate class of people who happen to be able to do something. Why should one be held liable rather than another?" - it can also be understood by referring the example that a person cannot be held responsible for the omission of not rescuing a stranger child whom he sees drowning even then he can rescue him without any appreciable exertion or risk of harm to himself. But this concept/version can be different if the child is one for whose safety and welfare there is a duty laid on the person who finds him drowning. In the above example, if the parent or guardian is standing there when the child is drowning, they will be held liable for failure to attempt and rescue for it would then be a case of an omission where there is and duty to act.

1. Stovin v. Wise, (1996) 3 All 801 (HL) p. 820.

2. Voluntary and Involuntary Acts

Q. Distinguish between Voluntary and Involuntary Acts.

Voluntary action means wilful exercise. It may be good or bad depending upon circumstances. According to Brown a voluntary act may be distinguished from an involuntary act by dividing voluntary act into (i) a willed muscular contraction, (ii) its circumstances and (iii) its consequences. An act is wrongful since the circumstances in which it is performed and the consequences which it produces. Example: To crook the forefinger with a certain force is the same act whether the trigger of a pistol is next to it or not. It is only the surrounding circumstances of a loaded pistol and of a human being in such relation to it as to be manifestly likely to be hit that make the act a wrong.

Involuntary act-When the muscular contraction is not willed. Salmond in his Jurisprudence has mentioned-'not in the absence of any actual exercise of will, but due to the lack of ability to control one's behaviour; involuntary acts are those where the actor lacks the power to control his actions and involuntary omissions are those where the actor lacks the power to control his actions and involuntary omissions are those where the actor's lack of power to control his actions renders him unable to do the act required.'

3. Mental Elements

Q. Give a comparative view on malice-in-law and malice-in-fact.

Voluntary acts also need some mental elements to fasten liability and these are malice, intention, negligence or motive etc.

Malice

The word malice denotes ill-will. In law, malice has two distinct meanings: (i) intentional doing of a wrongful act and (ii) Improper motive. First meaning signifies intention whereas the second one refers to the motive which includes not only ill-will but any motive which is disapproved by law. In common parlance, malice means ill-will against a person but in its legal sense a wrongful act, done intentionally, without just cause or excuse. It can also be divided in two:

Malice-in-law	Malice-in-fact
A wrongful act done intentionally	ill-will, spite or hatred, then we call it
without just cause or excuse, it can	malice in fact. It is generally relevant
be implied in every case where a	in the torts of defamation on a
person has inflicted injury upon	privileged occasion, malicious
another in contravention of the law,	prosecution, injurious falsehood,
without just cause or excuse.	deceit and conspiracy.

Bayley J. has described malice in the case *Brommage v. Prosser*, (1825) 4 B&C 247 (255), as - "Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a stranger a perfect blow likely to produce death. I do it out of malice, because I do it intentionally and without just cause or excuse. If, I maim cattle without knowing whose they are, if I poison a fishery, without knowing the owner, I do it out of malice, because it is a wrongful act, and done intentionally." So, a wrongful act, done knowingly and with a view to its injurious consequences, may be called malicious.

Motive

Motive is not that much important in law of torts as its other elements. Motive is the ulterior object or purpose of doing an act. It is more relevant in the case of defamation when qualified privilege or fair comment is pleaded. Salmond¹ has written that motive refers to some personal benefit or satisfaction which the actor desires whereas intention need not be so related to the actor.

In the case, *Nankee v. Ah Fong*, AIR 1935 Rang 73, it was observed that the motive of the person doing the act is immaterial. If it is a lawful act, however good his motive might be, he would have no right to do it. Motive and intention in such a question is absolutely irrelevant.

A lawful act cannot become unlawful merely because it is done with any motive at the same time, if the conduct is unlawful, good motive will not exonerate the defendant.

Intention, Negligence and Recklessness

Q. Define intention negligence and recklessness.

When a person has intention to commit some wrong act, he is having the knowledge that what would be its consequences and that he wants it to get fulfilled. Intention, we can say is a state of mind and it cannot be permanent, man's state of mind can change any moment. Salmond¹ has while discussing the term 'intention' quoted the dictum of Brain C.J. - that no one can be sure of what was in another's mind because what a person thinks can be inferred only from his conduct. An act is intentional as to its consequences if the person concerned has the knowledge that it would result and also the desire that it should result.

Negligence-In negligence a person commits an act without foreseeing the consequences, which may cause harm for others or himself.

Recklessness-Recklessness may also be termed as gross negligence but very often and more properly it is assimilated with intention.

Wilkinson v. Downston, (1897) 2 QB 57.-In this case, the defendant jokingly told the plaintiff about accident of her husband that he got his legs broken and he is in the hospital, the plaintiff fell ill due to nervous shock. Later on, she sued the defendant for damages. It was the observation of the court that the defendant could have known the natural consequences of his act. He was liable for his act whether he had intended it or not.

Intention not as essential condition-

e.g. nuisance, copyright, injury to person or property.

Intention as essential condition-

e.g. assault, conspiracy, malicious prosecution, defamation.

Fault

Q. Define fault with the help of relevant cases.

It is essential to know about the state of mind of a person to ascertain the liability for the offence, he has committed. In the torts like battery, false imprisonment and assault, state of mind of the wrongdoer is an important criteria. But in some cases, mental condition at the time of commission of an act is irrelevant while determining the liability of the wrongdoer. A man who was innocent and committed an act without any wrong intention even then he

1. Jurisprudence, 12th Edn., (1966), p. 371.

will be held liable. Under strict liability, absolute liability and vicarious liability, a person can be held liable even when there was no fault on his part. In the case Ryland v. Fletcher, 1868 LR 3 HL 330, it was observed that a person keeps something on his own land but if it escapes and causes damage to others then he is liable for the offence of causing damage to others. He cannot take plea for his defence that there was no fault on his part or that he was not negligent for collecting the thing or its escape. In the case M.C. Mehta v. Union of India, MANU/SC/0092/1986 : AIR 1987 SC 1086: (1987) 1 Comp LJ 99 (SC): JT 1987 (1) SC 1: MANU/SC/0092/1986 : (1987) 1 SCC 395: (1987) 1 SCR 819, while upholding the principle the absolute liability it was remarked that it (absolute liability) imposes absolute liability on hazardous and inherently dangerous industries for the harm resulting from the hazardous or inherently dangerous activity.

Due to increase in number of motor accidents a view has taken the shape that the victims and their dependents should be allowed certain amount of compensation on the basis of no fault without prejudice to their right of getting higher compensation on the principle of fault and this was first implemented in India by the Motor Vehicles (Amendment) Act, 1982.

As discussed above, abuse of rights has been generally prevented in the system. But, still we are away from the fence where a distinction can be drawn between abuse of private rights which directly injures the public e.g., setting fire to a corn-field and abuse of right directly affecting adversely to one's immediate neighbour. Thus the former should come under the category of criminal law whereas the later under the law of torts. To cause damage to such things which affect the public at large should figure under the criminal law. (e.g., petrol, kerosene, coal etc.). Whereas such act by which someone has been injured solely from an evil motive, the wrongdoer should be held liable under the law of torts.

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CHAPTER 5

GENERAL PRINCIPLES NULLIFYING TORTIOUS LIABILITY: GENERAL DEFENCES

1. Introduction

There are some general principles which nullify the tortious liability of a person. As we have already discussed in preceding chapters that an action may fail if the plaintiff fails to prove the essential ingredients of a tort. But even after proving the ingredients of a tort, a plaintiff will fail, if the defendant justifies his tort on the basis of principles which nullifies tortious liability.

2. Maxim of General Defence: Volenti non fit injuria

Q. Define the maxim volenti non fit injuria.

If a person suffers a harm voluntarily then it does not constitute a legal injury and is not actionable. The maxim volenti non fit injuria signifies this meaning. A man cannot make an excuse for an injury which he has received in fulfilment of his desire or willingly accepted to take the risk. If the person has consented either expressly or impliedly then he can't sue for a tort. Volenti non fit injuria can also be translated as 'the injury voluntarily suffered is not fit for action'. So, no breach of legal right can be said to be committed against the person who is a willing party or who has given his consent for the harm/injury to be received in consequence of the furtherance of his act. Such injury is not actionable. There are basic points which constitute the maxim volenti non fit injuria which the defendant requires to prove for justifying his tort. They are:

Knowledge of risk

At first instance, the plaintiff should have the knowledge about the nature of act/work and the risk involved in performing the act. If, he lacks the knowledge about the nature of work and quantum of risk what it will be when the work is performed; it will be presumed that he had no knowledge of the risk. The knowledge of the plaintiff is significant here and if it is missing, the defence of volenti non fit injuria cannot be availed by the defendant.

Free consent

Besides the knowledge of the nature of act as well as extent or risk in an act, free consent to run the risk is also necessary for the plaintiff. The consent must be voluntarily and with free will. Consent given by the plaintiff under coercion or force, fraud and mistake can't be treated as free consent.

Consent to illegal act

It was observed in the case *R. v. Donovan*, (1934) 2 KB 49, that no person can give license to another person to commit a crime. Winfield¹ has said, "certainly it cannot be true that the maxim is excluded whenever the act constitutes a crime as well as a tort, for every assault is criminal, and so are some libels, and yet it is possible, by assent, to negative tortious liability for many kinds of assault and libel."

Consent of minors or insane persons

Consent given by minors or insane persons are generally not taken as consent since both are considered immature as far as knowledge is concerned and in such cases, consent by their guardians are taken as sufficient.

Breach of statutory duty

In many cases, a number of duties are being imposed on the employer. When there is a breach of statutory duty by the employer, he is liable even when the employee has given the consent. Hence, consent to a breach of statutory duty is not acknowledged. In the case *Baddeley v. Earl Granville*, (1887) 19 QBD 647. Will J. has stated-"the law will not permit an employer to make it a term of his servant's contract that the latter shall

connive at a breach of his master's statutory obligations which is not intended for his benefit only but also for the benefits of others".

Now, it has become a well-established rule that the defence of *volenti non fit injuria* is not applicable to an action where there is a breach of statutory duty otherwise known as statutory negligence.

3. Application of the Maxim

Q. Discuss the application of maxim '*volenti non fit injuria*' with the help of relevant cases.

A man cannot complain of harm to which he has already given his consent with full knowledge and free will. It also applies to the intentional act which would be otherwise tortious. Some cases are discussed as below:

Ilott v. Wilkes, (1820) 3 B & Ald 304.

In this case, the defendant had kept spring guns in a wood on his ground to protect the game. The plaintiff had full knowledge about placement of spring guns trespassed on the defendant's land and got injured. The plaintiff brought a suit against the defendant that he had exceeded the right of private defence. It was the observation of the court that although defendant was exceeded his right of private defence he was not liable since the plaintiff had taken the risk of trespassing even after knowing that the spring gun was placed on defendant's land. The court observed that he having wilfully courted the danger himself his case fell within the maxim *volenti non fit injuria*.

Bird v. Halbrook, (1828) 4 Bing 628.

In this case, the defendant had placed a spring gun in the garden since flowers from his garden used to be stolen more often. One day, a pea-hen belonging to the plaintiff entered into defendant's garden. The plaintiff to catch his fowl got alighted the wall of the garden unaware of the spring gun placed there. The plaintiff got injured and the defendant was sued. The court gave the verdict in favour of plaintiff since he had no knowledge about the gun and the maxim *volenti non fit injuria* was not applicable here.

Maung Sein v. Emperor, AIR 1935 Rang 471.

Mrs. Ma Thin, wife of Maung Sein, died after giving birth to a child. An unqualified mid-wife attended Ma Thin during delivery of the child. Ma Thin, knowing completely about her qualification consented to appoint her as mid-wife. It was held that the maxim *volenti non fit injuria* is applied here as the plaintiff had taken the risk to appoint unqualified midwife with full knowledge hence, not entitled for damages.

Abovementioned cases are the examples of expressed consent.

There may also be cases where the risk can be taken by his implied consent. Cases of implied consent are as follows:

Thomas v. Quartermaine, (1887) 18 QBD 685.

The defendant had a brewery, where the plaintiff was working. The plaintiff tugged at a board with a view to remove it from the top of a boiling vat to which the board served as a lid. Suddenly, the lid came off and fell into a cooling vat, which was sunk in the floor about three feet away from the boiling vat. The fencing was not proper, the plaintiff fell into the boiling vat and got severely injured. It was observed that the plaintiff had full knowledge of the danger. Majority of judges was of the view that the action was not maintainable. Bowen L.J. remarked..... 'it is no doubt true that the knowledge on the part of the injured person which will prevent him from alleging negligence against the occupier must be knowledge against such circumstances as lead necessarily to the conclusion that the whole risk was voluntarily incurred. The maxim, be it observed, is not *scienti non fit injuria* but *volenti*. It is plain that mere knowledge may not be a conclusive defence. There may be perception of the existence of the danger without comprehension of the risk as where the workman is of imperfect intelligence or though he knows the danger, remains imperfectly informed to its nature and extent. There may again be concurrent facts which justify the enquiry whether the risk, though known, was really

encountered voluntarily."

In the instant case, the defendant did not provide a conducive place of working i.e., a place free of risk, hence he was negligent. But, the court did not find the defendant as guilty of negligence and held that the whole risk was voluntarily incurred.

Smith v. Baker & Sons, 1891 AC 325.

Smith was working under Baker & Sons and the place where he was working a crane often carrying heavy stones used to move over his head. He used to drill the rock for cutting purpose. Employer as well as the employee both had knowledge, that the stones being carried overhead may fall sometime, but no warning was given to Smith of the movement at which any particular jibbing commenced.

In this case, the principles laid by Bowen L.J., in the case *Thomas v. Quartermaine*, was not extended. The House of Lords held that the defendants were liable. Lord Herschell observed "where a person undertakes to do work which is intrinsically dangerous, notwithstanding that reasonable care has been taken to render it as little dangerous as possible, he no doubt voluntarily subjects himself to the risks inevitably accompanying it, and cannot, if he suffers, be permitted to complain that a wrong has been done to him, even though the cause from which he suffers might give to others a right of action." He further added-"where a risk to the employed, which may or may not result in injury has been created or enhanced by the negligence of the employer, does by mere continuance in service, knowledge of the risk preclude the employed, if he suffers from such negligence, from recovering in respect of his employer's breach of duty? I cannot assent to the proposition that the maxim, *volenti non fit injuria*, applies to such a case, and that the employer can invoke its aid to protect him from liability for his wrong." Then his Lordship referred to the case of *Thomas v. Quartermaine*, and disapproved its decision by stating, "if the effect of the judgment be that the mere fact that the plaintiff, after he knew the condition of the premises, continued to work and did not quit his employment, afforded his employer an answer to the action, even though a breach of duty on his part was made out, I am unable, for the reasons I have given, to concur in the decision."

This case has laid down the rule of implied consent where the plaintiff has taken the risk of performing the job in dangerous condition, he has consented for incurring the risk of harm, although the defendant did not take care to minimize the risk as much as possible.

Dann v. Hamilton, (1939) 1 KB 509.

In this case, Dann decided to board the car of Mr. Hamilton, Ms. Dann while entering the vehicle noticed that Mr. Hamilton was under the influence of liquor. The car met with an accident and Ms. Dann got injured. This accident occurred due to negligence of Hamilton. Now, the question was whether the maxim *volenti non fit injuria* was applicable or not? Asquith J. was of the view that this maxim did not apply or plaintiff could recover damages. Mere knowledge of this fact that Hamilton was drunk. Ms. Dann did not give her consent to do the job negligently or absolved the driver from liability for, any subsequent negligence on his part whereby the plaintiff might suffer harm..... There may be cases in which the drunkenness of the driver at the material time is so extreme and so glaring that to accept a lift from him is like engaging in an intrinsically and obviously dangerous occupation, intermeddling with an exploded bomb or walking on the edge of an unfenced cliff. It is not necessary to decide whether in such a case the maxim *volenti non fit injuria* would apply, for in the present case I find as a fact that the driver's degree of intoxication fell short of this degree. I therefore, conclude that the defence fails, and the claim succeeds.

South Indian Industries Ltd., Madras v. Alamelu Ammal, 1923 Mad 565.

Q. "The defendant can successfully plead the maxim only when he proves that the person injured knew of the danger, appreciated it and voluntarily took the risk." Discuss this statement in the light of the observation given in the case *South Indian Industries Ltd., Madras v. Alamelu Ammal*.

The defendant was performing the job of breaking the cast iron and for that purpose he used to drop it from a height of 35 feet. In this process, iron pieces flew for few yards. A screen was put up to stop the flying iron pieces. A warning was also issued to the persons nearby, but the workmen working at a distance were not warned about the danger to go on working that they might receive injury also. The plaintiff was standing at about 80 feet distance and was hit by the iron piece and got injured. It was found that the defendants did not take sufficient care and were guilty of committing negligence. The defendant took the plea of the maxim volenti non fit injuria but it was not applied in the case. The court observed-"the defendant can successfully plead the maxim only when he proves that the person injured knew of the danger, appreciated it and voluntarily took the risk. That the defendant had some knowledge of the danger is not sufficient. A man cannot be said to have voluntarily undertaken a risk the extent of which he does not appreciate."

4. Exceptions to the Application of the Maxim

There are exceptions to the application of the maxim volenti non fit injuria. Some cases are discussed as follows:

Wagner v. International Railway, (1921) 232 NY 176.

A passenger fell down from the railway car due to negligence of Railway Company. To search his friend; the fellow passenger got down as the train stopped. But, he fell down since it was darkness and got injured. Cardozo, J., held the Railway Company liable and observed-"Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore those reactions in tracing conduct to its consequences. It recognizes them as normal. The wrong that imperils life is a wrong to the imperiled victim. It is wrong also to the rescuer.....The risk of rescue if only, it is not wanton, is born of the occasion."

Haynes v. Harwood, (1935) 1 KB 146.

Here, the servant of defendant left a two-horse van unattended in a crowded street. The horses ran away. The plaintiff, a policeman was on duty and he was in the police station. He saw that a woman and many children were on the street. Seeing them in grave danger that they might be run over by these strong horses. The plaintiff came out of his police station and stopped the horses. But, in doing so he got injured. Greer L.J. accepted the American rule, as stated by Dr. Goodhart and observed that the defendant was liable. Simultaneously, he held that, "the rescuer's act need not be instinctive in order to be reasonable for the man who deliberately encounters peril after reflection may often be acting more reasonably than one who acts upon impulse."

The rescuer should act reasonably and not with emotions.

5. Act of God (Vis Major or Damnum Fatale)

Q. Describe the 'Act of God' or 'vis major' with the help of relevant cases.

As it is clear from the heading that what is not in hand of human being, we usually call that it is done by God. Flood, rainfall, frost, drought, wind, hurricane, earthquake etc., are the acts of nature. All these acts, most of the time cannot be anticipated and what would be its magnitude and its consequences. Cases related to Act of God or Vis Major are discussed below:

Mahindra Nath Mukherjee v. Mathuradas Chaturbhuji, AIR 1946 Cal 175.

A cinema advertising board was placed on the roof of the defendant which fell down and injured the plaintiff. Plaintiff brought a suit against the defendant and contended that the board fell due to storm of unusual severity. But, it was observed that during the season of monsoon a storm of this magnitude is not uncommon. The defendant had not ensured or foresee that the fixing of banner on such a height is strong enough to face the pressure of storm during monsoon season. The Calcutta High Court held that such a storm cannot be said to be so unexpected that no human foresight could reasonably be

expected to anticipate it and cannot be regarded as 'vis major' or 'act of God'. Hence, the suit was allowed and the defendant was found negligent. Before the act of God can be admitted the defendant could have taken reasonable care and done all that what he was bound to do.

State of Mysore v. Ramachandra, (1970) 73 Bom LR 723.

In this case, the State had constructed a reservoir for the supply of drinking water for the villagers of Nipani. But the construction was not completed and the over-flow channel linked with reservoir was partially constructed. Land and crops were damaged due to flow of water resulted from rain. The plaintiff filed the suit for damages. The State resisted the suit that it was the act of God. But, the court rejected the defence and observed - "Assuming an act of God such as flood wholly unprecedented, the damage in such a case results not from the act of man in that he failed to provide a channel sufficient to meet the contingency of the act of God. But for the act of man there would have been no damage from the act of God."

Nichols v. Marsland, (1876) 46 LJ Ex 174.

When a thing escapes from someone's possession due to an unprecedented and unanticipated act of nature and it is when practically impossible for the owner to prevent it, then the defence of the act of God applies and in such case the plaintiff can't recover the damages. In this case, Nichols was the surveyor of some country bridges for Cheshire. An estate containing three lakes of ornamental water fed by natural stream passing through the estate were owned by Marsland. An unprecedented and heavy downpour caused the lakes to overflow after breaking the embankments of the lakes and the waves carried away four bridges of the country.

Nichols, the plaintiff brought an action for damages on the plea that the defendant was negligent. Bramwell, J., observed-"everyone understands that a storm is supernatural in one sense may properly, like earthquake in this country, be called the act of God or vis major. No doubt, it was not the act of God or vis major in the sense that it was physically impossible to resist it but in the sense that it was practically impossible to do so. Had the banks been twice as strong, or, if that would not do, ten times, and ten times as high, and they were ten times as wide, the mischief might not have happened, but these are not practical conditions. They are such as, to enforce them, would prevent the reasonable use of property in the way most beneficial to the community..... I am of the opinion that the defendant is not liable." Mellish L.J., upheld the decision of the Court of Exchequer and said-"there was no negligence in the construction or the maintenance of the reservoirs, but that the flood was so great that it would not reasonably have been anticipated; although if it had been anticipated, it might have been prevented, and it seems to us in substance a finding that the escape of water was owing to the act of God."

The act of God or vis major can also be explained mathematically as follows:¹

(i) Unprecedented + Unforeseen + Irresistible = Act of God

(As it has been discussed in this Chapter in the cases Nichols v. Marsland; Mahindranath v. Mathura Dass)

(ii) Unprecedented + Foreseen + Irresistible + Act of God

(Nichols v. Marsland case)

(iii) Precedented + Unforeseen + Irresistible = Act of God

(Greenock Corporation case)

1. S.P. Singh, Law of Tort, 4th Edn., p. 46.

(iv) Precedented + Foreseen + Irresistible = Act of God

(Greenock Corporation and Mahindranath cases)

6. Inevitable Accident

Q. How do you differentiate accident with 'inevitable accident'? Explain with the help of relevant cases.

Sometimes, it becomes physically unavoidable to check an accident, it is called as 'Inevitable Accident'. Pollock¹ has defined it as-"the accident which is not avoidable by any such precautions as a reasonable man, doing such an act then and there, could be expected to take."¹

We can also say that an inevitable accident is that accident which could not have been prevented by the reasonable care, caution and skill.

Fardon v. Harcourt Rivington, (1932) 146 LT 391.

In this case, the defendant was travelling in his car with his dog. At one place, after parking the car, he got down but left the dog in his car and shut the door. Dog was quiet and docile. But the dog was jumping inside the car and creating all the nuisances and smashed the glass of window. One of the glass pieces as a splinter penetrated one eye of the plaintiff who was passing across. The plaintiff brought an action against the defendant for damages. Lord Dunedin did not find the defendant responsible for the accident as he observed-"this is such an extremely unlikely event that I do not think any reasonable man could be convicted of negligence, if he did not take into account the possibility of such an occurrence and provide against it either by not leaving the dog in the car or by tying it up so that it could not reach the window. People must guard against reasonable probabilities, but they are not bound against fantastic possibilities."

Padmavati v. Dugganaika, (1975) 1 Karn LJ 93: 1975 ACJ 222.

In this case, there were two strangers who took lift in a jeep. Somehow, the jeep in which they were travelling, the bolt which was fixing the right front wheel of the jeep in the axle got loosened and the wheel flew away from the axle. The jeep somersaulted and the passengers (strangers) got injured and one of them died thereafter. It was the view of the court that this was an accident, as there was no evidence to show that the defect was a patent one and could have been detected by check up on regular basis. In this case, the defendant was not held liable.

7. Mistake

Q. What does mistake mean? Define mistake of law and mistake of fact.

Mistake means realization of wrong by oneself. When one commits an error in understanding or when one understands or perceives wrongly. Thus, a mistake may be committed by a person and it may be of two kinds: (i) Mistake of law and (ii) Mistake of fact.

(i) Mistake of law.-It has got generally no defence of civil liability for the rule, ignorantia juris non excusat which applies equally to the law of torts as to other branches of law.

(ii) Mistake of fact.-It has got no ground of exemption from liability in tort. The defendant may be held liable in tort, although his mistake is based on reasonable and honest belief.

e.g.-in the case Ransom v. Kitner, (1888) 31 All App 241, the defendant killed the plaintiff's dog while he was hunting for wolves. The dog of plaintiff had striking resemblance to a wolf. The defendant was held liable for his act.

1. Pollock, Law of Tort, 15th Edn., p. 97.

When a person has committed some act by mistake, it can't be said that he has committed a wrongful act. If a plaintiff moves an action with malice or wrongful motive then in such circumstances, mistake may be taken as a good defence.

Sometime, even an innocent person faces prosecution, but the prosecutor incurs no liability unless he has acted both maliciously as well as without reasonable cause. That's why a mistaken arrest of an innocent person on suspicion of there being felony is not actionable; if the felony has actually been committed, and there is a reasonable ground for believing that the person arrested is guilty of it.

8. Necessity

Q. Describe necessity with the help of the maxim 'Salus populi supreme lex'.

Sometimes, intentional injury to a person or property may be caused yet the defendant may not be held liable if he pleads the defence of 'necessity'. The defence of 'necessity' originates from the maxim 'Salus populi supreme lex' which says the welfare of the people is the supreme law. This maxim has got the implied assent of every member of the society, that the welfare of the community comes first compared to individual's welfare i.e., the welfare of community is paramount and for that individual's property, liberty and life shall, under certain circumstances be placed in jeopardy or even sacrificed for public welfare.

In the year, 1507, Kingsmill, J.1 observed-"that the violation of another man's rights could be justified on the ground that the act was necessary to the common well, as in case of fire to take goods out of a house to save them, to pull down a house to save other houses and in time of war to enter another man's land to make a bulwark in defence of the king and the realm."

There are some cases in which decision has been given under the defence of necessity-

- (a) Deway v. White, 1827 M&M 56.-destruction of a building made ruinous by fire to prevent its collapse into the highway.
- (b) Saltetre case, (1605) 12 Rep 120.-here a house was pulled down which was on fire to prevent the spread of fire to the property of others.
- (c) Kirk v. Gregory, (1876) 1 Ex D 55.-in this case A died in a state of delirium tremens. His servants were feasting and drinking in the house. B, sister-in-law of A, removed the jewellery of A from the room where he lay dead and kept it in another room for the sake of safety. But, it was her mistaken belief and the Jewellery got stolen from that room. The court remarked, 'it is a defence that the act was done for the preservation or protection of the property of the person, provided there was reasonable necessity for the act'. B was held liable to A's executor for trespass to the jewellery because there was no proof that her interference was reasonably necessary.

9. Private Defence

Whenever there is some probability of danger, it is human instinct to save himself or his property and in course of saving his own, he uses force also. Every person has right to defend himself and his property or possession against an unlawful harm.

We will discuss here about private defence under following headings.

Defence of person

Q. Define private defence and describe 'defence of person' and 'defence of property'.

To use reasonable force in self-defence against an unlawful force is right of every person. But, the term 'reasonable' has to be decided. Whether the used force in self-defence was proportionate to the danger anticipated. Reasonable

also depends on the facts and circumstances. The force used may not be reasonable (i) if, it is not in proportion to the apparent urgency of the situation, or (ii) there is no necessity for the use of force. Salmond¹ has explained it as - 'in order that it may be deemed reasonable within the meaning of this rule, it is not enough that the force was not more than necessary for the purpose in hand. For even though not more than necessary it may be unreasonably disproportionate to the nature of the evil sought to be avoided'.

If A attacks B with his fist and in return B takes out his sword and cuts A's hand then B here can't take the plea of use of reasonable force to defend himself. One cannot lawfully defend himself against a trivial assault by inflicting death or grievous bodily injury even though the assaults cannot be prevented in any other way.

Another example - if A attacks B with a deadly weapon then B is justified in using a deadly weapon to protect himself.

But, one more question arises here that - can a person use reasonable force in defending another person against unlawful force? Pollock, Winfield and Clerk and Lindsell have similar opinion - there is no doubt that the right extends to the protection of one's spouse and family, and the weight of opinion includes defence of the servant by the master, or vice versa.

Defence of property

The principle is same here as in the matter of defence of person. A person is entitled to protect his movable/immovable property with the use of reasonable force if the time demands during any danger.

If A fences off his land in anticipation of flood coming to his way and if flood comes and turns towards A's neighbour and damages his property then here A can't be held responsible although his neighbour has got injured by A's act.

Here, we can say that a person will be held liable if he, while protecting his property uses unreasonable force or takes unreasonable measures.

Related cases are discussed as follows:

Bird v. Halbrook, (1828) 4 Bing 628.

Here, the defendant had kept a spring gun in his garden, since flowers were oftenly stolen from his garden. The plaintiff, a boy whose fowl had strayed away, jumped into defendant's garden to search his missing fowl. He had no knowledge about the gun there and he got injured. The court observed here that the defendant was liable since he had exceeded the right of private defence to his property.

Ramanuja Mudali v. M. Gangan, MANU/TN/0192/1984 : AIR 1984 Mad 103.

In this case, the plaintiff was moving towards his own house at night and when he was passing through defendant's land he got electrocuted by a live wire, put up by the defendant to stop the trespasser. Here, the defendant was held liable since he had exceeded the right of private defence to his property.

Holmes v. Bagge, (1853) 1 E&B 782.

Here, the plaintiff as well as the defendant, both were the members of a Cricket Club Committee. The defendant was a captain during a match and the plaintiff was a spectator. The defendant asked the plaintiff to substitute one of the players and the latter agreed upon. But, the defendant annoyed him by saying to put off his coat. The plaintiff neither removed the garment nor left the field. The defendant then directed to push him out forcibly from the field. The plaintiff filed a suit against the defendant for damages for assault. The defendant's plea was that he was in possession of the ground but this plea was not taken since the possession of the ground was in the committee of the club. The defendant was held liable.

Turner v. Jagmohan Singh, (1905) 27 All 531.

The defendant was going somewhere in his carriage, driven by two horses, on road. A vicious dog started following the carriage and repeatedly attacked the horses and came into defendant's compound. The defendant tried to prevent him but of no avail. Finally, the defendant took out the spear and attacked the dog and the dog got injured and later on died due to severe injury. On a suit filed by the plaintiff, the court observed that the defendant was justified in his action since he was tried his level best to scare off the dog but in spite of his attempts, he could not succeed and then only resorted for final blow.

10. Statutory Authority

Q. Defining the term 'statutory authority', discuss the case Chandram Nagaram Rice & Oil Mills Ltd., Gaya v. Municipal Commissioner of Purulia.

The Parliament enacts the law at the same time, it has also the power to reverse any principle of common law. Any act or omission tortious under the common law may be specifically made legal by a statute and in that respect, statutory authority is a defence.

Bhogilal v. Municipality of Ahmedabad, 3 Bom LR 415.

In this case, Municipality of Ahmedabad demolished a wall of plaintiff under their statutory powers. The roof of plaintiff also collapsed in the process. On the points raised by the plaintiff, the court held that no suit will lie against the defendant, as they have carried out their duty under statutory powers although the plaintiff has suffered injury. The power (statutory) has been exercised with judgment and caution.

Chandram Nagaram Rice & Oil Mills Ltd., Gaya v. Municipal Commissioner of Purulia, AIR 1944 Pat 408.

The plaintiff loaded 1000 canisters of mustard oil in a van belonging to Eastern Railways from Gaya to be sent to Purulia, West Bengal. As soon as, it reached Purulia, the local Municipal Commissioner seized the consignment, under the Bihar and Orissa Municipal Act, section 287. The seizure was to check the quality of the oil whether it was good or bad. After seizure of oil, it was loaded in a scavenger's truck by mehtars (sweepers).

The plaintiff brought a suit against the defendant on the ground that it has caused damages to their finances as well as reputation (branded name). The Court observed that the defendant in order to prevent beri-beri a disease within the municipality acted in haste and that the action of the municipality, if not actuated by malice or a result of conspiracy was certainly unreasonable and negligent. Justice Varma observed-"if a person is exercising his rights under a statute he is not liable unless it is proved that he acted unreasonably and negligently."

Absolute, mandatory or imperative authority

Q. Discuss absolute, mandatory or imperative authority.

Some powers which are conferred by the legislature for a particular thing to be done regardless of whether it inflicts an injury upon another person, it is called as absolute, mandatory or imperative authority. In case of harm, it is being covered by the authority e.g., to construct the railway line, there may be need of acquiring private land. But, in such cases the land owner will be suitably compensated. But, running a train without causing noise or vibration is impossible and for such complaint there is no remedy.

If, the legislature has authorized certain act and the authority given is imperative, no action would lie against the person who has the statutory authority to do the act, provided it is done without negligence. This statutory authority not only extends to the act itself, but to all its necessary consequences.

In cases viz. Nirmal Chandra Sanyal v. Municipal Commissioner of Patna, MANU/WB/0264/1936 : AIR 1936 Cal 707 and

Bhogilal v. Ahmedabad Municipality, MANU/WB/0264/1936 : AIR 1936 Cal 707, it was held-"When the Legislature has authorized an act, it must be deemed also to have authorized by necessary implication all inevitable results of that act."

Faiyaz Hussain v. Municipal Board of Amroha, MANU/UP/0108/1938 : AIR 1939 All 280.

During the observation of Muharram, the Shia Mohammedans contended that they had right to take out tazia of 27 feet in height during procession in Amroha by certain fixed routes. There were electric wires in the route of procession which was hurdle in taking out tazia of 27 feet in height. It was contention of the plaintiff that the defendant must raise the electric wire to such a height that could not interfere with tazia.

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

11. Act of State

Q. Define the 'Act of State' with the help of relevant cases.

The sovereign power always rests with the State. The State has right to enact a law to protect its citizens and itself. Sovereign powers fall outside the province of municipal law. When the supreme i.e., sovereign power is exercised by the State, it is called as 'Act of State'. The act of State in the present context means under the authority of government to a foreign State or a subject of a foreign State who is not residing in India, at the time of injury done to him.

The essence of the act of State is that State being sovereign cannot be sued in its own courts (i.e. Municipal courts) for any injury done/inflicted to a foreign State or its subject.

Tanjore case, Lord Kingsdown observed

'The transactions of independent States between each other are governed by other laws than those which municipal courts administer. Such courts have neither the means of doing what is right nor the power of enforcing any decisions they make.'

Jehangir v. Secretary of State, (1904) 6 LR 131 (DB).

In this case, the Government's contention was that to appoint or dismiss a Government servant was an act of State and hence, the court had no jurisdiction. But Batty J. outrightly rejected the contention of the Government defined the phrase 'act of State' as - it is a term which is not applicable to an action of the sovereign towards its own subjects in its own territory in time of peace. The expression is usually applied to an action of the sovereign towards foreign subjects, whether it be in time of peace. It would, however, be a misnomer to call the administrative acts of a sovereign against its own subjects in time of peace as acts of State and to claim immunity in respect of them although they may amount to a contract in the ordinary sense between the sovereign and his subjects.

Some more features about 'Act of State':

- ☛ it operates extra territorially,
- ☛ it doesn't operate against its own subjects,
- ☛ it operates against aliens and foreign subjects having no protection of municipal law.

A very pertinent question arises here that whether a person can be treated as a subject of that State which is de facto control of another State in which he resides? Can the action against that person by the State, having de facto control, be treated as act of State. We can try to find the answers of above questions in following case.

State of Saurashtra v. Mohammad Abdullah, MANU/SC/0091/1961 : AIR 1962 SC 445: (1962) 3 SCR 970.

The defendant held rights of properties which was granted by the Nawab of erstwhile State of Junagarh. After passing of the Independence Act, 1947, Junagarh became a sovereign but unlike other States did not accede to India. The Nawab left for Pakistan and there was chaos in the State. The administration of Junagarh was taken over by the Government of India on 9th November, 1947 at the request of Nawab's Council. The Government of India appointed an administrator to administer the State.

In 1948, the people of the State through a referendum voted in favour of accession of State to India.

On 21st January, 1949, Junagarh State was merged into United States of Saurashtra.

So, the control of Junagarh with the Government of India was de facto from 9-11-1947 to 20-1-1949, and the control was de jure from 21-1-1949 onwards. The Administrator appointed by Government of India cancelled the grants on 18th November, 1947 made by the Nawab to the respondents.

Now, the question before the court was - whether the action of the Administrator was justified i.e., was it within the ambit of 'act of State'? The Supreme Court observed that the orders of the administrator arose out of and during an act of State over which the municipal courts had no jurisdiction. Das J. observed that even though de facto control of Junagarh State was taken over by the Government of India on 9th November, 1947 but there was no de jure change of sovereignty until January 20, 1949. The respondents were aliens against whom the orders of the administrator were an act of State.

But it has to be kept in mind that where the action has been taken against the subject after taking over de jure control of the State, it will not amount to act of State.

12. Judicial Acts

Q. Give salient features of 'Act of State' Discuss it in the light of the observation given by the Supreme Court in the case. The State of Saurashtra v. Mohammad Abdullah.

In *Anderson v. Gorrie*, (1859) 1 QB 668 (671), it was observed that if a judge or a judicial officer acts within his jurisdiction then no action lies for acts done or words spoken by a judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office. The rule of judicial immunity from liability is based on the principle for the benefit of the people with a view that judges/judicial officers discharge their duties without fear of consequences.

There is also remedy if the judicial error has been committed in the form of appeal to higher Court and the judicial corruption can be removed through criminal prosecution.

The above rule of English Law has been extended to judicial officers in India by the Judicial Officer's Protection Act, 1850. Section 1 of the Act provides:

"No Judge, Magistrates, justice of peace, collector or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of....."

Under this Act, the officer must be acting judicially to claim the protection and that mere fact of his being a Judge, Magistrate, or other judicial officer, does not protect him as he might be acting in his executive capacity.

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CHAPTER 6

REMOTENESS OF DAMAGE

1. Introduction

A person who commits a negligent act and injures someone, then certainly he should be punished for his wrong act. But, the question arises upto what extent he should be punished? Secondly, can he be held liable for all the consequences, which have resulted from his act? But, it would not be proper that a man can be held liable ad infinitum.

Bacon in 1630-'In jure non remota causa sed proxima spectatur' - a maxim for negligent actor. He elaborated it as - "it were infinite for law to consider the causes of causes, and their impulsions one of another: therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking to any further degree".¹

But, the whole meaning of law can't be squeezed from one maxim.

Lord Sumner in the case *Weld Blundell v. Stephens*, 1920 AC 986.-'The object of a civil enquiry into cause and consequences is to throw liability on some responsible person and to give reparation for damage done..... The trial of an action for damage is not a scientific inquest into a mixed sequence of phenomenon, or an historical investigation of the chapters of events..... It is a practical inquiry'?

We can further add here that to understand the remoteness of damage, it is necessary to fix the consequences of act somewhere otherwise it would be endless. Therefore, in law people are held responsible for the consequence which are not remote.

Prior to discussing 'remoteness of damage' there are three things which have to be looked upon first-

- (a) in every case there is a duty of care owed to the plaintiff and the test of duty depends on what a person can foresee;
- (b) whether a breach of duty has been committed and the test of breach of duty depends on the person that he acted like a reasonable and prudent person; and
- (c) if the negligent breach of duty was a cause of injury when, the above three preliminary conditions - duty, breach of duty and cause of

1. Bacon, Maxims of the law, 1630 Reg 1.

injury are proved in favour of plaintiff then only the fourth criterion i.e. remoteness of damage comes into play.

Remoteness of damage is decided on the basis of the principles laid down by the Court in various cases.

2. Test of Remoteness of Damage

Q. Define 'Remoteness of Damage' What are those criteria which should precede while invoking the rule of remoteness of damage?

Q. Define 'direct consequences' in light of the observation given by Scrutton LJ, in the case *Polemis*.

Q. What is the difference in between the judgments given in the case *Polemis* and *Liesboch* case?

There are two views on the test of remoteness of damage:

- (i) Pollock-he said that the consequences are too remote if a reasonable man would not have foreseen them as it was observed in the case *Rigby v. Hewitt*, (1850) 5 Ex 240.
- (ii) As it was observed in the case *Smith v. L&S W. Ry.*, (1870) 3 KB 577, that if a reasonable man would have foreseen any damage to the plaintiff as likely to result from his act, then he is liable for all the direct consequences of it suffered by the

plaintiff, whether a reasonable man would have foreseen them or not.

Polemis (in re:) this second rule was favoured while delivering the verdict in the case Polemis and Furness - A ship was hired under a charter which exempted both the ship-owner and the charterer from the liability for fire. Petrol in tin was loaded on the ship and during the loading tin got leaked and thus vapour was formed in the storage. At Casablanca port, while unloading the cargo a servant carelessly dropped a plank which caused fire in the ship. The ship was destroyed. Some damage to the ship may be foreseeable but to get destroyed completely by fire was not. Hence, the Court of Appeal held defendant liable for the consequences arisen out of the negligence. Scrutton L.J. defined, direct, consequences as - To determine whether an act is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage; if he would not, the act is not negligent. But, if the act would or might probably cause damage, the fact that the damage in fact caused is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act, except that they could not avoid its results. Once, the act is negligent, the fact that its exact operation was not foreseen is immaterial. This was the principle laid down in the case Smith v. L&S. W. Ry., the judges of Polemis followed this principle and observed that once the negligence in act may cause injury and is foreseeable, then any person in such situation may recover even though it is unforeseeable that he might suffer damage in any way.

Winfield has elaborated it as - the question of the defendant's initial liability i.e., whether he committed a tort against the plaintiff, must be distinguished from the secondary question of remoteness of damage, namely, for what consequences of the defendant's conduct is the plaintiff entitled to recover compensation. The case is no authority for liability to the unforeseeable plaintiff.

Liesboch case, 1933 AC 448.

In this case, the defendant had confessed to have sinking the plaintiff's dredger. It was the question that how much defendant should pay to the plaintiff. Plaintiffs were in favour of the rules of Polemis (in re:) to be invoked i.e., the wrongdoer should be held liable for all the direct consequences, whether reasonably foreseeable or not. The House of Lords gave the view that the recovery should be made for market price of dredger and compensation for loss in carrying out the contract between the date of sinking of dredger and resumption of work by new dredger, but it was not acceded to for claim of extra expenses due to poverty.

Lord Wright without over-ruling, elaborated about distinction between the instant case and Polemis (in re:) as the injury in Polemis (in re:) was the immediate physical consequences of the negligent act and further said that 'nor is the appellant's financial disability to be compared with that physical delicacy or weakness which may aggravate the damage in the case of personal injuries, or with the possibility that the injured man in such a case may be either a poor labourer or a highly paid professional man'. The former class of circumstances goes to the extent of actual physical damage and the latter goes to interference with profit earning capacity, whereas the appellant's want of means was, as already stated, extrinsic. This case gave two points-

(i) it created a distinction between physical disability and plaintiff's impecuniosity; and

(ii) it restricted the Polemis (in re:) rule to only "immediate physical consequences". Regarding second point, the House of Lords preserved the rule of Polemis (in re:) that if some damage is foreseeable then he will be liable for all the direct consequences even if unforeseeable provided they are immediate physical consequences.

Overseas Tankship (UK) Ltd. v. Morts Dock and Engineering Co. Ltd. or Wagon Mound No. 1, (1961) AC 388.

During bunkering operations in Sydney harbour, from the Wagon Mound a large quantity of oil spilled over and this ship was under the defendant's control as charterers. The oil reached to plaintiff's wharf and during a welding operation in the course of repairs, a molten metal fell and caused fire and it led to the destruction of wharf as well as vessels kept there for repairing.

In this case, it was laid down by the Privy Council that the essential factor in determining liability for consequences of a tortious act of negligence is whether the damage is of such a kind as a reasonable man should have foreseen, and, further, that a man should not escape liability however 'indirect' the damage, if he foresaw or could reasonably have foreseen the intervening events..... Applying that test in the instant case, it appears to me that, in the conditions prevailing in East

Africa, it is to be foreseen that a traffic accident may result in a vehicle involved being left unattended though no fault of the owner, and that in such a case loss of the contents of the vehicle through pilferage is not merely foreseeable but highly probable.

Judicial Committee also sidelined the law as was observed in the *Polemis*. Later on, it was pointed out that the test of directness looked at the happenings, after the event, it was further observed. 'After the event a fool is wise. But it is not hind sight of a fool: it is the foresight of a reasonable man which alone can determine responsibility.'

Hughes v. Lord Advocate, 1963 AC 837.

The employees of the Post Office left an open manhole (opened by them) unattended in the evening. The manhole was covered by a tent. A paraffin lamp was also placed there. Two children (8 & 10 yrs. old) took the lamp and entered the manhole. The lamp was somehow knocked into the hole and a violent explosion took place and the flames shot thirty feet into the air. The plaintiff was knocked back into hole and received serious burns. The court was of the view that it was reasonably foreseeable that the children would play with the lamp which was unattended and it might also cause burn injuries, but it was unforeseeable that a paraffin lamp would explode and would cause serious burn injuries. In following words, the Law Lords held the defendants liable-

Q. The defenders are liable for all the foreseeable consequences of their neglect-Explain this Observation of Lord Pearce in the case Hughes v. Lord Advocate.

"In order to establish a coherent chain of causation it is not necessary that the precise details upto the accident should have been reasonably foreseeable: it is sufficient, if the accident which occurred is of a type which should have been foreseeable by a reasonably careful person. An explosion is only one way in which burning can be caused. Burning can also be caused by the contact between liquid paraffin and a naked flame. In the one case paraffin vapour and in the other case liquid is ignited by fire. I cannot see that these are two different types of accident. They are both burning accidents and in both cases the injuries would be burning injuries. Upon this view the explosion was an immaterial event in the chain of causation. It was simply one way in which burning might be caused by the potentially dangerous paraffin lamp..... The defender cannot escape liability by contending that he did not foresee all the possibilities of the manner in which allurements - the manhole and the lantern would act upon the childish mind"

In the words of Lord Pearce - the defenders are therefore liable for all the foreseeable consequences of their neglect. When an accident is of a different type and kind from anything that a defender could have foreseen, he is not liable for it. But to demand too great precision in the test of foreseeability would be unfair to the pursuer since the facets of misadventure are innumerable. The accident was but a variant of the foreseeable.

Lord Reid observed that the fact that the injuries suffered by the appellant, though perhaps different in degree, did not differ in kind from injuries which might have resulted from an accident of a foreseeable nature. The cause of this accident was a known source of danger, the lamp but it behaved in an unpredictable way.

The House of Lords held that it was unpredictable that a lamp might explode, but the defendants were in breach of duty in leaving the manhole unattended because they should have reasonably anticipated that boys might take lamp into the shelter and that, if the lamp fell and broke, they might suffer injury from burning. So the lamp, a known source of risk, caused injury through an unforeseeable sequence of events, but the defendants were held liable. It is, therefore, not necessary that the precise details leading upto the accident should have been reasonably foreseeable. It is sufficient, if the accident which occurred is of a type which should have been foreseeable by a reasonably careful person.

3. Extent of damage

Here, we are talking about the injury - physical as well as of property. In case of damage of property, the compensation can be calculated but it is always a cumbersome process to make estimate about physical injury. It is difficult to repair/rectify the injury by damages, nor is sanctity of life upheld by their award. The test of reasonable foresightedness towards a normal healthy person should be followed in the absence of any logical reasoning, rather than what the law is being followed today, unless overruled, that the extent of damage if aggravated due to some weakness, which is inherent in nature, full liability is attached in the case of people as it was observed in the case *Smith v. Leach Brain & Co. Ltd.*, (1962) 2 QB 405.

Can the rule regarding the degree or extent of damage to property-that 'defendant takes his victim as he finds him' be applied to dilapidated and weak property? The answer of this question is still awaited. In the case, *Liesboach Dredger v. S.S. Edison*, 1933 AC 448, the House of Lords, while restricting the rule of *Polemis* (in re:), stated the principle of 'immediate physical consequences' in relation to extent of damage to property.

4. Ways or Manners of Causing the Damage

Foreseeability is not the only criteria but what are the ways or manners in which damage has been caused should be foreseeable.

In the case *Hughes v. Lord Advocate*, 1963 AC 837, the House of Lords observed that the chain of events leading upto the injury is not relevant so long as the wrongful act could be foreseen as a possible factual cause of the kind of injury. This principle does agree with the direct rule of *Polemis* (in re:) as far as manners are concerned, and thus the basic rule of reasonable foresight laid down in the *Wagon Mound No. 1*, has been rejected by the House of Lords and East African Court of Appeal. In *Doughty v. Turner Manufacturing Co. Ltd.*, (1964) 1 QB 518, the unforeseeable 'manner or ways' which created the effects of wider range than reasonably foreseeable, the Court's view was that 'ways or manners' were relevant. In this case, the injury was received by the plaintiff, not by the splashing of liquid in a vat, when the lid fell into it, but by the effervescence resulting from the interaction of the material from which the lid was made with the substance in vat. The Court of Appeal observed that the extent of the effects of the effervescence was wider than would have been the extent of any splashing caused by the fall of the lid. Hence, there was no liability.

Hughes and *Doughty* cases can be distinguished but the line of distinction is very thin.

5. Kinds of Damage or Injury

Q. Upto what extent kinds of damage or injury can influence the verdict in a case? In the light of the observation given by the court in the case *Tremain v. Pike* define the term element of foreseeability.

In the case *Tremain v. Pike*, 1969 WLR 1556, the plaintiff was employed as a herdsman contracted a rare disease - leptospirosis, which is caused through contact of rat's urine. It was not earlier known to farming community nor it was prevalent in the area. The learned judge observed that the defendants were not liable because they could not have realized as reasonable men the extent to which the farm was infested with rats so as to give rise to any sort of danger whatsoever from their presence. The learned judge further observed that even if the defendants had been in breach of duty, in that they ought to have known of the extent of the infestation by rats and ought to have foreseen that the plaintiff was or might be exposed to some general hazard involving personal injury, illness or disease in consequence of such infestation, they were still immune from liability on the ground, that the disease of leptospirosis was at best a remote possibility which they could not reasonably foresee. The learned Judge held that disease in question was 'not comparable to other human disabilities which may flow from an infestation of rats'.

Here the disease was caused due to contact with rat's urine. That was entirely different in kind from the effect of a rat bite or food poisoning contaminated by rats. In this, he relied by way of comparison and contrast, upon the earlier decisions in *Smith v. Leach Brain & Co. Ltd.*, (1962) 2 QB 405 and *Brandford v. Robinson R. Ltd.*, (1967) 1 WLR 337. He held further that in those cases, the risk of injury from a burn or from extreme cold was foreseeable and it was only the degree of injury or the development of the sequela was not foreseeable.

From this judgment, it can be construed that how narrow level of abstraction in respect of foreseeable damage was invoked by the learned judge in order to determine the liability of the defendant. *Tremain* case differentiated between injury from rats by biting and injury from rat's infection. It may further be said that the only real type of injury to be considered was injury by rats, however the precise injury was suffered and the rationale of these distinctions is said to be the element of foreseeability.

6. Conclusion

The liability has become remote with the development of remoteness principles in English Law.

In the *Wagon Mound No. 1*, their Lordships discussed the moral and social consequences of the correct approach to the

problem of defining the duty of care of the remoteness issue. But, in the extensive and ever-widening field, its principle has no place whatsoever in recent times. The foreseeability rule in relation to remoteness, as said earlier, has already been rejected in respect of degree or extent of damage, physical disability, financial disability and the manners or ways in which a foreseeable kind of damage is caused.

In India, the law is followed usually on English lines and most of the times, the justice is done in favour of defendants whatever analysis of negligence is invoked or distinctions are made, they must stem from the ultimate desire and purpose of the law to achieve a just result in any given case.

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CHAPTER 7

PERSONAL CAPACITY

1. Introduction

The general rule in the law of torts is that every person is entitled to sue and are also liable to be sued. But, there are some exceptions to this rule. The exceptions may be studied under following two heads:

- (a) Who cannot sue? and
- (b) Who cannot be sued?

(a) Who cannot sue?

- (i) Convict
- (ii) Alien Enemy
- (iii) Married Woman
- (iv) Husband & Wife
- (v) Bankrupt
- (vi) Infant/Minors
- (vii) Corporation
- (viii) Foreign State

Convicts and persons in custody

Q. Categorise the person/entity who can sue and can be sued. Can a person who is in prison can file a writ for protection of his rights? Explain it.

A felon or convict is a person against whom judgment of death or penal servitude has been awarded on any charge of treason or felony. In the case *D.B.Y. Patnaik v. A.P.*, MANU/SC/0038/1974 : AIR 1974 SC 2092: 1975 Cr LJ 556: (1975) 3 SCC 185: (1975) 2 SCR 24, it was held that convicts are not, by mere reason of the conviction, denuded of all the fundamental rights which they otherwise possess. A compulsion under the authority of law, following upon conviction, to live in a prison house entails by its force the deprivation of fundamental freedoms like the rights to move freely throughout the territory of India or the right to practice a profession. A man of profession would thus be stripped of his right to hold consultations while serving out his sentence. But the constitution guarantees other freedoms like the right to acquire, hold and dispose of property for the exercise of which incarceration can be no impediment. Likewise, a prisoner or even a convict is entitled to the precious right guaranteed by Article 21 of the Constitution that he shall not be deprived of his life or personal liberty except according to procedure established by law. It was also observed in the case *Sunil Batra v. Delhi Administration*, MANU/SC/0184/1978 : AIR 1978 SC 1675 (1727): (1978) 4 SCC 494: 1978 Cr LJ 1741: (1979) 1 SCR 392, that conviction of a person, thus does not draw any iron-curtain between him and his rights and he is not reduced to a non-person.

Where the wrong is not with respect to property, but to the person, as for example, assault or slander, it would be open to the convict to maintain an action.

In *Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav*, MANU/SC/0106/2005 : (2005) 3 SCC 284 (311): AIR 2005 SC 972: 2005 (1) BLJR 631: 2005 Cr LJ 1441: JT 2005 (2) SC 450, it was observed that a Member of Parliament is not above the law as an undertrial prisoner and is subjected to jail discipline. If, he has won an election (contesting from jails), he can be allowed to take oath as an M.P., but he has to be brought back to jail after taking oath.

But, a prisoner can't have 'residual liberty' to sue for false imprisonment for breach of prison rules, if he is segregated

in breach of these rules he can challenge the segregation by writ petition and if conditions in which he is living is inhumane and he suffers with health problem then he may also have a private law remedy of suing in negligence. *Hague v. Deputy Commissioner of Parkhurst Prison*, (1991) 3 All ER 733 (HL).

Alien Enemy

Alien Enemy is a person of enemy nationality or a person residing in or carrying on business in enemy territory, whatever his nationality. Since, the residence in enemy territory is the real test, even a citizen of India resident there will fall within the description. An alien enemy who is residing outside India or in India without the permission of the Government cannot sue in an Indian court. He can sue only, if he is residing with the permission of the Government.

Married Woman

A married woman can't sue without her husband being joined as a party. But, under the Law Reform (Married Women and Tortfeasors) Act, 1935, she can sue if she were a *feme sole*.

Under section 7 of the Married Women's Property Act, 1874, a married woman may sue in tort just as a *feme sole* and in process if she recovers any damage, it becomes her sole property and any damage recovered against her are payable out of her separate property. But, this Act doesn't apply to Hindus, Sikhs, Jains and Muslims and these communities are governed by their personal laws. According to personal laws of these communities, a woman can sue in respect of her separate property without joining her husband in the suit.

Husband and Wife

Q. Whether a wife can maintain an action against third party for the injuries committed by her husband? Discuss it with the help of relevant cases.

Prior to Married Women's Property Act, 1882 and the Law Reform (Married Women and Tortfeasors) Act, 1935, a married woman could not sue for any tort committed by a third person unless her husband joined with her as plaintiff. It was also not possible to sue against her without making her husband as a defendant. But after these Acts, it has become possible that a married woman can sue or can be sued without making her husband as a joint party. After the Law Reform (Husband and Wife) Act, 1962, each of the parties to a marriage has the same right of action in tort against each other as if they were not married but it also depends on court to stay the proceedings if it feels that the matter relates to trivial issues.

Section 7 of the Married Women's Property Act, 1874-

"A married woman may maintain a suit in her own name for the recovery of property of any description which by force of the said Indian Succession Act, 1865, or of this Act, is her separate property, and she shall have, in her own name the same remedies, both civil and criminal, against all persons, for the protection and security of such property, as if she were unmarried, and she shall be liable to such suits, processes and orders in respect of such property as she would be liable to if she were unmarried."

There is a very pertinent question here - whether a wife can maintain an action against third party for the injuries committed by her husband? We can understand this situation if we look into the facts and decisions in following cases:

Smith v. Moss, (1940) 1 KB 424.

Here, the wife got injured owing to the negligence of her husband while he was driving the car as agent for his mother. But, in such cases, the wife can't sue her husband as in the eyes of English Common Law, both husband and wife are considered as one entity. But, it was observed that the wife could hold his master vicariously liable on the ground that 'others may not hide behind the skirts of (marital) immunity.

Here, the husband's freedom from liability is based on an immunity which is personal to him.

Broom v. Morgan, (1959) 1 All ER 849.

In this case, the plaintiff and her husband were working as a helper and manager to the same employer. The plaintiff (wife) sustained injuries due to the negligence of her husband. She sued the employer for damages. In defence, it was the plea that the wife cannot maintain a suit against her husband, it would also immune the master for whom he was working. The defendant's plea was rejected and the court followed the decision of *Smith v. Moss*. Singleton, L.J., stated-

"The fact that a wife has no right of action against her husband in respect of his tortious act and negligence does not mean in law she has no right of action against her husband's employer if he, when he did that negligent act, or made that negligent omission, was acting within the scope of his employment. They remain liable, and there is no reason either in law or in commonsense why they should be given an immunity which springs, in the case of husband and wife, from the fiction that they are one and from the desire that litigation between husband and wife shall not be encouraged."

In India, the wife cannot sue her husband for personal injuries on the basis of personal laws of different communities, but she can sue her husband's employer if husband has committed a tort against her during the course of employment. It follows that on the basis of parity, a husband may also recover against her employer if she has committed a tort against her husband during the course of her employment.

Bankrupt or Insolvent

Q. Whether an employer is vicariously liable to the servant's wife for the tort of his servant? Discuss it with the help of relevant cases.

If an insolvent commits a tort, its liability is not a debt provable in insolvency and is not discharged by insolvency. But, an insolvent may be sued for a tort committed by him either before or during insolvency and in case of decree against him, the amount thus awarded is a debt provable in insolvency.

But a bankrupt or insolvent cannot sue for wrongs in respect of his property since all his property vests in a Trustee in bankruptcy according to English Law, or the Official Assignee or the Official Receiver in India.

Infant/Minors

Q. What are the rights of infants who are still in the womb of his mother?

Q. Can a person be held liable for causing injuries to children ventres a mere under Indian Law?

An infant or minor may sue with the help of his next friend (usually father) if any wrong has been done to him. But, if an infant who has sustained injuries when he was in the womb of his mother can maintain an action for injuries is yet to be answered.

In the case *Walker v. G.N. Rly.*, (1890) 28 LR Ir 69, a child was borne crippled and deformed after an accident to it ventres a mere (i.e. when he was in mother's womb) owing to the negligence of company, while the mother was travelling on its line. The railway company was not held liable due to two reasons:

First-the railway company owed no duty of care towards the child since there was no contract with the child, or the company did not know the existence of child at all. Second-the medical evidence to establish the claim was also uncertain.

In England, the British Parliament passed the 'Congenital Disability (Civil Liability) Act, 1976', by which an action for the injury to unborn child has been permitted in some cases. If someone's wrongful acts hamper growth of the unborn child in mother's womb resulting in disabled and abnormal infant then the action may lie against the wrongdoer. Even father can be held liable for his wrongful act which cripples the growth of child under this act. The mother can be held liable for disabilities to child if she is found guilty of negligent driving of a motor vehicle. Damages for the loss of expectation of life of a child can be claimed provided the child lives for at least 48 hours after his birth.

But, we, in India lack such Act but rights of unborn child are recognised in Hindu Law. The child in womb has right to share in the property. Causing death to unborn child, abortion and miscarriage are also made penal offences under sections 312, 313 and 316 of the Indian Penal Code.

Corporation

Q. Define corporation can it be called a legal person and be sued for its torts?

A corporation is considered as a legal person. Its features lie in name, perpetuity of existence and capacity to sue and be sued.

(A) A corporation can sue for torts against itself, for malicious presentation of a winding-up petition.

(B) a libel charging it with insolvency or with dishonest or incompetent management.

In *Mayor of Manchester etc. v. Williams*, (1891) 1 QB 94, it was observed that a corporation cannot maintain an action for libel charging it with corruption for it is only individuals and not the corporation who can be guilty of such an offence.

A corporation is liable for torts committed by its agents or servants as an employer for the torts of his servants, when the tort is committed in the course of doing an act within the scope of the powers of the corporation. It may thus be liable for assault, false imprisonment, trespass, conversion, libel or negligence.

The definition of Corporation can be understood with the explanation of Viscount Haldane LC in the case *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*, 1915 AC 705 (713): 113 LT 195 (HL), as-

"A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation."

Foreign Sovereigns

No action lies against any foreign sovereign. No court can entertain an action against a foreign sovereign for anything done, or omitted to be done, by him in his public capacity as representative of the nation of which he is the head; *De Harbar v. The Queen of Portugal*, (1851) 17 QB 171. To have a residence in a foreign territory does not lead to a waiver of immunity or submission to local courts.

(b) Who cannot be sued?

- (i) Sovereign or King
- (ii) Act of State
- (iii) Foreign Sovereign and Ambassador
- (iv) Infant/Minors
- (v) Lunatic
- (vi) Drunkard
- (vii) Corporation
- (viii) Trade Union

Sovereign or King

'The King can do no wrong' is the maxim on which the immunity of the crown from civil liability is based. So, an action for personal wrong will not lie against the Crown. By, 'the Crown Proceedings Act, 1947' while changing the old law. It

also preserved the rule that no proceedings can be brought in tort against the crown in a private capacity.

In our country there is no King. As per the provisions enshrined in the Constitution of India, the President and the Governors shall not be answerable to any court (i) for the exercise and performance of the powers and duties of their office, or (ii) for any act done or purporting to be done by them in the exercise and performance of those powers and duties. Under section 87B of the Civil Procedure Code, no ruler of any former Indian State may be sued in any court except with the permission of the Government of India.

Act of State

If Act is done in exercise of sovereign power in relation to another State or subjects of another State which cannot be questioned by municipal courts is called as 'Act of State'. Acts done by rulers in exercise of political power to the people of another State are Acts of State and, therefore, they are exempted from liability. If a foreign national gets injured in course of exercising some sovereign power, he can get remedy through diplomatic means. Some salient features of an Act of State are:

- (A) The act is done by State's representative,
- (B) The act is injurious to other State or its subject,
- (C) Such acts are done either with the prior sanction or is subsequently ratified by the State.

Foreign Sovereign and Ambassador

In English Law, the courts have no jurisdiction over an independent foreign sovereign, unless he submits to the jurisdiction of the court as it was observed in the case *Mighell v. Sultan of Johore*, (1894) 1 QB 149. The same protection is also available to a diplomatic agent or ambassador and his family.

In India, section 86 of the Civil Procedure Code says that no ruler of a foreign State may be sued in any court except with the permission of the Government of India and it should be certified in writing by a secretary to that Government. Same immunity is extended to an ambassador or diplomatic agent and his family.

Infant/Minors

Q. Can a minor be held liable for his torts? Describe it in the light of observation given in the case *Swarup Kishore v. Goverdhandas*.

In India, below the 18 years of age, a boy or girl is called as minor. A minor or infant is equally liable for his torts as an adult person. Knowledge, intention or malice is a necessary ingredient in constituting a tort and infancy is a good defence in case he has not attained sufficient maturity of understanding.

In the case *Swarup Kishore v. Goverdhandas*, AIR 1956 MB 84, the defendant slapped the plaintiff in presence of several persons. The defendant was a 16-year old boy and the defense plea was that defendant can't be held liable in damages as he was a minor. But this contention was rejected by Justice Dixit who observed that a minor can be held liable for his torts as an adult. The rule of exemption from liability for a minor has no applicability in conduct tortious in itself and in its very essence-"It is only in those cases where an act is innocent in itself but become tortious by the addition of some ingredient such as intention, malice, knowledge or state of mind in the person charged as a wrong doer that the age and mental capacity of the defendant becomes relevant."

Lunatic

Q. Can insanity be considered as a defence in tort? Do you agree with the statement that if the nature and quality of act are known to the defendant then no defence is available for the defendant?

Liability lies with lunatic is same as with infants. It has been said that insanity by itself is not a defence in tort. But in malice insanity presents a good defence to the existence of such malice or intent.

If the person does something which is not voluntary, but the act of automation, like the act of a fever patient in his

delirium or a somnambulist in his sleep or of an epileptic in his paroxysm, and for such act, defendant is not liable.

The degree of insanity has to be decided in each case and it depends on the facts and circumstances of the case to decide about the liability.

If the nature and quality of act are known to the defendant then no defence is available for the defendant.

Ranganagulu v. Mullackal, MANU/KE/0009/1974 : AIR 1974 Ker 25 (Vol. 61, c. 9), is an important case to be mentioned here. Ranganagulu, the appellant was a regular visitor from Ramnad district who used to visit Mullackal temple at Alleppey to worship there. Once, he entered the temple with shirt and shoes and broke the idol of the deity. He was handed over to the police. The police suspected him as an insane and kept him under surveillance of a doctor. The doctor observed that he was indifferent to the surroundings, does not sleep at night, talks incoherently, laughs without any reason and declared him as an insane. After cross-examination, the doctor admitted that these conditions can't be held as sufficient to say that he was insane, if considered individually. But, if put all these pieces together, we can say that he is insane. The Court stated that this evidence is not sufficient to hold that the appellant was not in a position to know the nature and quality of his act, nor his acts were involuntary. The Court held that the appellant was liable and stated that 'much importance should not be attached to the medical certificate, at any rate, it is not possible to hold that the appellant was incapable of understanding the nature and quality of this act; obviously, the appellant's act in breaking the idol was not an involuntary act either - the act of an automation. Even, if he was under the impression that he had the right to enter the sanatorium of the temple or he was not aware of the consequences of his act, still, if he knew the nature of his act and if the act was not an involuntary act, he is liable for the act if the act is tortious.

Drunkard

In the law of tort, drunkenness is not considered as a good defence. It is every man's sense to know the consequences of what he does. If a man drinks and does the things and thinks that he would not be liable for his act in this state then he is wrong. But, if A administers intoxicants in B's drinks against his will, or by fraud, or by mistake then B may not be held liable in tort provided he is unable to differentiate between right and wrong.

Corporation

A corporation is considered as a person in the eyes of law and is vicariously liable for the acts of its servants or agents in the course of their employment. It can be held liable for torts like false imprisonment, conversions, libel, trespass or negligence.

We can mention here the case of T. Pillai v. Municipal Council, MANU/TN/0204/1961 : AIR 1961 Mad 230, in which plaintiff had a pet dog and it was killed by the municipal employee in course of killing stray dogs in the municipal area. The court had observed that the defendant was liable and remarked - 'the corporation is a fictitious and legal persons having an entity in law distinct from its members and by its very nature can only act through its servants or agents, and not in propria persona and the corporation is as much liable in an action in tort as an individual. Whatever difference of opinion there may be on the question of legal doctrine as to how far an agent or servant of a corporation can be said to act within the scope of his employment in respect of a tort which is ultra vires the corporation, there is consensus of authority for holding that a corporation cannot be immune from liability in respect of tort brought about at its instance on the ground that the act was not intra vires the corporation.

Trade Union

A trade union can be a body corporate if it is registered under section 13 of the Indian Trade Unions Act, 1926 and can sue and be sued. If, a trade union is not registered then under Order 1, rule 8 of the Code of Civil Procedure, 1908 any one or more of its members may be sued as representing the trade union. Members of a registered trade union are exempted from liability in respect of certain torts.

CHAPTER 8

JOINT TORTFEASORS

1. Independent Tortfeasors & Joint Tortfeasors

Define independent and joint-tortfeasors with suitable examples.

Sometimes, same damage is caused to one person by several wrongdoers and they may be either independent tortfeasors or joint-tortfeasors.

When a person causes the damage by independent wrongful acts; they are called as independent tortfeasors whereas joint-tortfeasors cause the same damage to fulfil their common ambition. To be joint-tortfeasors, it is essential that the persons should have the same mental level or intent. In the case, *The Kursk*,¹ the Court of Appeal distinguished between independent and joint-tortfeasors as-"Persons are said to be joint-tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design but mere similarity of design on the part of independent actors causing independent damage is not enough there must be concerted action to common end".

Example.-There are two persons, A and B both are driving their cars and they have a bet who will reach first to the car of C. In doing so, both drive very fast and collide with the car of 'C'. C gets injured. Here both A and B will be held liable as joint-tortfeasors. But, if A and B are going driving their respective cars and have no such plan and meet with such accident with C then both A and B will be considered as independent tortfeasors.

2. Joint Tortfeasors

The joint liability arises under three following circumstances:

Agency-When someone appoints a person to act on his behalf and if any tort is committed by such person then both the persons, principal as well as agent are jointly as well as independently liable and they are treated as joint-tortfeasors.

Vicarious liability-If, a person is held liable for the tort committed by someone else under special relationship then it will be a joint liability and both are tortfeasors.

Joint or common action-When a group of two or more persons join together for a common action then all the persons who are consisting the groups are jointly and severally liable for a tort which has been committed in furtherance of an action.

1. Law Reports (1924) Probate Div. 140.

It would not be out of place here to mention that where the damage caused by each of the several tortfeasors is distinct then each of the tortfeasors will be liable only for the damage which is attributable to his own act.

In *Machindranath Kernath Kasar v. D.S. Mylarappa*, the damage is caused by negligence on the part of the driver of offending vehicle. The Apex Court held that when a damage is caused upon act of negligence on the part of a person, the said person is primarily held to be liable for payment of damages. The owner of the vehicle would be liable as he has permitted the use thereof. To that effect only under the Motor Vehicles Act, both driver and owner would be jointly liable. This, however, would not mean that they are joint tortfeasors in the strict sense of the term. There exists a distinction between the liability of the owner of a vehicle which was used in commission of the accident and that of the driver for whose negligence the accident was caused, but the same would not mean that the owner and the driver are joint tortfeasors in the sense as it is ordinarily understood. (MANU/SC/2484/2008 : AIR 2008 SC 2545).

3. Liability of Independent Tortfeasors

Distinguish between liabilities of independent and joint-tortfeasors.

Independent tortfeasors are severally liable for the same damage owing to independent causes of action. In the case of *Thompson v. London County Council*, (1899) 1 QB 840, the house of plaintiff got damaged due to excavation carried out by A negligently and it had further aggravated the damage of house by B who left the watermain insufficiently stopped. The Court held both A and B liable for damage but not as joint-tortfeasors as their acts were independent. It was held that the damage is one but the causes of action which led to that damage are two. Hence, such tortfeasors are severally liable for the same damage but they are not jointly liable for the same tort.

In the *Koursk* case,¹ two ships *Koursk* and *Clanchisholm* collided with each other and in this process, the ship *Clanchisholm* ran into another ship *Itria* and sank the same. The owners of *Itria* brought the case against the owners of *Clanchisholm* and recovered damages but not satisfied with the amount since *Clanchisholm* had their limited liability for a lesser amount. Then the owners of *Itria* filed a suit against the owners of the *Koursk* also. It was observed that *Koursk* and *Clanchisholm* were independent tortfeasors and not joint. So, there could be as many causes of action which will correspond with the number of tortfeasors. Further, the court was of the view that the judgment delivered in the *Clanchisholm* did not bar the action against *Koursk*.

4. Liability of Joint-Tortfeasors

What are those three circumstances in which joint liability of tortfeasors arises?

Three principles have been given in English Common Law regarding liability of Joint-tortfeasors.

First principle	Second principle	Third principle
Liability of wrongdoers are joint and several i.e., each one is liable for the whole damage. Here, the injured party may sue them jointly or any of them separately and the decree against them may be executed against any one of them.	It was observed in the case <i>Brinsmead v. Harrison</i> , (1871) 2 R 7 CP 547, that a judgment obtained against one joint wrongdoer released all the others even though it was not satisfied. The tort is said to have merged in the judgment.	A tortfeasor liable in damage for his fraud or wilful wrongdoing could not recover contribution or indemnity from a joint tort-feasors.

1. Law Reports (1924) Probate Div. 140.

In <i>Arneil v. Peterson</i> , 1913 AC 560, two dogs belonging to two different owners attacked a flock of sheep and injured many of them. When the plaintiff was sued, it was claimed that he was responsible for half of the damage. It was held that each owner is responsible for whole damage.	<i>Brinsmead</i> sued <i>Harrison</i> for recovery of piano. <i>Harrison</i> defended that <i>Brinsmead</i> has already recovered judgment against his joint-tortfeasor. <i>Brimstead</i> had this plea that he could not realise the amount from tortfeasor hence this action was brought. But <i>Blakburn, J.</i> held that it will not be permitted.	In <i>Merryweatherv. Nixon</i> , (1799) TR 88, two persons (X and Y) damaged the machinery in <i>Starkey's mill</i> . <i>Starkey</i> sued them jointly and got judgment for £ 840 and executed against X for the whole. X sued Y for contribution for £ 420. But Lord <i>Kenyon</i> dismissed the suit and held that he can't obtain it from his joint tortfeasor Y.
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But, all the above rules were abolished by the Law Reform (Married Women and Tortfeasors) Act, 1935 and The Civil Liability (Contribution) Act, 1978. The third rule created by section 6(i)(b) of the Law Reform Act of 1935 was repealed and replaced by section 4 of the Civil Liability (Contribution) Act, 1978 which will not allow the only recovery of cost in

the subsequent suits, unless the court is of the opinion that there was reasonable ground for bringing the action.

5. Law in India

We don't have any statutory law on Joint-Tortfeasors liability in India. Till 1942, the courts in India followed the law as laid down in Brinsmead and Merryweather cases but later on the courts abandoned the law as preached in above cases.

Further, Indian courts also not followed the statutory law of England wherever it was against the principles of equity, justice and good conscience.

In Nawal Kishore v. Rameshwar, MANU/UP/0172/1955 : AIR 1955 All 594, case Justice Agarwal gave illustration on this point as-

"there is no statutory law of torts in this country. The courts of this country act on the principles of equity, justice and good conscience in matters which are not covered by statute and rely upon the principles established under the English Law to find out what the rule of justice, equity and good conscience is. Any technical rule or statutory law of England is not as such, considered to be based on the principle of equity, justice and good conscience, unless it appears to be so to the judge deciding the case. It appears to us that the rule of law indicated in

Clause 6(1)(b) of the Act, 1935 is not necessarily based on any principle of equity, justice and good conscience. There is no justifiable reason why, in the subsequent suit, if more than one suit is brought for damages against different persons, the plaintiff should be restricted to the amount decreed against the joint-tortfeasor in his suit against the other joint-tortfeasor against whom the cause of action is not only joint but joint and several."

Kushal Rao v. Babu Ram Ganapat Rao, MANU/NA/0039/1941 : AIR 1942 Nag 52, in this case, the Chief Justice Stone while discussing the liability of joint-tortfeasors said that the rule in Merryweather v. Nixon is not consistent with justice, equity and good conscience and should not be followed in India-"The English rule that there is no right of contribution between joint-tortfeasors should not be applied to Indian conditions where courts do not merely administer the common law but decide in accordance with equity, justice and good conscience and where it is very desirable to exercise the power to differentiate between the various persons held jointly liable at the suit of the persons injured."

Recently, it has been seen that the Indian courts are tempted to follow or adopt common law of England if it is in consonance with the principles of equity, justice and good conscience under Indian conditions.

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CHAPTER 9

TRESPASS TO PERSON

1. Introduction

Any direct invasion of a protected interest from a positive act is actionable subject to justification. Those wrongs which affect someone's personal safety and freedom is termed as 'trespass to person.' It can be committed negligently as well as intentionally. If the invasion is direct though foreseeable or the invasion is from an omission as distinguished from a positive act, there could not be any liability in trespass, but may be liable for some other action.

There are four forms of intentional trespass to the person as follows-

- (i) assault,
- (ii) battery,
- (iii) mayhem, and
- (iv) false imprisonment.

Assault

Define trespass to person. What are the different kinds of trespass to person?

An assault is an unlawful attempt to do a bodily or corporeal hurt to another, coupled with an apparent present ability and intention to do the act. We can understand it better with the help of going through the observations as given in the following cases-

Stephens v. Myers, (1830) 4 C & P 349.-In this case, the plaintiff was the chairman of a parish meeting. The defendant was somewhat stubborn and vociferous, majority in the meeting was in favour of turning him out. On this development the defendant said that he would rather pull the chairman out of the chair than be turned out of the room. He, then advanced with his fist clinched towards the plaintiff, but was stopped by church warden who sat next to the plaintiff. He was held liable for assault and Tindal, C.J. remarked:

"It is not every threat, when there is no actual personal violence, that constitutes an assault. There must be in all cases, be the means of carrying the threat into effect. The question I shall leave to you will be whether the defendant was advancing at the time in a threatening attitude, to strike the chairman, so that his blow would almost immediately have reached to the chairman, if he had not been stopped; then though he was not near enough, at the time to have struck him, yet if he was advancing with that intent. I think it amounts to an assault in law. If he was so advancing, that within a second or two he would have reached the plaintiff, it seems to me it is an assault in law."

The most important factor in assault is to carry out threat into effect. Physical impact is not necessary. There should be some reasonable apprehension of immediate injury or violence to the plaintiff.

Bavisetti Venkata Surya Rao v. Nandipati Muthayya, MANU/AP/0138/1964 : AIR 1964 AP 382.

The plaintiff was an agriculturist and Rs. 11.60 was arrear in his name of land revenue. The village munsif went to him to collect the land revenue but he shown his inability to pay. Munsif told the plaintiff that if he becomes defaulter then his ear-rings will be taken out and called a goldsmith. When the goldsmith came, another person who was present there, paid the dues to the Munsif. The Court was of the view that it was not a case of assault as after the arrival of goldsmith the defendant did not say anything or did anything to create an atmosphere of fear and physical threat to the plaintiff.

Battery

What is battery? Distinguish it with assault. What are the ingredients to constitute a battery?

When some force is used directly or indirectly then it is called as battery. It can also be defined as intentional application of force against another without any lawful justification. If someone uses force in angry or revengeful manner without lawful justification, then we may call it as 'battery'.

There are two things necessary to constitute a battery-

(a) hostile intent, and

(b) use of force.

(a) Hostile intent-Intention of defendant is essential for constituting battery. Intentional touching another person in a hostile manner or against his will is a battery. But, if the person who is not of sound mind, his hostile act may not be termed as battery. But, if the defendant knows what he is doing is wrong then he can't take the defence of incapacity or lunacy.

In the case, *Morris v. Marsden*, (1952) 1 All ER 925, the defendant was suffering from mental disease attacked plaintiff causing some injury to him. The defendant knew the nature and quality of act but it was not known to him that what he was doing was wrong. In an action for damages for the tort of battery it was held that since the defendant knew the nature and quality of his tortious act, he was liable for damages.

(b) Use of force-Unjustified use of force is another ingredient of battery. There should be some physical touching but bodily contact is not necessary. In *R. v. Cottageworth*, 6 Mad 172, spitting on a man's face was held as a battery. If in a bus or train person touches other gently, it is not a battery but if a person uses force crossing other person in crowd, bus or train in a rude and inordinate manner then it is a case of battery.

In *Pratap Daji v. B.B. & C.L. Rly.*, 1875 (1) Bom 52, the plaintiff entered a carriage on the defendant's railway and forgot to purchase a ticket. At next station, when he was asked for a ticket, he refused. After sometime he was asked to get out of the carriage again he refused at this also. Then, he was forcibly removed from the carriage. The plaintiff filed a suit against the defendant for action then the Court observed that the use of force was justified. Since he was a trespasser (without holding a valid ticket to travel in). Defendants were thus not held liable.

Defence against Assault & Battery

What are the defences available against assault and battery?

There are below some particular instances mentioned where defences are available against assault and battery:

(a) Expulsion of trespasser-If someone enters upon the property of another person without his permission and doesn't leave the place even after request then he can be evicted with force as much as it is required and in such situation the force used is justified.

(b) Lawful correction-Assault and Battery may be justified, if it is used as corrective measures. Correction of a pupil, child or a soldier. But, the corrective measures should not be unreasonable or excessive.

(c) Retaking of Goods-If a person wrongfully takes possession of someone else's property, then the rightful person (owner) or someone authorized to take care of owner's property may request to get his property back and if the wrongdoer refuses to give in then the owner or authorized person may use reasonable force as he thinks fit for the situation.

(d) Preservation of public peace-If someone is threatening the public peace or causing nuisance at public worship place he can be checked from doing so with the help of using reasonable force.

(e) Statutory Authority-If a legal authority is performing his duty and someone comes in between and stops him from performing his duty the person may be stopped with the use of force.

So, above are the exceptions against assault and battery, justifying the use of reasonable force in certain circumstances.

Distinction between Assault and Battery

Assault	Battery
✎ action which puts another person in instant fear of unlawful force	✎ use of unlawful force
✎ actual contact is missing	✎ actual contact is necessary
✎ to throw water on someone is assault	✎ to throw water on someone and if drops fall on him, is battery

Mayhem or Maim

Mayhem is another form of battery, where bodily injury is of that extent that a person is weakened in fighting or in defending himself.

Cutting off or disabling or weakening a man's hand or finger, or striking out his eyes or foretooth, or castrating him come under the name 'mayhem'. But cutting of man's ear, nose, hair or back teeth come under battery.

False imprisonment

When a person checks someone's free movement that is movement on one's own will then it is called as false imprisonment. It can be in an open field, house or in a street. Total restraint or total confinement of a man's liberty is false imprisonment. There are two essential elements to hold a false imprisonment - first, there must be a total restraint on the liberty of the plaintiff and second, it must be without any lawful justification.

Total restraint

The false imprisonment is committed when total restraint has been imposed upon someone's liberty. When a person forces someone to be in a position against his will, for example X is on the roof-top and Y maliciously takes away the ladder and now X has no option to get down and remains there against his will, it will tantamount to total restraint.

Knowledge of Plaintiff

A person can be held imprisoned without his knowledge. But, it is possible to hold captors liable for imprisonment, if it is not known to the imprisoned man that he is a captive or being detained.

In *Meering v. Graham White Aviation Co. Ltd.*, (1920) 122 LT 44, a person (plaintiff) was suspected of having stolen a keg of varnish from the shop of employers i.e., defendants. The employer asked plaintiff to go with their policemen to the company's office. After reaching there, he was asked to wait in the waiting room while the two policemen remained in the neighbourhood. The defendants were held liable for false imprisonment. The defendant's plea was that the plaintiff was free to go anywhere and he was knowing it but did not go anywhere. But, the court was not convinced and observed that the plaintiff from the moment came under the influence of the police was no longer a freeman.

Atkin, L.J. said-"It appears to me that a person could be imprisoned without his knowing it. I think a person can be imprisoned while he is asleep, while he is in a state of drunkenness, while he is unconscious, and while he is a lunatic".

Partial restraint

What is partial restraint? Discuss it with the help of the case *Maharani of Nabhav*. Province of Madras.

In false imprisonment, there is total restraint of the liberty of a person and without justification. But, if the wrongful restraint on the liberty of a person is partial then it doesn't come under false imprisonment.

In *Maharani of Nabha v. Province of Madras*, ILR 1942 Mad 696: (1942) 2 MLJ 14, the facts were that under government orders, the Ex-Maharaja was restricted in his movements to the municipal limits of Kodaikanal. The Maharani was going to Madras but the S.P. Madurai wrongly informed that the ex-Maharaja was going with his family to Madras and issued direction to his sub-ordinates to stop Maharaja from leaving Kodaikanal. By mistake, the Sub-

Inspector understood it as to prevent Maharani from going to Madras. Maharani came with her daughter in a car to Kodaikanal railway station to board a train for Madras. The Sub-Inspector told Maharani not to board the train for Madras and posted two police-men near the railway compound to prevent her car from being taken out of the compound. A suit was filed by the Maharani against the police acts. The Court observed that no wrongful confinement could be said to have taken place-

"The offences of wrongful confinement or restraint are offences affecting the human body and cannot be said to have been committed if a person is not himself restrained or confined but the liberty of going in the conveyance in which he wishes to go or of taking the article which he wishes to carry and without which he is not willing to proceed is denied to him."

Detention without lawful justification

For false imprisonment, it is necessary that there should be total restraint on liberty without any lawful justification. In *Rudul Sah v. State of Bihar*, MANU/SC/0380/1983 : AIR 1983 SC 1086: 1983 Cr LJ 1644: 1983 (2) SCALE 103: MANU/SC/0380/1983 : (1983) 4 SCC 141: (1983) 3 SCR 508, the petitioner was acquitted by the court in 1968 but released from the jail in 1982 i.e., 14 years after his acquittal from the case. The State pleaded that the petitioner remained in jail for his treatment since he had some mental disorder. The plea of State was rejected by the Court and as an ancillary relief, in a writ of habeas corpus by the petitioner, the Supreme Court granted a sum of Rs. 35,000 as compensation as an interim measure without precluding the Commissioner from claiming further compensation.

In another case *Kundan Lal v. Dr. Des Raj*, (1954) 56 PLR 331, the SP on an application moved by the surety, cancelled the bail bond and ordered the rearrest of the plaintiff. On SP's order, sub-inspector rearrested him. The Court held that the SP had no power to cancel the bail bond and the order of rearrest was unlawful. Both the SP and sub-inspector were held liable for false imprisonment.

2. Defences

There are some instances of Defences as mentioned below:

Reasonable condition

It won't be a case of false imprisonment by preventing a man from leaving the premises since he has not fulfilled reasonable condition subject to which he entered.

In *Herd v. Weardale Steel, Coal and Coke Co.*, 1915 AC 67, a miner descended a coal mine at 9.30 a.m. with a view of working therein. He was entitled to get out of the mine at 4.30 p.m. On reaching there, he wrongfully refused to do certain work and at 11 a.m. he requested to get out of the mine. But the employer refused to do so saying that lift can't be used before

1.30 p.m. although the lift was available. The Court said that it was not the case of false imprisonment.

Judicial Authority

In our country, the Judicial Officers are protected from liability for doing a wrongful thing in the discharge of their duty and hence a Judicial Officer cannot be sued for false imprisonment.

Section 1 of the Judicial Officer's Protection Act, 1850 says-

"No Judge, Magistrate, Collector or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered within the limits of his jurisdiction: provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of....."

The above provision given in the act gives a free hand to legal authorities to discharge their judicial duties within their jurisdiction, and at the same time, the protection is given to them even if their act done or ordered found to be erroneous irregular or even sometimes illegal. Moreover, a judicial officer while discharging his duties he stretches beyond his jurisdiction area and if he does so in good faith believing the area within his jurisdiction would not be held

liable.

Jurisdiction does not mean the power to do or order the act impugned but generally the authority of the judicial officer to act in the matter.

But, if a judicial officer acts maliciously or knowingly acted outside his jurisdiction, then he may be held liable. (Anwar Hussain v. Ajoy Kumar Mukherjee, MANU/SC/0374/1965 : AIR 1965 SC 1651: 1965 Cr LJ 686).

Arrest by Police

If a policeman making an arrest in execution of a judicial order notwithstanding any defect of jurisdiction by judge or magistrate, no action will lie against the policeman.

But this protection from liability does not extend to any irregularity in the execution of the warrant and there is no defence if the person other than the person named in the warrant is arrested, however innocent the person making the arrest may be. If, the police officer doesn't have the arrest warrant the defence of lawful authority can't be taken. If, some policeman is arresting a person on reasonable suspicion of any crime without any warrant then he must inform the person of the true grounds on which he is making an arrest and if he doesn't give the true reason then he is liable for false imprisonment.

Arrest on complaint before a judicial officer

In Austin v. Dowling, 1870 LR 5 CP 534.-a party files a complaint before a judicial officer and the judicial officer in the discharge of his judicial duty issues a warrant upon which the person charged is arrested, the party filing the complaint is not liable for false imprisonment. Here, the reason given is that a man is liable for his acts or his agent's act and a judge is no man's agent. The judge acts in his own judicial capacity/discretion.

3. Remedies

What are the remedies available against the false imprisonment?

In the case of false imprisonment following remedies are available:

Self-help-

The person who is unlawfully detained, need wait until he is released before seeking redress. Self-help is available for him to escape.

Habeas Corpus-

Under Article 32 or 226 of the Constitution of India, a person can move to the Supreme Court or High Court respectively for the issue of Habeas Corpus if he has been wrongfully detained. This remedy has been provided by the Constitution for those who have been wrongfully detained. It is also possible that the person who has been wrongfully detained may have been set free by the time the writ of Habeas Corpus is disposed off. In this situation the Court may also grant compensation as ancillary relief. [e.g. Rudul Sah v. State of Bihar, MANU/SC/0380/1983 : AIR 1983 SC 1086: 1983 Cr LJ 1644: 1983 (2) SCALE 103: MANU/SC/0380/1983 : (1983) 4 SCC 141: (1983) 3 SCR 508 and Bhim Singh v. State of Jammu and Kashmir, MANU/SC/0064/1985 : AIR 1986 SC 494: 1986 Cr LJ 192: 1985 (2) SCALE 1117: (1985) 4 SCC 477: 1986 (1) UJ 458 (SC)].

In A.D.M. Jabalpur v. Shivkant Shukla, MANU/SC/0062/1976 : 1976 (2) SCC 521: AIR 1976 SC 1207: 1976 Cr LJ 945: (1976) Supp SCR 172: 1976 (8) UJ 610 SC, it was observed that the Habeas Corpus is not available during a proclamation of emergency.

CHAPTER 10

TRESPASS TO LAND

1. Introduction

Trespass means to enter unlawfully upon another's land or unjustifiable interference with the possession of land. It is a wrong against possession rather than ownership. Possession is an important factor relating to trespass.

2. Possession

Define possession. Distinguish between possession-in-fact and possess-in-law.

Possession means to have something at one's own disposal or exclusive right to use it. It is protected in its own right.

Salmond-

"the possession of a material object is the continuing exercise of a claim to the exclusive use of it." It has got two elements-mental as well as physical. The mental element is called as 'animus' and the physical element is known as 'corpus'.

Animus denotes intention of the possessor with respect to thing and corpus consists in the external facts in which this intention has realised, embodied or fulfilled itself.

Physical possession of a thing doesn't give right of possession who holds it. For example, A has gone to a car show room and he is examining the various features of the vehicle and taking the test drive. During driving the car, the car is in his custody but not in his possession. But, if he runs away with the car, he is in full possession of it. Here, he has got necessary animus and possession both, and can exclude others except the car shop-owner. So, the wrongful possession is protected by law against all except the real owner of the car i.e., car shop-owner.

Possession

(a) Possession in fact (de facto possession) e.g. - servant's possession	(b) Possession in law (de jure possession) e.g. - master's possession
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Here, the servant's intention is to exclude others on behalf of his master and he can maintain an action under trespass against those who interfere with the possession of property or article. Whereas a master's intention is to exclude others from interfering with the thing and he does so on his own behalf.

There is also a difference between 'right to possession' and 'right of possession'. If A is a landlord who sublets his premises to B for 11 months, it means A has right to possession after expiry of 11 months and during this period the tenant has right of possession. A person who has right of possession is entitled to sue for trespass and not he who has right to possession.

3. Trespass

If, someone interferes with the possession of land without justification, then it is called trespass. It is also an offence under section 441 of the I.P.C. provided the requisite intent is present. The interference can be done by actually dispossessing of the land or by intruding upon it or by doing an act affecting the sole possession of the owner, in each case without justification.

4. Entry - Must in trespass

'A person is thrown upon the other main's land by someone else'-Can it be said that it is a trespass?

If a person enters a land assuming it as his own although it belongs to someone else, he has committed the wrong of trespass. Any voluntary intrusion upon land without the consent of the person having possession or right of immediate

possession is a trespass to land. It is actionable even without proof of damage. Trespass of land is committed by intrusion of any sort of entry or contact directly from an act of defendant e.g.-

- (i) placing a ladder against premises - *Wetripp v. Beldock*, (1938) 2 All ER 779.
- (ii) driving a nail into a wall of another - *Lawrence v. Obee*, (1815) 1 Stark 22.
- (iii) growing a creeper upon it - *Sunpson v. Weber*, (1925) 133 LT 46.
- (iv) placing rubbish against the wall of another - *Gregory v. Piper*, (1829) 9 B&C 59.

are all examples of trespass.

But, if the entry is involuntary then it does not amount to trespass. When a person is thrown upon the other man's land by someone else then it is not a trespass. (*Smith v. Stone*, 1647 Style 65).

A person who has got permission to enter one part of a building or enclosure has got a license to visit that particular part and not the entire building. If, a person who has been allowed to sit in the drawing room goes to bedroom without any justification, it is called trespass.

Trespass can also be committed by an agent or with some material object. To throw a stone or grazing grass by the cattle on other's land also come under trespass.

If A plants a tree on his own land and its roots and branches spread on B's land then it amounts to nuisance but if A plants a tree on B's land then it is trespass. If a person (A) owns a land its sub-soil also belongs to him and if another person (B) makes a tunnel beneath the land owned by A then it is a trespass. It is also possible that land is owned by one person and its sub-soil belongs to other then in such case if anyone who walks over the land this will be the trespass against the land owner and not who owns the sub-soil.

5. Trespass on Highway

If someone's land spreads over highway then the soil cover of such land is presumed to be owned by that person. Here, the action for trespass can be maintained only when the trespasser makes an unjustifiable and unreasonable use of land. In such cases, the plaintiff has to prove negligence on part of defendant.

In the case - *Harrison v. Duke*, (1893) 62 LIQB 117, it was the observation of the court that the public interest in the highway is to have the right of passage. If, it is used in a reasonable way, then it is not a trespass, but if it is used unreasonably then the user will be liable for trespass.

6. Trespass in the airspace

The maxim *cujus est solum ejus est usque ad coelum* means, whose is the soil his is also that which is above it, and the trespass in airspace is governed by this maxim. But, it doesn't give ownership over the infinite space and the portion of airspace which is capable of being reduced into private ownership.

Trespass in the airspace can be committed through aircraft or otherwise.

In England and India, there are statutes to regulate aircraft trespass. As per England's Civil Aviation Act, 1949 (section 40) no action will lie for trespass or nuisance if aircraft flies over a reasonable height. But, if the material damage is caused by the aircraft, the aircraft owner shall be liable for damages without proof of negligence.

In our country the Aircraft Act, 1934 with Aircraft Amendment Act, 1960 makes the act of a person punishable who wilfully flies an aircraft in such a manner so as to cause danger to any person or his property, but it contains no provision of civil liability as it has been given in the English Act.

7. Trespass ab initio

Discuss the following-

(a) Trespass in the airspace

(b) Trespass ab initio

(c) Continuing trespass

If a person enters certain premises and he has been authorised by law to do so, after entering the premises he abuses that authority, it is trespass ab initio. It means law considers a person as a trespasser from the very beginning even if he had entered there lawfully under the presumption that he had gone there with that wrongful purpose in mind. A man becomes trespasser ab initio only when his act amounts to misfeasance and not non-feasance.

(a) misfeasance - to do a wrongful act

(b) non-feasance - omission to do something

In the case of *Six Carpenters*,¹-all the carpenters entered in an inn and ordered for some wine and bread. After having wine and bread, they refused to pay. The Court held that they were not trespassers ab initio since, the case was of only non-payment it was non-feasance and not a case of misfeasance.

8. Continuing Trespass

If a man is building a wall or throwing stones on others land it is called as continuing trespass till it is removed from the place. The right to sue in such cases will continue from day one till it is removed. In the case of *Holmes v. Wilson*, (1839) 10 Ad&E 503, it was held that recovery of damage in the first action, by way of satisfaction does not operate as a purchase of the right to continue the injury. Where the plaintiff has been completely dispossessed or ousted, the resulting injury is complete on the day of plaintiff's ouster and then there will not be space from applying the principle of 'continuing trespass.'

9. Entry with Licence

Define licence with the help of relevant case.

Licence means authority granted and entry with licence means to enter some premises for which the person has been authorized by the one who has got the possession of the said premises.

1. (1610) 8 Co Rep 146a.

According to section 52 of the Indian Easements Act, 1882 Licence means -

"Where one person grants to another, or to a definite number of persons a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in property, the right is called a licence."

To permit a person to demolish an old house is an example of licence. After the licence is revoked, the licensee must quit the place within reasonable time. If he does not do so, he will become a trespasser.

Types of Licence

(i) a bare licence can be revoked;
to give permission to demolish
the building is a licence.

(ii) a licence coupled with grant
can't be revoked; to give
permission to demolish the
building and to carry
away the bricks and iron
equipments is a grant - is a
licence with grant.

In *Hurst v. Picture Theatres Ltd.*, (1915) 1 KB 1, Mr. Hurst purchased a ticket to watch a movie show at defendant's theatre. He went inside the theatre and took the seat but he was forcibly taken out of the theatre.

He sued for assault and the Court awarded ₹ 150 as damages. It was the observation of Buckley, L.J., that right to go into the theatre was a licence but right to see and enjoy the movie from beginning to end is a grant. So, it was a licence coupled with a grant.

10. Remedies

Right to re-enter

The person who is entitled to possession can re-enter the premises in a peaceful manner. To oust a trespasser is not a wrongful act if the person has a right to do so. In *Hemmings v. Stoke Poges Golf Club*, (1920) 1 KB 720, the plaintiff was a tenant of a cottage owned by the defendant. Defendant was terminated from his service and then he wanted to take the possession back from the plaintiff and for that purpose he gave a notice to him. But, the plaintiff refused to vacate the cottage. The defendant then entered the cottage and removed the plaintiff and his furniture with reasonable force. The suit was brought by the plaintiff for assault, battery and trespass but the Court rejected all that.

Action for ejectment or recovery of land

Under the Specific Relief Act, 1963, a person who has been dispossessed of immovable property can get a speedy disposal of his case.

Section 6-

"If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit recover possession thereof, notwithstanding any other title that may be set up in such a suit. No suit under this section shall be brought after the expiry of six months from the date of dispossession."

So, under this section one can get his immovable property back establishing any title. But, there are some criteria which have to be fulfilled before evoking this section by the plaintiff and these are-

- (i) he was in possession of certain premises or immovable property,
- (ii) he was evicted by the defendant without due course of law; and
- (iii) the suit has been brought within 6 months from the date of his possession.

Moreover, this section gives relief to those who are in lawful possession of immovable property.

Distress damage feasant

Distress damage feasant is also a remedy which empowers a person in possession of land to seize the trespassing cattle or other chattels and detain them until compensation (equal to destruction caused by cattle or chattels) has been paid to him.

It has to be mentioned here that right to detain an object is only when it is trespassing on the land and not when the trespass is over and the object is not on the land.

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CHAPTER 11

TRESPASS TO GOODS AND CONVERSION

1. Trespass to Goods

Define trespass to goods with the help of relevant cases.

If, there is a direct act which causes damage to goods by seizure or removal to someone then it is called as trespass to goods. For example, removing a tyre from a motor car *G.W.K. Ltd. v. Dunlop Rubber Co. Ltd.*, (1926) 42 ILR 376. Scratching the panel of a coach [*Foulder v. Willoughby*, (1841) 8 N&W 549.] destroying or injuring the goods, beating or killing the animals or infecting them with the disease¹ or chasing the animals to make them run away from the possession of owner or killing a dog by giving it poisoned meat.²

For trespass to goods, it is essential that the injury and damage must be direct and not consequential. It is further required that the plaintiff must have the possession of goods either actual or constructive or a legal right to the immediate possession at the time of trespass. A trespass to goods is also actionable per se i.e., without any proof of actual damage.

Kirk v. Gregory, (1876) 1 Ex D 55.-in this case, on a person's death, his sister-in-law removed some jewellery from his dead body and kept it in another room with a reasonable belief that the jewellery will be more safe in another room since people will come to pay homage to deceased. But, it was her mistaken belief and the jewellery got stolen from that room. Sister-in-law was held liable for trespass to the jewellery. Earlier, it was not essential for the plaintiff to prove intention or negligence on the part of defendant in an action for trespass, but now in the light of recent cases of trespass to person, it appears that the plaintiff should prove intention or negligence of the defendant in respect of trespass to goods.

National Coal Board v. Evans, (1951) 2 KB 861.

In this case, the defendants had employed certain independent contractors to make excavations on their land. Beneath the land the plaintiff's predecessor had laid some electric cables. The defendants had no knowledge about the underlying cables. In course of excavations, the cable got damaged. The defendants were not held liable for this damage as it was not known to them.

1. Winfield, Law of Tort 10th Edn., p. 403.

2. Salmond, Law of Torts, 14th Edn., p. 138.

Some points to learn

Ã~ Trespass is a wrong against possession rather than ownership.

Ã~ A person in possession can maintain an action though somebody else is the owner of that goods.

Ã~ A trespasser cannot by his trespass acquire the right of ownership in the goods. Such a possession does not stop owner from taking back the property from the trespasser. (*Khan Mohammad v. State of Rajasthan*, MANU/RH/0007/1967 : AIR 1967 Raj 37).

Ã~ A joint owner of the property can maintain an action of trespass against the co-owner if the latter has done something which amounts to his ouster. (*Jacob v. Seward*, 1872 LR 5 HL 464).

2. Defences

While exercising a legal right or under legal process or in defence of person or property, trespass to goods can be justified. For example, a man can't be held liable if he interferes with another's chattels in defence of his son's livestock.

Examples

(a) If A's dog attacks B's sheep then B is justified in shooting the dog but the condition is that, the shooting should be reasonable and essential for the protection of livestock.

(b) If X leaves his vehicle on the road in a manner that it has blocked the passage then Y can remove the vehicle to facilitate his passage and in doing so, he would not be held liable for trespass.

3. Remedies

Explain detinue and elaborate what was lacking from this defence; give the salient features of Interference with Goods Act, 1977 which allows for conversion remedies.

Detinue is an action to recover the goods which has been wrongfully detained by the defendant. The plaintiff can bring the action against the defendant who unlawfully detains the goods and doesn't deliver the same on lawful demand. Detinue was abolished in England by the Torts (Interference with Goods) Act, 1977, which allows for conversion remedies that were available under common law for detinue. Under section 3 of the Act, provision has been given to recover the damages by delivery of goods or payment of damages equivalent to the value of goods.

Similar Act in India is not available but under sections 7 and 8 of the Specific Relief Act, 1963 provision has been given to recover the specific movable property. Section 7 enables a person to recover his property in a manner provided by Civil Procedure Code, 1908, and section 8 of the Act provides speedier relief to the plaintiff in certain cases to recover the specific property from the defendant. For example-

- (i) when the defendant is an agent or trustee for the plaintiff;
- (ii) when compensation would not afford the plaintiff adequate relief;
- (iii) when it is very difficult to ascertain the actual damage caused by its loss; and
- (iv) when the possession of the thing has been wrongfully transferred.

Damages-

In cases of trespass to goods, the damages in general are measured by the value of the goods or the amount of injury done to them. In *Dajiba Anand Ray v. B.B. & E.I. Rly. Co.*, (1869) 6 BHC (ACJ) 235, the defendants without taking permission from the plaintiff started quarrying on the land of the plaintiff and removed a large quantity of the stones from there. On an action by the plaintiff, the Court held that the plaintiff was entitled to recover by way of damages, the value of the stones after it was quarried. At the same time, the Court also held that the defendants were not entitled to get the labour cost which they incurred on quarrying the stones.

4. Conversion

Describe conversion and details about its type.

Interference with Goods Act, 1977 which allows for conversion remedies.

Conversion is said to have been committed when there is wilful interference without lawful justification with other's property.

Salmond -

a conversion is an act of wilful interference, without lawful justification, with any chattel in a manner inconsistent with the right of another, whereby that other is deprived of the use and possession of it. We can say that intentional interference with another man's property is conversion. Even, if a person honestly believes that he is entitled to do so and interferes with the property of plaintiff, he is liable for conversion.

An act of conversion may be committed in following ways-

- (i) when some property is taken by someone wrongfully.

- (ii) property is wrongfully parted with.
- (iii) wrongful sale of goods/property.
- (iv) wrongful retention of goods.
- (v) wrongful destruction of property.
- (vi) when the lawful owner's right is denied.

Conversion by Taking

Any person who without being authorised by the owner of the property takes possession of his goods with the intention of asserting suzerainty over them is liable of conversion.

For example -

to steal someone's goods is a conversion, but mere removal of the goods from one place to another will not be an assertion of rights adverse to the plaintiff's and it may not be conversion as it was held in the case. *Foulder v. Willonghby*, (1841) 8 M&W 540.

In another case *Roop Lal v. Union of India*, (1841) 8 M&W 540, the military jawans saw some woods lying near the bank of a river and thought that it belonged to no one and is a property of government. They took the same for campfire and used it as fuel.

The plaintiff brought the suit for the tort of conversion. It was held that the defendants were liable even if the military jawans did not intend to commit theft or believed it honestly that the wood belonged to the government.

Conversion by parting with goods

If, someone (A) was entrusted with the duty to look after the goods of B but, if A puts it in someone else (C) hands then it is contrary to what A has been entrusted with. The mistake has been committed as soon as some rights over property have been given along with the possession. In *Dhyan Singh Sobha Singh v. Union of India*, MANU/SC/0010/1957 : AIR 1958 SC 274: (1958) 1 SCR 781, it was observed that every person is guilty of a conversion, who without lawful justification deprives a person of his goods by delivering them to someone else so as to change the possession.

Conversion by sale of Goods

If, a person innocently obtains possession of the goods of a person who has been fraudulently deprived of them and disposes them of whether for his own benefit or that of any other person, is guilty of conversion as it was observed in the case of *Hollins v. Fowler*, 1875 LR 7 HL 757 (795): 44 LJ QB 169. In

R.H. Wills & Son v. British Car Auctions, (1978) 2 All ER 392, Lord Denning said-"when the goods are sold by the intervention of an auctioneer under the hammer or as a result of a provisional bid, then if the seller has no title, the auctioneer is liable in conversion to the owner."

Wrongful retention of goods

If, a man is in possession of another's chattel and refuses to hand it over to its real owner, then it is an assertion of a right inconsistent with his general dominion over it; and the use which at all times, and in all places he is entitled to make of it, and consequently amounts to an act of conversion.

Demand and Refusal

If the goods of an owner are in possession of someone else then he should send someone to demand and receive them and if the demand of his or his agent is not met by the possessor this is the evidence of conversion. In *Wilton v. Girdlestone*, (1822) 5 B&Ald 847, it was said that a demand and refusal do not in themselves constitute a conversion, but they are evidence of a prior conversion.

As per observation given in *Alexander v. Southey*, an unqualified refusal is always conclusive evidence of a conversion, but a qualified, reasonable and justifiable refusal is not.

Wrongful destruction of goods/property

A person who without any justified reason wilfully consumes or destroys a chattel belonging to another person and some article loses its shape or identity, it amounts to destruction. For example, eggs are destroyed when an omelette is made; cotton is destroyed when yarn is made and corn is destroyed when it is ground into flour. In the case *Richardson v. Atkinson*, (1723) 1 Sir 576, the defendant took some wine out of the plaintiff's cask and mixed water to compensate the taken wine from the cask. The court held the defendant liable for conversion of the whole cask as he converted part of the contents by taking them away and the remaining part by destroying their identity.

When the lawful owner's right is denied

Earlier, it was said that the conversion of goods may happen even though the defendant has never been in physical possession of them, if his act amounts to an absolute denial and repudiation of the plaintiff's right.

It was overruled by section 11(3) of the Torts (Interference with Goods) Act, 1977 which provides that denial of title is not itself a conversion.

In *Akola Electric Supply Co. Ltd. v. Gulabi*, ILR 1950 Nag 453, interference with a chattel in a manner inconsistent with the right of the owner accompanied by a denial of title of the owner amounts to conversion.

5. Defence to conversion

Jus Tertii is a defence to an action for conversion. It may be the defendant's plea that some third party has superior title to that of plaintiff. But, this defence has got some limitations as-

- (i) where the plaintiff was in possession of the goods at the time of conversion, the defendant cannot plead jus tertii; *Armory v. Delamirie*, (1722) 1 Sir 505.
- (ii) where the plaintiff was not having the possession of goods at the time of conversion in actual terms, but only a right to possess, in such a case the defendant can take the plea of jus tertii; *Leake v. Loveday*, (1842) 4 M&G 972.
- (iii) a bailee is estopped from setting up the title of an owner who has not given him authority to make the claim on his behalf; *Rogers v. Lambert*, (1891) 1 QB 318.

6. Remedies

What are the remedies against conversion?

Describe conversion and details about its type.

Where the defendant is in possession of goods during trial, there is a further remedy by way of an order for redelivery. There are two remedies-

- (i) Damages; and
- (ii) Re-delivery

Damages

Damages depend on types of injury. If injury is simple, the damage will be nominal but if it is substantial the damages will be assessed according to the value of torts. If some chattels or goods are destroyed, the damages will be assessed upon the basis of full value. *Ash v. Duke*, (1936) 2 All ER 71. It would not be out of place to mention here that if the plaintiff has recovered the value, his title to the goods becomes extinguished.

The damages done to goods are measured on market value at the time of conversion provided no special damage has

been sustained and the goods are received back after action; Mohammad Mohsin Khan v. Turab Ali Khan, (1909) 6 ALIR 441.

In Williams v. Arthur, (1847) 5 QB 320, it was held that the articles or goods have been returned, but have fallen in price, the defendant has to pay damages on the basis of difference in the price at the time of demand by the plaintiff and the time of return.

Re-delivery

After abolition of detinue, Tort (Interference with Goods) Act, 1977 came into being, but the rights of the plaintiff remained the same. The Court may order at its discretion as-

- (a) for delivery of the goods together with payment of any consequential damages, or
- (b) an order for the delivery of the goods, but with an alternative option to the defendant to pay the value of the goods together with payment of consequential damages, or
- (c) an order for damages alone.

7. Distinction between Trespass and Conversion

Distinguish between trespass and conversion.

Trespass	Conversion
1. It is a wrong to the actual possessor hence cannot be committed by a person in possession.	1. It is a wrong to the person entitled to immediate possession.
2. Trespass is to damage the other's chattel or goods, but without intending to exercise an adverse possession over it.	2. It is a breach made adversely in the continuity of the owner's dominion over his goods though the goods may not be hurt.
3. The gist of the action in trespass is the force and direct injury inflicted.	3. Here, in conversion it is the deprivation of the goods or their use.

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CHAPTER 12

TORTS AFFECTING DOMESTIC AND SERVICE RELATIONSHIP

1. Introduction

A man has a proprietary interest in the services of his family members and servants. Any act of person which hurts the relationships with his family members gives birth to torts.

Wrongs to family relationship may be divided into three categories:

- (i) Husband and Wife;
- (ii) Parents and Children; and
- (iii) Master and Servant

2. Husband and Wife

This category deals with the wrongs which affects the husband's rights with respect to his wife and vice-versa.

Enticement

What are the types of torts which affect domestic and service relationship?

An action for enticing away other's wife is maintainable in the court in India as well as England. It is considered as an infringement of the plaintiff's rights under the contract of marriage that gives rise to the action. As it was observed in the case *Sobha Ram v. Tika Ram*, 1936 ILR 58 All 903, that a husband has got a right against a third party for the loss of society or service of his wife. If a husband proves that he has been deprived of consortium or service of his wife by a third party, then this tort is maintainable by the husband.

In *Place v. Searle*, (1932) 2 KB 497, the plaintiff brought an action against the defendant and alleged that defendant was maintaining intimate relationship with his wife for last six years and persuaded her to leave him telling her 'come on, Gwen, we will go' and they left the plaintiff's house.

Scrutton, L.J. observed-

"It seems to me clear, at the present day, that a husband has a right to the consortium of his wife, and the wife, to the consortium of her husband and that either has a cause of action against a third party who without justification destroys that consortium. It is the duty of the wife to reside and consort with her husband. This is the duty which she owes to him and a person who tempts or entices her to violate this duty commits a wrong towards the husband for which he is entitled to recover damages, unless the person who harboured her acted from 'principles of humanity', to protect her from her husband's ill treatment, in which no action can be maintained, even though it should turn out that the wife's allegation was unfounded."

Adultery or Criminal conversation

In Indian law, ignorance of defendant that the woman was married is a good defence in case of adultery. Upto what extent you agree with this statement-Explain.

In the case of adultery the action is rested upon the same ground as that of enticing the wife away from her husband. To commit adultery with another's wife is a wrong against her husband. In England, the husband's claim for damages is governed under the provisions of the Matrimonial Causes Act, 1950. Even if wife has given her consent to have sexual intercourse, in law, she is incapable of giving such consent since her consent is immaterial in the case of adultery. If the adulterer does not know that the woman is married in that case, in strict law such ignorance is no bar to damages and the damages will be awarded inspite of it. (*Butterworth v. Butterworth*).

But, in our country, the view is different, in the case of *Abdul Samad v. Mohd. Ramzan*, 1949 Nag 346, it was observed that the ignorance of defendant that the woman was married is a good defence unless there is some special reason.

In *Menon v. Menon & Worth*, it was pointed out that where the husband has already obtained damages for enticement of his wife from another man and with whom his wife has also committed adultery, the husband is entitled to maintain a fresh action for the award of damages for adultery against the defendant.

But the position is different with wife. In the case *Winchester v. Fleming*, (1958) 1 QB 259, it was observed that a wife cannot bring an action for damages solely in respect of adultery committed with her husband. She is also incapable of suing a third party for harbouring her husband.

Action for personal injuries

If a person's wife gets injured by someone then the husband can bring an act against the wrongdoer. Wife is equally capable of bringing an action against the person who causes injury to her husband. These two actions may be brought separately or jointly. In *Best v. Samuel Fox & Co. Ltd.*, 1952 AC 716, wife brought an action against the defendant who injured her husband. Owing to injuries, the husband became incapable of performing sexual intercourse and in consequence the plaintiff (wife) suffered in health. The plaintiff's plea was that due to injury to her husband, she has been deprived of normal marital relations and opportunity of having children. But, the Court held that there was no principle or authority in English Law on which such action could be founded hence she was not entitled to succeed.

3. Parents and Children

What are the parental rights? Explain it with the help of relevant cases.

Parental rights are those rights which give custody and control of children and to the produce of their labour till they arrive at the age of 21 in England and 18 in India. If children exceed these age then they are not within this rule unless they render actual service to the parents. When a parent has lost the

In Indian law, ignorance of defendant that the woman was married is a good defence

in case of adultery. Upto what extent you agree with this statement-Explain.

services of child and it is proved then only he/she has a cause of action in tort. A relationship of master and servant is necessary between parent and child for the parent to succeed in tort. The parent cannot maintain any action in tort if the child is too young or he is already in service of another person.

In the case *Ram Lal v. Tula Ram*, (1881) 4 All 97, a married woman was deserted by her husband and she was living with her father. The defendant abducted her then the woman's father sued for compensation for the loss of service of her daughter and also for cost which was incurred by the plaintiff on prosecuting the defendant for abduction. Stuart, C.J., observed that the action was maintainable.

But, if the father has sued for seduction of his daughter, the right to sue doesn't survive the father and the suit abates.

4. Master and Servant

If, anyone who maliciously or with notice, interrupts the relationship between master and servant, he will be liable for actionable wrong. If he does it in following ways-

- (i) by procuring the servant to depart from his master's service, or
- (ii) by harbouring and keeping him as servant after he has quitted the service, and during the time stipulated for as the period of service, or
- (iii) by beating or confining him in such a manner that he is rendered incapable of performing his work.

Some cases and the verdict given for them-

- (a) taking of any servant or apprentice out of the service of another is actionable; *Barrham v. Dennis*, (1599) 2 Cro Eliz.
- (b) To seduce a servant from his master who has paid the penalties stipulated for leaving him then no action lies for

his seduction; *Evans v. Walton*, 1867 LR 2 CP 615.

(c) action lies against a third person who maliciously induces another to break his contract of exclusive personal service with an employer although the relation of master and servant may not strictly exist between the employer and the employed; *Bowen v. Hall*, (1881) 6 QBD 333: 44 LJ 75.

(d) if the agreement to do the work is unreasonable and not binding, an action will not lie against a third person for enticing the contracting party away; *D. Francesco v. Barnum*.

(e) where injury is caused to a servant, besides the action which the servant himself may have against the wrong doer, the master also, as a recompense for his immediate loss, may maintain an action. The master must allege and prove the special damage he has sustained by the injury to his servant; *Berringer v. Great Eastern Rly.*, (1879) 4 CPD 163.

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CHAPTER 13

NEGLIGENCE

1. Introduction

Define negligence and discuss two theories-subjective and objective theories with the help of relevant cases.

When there is no intention of causing harm to the person complained of - it is called as negligence. Carelessness on the part of defendant constitutes negligence.

If, there is an unreasonable conduct followed by harm to another-it gives rise to liability for negligence. There are two theories pertaining to negligence have been given in the law of tort-

Subjective Theory-

As per this theory, negligence denotes 'state of mind'. It treats negligence as a specific tort and sets at rest all the controversy over this point. It has got support from Austin, Salmond and Winfield.

Objective Theory-

Negligence is a type of conduct and not a particular state of mind. It has been recognised by the House of Lords in *Donoghue v. Stevenson*, 1932 AC 562, where negligence has been treated as a specific tort.

2. Meaning

Swayne, J.-

'Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation.'

Winfield-

'Negligence as a tort is the breach of a legal duty to the care which results in damage, undesired by the defendant, to the plaintiff.'

3. Essential Ingredients of Negligence

What are the essentials of constituting a negligence

Describe the important principle of determining a duty as laid down by Lord Atkin in the case *Donoghue v. Stevenson*.

- (a) it was a legal duty of defendant to take reasonable care towards the plaintiff to avoid the damage complained of,
- (b) the defendant committed a breach of that duty; and
- (c) due to breach of duty plaintiff suffered damage.

Duty to take care-

A person is supposed to behave in a reasonable manner but if he deviates from acting as a reasonable person then he is said to be careless. But, for every careless act a man cannot be held responsible in law.

Criterion of duty-

To determine whether duty to take care was there or not is upto Judge. It becomes easier to decide where there is already earlier decision which have established the duty. Brett MR in *Heaven v. Pender*, (1883) 11 QBD 509, attempted to formulate a principle for the first time. It was established in this case that under certain circumstances, one man may owe a duty to another, even though there is no contract between them.

"One man is near to another, or is near to the property of another, a duty lies upon him not to do that

which may cause a personal injury to that other, or may injure his property."

After this case, in *Le Liever v. Gould*, (1893) 1 QB 491, too it was held that a duty to take care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other.

In the case of *Donoghue v. Stevenson*, 1932 AC 562, Lord Atkin laid down a very important principle of determining a duty.

In this case, the defendant was a manufacturer of ginger-beer who sold the beer in a sealed and opaque bottle. A person bought it and presented it to his friend Miss Donoghue. She drank the ginger-beer. In the bottle, she found decomposed body of a snail. She fell ill and sued the manufacturer for negligence.

It may be noted here that there was no contract between the plaintiff and the defendant. Delivering the majority judgment Lord Atkin laid down the rule of determining the duty-

"The liability for negligence is no doubt based upon a general public sentiment of moral wrong doing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question, 'who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omission which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

Lord Atkin after laying down the principle of notional duty, stated that under what circumstances a manufacturer owes a duty of care towards the consumer in following words:

"..... a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

It was held that although there was no contractual duty on the part of the defendant, but the defendant owed her a duty to take care that the bottle did not contain noxious matter and that he would be liable if that duty was broken.

Lord Atkin's principle has generally been accepted broadly but it can't be accepted as a universal rule.

4. Burden of proof in an action for negligence

Elaborate "burden of proof" in an action for negligence.

In the case of negligence, the onus is on plaintiff to prove the action of defendant due to which he has sustained injuries. He must prove the act or omission of the defendant so that the defendant could be held liable for damages. The act or omission must also be the proximate cause of damage to the plaintiff. Where the balance is even as to which part is in fault, the one who relies on the negligence of other is bound to turn the scale. In the case *K.C. Kumaran v. Vallabh Das Vasanji*, MANU/KE/0003/1969 : AIR 1969 Ker 9, it was held that the initial burden of making out a prima facie case of negligence against the defendant lies heavily on the plaintiff and once this onus is discharged, it will be for the defendant to prove contributory negligence or that the incident was the result of inevitable accident.

5. Defences for Negligence

Defences depend upon the conditions which in general are negative tortious liability viz., *volenti non fit injuria*, private defence, statutory authority act of state, remoteness of damage etc. Some of them have been explained as follows:-

- (a) Contributory Negligence,
- (b) Vis Major or Act of God, and
- (c) Inevitable Accident

Contributory Negligence

If someone has committed a negligent act and the other person is not avoiding the consequence arising out of that negligent act even when means and opportunity were afforded to do so it is called contributory negligence. It is difficult for plaintiff to claim the damages from the defendant's negligence if the plaintiff fails in exercising ordinary care, diligence and skill to avoid the consequences of defendant's negligence. It is based on the maxims - *volenti non fit injuria* and *in jure non remota causa sed proxima spectatur*.

Negligence ordinarily means breach of a legal duty to care, but when used in the expression "contributory negligence" it does not mean breach of any duty. It only means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an "author of his own wrong". The question of contributory negligence arises when there has been same act or omission on the claimant's part, which has materially contributed to the damage caused, and is of such a nature that it may properly be described as negligence. Thus, to hold that the conduct of the claimant amounted to contributory negligence, there has to be some causal connection with the damage suffered by the claimant.

Vis Major or Act of God

What are the defences available against the act of negligence?

In the Chapter 5, we have already discussed, the Act of God or Vis Major. Any natural phenomenon like earthquake, volcano, tornado, hurricane, flood which is so straight, violent, direct, sudden and irresistible act which could not by any amount of human care and skill could have been resisted. *Nugent v. Smith*, (1876) 1 CPD 19, came under Vis Major or Act of God. Its defence must be the cause causans and not merely cause sine qua non of the damage complained of. It should be that extraordinary which could not reasonably be anticipated. To say that vis-major co-existed or followed on negligence is no adequate defence. In *Nichols v. Marsland*, 1875 LR 10 Ex 255, the defendant had various artificial lakes on his land being maintained with care and caution, a long spell of rain was witnessed and the reservoirs bursted and carried away some country barges. The action was filed but it was held that this much rain was not anticipated and the escape of water was an Act of God.

Inevitable Accident

It is also a type of defence in an action for negligence. A was lying drunk on a road. B was moving in a car round a bend. Before reaching to A, B could have seen him in ordinary circumstances but a sheet of newspaper blown by wind landed on the windscreen of B's car and he could not see A and crossed over him. A got injured. But here A could not succeed as it was a case of inevitable accident.

6. The maxim: Res ipsa loquitur

Explain the maxim_ Res ipsa loquitur with the help of relevant cases.

To prove the negligence of the defendant by the plaintiff may sometimes cause hardship to the plaintiff if he could not know what precise acts or omissions led to his injury or damage and that the cause of damage was known only to the defendant. In such situation, the maxim *res ipsa loquitur* may be applied. It is a rule of evidence. It meant that the things speak for itself i.e., that facts and circumstances which the plaintiff has proved establish a *prima facie* case of negligence against the defendant. The crux of the matter is that the accident should tell its own story and make a picture of negligence on the part of defendant.

Example-

- (i) A person was going along a highway and he got injured by the fall of a barrel from out of the window of the

defendant's ware house; *Byrne v. Boadle*, (1863) 2 H&C 732.

(ii) The plaintiff was injured from a cinema banner which fell from the defendant's premises when he was walking on the road; *Mahindra Nath v. Mathura Das*, AIR 1946 Cal 175.

(iii) Where an employee was killed by an explosion of the gas apparatus in the defendant's factory; *Moore v. Fox & Sons*, (1956) 1 All ER 182 CA.

(iv) Where a surgeon left a towel inside the stomach of a patient after an operation; *Mohan v. Osborne*, (1939) 2 KB 14.

Winfield has stated that there are two requirements for applying the maxim *res ipsa loquitur*:-

The thing causing the damage must be under the control of the defendant or his servant

Evidence of Negligence on the part of defendant is necessary which caused the accident. The control is actual or not, not necessary, mere right to control is sufficient to hold the person responsible for the accident. But it is always not necessary, that all the circumstances which led to the accident be under the control of defendant, (*Moore v. R. Fox & Sons*) and if, there are other persons besides the defendant under whom the control was existed then mere happening of the accident is insufficient evidence against the defendant; *Gee v. Metropolitan Rly.*, 1873 LR 8 QB 161.

The accident must be such as could not in the ordinary course of things have happened without negligence

If, the fact of the accident itself justifies the inference of negligence then all the circumstances may be considered with experience and wisdom. The judge also takes notice of the common experience of mankind.

Example-

(i) it is common experience which shows that a barrel of flour will not fall from an upstairs window on to a passerby in the street if those in charge take proper care; *Byrne v. Boadle*, (1863) 2 H&C 732.

(ii) a clock tower will not fall onto a passer by in the street if those in charge take proper care; *Municipal Corporation of Delhi v. Subhagwanti*, MANU/SC/0010/1966 : AIR 1966 SC 1750: (1966) 3 SCR 649.

(iii) two railway trains belonging to the same company will not collide without negligence on the part of the company or its servants; *Skinner v. L.B. & S.C. Rly.*, (1850) 5 Ex 787.

An important case on this point

'The accident must be such as could not in the ordinary course of things have happened without negligence.'
Describe it in the light of judgment given in the case *M.C.D.v.Subhagwanti*.

Municipal Corporation of Delhi v. Subhagwanti, MANU/SC/0010/1966 : AIR 1966 SC 1750: (1966) 3 SCR 649.

Three persons died due to collapse of the Clock Tower which was situated opposite the Town Hall in the Chandni Chowk, Delhi. It belonged to the plaintiff i.e., under the control of the Municipal Corporation of Delhi. Three suits for damages were filed by the heirs of three deceased persons-Ramaswami, J., observed:

"It is true that the normal rule is that it is for the plaintiff to prove negligence and not for the defendant to disprove it. But there is an exception to this rule which applies where the circumstances surrounding the thing which causes the damage are at the material time exclusively under the control or management of the defendant or his servant and the happening is such as does not occur in the ordinary course of things without negligence on the part of the defendant. The doctrine of *res ipsa loquitur* applies in the circumstances of the present case. It has been found that the Clock Tower was exclusively under the ownership and control of the appellant or its servants. It has also been found by the High Court that the Clock Tower was 80 years old and the normal life of the structure of the top storey of the building, having regard to the kind of mortar used, should be only 40 or 45 years. There is also evidence of the Chief Engineer that the collapse was due to thrust of the arches of the top portion

and the mortar was deteriorated to such an extent that it was reduced to powder without any cementing properties. It was also not the case of the appellant that there was any earthquake or storm or any other natural event which was unforeseen and which could have been the cause of the fall of the Clock Tower. In these circumstances the mere fact that there was fall of Clock Tower tells its own story in raising an inference of negligence so as to establish a prima facie case against the appellant."

The burden on the defendant

In such cases, where the maxim *res ipsa loquitur* applies what the defendant can do to discharge his burden. In the case *State of Punjab v. Modern Cultivators*, MANU/SC/0011/1964 : AIR 1965 SC 17: (1965) 67 PLR 117: (1964) 8 SCR 273, the defendant, in order to discharge his burden, "can show that the breach was due to act of God or due to act of third party or any other thing, which would show that he had not been negligent".

Explanation.-

If A enters the house of B with the intention of theft. B, somehow grapples with him and during scuffle B picks a metallic block and wanted to hit A but it slips from the hand of B and falls upon a passerby who was going under the window of B's house. Here, in this case the maxim *res ipsa loquitur* applies but when the defendant shows as to how the accident actually occurred and there is no mistake on his part or he has taken due diligence on his part as in the present case, he will not be liable.

In *P. Ramudu v. Superintendent Engineer, A.P.S.E.B.*, the victim and her two she buffaloes were came in contact with the G.1 wire and as a result, they were electrocuted. The said wire had fallen on the ground from one end and has not been removed for continuous period of 8 days. There was no explanation by the department as to why the said wire has not been removed for continuous period of 8 days. There was negligence on the part of officials of the electricity department. Therefore, the court directed to pay Rs. 94,000 as compensation. (Writ Appeal No. 54/1999, decide on dated 4-11-2008).

In *U.P. Power Corporation v. Bijendra Singh*, AIR 2009 All 56, the respondent instituted a suit for damages on account of death of his elephant due to electrocution. The court held that if the enterprise is permitted to carry on a hazardous or inherently dangerous activity for its profit or for earning revenue, the law must presume that such permission is conditional on enterprise absorbing cost of any accident arising on account of such activity as an appropriate items of its overheads. Since electrocution caused such death, no differentiation can be made in respect of such liability of the authority. The question of strict liability is in built under law to avoid any accident, if not, by other measures. The death of the elephant was caused by coming in contact with high voltage open wire of electricity hanging on road, the corporation cannot avoid the liability to pay compensation to the owner of the elephant.

7. Consequent damage

Plaintiff's damage must be caused by the defendant's breach of duty and not due to any other cause. Even if the damage is caused by the defendant's breach of duty, the defendant will not be liable if the damage is too remote a consequence of it, or it may be case of contributory negligence.

Application of the Donoghue principle

Discuss the application of Donoghue principle in the following cases-

(a) Grantv. Australian Knitting Mills

(b)Malfoot v. Noxal Ltd

(c) P.V.C. Thakaranv. K. Narayanan

Grant v. Australian Knitting Mills, 1936 AC 85.

The plaintiff purchased a woollen garment from a retailer which was manufactured by the defendant. After wearing the cloth, plaintiff suffered from dermatitis due to presence of sulphites, which was negligently left in

the cloth during the manufacture. Sulphites was hidden and could not be detected easily. The rule of *Donoghue v. Stevenson* was followed by the Privy Council and held that under prevailing circumstances, the defendants owed a duty of care towards the plaintiff even though there was no contractual relationship between plaintiff and defendant.

Privy Council rejected this argument that *Donoghue's* case related to food or drink where the parts were to be worn externally on the ground that 'no distinction however, can be logically drawn for this purpose between noxious thing taken internally and a noxious thing applied externally.'

Malfrout v. Noxal Ltd., 1936 AC 85.

The defendants were employed to fit a side car to plaintiff's motorcycle. The husband was driving the motorcycle with his wife; and the side car broke away from the motorcycle and both husband and wife got injured.

It was held by the court that both husband and wife could recover damages on the ground that a contractor knows that his work requires extra care as if it is not done cautiously and carefully it may expose others besides his contracting party to danger and that it will be used without intermediate examination, he is under a duty to those persons.

P.V.C. Tharakan v. K. Narayanan, MANU/KE/0045/1972 : AIR 1972 Ker 159.

In this case, a 5-year old boy was hit by a car being driven by the second defendant. The car belonged to the first defendant. The road, where the accident took place was surrounded by shops and residences. The vehicular traffic was also more.

Justice Krishna Iyer while holding the defendants liable said-

"I agree that accidents without negligence are not uncommon and every automobile casualty does not call for a rash driver as scapegoat of the law. The plaintiff must prove the defendant's negligence. It happens sometimes that children, not properly taken care of by their parents, frisk about thoughtlessly and get run over by the most careful drivers. They are cases of *damnum sine injuria*. Let us examine the situation more closely. A pedestrian or a cyclist may sometimes be negligent and may cause damage, but a motorist causing damage by negligent driving causes casualties when life is lost. Naturally, the very severity of the consequences must lead to greater diligence. I would therefore expect an automobile driver as a prudent person to take far more care than a pedestrian or a car driver. Similarly, driving on a city road or along a residential street which is crowded and there being shops by the road, calls for greater care on the part of the speedy motorist. Again a road which is narrow, puts the driver under a more serious obligation of circumspection. In this case, there is evidence to show that somewhere near the point of accident there was a stationary bus, thus narrowing the street available for driving. The various factors that produce accidents in an overcrowded city with narrow streets must register in the motorist's mind. Negligence is not a legal abstraction. First, there must be a duty to take care; and next the act which caused the damage must have been done without that degree of care that the law enjoins. Love thy neighbour is a moral injunction do not harm the neighbour is a legal obligation. Who is neighbour in the eyes of law has been explained by Lord Atkin in *Donoghue v. Stevenson*. The rule regarding the prudent man and his perspective about neighbours and the initial presumption against the motorist now spelt out by me may be viewed as too demanding but those who use vehicles in high risk circumstances must bring to bear in equally high degree of care as a safety obligation."

8. Negligence: Legal profession

Describe Halsbury's law vis-a-vis negligence in legal profession.

For more than a century, in England it was held that barristers cannot be sued for breach of professional duty. It was

the notion earlier that there is no contractual obligation towards their clients and the fees received by them are considered in the nature of honorarium. In *Swinfen v. Chelmsford* (Lord), (1860) 5 H&N 890, Pollock C.B. said-

"We are all of the opinion that an advocate in the English Bar, accepting a brief in the usual way, undertakes a duty, but does not enter into any contract or promise, express or implied. Cases may indeed, occur where, on an express promise (if he made one) he would be liable in assuming it; but we think a barrister is to be considered not making a contract with his client, but as taking upon himself an office or duty, in the professional discharge of which not merely the client but the court in which the duty is to be performed, and the public at large, have an interest."

Halsbury's Laws of England states the law as follows:

"If a barrister acts honestly in the discharge of his duty, he is not liable in action by his client for negligence or for want of skill, discretion or diligence in respect of any act done in the conduct of a cause or in setting drafts or in advising. No action is maintainable against a barrister for un-skillfully drawing pleadings. The law requires of counsel nothing but the honest discharge of his duty to the best of his judgment and he means what he does to be for the benefit of his client, he is not responsible to his client for anything he does. The immunity from action is not confined to litigation, but extends to all cases where the relation of counsel and client exists."

In our country, section 5 of the Legal Practitioners (Fees) Act, 1926 provides that no legal practitioner i.e., advocate, vakil, pleader, mukhtar or revenue agent, who has acted or agreed to act shall, by reason only of being a legal practitioner, be exempt from liability to be sued in respect of any loss or injury due to any negligence in the conduct of his professional duties.

In *Manjit Kaur v. Deol Bus Service*, AIR 1989 P&H 183, plaintiff's husband died in a road accident, filed an appeal through her counsel for enhanced compensation. The case remained on the daily list for two weeks and then it was dismissed in default because the counsel failed to appear on behalf of the client. The application for re-hearing of the appeal also became

time-barred, because the counsel did not communicate with the party anything about the appeal for years. The High Court found the behaviour of the counsel as incompetent and warned him for such lapses in future. He was also directed to return the fees to client and to compensate the party for costs of Rs. 1000, for re-hearing of the appeal.

9. Negligence: Medical Profession

Describe negligence in medical profession. What are those duties which a doctor owes to a patient?

Every person has got a duty to behave in a responsible manner and also perform his work as a prudent person with reasonable care. Medical people are also expected to show the care and skill not as a layman but as a member of his class. Such a person when consulted by a patient owes him certain duties - viz.,

- (i) first of all he has got a duty of care in deciding whether he can take up that case;
- (ii) a duty of care in deciding what treatment to give; and
- (iii) a duty of care in the administration of treatment.

If a breach of any of these duties are committed by the doctor, then patient has a right to sue against the doctor for the act of negligence.

The doctor must carryout his task with reasonable degree of skill and knowledge and must also exercise a reasonable degree of care. In context of medical treatment, negligence calls for treatment with difference. A doctor can be held liable for his negligence on either of two findings - one, he did not possess the skill which was prerequisite for the treatment or second, he did not exercise with reasonable competence the skill which he possessed.

Some cases regarding negligence of doctors:

Gian Chand v. Vinod Kumar Sharma, MANU/HP/0140/2008 : AIR 2008 HP 97. the victim-child had suffered minor burns and though she was admitted to the surgical ward she was shifted to the children medical ward. Due to burn injuries she could not be clothed. Therefore, she should not have been exposed to the vagaries of whether. She should have been kept in the warmest place available and probably for this reason on the first night she was sifted to the children medical ward. It appears that the doctor took umbrage to the fact that the child had been kept in his ward without his permission and forced her leave the ward. The doctor has not given any explanation as to why he shifted her out. It is held that the doctor was not only negligent but he was callous in his approach when he forced the parents to shift the child from the children medical ward to the veranda outside in the cold rainy weather especially keeping in consideration the injuries suffered by her and the fact that she could not even wear clothes. Thus, the doctor is liable for the death of the child.

Dr. Lakhman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole, MANU/SC/0362/1968 : AIR 1969 SC 128: (1969) 71 Bom LR 236: (1969) 1 SCR 206.

Defendant's son, aged 20 met with an accident on a sea beach and his left leg got fractured. He was brought to the hospital for treatment. To reduce the fracture, the doctor did not give an anaesthesia and resorted for a single dose morphin injection. He used excessive force in treating the patient as three attendants pulled the leg of the patient to adjust the bone of fractured leg. The patient suffered the shock and ultimately he died. The Supreme Court held the doctor guilty of negligence.

Achutrao Haribhau Khodwa v. State of Maharashtra, MANU/SC/0600/1996 : AIR 1996 SC 2377: 1996 ACJ 505: 1996 (II) AD (SC) 261: (1996) CPJ 8 (SC): JT 1996 (2) SC 624: 1996 (2) MLJ 105 (SC): 1996 (I) OLR (SC) 424: 1996 (2) SCALE 328: MANU/SC/0600/1996 : (1996) 2 SCC 634: (1996) 2 SCR 881.

A woman was operated for sterilisation in a Government Hospital and during operation, a mop (towel) was left inside which caused peritonitis to the woman and due to which she died. The action was filed on presumption of negligence against doctors with the application of the principle of res ipsa loquitur. The Supreme Court explained the nature of duty of care in the medical profession as follows-

"The skill of medical practitioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment which may be admissible for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and the Court finds that he has attended on the patient with due care, skill and diligence and if the patient still does not survive, or suffers a permanent ailment, it would be difficult to hold the doctor guilty of negligence. In the instant case, however, the conclusion of negligence was drawn against the doctors by applying the principle of res ipsa loquitur, and the Government was vicariously held liable."

Dr. T.T. Thomas v. Elissar, MANU/KE/0014/1987 : AIR 1987 Ker 52.

In this case the plaintiff's husband got admitted with severe abdominal pains in a hospital on 11th March, 1974. It was diagnosed as a case of acute appendicitis which required immediate operation to save the life of the patient. But, the doctor did not perform the operation and the patient died two days later i.e., on 13th March, 1974. It was held by the Kerala High Court that the doctor was negligent in performing his duty and the patient could have been saved by performing emergency operation. The doctor's plea that the patient had not consented to the operation was also rejected by the court on the ground that the burden of proof was on the defendant to show that the patient had refused to undergo the operation and in this case, the doctor had failed to prove the same.

State of Haryana v. Santra, 2000 ACJ 1188: (2000) 3 GLR 2309: JT 2000 (5) SC 34: (2000) 3 MLJ 98 (SC):

2000 (3) MPHT 150: 2000 (II) OLR (SC) 234: (2000) 125 PLR 790: 2000 (3) SCALE 417: MANU/SC/0295/2000 : (2000) 5 SCC 182. In this case Santra was having seven children and she came to CMO, Gurgaon for sterilisation which was done in a family planning programme being sponsored by the State Government. She developed pregnancy even after the sterilization operation, she gave birth to a female child increasing extra economical burden on her. The Court held that the doctor was negligent in performing his duty and he as well as State are liable for this negligence and therefore both State and doctor were liable to pay the damages to the plaintiff.

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CHAPTER 14

NERVOUS SHOCK

1. Introduction

Nervous shock is that branch of law which is nascent and still developing. If a person has got injury through his senses i.e., by his visual or acoustic senses it comes under the category of nervous shock.

2. Meaning and Principles

The shock where it operates must be a shock which arises from a reasonable fear to immediate personal injury to oneself". Do you agree with limitation of liability as propounded by Justice Kennedy in the case of 'Dulieu v. White'?

The defendant owed a duty of care to the boy and not to the mother. What were the observation of the Judges (Singleton L.J.; MC Nair, J.; and Denning L.J.) in the case Kings v. Philips?

We know that the brain regulates the function of the body. From brain's hind-part i.e., medulla oblongata, spinal chord arises from which nerves originate and goes to various parts of the body. We have got five senses (eye, ear, nose, tongue and skin) through which we came to know about the things which surround us. In simple terms, if a man has seen something which is unbelievable or horrible or supposed to cause imminent danger to him/others, then he may suffer with nervous shock.

Victorian Railway Commissioners v. Coultas, (1888) 13 App Cas 222.-

In this case, the appellant's gate-keeper negligently invited the plaintiff and his wife, who were driving in a buggy, to enter the gate at a railway crossing when the train was approaching. The distance between buggy and train was very narrow and actual collision did not take place, but seeing the danger from so close, the lady got fainted and suffered a severe nervous shock resulting in illness and miscarriage. The Privy Council held that "damage arising from mere sudden terror unaccompanied by any physical injury but occasioning a nervous or mental shock cannot under such circumstances be considered a consequence which in the ordinary course of things would flow from negligence of the gate-keeper". And in this case it was held that the damage was too remote to be recovered since there was no actual bodily impact.

But this view was changed later on when it was held in the case Dulieu v. White, (1901) 2 KB 669, that to take cognizance of only physical injury resulting from actual impact is to be discarded on the ground that the nervous shock accompanied by definite illness is as much a physical injury as a broken bone or torn flesh wound.

Dulieu v. White, (1901) 2 KB 669.-

The plaintiff, a pregnant woman, was standing behind the bar of her husband's public house, and the defendants by their servants, negligently drove a pair of horse van into that house. The plaintiff was physically not hurt but suffered nervous shock. She fell ill and delivered a prematured baby.

Defendant's plea was that there is no action since plaintiff did not suffer any physical injury. But, Kennedy J., held the defendant liable and said-

".....merely mental pain unaccompanied by any injury to the person cannot sustain an action for negligence. If the fear is proved to have naturally and directly produced physical effects, so that the ill results of the negligence which caused the fear are as measurable in damages as the same results would be if they arose from an actual impact, why should not an action for those damages lie just as well as it lies where there has been an actual impact".

Justice Kennedy also introduced a limitation of liability by stating that the shock where it operates must be a shock which arises from a reasonable fear of immediate personal injury to oneself.

In Dulieu's, the principle laid down in Victorian Railway Commissioners' case as the damage due to nervous shock is too remote a consequence for recovery was put to rest. Justice Kennedy held that the defendant's negligence would make

him liable if the natural and direct consequence is nervous shock followed by illness, subject to the condition that the shock must have been due to reasonable fear of one's own safety.

Hambrook v. Stokes Bros, (1925) 1 KB 141.-In this case, the defendant's servant left a motor lorry unattended at the top of street with its engine running. Somehow, lorry started running on the street violently. Mrs. Hambrook, was walking on the street, and her children had just parted with her and were gone in the direction where now lorry was approaching. She got frightened for safety of her children. One of the passer by informed her that one child similar to description given by her has got injured. After hearing this news she suffered a serious nervous shock and she died. The plaintiff's plea was that the defendant was negligent in leaving the lorry unattended and running. Mrs. Hambrook suffered nervous shock either due to reasonable fear of immediate personal injury to her or her children and she died. Defence plea was that although the servant of defendant was negligent, but the shock was due to fear of her children and it did not give rise to a cause of action.

Trial court taking the view of *Dulieu* case, applied the limitation put forth by J., Kennedy and found that Mrs. Hambrook died due to fright for the safety of her children and defendant was not liable.

On appeal, Bankes and Atkin L.JJ., rejecting, the limitation proposed by

J., Kennedy in *Dulieu* case held that the defendant was liable for her death-

"Accepting the line of reasoning illustrated by authorities, it follows that what a man ought to have anticipated is material when considering the extent of his duty. Upon the authorities as they stand the defendant ought to have anticipated that if his lorry ran away down this narrow street, it might terrify some woman to such an extent, through fear of some immediate bodily injury to herself, that she would receive such a mental shock as would injure her health."

Justice Bankes imposed a limitation by stating that "the defendant would be liable only if the shock resulted from what Mrs. Hambrook either saw or realized by her own unaided senses, and not from something which some one told her".

It was also noted in this case that there was an acceptance of negligence in the pleadings, and this meant that the breach of a duty owed to Mrs. Hambrook was admitted by the defendant. That is why it was not necessary for the court to consider the circumstances in which a duty of care exists in cases of nervous shock.

King v. Philips, (1953) KB 433.-

A small boy, Michael Charles King was on his tricycle on Bristall Road, London. A taxicab driver while backing his cab hit the tricycle. The mother of the child, who was inside her house some 70 to 80 yards away, heard boy's scream, she came out and saw tricycle of his son under the taxicab, but the child was not there who came to home with slight injury. The lady suffered nervous shock followed by illness, for which she claimed damages.

The lower court awarded damage only to boy (Â" 10) and rejected the claim of his mother. The Court of Appeal also upheld the decision of the lower court and held that the defendant owed a duty of care to the boy and not to the mother.

Observation of Judges in this case:

Singleton L.J.-

".....the decision of the House of Lords in *Bourhill v. Young*, shows that the test in such cases is whether the driver could reasonably, have foreseen any damage to the plaintiff. Unless he could, it was said, no duty was owed to her, and consequently there was no negligence vis-a-vis the plaintiff."

McNair, J.-

"If I am asked where the line is to be drawn, I should humbly, reply..... it should be drawn where in the particular case the good sense of the jury or judge decides."

Denning Lord J.,-

"The true principle is this: Every driver can and should foresee that if he drives negligently, he may injure somebody in the vicinity in some way or other; and he must be responsible for all the injuries which he does in fact cause by his negligence to anyone in the vicinity, whether they are wounds or shocks, unless they are too remote in law to be recovered. If he does by his negligence and in fact causes injury by shock, then he should be liable for it unless he is exempted on the ground of remoteness."

Denning Lord J., also distinguished this case with that of *Hambrook's case*, as-

".....I think that the shock in this case is too remote to be a head of damage. It seems to me that during slow backing of the taxicab the driver cannot reasonably be expected to have foreseen that his backing would terrify a mother 70 yards away, whereas the lorry driver ought to have foreseen that a runaway lorry might seriously shock the mother of children in the danger area."

From the above observations, it may be inferred that although the Judges agreed in the result but they disagreed in the theoretical basis of that result.

McLoughlin v. O'Brian, (1982) 2 All ER 298.-The plaintiff's husband and three children met with an accident. One child died while plaintiff's husband and other children received severe injuries. The plaintiff was two miles away from the site of accident, when the accident took place. After hearing this news, the plaintiff suffered severe and persisting psychiatric illness. The House of Lords in an unanimous voice (L. Bridge, L. Scarman, L. Wiberforce, L. Edmund Davies and L. Russell) held the defendant liable for the nervous shock and allowed the appeal for damages.

Page v. Smith, (1995) 2 All ER 736.-

The plaintiff in the motor accident remained unhurt but suffered 'Myalgic Encephalomyelitis', a psychiatric illness with which he had earlier suffered but was in remission that time. The injury although was not foreseeable in a normal man but as a personal injury of physical harm was foreseeable, the defendant was held liable for damages. The House of Lords also laid down following propositions, which may be taken as guiding factors in deciding such kind of cases-

- (i) In cases involving nervous shock, it is essential to distinguish between the primary and secondary victims.
- (ii) In claims by secondary victims, the law insists on certain control mechanisms, as a matter of policy in order to limit the number of potential claimants. Thus, the defendant will not be liable unless psychiatric injury is foreseeable in a person of normal health. If, plaintiff is the primary victim, then this mechanism has no place.
- (iii) If claim is sought by secondary victims, it may be legitimate to use hindsight in order to be able to apply the test of reasonable foreseeability at all.
- (iv) Subject to the above qualifications, the approach in all cases should be the same.
- (v) A defendant who is under a duty of care to the plaintiff, whether as primary or secondary victim, is not liable for damages for nervous shock unless the shock results in some recognised psychiatric illness.

3. Conclusion

Due to vagueness/ambiguity of the rule of foreseeability, the House of Lords faced a lot of difficulty and therefore laid down some qualifications to the rider of reasonable foresight in certain cases e.g.-

- (i) where secondary victim has close relationship of love and affection with the primary victim and also that his proximity to the accident is sufficiently close in time and space (*McLoughlin v. O'Brian*);
- (ii) in case of secondary victims, it may be legitimate to use hindsight in order to be able to apply the test of

reasonable foreseeability at all (Page v. Smith); and

(iii) tortfeasor must take his victim as he finds him (Page v. Smith).

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CHAPTER 15

CONTRIBUTORY NEGLIGENCE

1. Introduction

Q. Define contributory negligence. What is the role of plaintiff in succeeding in the case of contributory negligence?

Injury or death to one party is caused due to negligence of second party. But, sometimes, court faces a situation when both the parties in one way or other were negligent. In such situation, the court has to decide as to whose negligence caused the injury or death.

There are three possible answers to such an enquiry depending upon the circumstances of the case-

- (i) The defendant's negligence alone caused the death or injury;
- (ii) The deceased's or the plaintiff's negligence was solely responsible for the death or injury; and
- (iii) The negligence of both the parties caused the death or injury.

☞ Plaintiff will succeed if the defendant's negligence was alone sufficient to cause injury or death, although there was some negligence on part of the plaintiff.

☞ Plaintiff will succeed if the injury or death caused to plaintiff was result of his own negligence, even if there was some negligence on the part of defendant.

Contributory negligence can also be defined as not avoiding the consequence arising from the defendant's negligence although the plaintiff had means and opportunity to do so.

Q. Why it was thought that the verdict given in the case of *Butterfield v. Forrester* was not in favour of victim?

Butterfield v. Forrester, (1809) 11 East 60-65.

In this case, the plaintiff was riding on his horse, violently collided against the pole and got injured. This pole was erected by defendant for some repair work to his house. On the road, there was sufficient light and the pole was visible from a distance of nearly 100 yards. The court rejected the plea of the plaintiff and held that the plaintiff could have avoided the accident by exercising due care.

Ellenborough C.J. stated that-".....a party is not to cast himself upon an obstruction which has been made by the fault of another and avail himself of it, if he does not himself use common and ordinary caution to be in the right. One person in fault will not dispense with another's using ordinary care for himself."

But, the above proposition is not in favour of plaintiff and he may lose action even for his slight negligence. Then, in the case *Devis v. Mann*, (1882) 10 M & W 546, the court modified the above rule and introduced the 'last opportunity rule'.

Q. Discuss the role given in the case *Devis v. Mann*.

Devis v. Mann, (1882) 10 M & W 546.

The plaintiff left his donkey with two of its legs tied in a narrow street. The defendant was coming on his wagon at a very good speed. The wagon ran over the donkey, and donkey died. The Court found defendant liable as he had the last opportunity to avoid the accident by taking ordinary care. The Court observed-".....although the animal may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man may justify the driving over goods left on public highway, or even over a man lying asleep there, or purposely running against a carriage going on the wrong side of the road."

British Columbia Electric Co. v. Loach, (1916) 1 AC 719.

Mr. Hall was in a cart with Mr. Sands. When they were crossing, they did not bother to see whether any tram car was

approaching them. When the tram car saw them at level crossing, it was only 400 feet away and when the brake was applied, the tram could not be stopped as the brake was defective and the cart was knocked down.

The Jury found that the tram was at a very high speed and it could have been stopped, if the brakes were in order. At the same time, it was also observed that Mr. Sands was also negligent in not looking whether the line was clear. The defendants took the plea of contributory negligence. But the House of Lords observed that they could not take the defence of contributory negligence as they had the last opportunity to avoid the accident.

2. Apportionment of Damages

It has been seen that in the cases of contributory negligence, damages have also been divided depending upon the proportion of the negligence committed or contribution by both the parties.

Vidya Devi v. M.P. State Road Transport Corp., MANU/MP/0022/1975 : AIR 1975 MP 99.

A motorcyclist ran into a bus negligently and was killed. The bus driver was also found negligent in not averting the possible collision. The Court found that the deceased motorcyclist was more negligent than the bus driver. The blame was in two-third and one-third ratio (motorcyclist: bus driver)

(2/3 : 1/3). The Court thus awarded the damages to the extent of one-third only.

Vidya Soni v. Pushpesh Dwivedi, MANU/MP/0371/2008 : AIR 2008 MP 319.

The claimants-appellants initiated an action for grant of compensation for the death of the deceased who died in a vehicular accident. The tribunal has recorded a finding that the deceased did not have the licence nor was the motor-cycle insured and has held that the deceased has contributed 50% in causation of the accident. However, in appeal the court dislodging and unsettling the finding of the tribunal on that score hold that there has to be causal relationship between violation and accident caused. There has to be some act done by the person concerned in causing the accident. The commission or omission must have some nexus with the accident. In the case at hand, it is clear from the evidence brought on record that the offending vehicle, was coming in a great speed with one head light and dashed against the motor cycle. No evidence has been adduced to establish that the driver of the motor-cycle had acted in any manner due to which the accident was caused.

His presence alone at the place of accident would not tantamount to contributory negligence. Thus, there was absolutely no negligence on the part of the motor-cyclist.

Maya Mukherjee v. Orissa Co-op. Insurance Society Ltd., MANU/OR/0050/1976 : AIR 1976 Ori 224.

A motorcyclist and car collided with each other which resulted in death of motorcyclist. The Orissa High Court fixed the negligence of the motorcyclist at 60% and that of the car driver at 40%. The total damage estimated was

Rs. 75,000. Accordingly, the court awarded Rs. 30,000 to the motorcyclist's heirs.

It may be inferred from the above cases that the law depicted in the Law Reform (Contributory Negligence) Act, 1945 has been followed. It is due to the fact that the Parliament of India has not enacted any law to this effect; so that this unjust and draconian law could be avoided to get implemented by the Court. In 1988, the Government of India amended the Motor Vehicles Act, and minimized the rigour and trauma of common law and allowed a fixed amount of compensation of Rs. 50,000 in case of death and Rs. 25,000 in case of permanent disablement, to accident victims. Even in case of negligence committed by victim, the amount of compensation would not be affected.

3. Doctrine of alternative danger and contributory negligence

If the defendant has placed the plaintiff in a grave situation and the plaintiff tries to escape in a perilous way and has acted under a reasonable apprehension of danger and in a reasonable and prudent way, the defendant cannot set up a defence of contributory negligence.

Q. What is doctrine of alternative danger? Explain it with the help of the case Jones v. Boyce.

Jones v. Boyce, (1816) 1 Stark 493.

In this case, the plaintiff was a passenger in defendant's coach. The driver was driving the coach so negligently that the plaintiff saw imminent danger to his life. In course of saving himself from the danger, he jumped off the coach and his leg was broken. After that the coach stopped. It was the defendant's plea that had the plaintiff remained in his seat, he would not have suffered much harm. The Court was of the view that the plaintiff's act was the demand of the hour and he was justified. Lord Ellenborough observed that "to enable the plaintiff to sustain the action it is not necessary that he should have been thrown off the coach, it is sufficient if he was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap or to remain at certain peril; if that position was occasioned by the default of the defendant, the action may be supported".

4. Contributory negligence by the children

Q. What is the status of contributory negligence committed by children. Explain it with the help of relevant cases?

The rule of contributory negligence is not applied in case of children. Their inexperience is taken into account while deciding the cases involving them. Children are not considered as matured enough as an adult to judge the things correctly. When the plaintiff is a child, allowance must be made for his inexperience and infirmity of judgment.

Motias Costa v. Roque A. Jacinto, AIR 1976 Goa 1.

A 6-year old child was crossing the road to reach his school, as the school was on the other side of the road. A motorcycle was coming on that road and it knocked down the boy who got severe injuries. When the action was brought against the defendant, the plea of contributory negligence was raised by the defence. But the Court rejected the plea on the basis that it was a child and it cannot be expected from him that he would behave in a matured manner as an adult. The motorcyclist, as a reasonable person, could have anticipated that during the school hour, children would cross the road and he failed to drive the vehicle cautiously. The Court observed-"There cannot be a case of contributory negligence on the part of children because a child cannot be expected to be as careful for his own safety as an adult and in such a case a plea of contributory negligence cannot be availed."

Alka v. Union of India, AIR 1993 Del 267: 1995 ACJ 1254: 1993 (25) DRJ 560: ILR 1993 Del 303: (1993) 105 PLR 24.

The defendant installed an electric pump in a room adjacent to the room which was left unattended and open. The plaintiff, a 6-year old child entered the room and put her hand in the running motor without appreciating any danger. She suffered physical injuries and lost two fingers of her right hand. The Court found the defendant liable and awarded a damage of Rs. 1,50,000 in favour of plaintiff for defendant's gross negligence.

M.P.S.R.T. Corporation v. Abdul Rahman, MANU/MP/0050/1997 : AIR 1997 MP 248: 1997 (2) MPLJ 224.

An accident took place, when a motorcycle with three passengers riding on it collided with the bus. All three passengers on the motorcycle, the driver and two pillion riders including one child, died in the accident. Both the pillion riders i.e., grown up persons and child got full compensation as they were not found guilty of contributory negligence.

5. Doctrine of Identification

Q. Discuss doctrine of identification with the help of relevant case.

The Doctrine of Identification means that a servant with his master, agent with his principal and a child with his parents/guardian are identified depending on the case. The defence of contributory negligence can be pleaded not only when the plaintiff was himself negligent but also when the negligence has been contributed by his ward i.e., servant. Since the master is vicariously liable for the act of his servant the rule is that during the employment, negligence of a servant is imputed to his master, whether the master is the plaintiff or the defendant.

Bernia Mills v. Armstrong, (1881) 18 AC 1.

Two ships collided with each other and two persons from one ship got drowned due to collision. It was revealed later on that both the ships had committed wrong and were equally responsible for the accident. In an action by the

representatives of the deceased persons, the defendant pleaded of contributory negligence. The House of Lords did not identify the victims with their carrier for its negligence for the purpose of the defence of contributory negligence and held the other ship liable for damages.

6. Burden of Proving Contributory Negligence

The onus of proving the contributory negligence is on defendant and if defendant does not take the plea of contributory negligence then the plaintiff is not bound to prove it. In case of inability of the court to decide the extent of negligence committed by the parties, the defendant is likely to take the benefit.

Example-A is trying to catch a bus, the bus has just started and is gaining speed. A has just taken the hold of handle and is trying to put his foot on foot-board but suddenly he lost hold of the handle. His foot could not take his load as it was not firmly fixed. A fell down and got injured. In this case, A will be held liable for his fall from the bus, as he tried to board a moving bus. It was risky to catch a moving vehicle this way. The footboard would not have affected him, if the bus would not have been in motion, so the bus company would not be held liable.

7. Composite negligence and nature of liability in composite negligence

When the negligence is committed by two or more persons, then such negligence is called as composite negligence. The term 'composite negligence' is used in our country for both kinds of cases: independent tortfeasors and joint-tortfeasors. In composite negligence, liability of the tortfeasors is joint and several. In such a situation, no body is allowed to say that there should be apportionment of damages and his liability should be on the basis of his fault. The judgment delivered against the composite tortfeasors is for a single sum without any apportionment and it is the discretion of the plaintiff to enforce the whole of his claim against any one of the defendants. If one defendant has paid more than his share, he may claim contribution from the other defendants.

Hira Devi v. Bhaba Kant Das, MANU/GH/0069/1976 : AIR 1977 Gau 31.

There was an accident due to negligent bus driver of a State Transport and a car driver. One person died due to this accident who was travelling in another car and also some other occupants of that car got injured. The tribunal appointed made apportionment of damages between bus and car owners. But the Guwahati High Court found that the Tribunal was in error in apportioning the damages between the two tortfeasors. The Court stated that this is a case of joint-tortfeasors and the liability of the owner of the car has not been established. The claimants were held entitled to recover the entire amount of claim from the owner of the bus i.e., State of Assam. Simultaneously, the Court also said that this does not affect the right of the State to claim contribution from the other tortfeasor, i.e., the owner of the car.

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CHAPTER 16

LIABILITY OF THE OCCUPIERS FOR DANGEROUS PREMISES

1. Introduction

We live in city, town or village and owing to our daily life, we usually visit commercial, industrial or such installations, where we work or go for personal reasons. For example - hospitals. The owners of such buildings or installations are supposed to take care of maintenance of these buildings. There is no such law in our country to protect the rights of those individuals who suffer injury due to malfunctioning of any equipment attached to buildings or bad conditions of building itself.

In England, there is Occupier's Liability Act, 1957, which was enacted as a result of the Report of a Law Reform Committee, 1952. The liability of occupier of premises is towards all the visitors/entrants, except trespassers, is now governed under the English law by the Occupier's Liability Act, 1957.

2. Premises

It does not mean only land but also shop, factory, vehicle, railway carriages, scaffolding, aeroplane, ship or appliances attached with them like a lift or stairs etc.

3. Occupier

Q. What are the liabilities of occupier towards visitors or entrants?

Occupier means the person who has control over the premises. The Law Lord in an important case *Wheat v. E. Lason & Co.*, (1966) 1 All ER 582 (HL), laid down the meaning of the term 'occupier'-

"It was simply a convenient word to denote a person who had a sufficient degree of control over premises to put him under a duty of care towards those who came lawfully on to the premises. In order to be an 'occupier' it is not necessary for a person to have entire control over the premises. He need not have exclusive occupation. Suffice is that he has some degree of control. He may share the control with others. Two or more may be occupiers. And whenever this happens, each is under a duty to use care towards persons coming lawfully on to the premises, dependent on his degree of control. If each fails in his duty, each is liable to a visitor who is injured in consequences of his failure but each may have a claim to contribution from the other."

The person who occupies the premises and who has control over them is the occupier. If a landlord lets his entire premises to a tenant, then it is the tenant who has control over them. If, an owner lets all the floors and flats to tenant and keeps staircase, balcony or some parts of roof, then the owner will be held responsible for any defect in the said part.

4. Visitor

Q. Define the terms:

(a) Premises;

(b) Occupier;

(c) Visitor

Prior to the Act of 1957, the liability of an occupier varied according to the class of persons coming on his premises. There were four categories:

(a) person entering under a contract.

(b) invitee i.e., a person who enters for the purpose of occupier's business or for a business where both are mutually benefited.

(c) licensee i.e., a person who enters the premises with the permission of the occupier e.g. guest invited on dinner.

(d) a trespasser.

Accordingly, the duty of care owed by an occupier to these persons varied from top to bottom in decreasing manner.

Q. Is there any difference between the liabilities of occupier of a premises towards an invitee and a trespasser?

The Occupier's Liability Act, 1957 abolished the distinction between an invitee and licensee. The occupier owes a single duty. The same common duty of care is owed by an occupier to contractual entrants. But, the trespassers are not covered in the Act.

A person is entitled to enter a premises with permission but sometimes a person enters the premises with implied permission. To decide such cases, general principles are to be followed and the entrant has to show that he had implied permission received from the occupier.

Some examples:

(i) A person who enters the premises to communicate with the occupier is presumed to have implied permission; *Brunner v. Williams*, 1975 Cr LR 250.

(ii) Tolerance of repeated trespass does not confer any licence but this factor may be taken into account in support of an implied licence; *Lowery v. Walker*, 1911 AC 10.

(iii) It should be noted that a visitor ceases to be a visitor if he goes to a place which is not covered by the permission; *Lewis v. Ronald*, (1967) 2 QB 393.

5. Duty of the occupier to visitors

Q. What are the duties of occupier to visitors as per section 2(2) and 2(3) of the Occupier's Liability Act, 1957. Discuss it with the help of relevant cases.

Section 2(2) of the Occupier's Liability Act, 1957 states that the common duty of care which an occupier owes to all his visitors is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there.

Section 2(3) of the said Act says that the circumstances relevant for the purpose will include 'the degree of care, and of want of care which would ordinarily be looked for in such a visitor'.

In the case *City of Ferguson v. Marrow*, 210 Federal Report (II) Series 520, the plaintiff, a youth of 21 years of age was an experienced but not an expert swimmer, took a dive in a swimming pool and got his head hit in the swimming pool against its bottom. It was found as a matter of fact that there was danger due to insufficiency of depth of water in the pool. The Court held the pool authorities liable.

Klaus Mittlebachert v. East India Hotels Ltd., AIR 1997 Del 201: 1999 ACJ 287: 1997 II AD (Del) 23: 65 (1997) DLT 428: 1997 (40) DRJ 147.-

In this case, the victim was a German national who while taking a dive in a swimming pool in the 5-star hotel hit his head against the bottom of the pool. He suffered severe injuries, resulting in paralysis and he died after 13 years of accident. It was found that in the swimming pool, water was not sufficient. The Court held the hotel liable for defective design of the swimming pool. The court observed as follows:-

"A 5-star hotel charging a high or fancy price from its guests owes a high degree of care to its guests as regards quality and safety of its structure and services it offers and makes available. Any patent defect in its structure or services, which is hazardous to guests, would attract strict liability to compensate for consequences flowing from its breach of duty to take care. The 5-star price tag

hanging on the service pack attracts and costs an obligation to pay exemplary damages if an occasion may arise for the purpose. A 5-star hotel cannot be heard to say that its structure and services satisfied the standard of safety of the time when it was built or introduced. It has to update itself with the latest and advanced standards of safety."

Adult or Child Visitor

Hawkins v. Coulsdon & Purley U.D.C., (1954) 1 QB 319.-

In this case, Donning L.J. observed - "that the difference between an adult visitor and a child visitor is that the child will meddle where the adult will not and so what is safe for an adult may not be safe for a child".

Glasgow Corporation v. Taylor, (1922) 1 AC 44.-

Corporation maintained a public park which was much frequented by the children. A child, 7 years of age picked up some berries from shrub and ate it, shrub was poisonous, the child died. The Court was of the view that the existence of poisonous berries was known to corporation but it did not make any effort to warn or stop children from reaching berries and hence corporation was liable for want of due care.

Specialist Visitor

In G.C. Contractors v. Christman.-

The facts were that a window cleaner was engaged to clean the windows of a club. One of the windows was defective and when it was being cleaned, it fell down quickly and trapped the cleaner's hand. The court observed that the window cleaner had no cause of action against the club for the risk of a defective window which is incidental to the calling of a window cleaner. But, in case of a guest, the result would have been different.

6. Structure adjoining the highway

Any structure, which has been erected sideways of highway should be in good condition, so that it could not cause danger to passers-by. If, building or construction causes damages to anyone then the owner will be held liable.

Kallulal v. Hemchand, AIR 1958 MP 48.-

The appellant was the owner of a house adjoining the highway. By the side of the house, stalls on thelars used to be kept nearby the house adjoining the highway. During rainy season, one day, the wall collapsed, killing two children of respondent. The MP High Court applied the maxim res ipsa loquitur and held that the collapse of the wall was itself an evidence that the said wall was not properly maintained or was in bad shape. During rainy season 2-3 inches of rain is not unpredicted. It was not unforeseen or an Act of God. The rainfall ought to have been anticipated and provided against. The owner of the House was held liable.

7. Occupier's liability towards trespassers

Q. What are the occupier's liability towards trespassers?

The Occupier's Liability Act, 1957 doesn't cover trespassers. The Occupier's duty towards trespasser is at the lowest in common Law.

In V. Krishna Naidu v. Union of India, MANU/TN/0585/1975 : AIR 1976 Mad 95, the taxi driver entered a railway level crossing which was provided with gates, gongs and red lights on both sides. When the gate was about to be closed and there was sufficient warning from ringing of gongs and the red lights were on. The Madras High Court observed that the taxi driver was a trespasser and can't be said to have entitled to recover any damage.

The duty and liability of an occupier towards trespassers have undergone considerable change by liberal judicial approach in the recent years, and later on by the Occupier's Liability Act, 1984.

In the case *Robert Addie & Sons (Collieries) Ltd. v. Dumbreck*, 1929 AC 358 (HL), the House of Lords laid down the duty of care of an occupier towards trespasser in these words:

"Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from any concealed danger. The trespasser comes to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser or at least some act done with reckless disregard of the presence of the trespasser."

Thus, in the above case, it was held that an occupier did not owe any duty of care to a trespasser except that not to inflict injury intentionally or recklessly on a trespasser known to be present.

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Chapter 17

VICARIOUS LIABILITY

1. Introduction

Q. Define vicarious liability. What are the circumstances, where the liability attaches to a person for the wrong committed by others?

Since ancient times, it is the rule that a person should be held liable for his own mistake. In the words of Plato - "a person should be held for his own sins". But, in thirteenth century, in England, it was for the first time, established that the master would be liable for his servant's or slave's torts only when there is an express command of the master to the servant's wrong.

By the end of 17th century, this concept of liability was found inadequate due to rise in commercial transactions. New development took place when Sir John Holt in the case of *Tuberville v. Stamp*, (1697) 1 Ld Raym 267, held that "the master would be liable for his servant's tort if he had given his implied command". This 'implied command' can only be inferred from the general scope of the servant's employment. Accordingly, if the servant commits any wrong during the course of his employment with the master, then the master will be held liable for the torts of his servant. It can be said without any exaggeration that Justice Holt was the proponent of the modern law of vicarious liability.

It depends on circumstances, whether liability attaches to a person for the wrongs committed by others. It arises in three ways: (i) Liability by ratification, (ii) Liability arising out of special relationships & (iii) Liability by abetment.

2. Liability by Ratification

When a person commits a tort while acting on behalf of another but without his authority and that the other subsequently ratifies that act, he thereby becomes responsible for it. Such act is based on the maxim 'omnis ratihabitio retrorahitur mandato priori acquiparatur' means every ratification of an act relates back and thereupon becomes equivalent to a previous request. It has been explained by Tindal C.J., in the case of *Wilson v. Tumman*, (1843) 6 M&G 236 (242), as - "an act done, for another, by a person not assuming to act for himself, but for some other person; though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well established rule of law".

Three conditions are to be satisfied before one person can be held liable for another's tort on the ground of ratification. These are:

- (a) only such acts bind a principal by subsequent ratification as were done at the time on his behalf. This necessarily implies that what is done by a person on his account cannot be effectually adopted or ratified by another;
- (b) the person ratifying the act must have full knowledge of its tortious character; and
- (c) an act which is illegal and void cannot be ratified.

3. Liability Arising out of Special Relationship

Master-Servant and Principal-Agent are the relationships which has a place in the partnership.

It can be understood under following headings:

- (i) Principal and Agent, (ii) Partners (iii) Master and (iv) Independent Contractor.

Principal and Agent

There is a maxim 'qui facit per alium facit per se' which means 'he who does an act through another is deemed in law to do it himself' on which the vicarious liability of principal for the tort of his agent is based. A principal is vicariously liable for the tort of his agent committed within the course of his authority. Thus, a contract concluded by an agent on

behalf of his principal with third party/parties within the course of his authority would bind the principal to the third party. Other than where a principal has made himself personally liable i.e., by way of guarantee, indemnity etc. liabilities of him, under common law, are confined to cases where they have been guilty of tort towards those to whom they discharge fiduciary obligations. Additionally, qua third parties, where he has committed tort. To the third party, he may be personally liable. However, such liability would not flow from a contract but would flow in an action at tort.

Agent - A person who, otherwise than as servant and otherwise than as an independent contractor, whether by way of contract, or only by way of request, conducts some business or performs some act or series of acts on behalf of another i.e., principal.

Example-If A authorises B to drive his car and if B somehow meets with an accident and injures someone, then A will be held vicariously liable. Here, authorization is an important ingredient to hold the master liable.

A director, by making false representations about his company, induces a third party to advance a loan to the company. Whether he is liable for such misrepresentation? If he is liable at what law?

Where a person makes false representation to third party about something, he may be personally liable to him on prove of such false representation. However, his liability would not flow from a contract but would flow in an action at tort. The director induces the third party to advance a loan to his company. The tort being of misrepresentation of inducement and causing injury to the third party having induced the third party to part with money. Thus, on prove of his false representation, he is personally liable to the third party.

Ormord v. Crosville Motor Services Ltd., (1953) 2 All ER 753.

Q. Elaborate the liability of a person who allows his vehicle to be driven by someone else.

In this case, the defendant was about to compete in the car rally asked his friend to drive his car from Birkenhead to Monte Carlo so as to meet the defendant at the end of rally there. The friend had to carry a bag in the car for defendant as both of them had to go on a holiday after completion of programme. When the friend departed from Birkenhead for Monte Carlo met with an accident and collided with an omnibus. The Court held the defendant liable for his friend who was using his car. Lord Denning said-

"The law puts a special responsibility on the owner of a vehicle who allows it to go on road in charge of someone else, no matter whether it is his servant, his friend or any one else. It is being used wholly or partly on the owner's business or for the owner's purpose, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern."

Partners

Q. Define the following terms:

(a) partners 91

(b) principal and agent

(c) master and servant

Partners are vicariously liable for torts committed by their co-partners acting in the ordinary course of the firm's business.

The liability of partners is governed by section 26 of the Partnership Act, 1932-

"Where, for any wrongful act or omission of any partner acting in the course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm..... the firm is liable therefore to the same extent as the partner so acting or omitting to act."

Hamlyn v. Houston and Co., (1903) 1 KB 81.-

In this case the defendant company's partner bribed a clerk of the competition firm to know the details of the contract. The Court held the firm liable as the partner was acting in the course of the firm's business.

Master and Servant

The liability of the master for the tort which has been committed by his servant is based on the maxim - 'respondent superior' i.e., superior is responsible. In the law, it is established that he who employs another to do something does it himself or he who does an act through another is deemed in law to do it himself.

We will study the relationship of master and servant under the following heads:

- (i) Who is a servant
- (ii) Lending a servant
- (iii) The scope of employment
- (iv) Carelessness of servant
- (v) Mistake of servant
- (vi) Fraud of servant
- (vii) Theft by servant
- (viii) Outside the course of employment
- (ix) Lift to an unauthorized person
- (x) Delegation of duty by servant
- (xi) Express prohibition by master
- (xii) Servant and independent contractor.

Who is a servant?

Servants can be distinguished from other kinds of agents by reference to the degree of control exercised, or exercisable, over him by his master. Depending upon the control of master on the person he is said to be as the 'servant'. Under the 'contract of service' a master has the control over the servant by ordering or requiring him "what is to be done" and "how it shall be done". If a master controls a man by ordering him 'what is to be done' and 'the manner in which the work has to be done', then the man is a servant, otherwise he is not.

But today, vicarious liability has been extended. Earlier, hospital authorities were not held to be vicariously liable for the activities of their professional staff because they lacked the power of control over the manner in which the work was to be done.

But, now the hospital authorities are held liable not only for the negligence of nursing staff, but also for that of radiographers in whole-time service, resident house surgeon, and whole time medical officer or surgeon as it was held in *Gold v. Essex*, (1942) KB 203; *Collins v. H.C. Council* and *Cassidy v. Ministry of Health*, (1951) 2 KB 343.

In *Mooren v. Swinton & Pendlebury Council*, (1965) 2 All ER 351. Lord Parker C.J., held- "the cases have over and over again stressed the importance of the factor of superintendence and control, but that is not the determining test is quite clear. Clearly superintendence of control cannot be the decisive test when one is dealing with a professional man, or a man of some particular skill and experience."

According to Lord Thankerton, there are four essential elements of a 'contract of service'-

- (i) the master's power of selection of his servant;
- (ii) the payment of wages or other remuneration;

- (iii) master's right to control the method of doing the work; and
- (iv) the master's right of suspension or dismissal.

Lending a servant

Q. Whether an employer would be held liable if he lends his servant to someone else and the servant commits a tort?

Sometimes an employer lends his servant to some other employer for a particular purpose or for a period of time. If, in such a case, if the servant injures a third party then the question arises who will be vicariously liable - First employer or the second employer?

This question can be answered on the basis of an important case of *Mersey Docks and Harbour Board v. Coggins and Griffiths (Liver Pool) Ltd.*, (1847) 1 AC 1, which was decided in the year 1947 by the House of Lords:

In this case, the appellants hired out a crane to the respondents for the purpose of unloading a ship. A driver was also provided to the hirer on the condition that he will be the servant of the hirers for the contract period. The hirer didn't have any control over the driver vis-a-vis his actual management of crane. During the unloading of ship, the driver injured a person by negligent working of the crane. It was the observation of the house of Lords that the appellants as the general employer of the driver were liable to injured person.

Lord Porter in *Mersey Dock's* case pointed out-

Q. Many factors have bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed, have all to be kept in mind?

"Many factors have bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed, have all to be kept in mind. But the ultimate question is not what specific orders, or whether any specific orders, were given but who is entitled to give the orders as to how the work should be done."

The power of control in such cases is presumed to be in the general employer and the burden of proving the existence of that power in the hirer rests on the general employer.

In *Rajasthan State Road Transport Corp. v. Kailash Nath Kothari*, MANU/SC/0849/1997 : AIR 1997 SC 3444: 1997 ACJ 1148: JT 1997 (7) SC 673: RLW 1997 (3) SC 421: 1997 (5) SCALE 680: MANU/SC/0849/1997 : (1997) 7 SCC 481: (1997) Supp 3 SCR 724: 1997 (2) UJ 669 (SC), that the State Road Transport Corporation hired a bus alongwith a driver to ply it on its route from a private bus owner. The driver continued to be on payroll of the bus owner. The bus met with an accident. Justice Anand observed-

Q. If the original employer is able to establish that when the servant was lent, the effective control over him was also transferred to the hirer, the original owner can avoid his liability?

"The general proposition of law that an employer, i.e., the person who has the right to hire and fire the employee is generally responsible vicariously for the tort committed during the course of employment, is a rebuttable presumption. If the original employer is able to establish that when the servant was lent, the effective control over him was also transferred to the hirer, the original owner can avoid his liability. In such a case hirer will be held vicariously liable for the tort committed by the concerned employee."

The Scope of Employment

Q. Wrong may be committed due to the servant's negligence while carrying out the orders of the master.

It is a fact that one man in legal sense the 'servant' of another does not in itself render the 'master' liable for any or every tort which the servant may commit.

Master can only be held liable vicariously for such torts which are committed by the servant in the course of

employment. An act is said to be done in the course of employment when the servant executes the order of the master: (a) The master has ordered the servant to commit a wrongful act, or (b) wrong may be committed due to the servant's negligence while carrying out the orders of the master.

In the first case, master's order is itself wrongful. For example, if master asks his servant to throw garbage on other's land, the master will be held liable. In the second case, if master asks driver to drive his car and the driver drives the vehicle negligently, or where a clerk who was permitted to use a lavatory and who left the tap open which flooded the lower premises. These acts are considered within the course of employment. Such cases comes within the purview of 'respondent superior' i.e., superior is responsible or let the principal be liable.

Carelessness of servant

Sometimes, wrong may be committed due to negligence of servant.

In *Century Insurance Co. v. Northern Ireland R.T. Board*, 2942 AC 509, the respondents were insured by the appellants against damage arising from the use by the respondents of their petrol tankers. One driver working under respondent, lit a cigarette while delivering petrol at the garage and threw the match box upon garage floor. It caused explosion and the property was damaged. The appellant raised the plea that the driver was outside their employment hence they were not liable. But, the Law Lords held that though the driver lighted the cigarette for own purpose, it was a negligent method of conducting his work. The Law Lords also followed the dissenting opinion in *Williams v. Jones*, (1865) 3 H&C 602 and held the appellants liable as the driver's negligent act was within the course of his employment.

Mistake of Servant

During the course of employment, if a servant commits any wrong then the master shall be held liable. In *Bayley v. Manchester Sheffield and Lin Rly.*, 1882 LR 7 CP 415, it was the duty of porter of the Railways (defendant) to prevent passenger from getting into wrong train but a porter of defendant under erroneous belief that plaintiff was sitting in a wrong train pulled the plaintiff out of the train. The Court found the porter wrong and held the defendant liable for the servant's errors of judgment.

Fraud of Servant

Q. Who will be held responsible of a servant commits a fraud?

During the course of employment under a master, if the servant commits any fraud then the master would be liable.

In *Lloyd v. Grace Smith & Co.*, 1912 AC 716, the plaintiff had a small cottage and some money which was due on a mortgage to the tune of ₹ 1,000 approached the manager of a solicitor's firm for advice on how to increase her money. The manager advised her to sell the cottage. The plaintiff authorized the manager to sell the cottage. The manager sold the cottage and absconded with money. The Court held that the firm would be held liable for all the frauds committed by its servants since the servant was acting within the course of employment.

State of Uttar Pradesh v. Hindustan Levers Ltd., MANU/UP/0138/1972 : AIR 1972 All 486. Here, Hindustan Levers Ltd. wanted to deposit Rs. 50,000 in Government sub-treasury at Ghaziabad as excise duty and for that purpose it instructed its Bankers, Punjab National Bank to do so. The Bank informed Hindustan Lever Ltd., regarding necessary payment and also intimated company by a letter with receipt (challan) enclosed. But, later on HLL found that necessary deposit has not been done with sub-treasury by the Bank and it had embezzled the said amount. The court found that Bank liable for the embezzlement committed by its staff.

Theft by Servant

Earlier, it was the rule that if a servant steals something belonging to other person, the master will not be held vicariously liable. In the case *Morris v. C.W. Martin & Sons Ltd.*, (1966) 1 QB 716, the plaintiff had sent her fur coat to X to be cleaned and-

with plaintiff's permission gave it to

X-----> Z (defendant)

handed it over to servant

Z ----->M (Servant)

M (Servant) stole the coat.

The Court of Appeal held that the defendants were liable as their servants performing the duty of cleaning and taking care of coat instead converted the coat i.e., committed the tort. According to Winfield, unless there are specific terms in the contract of bailment which displace the general rules of vicarious liability, it has to be inquired first whether the goods were stolen which had been entrusted to his care. If, it was not then until the primary liability of the defendant can somehow be made out, the defendant cannot be held liable but if it is, then the theft was committed by the servant during the course of his employment and the master will be held liable.

Outside the course of employment

There are so many factors to be considered first before deciding that a particular act is or not within the course of employment.

In committing a tort, the servant acts for his own benefit and not for his master's, the latter should not be held liable as it was held in *Barwick v. English Joint Stock Bank*, 1867 LR 2 Exh 259. In *Lloyd case* (case 9 of this chapter), it was observed that master holds servant out as his representative and if in this capacity, the servant opted to enrich himself at the expenses of others, it is correct to hold the person liable is who placed him in a position to do so.

In *K.B. Co. v. Saad Bin Ahmad*, it was observed that even though an act be done in the general course of employment still it may not render the employer vicariously liable if it is uncalled for or is excessive.

Lift to an unauthorised person

In *Pushpabai Purshottam Uderhi v. Ranjit Ginning & Pressing Co. Pvt. Ltd.*, MANU/SC/0249/1977 : AIR 1977 SC 1735: (1977) 2 SCC 475: (1977) 3 SCR 372, the Manager of the Company was going to Pandhorna from Nagpur on a business trip. He also took another employee of company, Purshottam with him. The car met with an accident and Purshottam died. The manager was driving the car at the time of accident.

It was the view of the High Court that the manager in taking the deceased as a passenger was not acting in the course of employment. But Hon'ble Supreme Court reversed this decision with remarks that in present case a responsible officer of the company, the manager, had permitted Purshottam to have a ride in the car. Taking into account the high position of the driver who was the manager of the company, it is reasonable to presume, in the absence of any evidence to the contrary, that the manager had authority to carry Purshottam and was acting in the course of employment.

Delegation of Duty by Servant

Q. Elaborate delegation of duty by servant.

A servant may delegate his duty in certain circumstances. If a servant has got the authority from his master to delegate his duty in real emergency at the time when his master is not available to give permission, the person to whom he delegates the duty then the master will be liable for his negligence also.

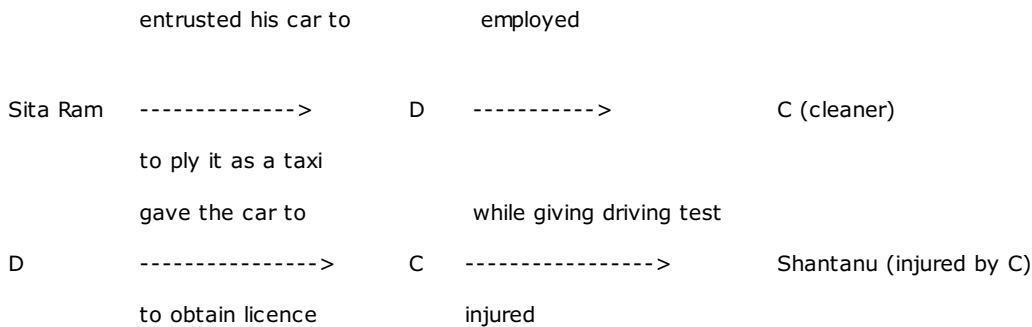
Even, if a servant has delegated his duty to another and that person commits negligence then the master will be held liable not because that the person who was appointed/delegated has committed the negligence but his servant has delegated his duty to another person during the course of employment.

In *Ricketts v. Thomas Tilling Ltd.*, (1915) 1 KB 644, the driver of the bus permitted the conductor to drive the bus and turn the bus in right direction for next journey. The driver was sitting by the side of conductor. The conductor drove the bus negligently and knocked down the plaintiff. The Court held that the defendant was not liable for conductor's

negligence but was liable for the act of driver who wrongly delegated his duty to conductor in course of employment. In words of Pickford LJ.-

"The fact that he allowed somebody else to drive does not divest him of the responsibility and duty he has towards his master to see that the bus is carefully, and not negligently, driven."

The Supreme Court followed the principle of Rickett's case in the case of Sita Ram v. Santanu Prasad, AIR 1966 SC 1967.



Now, the question was, whether Sita Ram, owner of the car was liable vicariously for the accident committed by C? Rickett's case was cited while arguing for this case. The Supreme Court distinguished this case with that of Rickett's case and stated that in Rickett's case-"turning the bus in the right direction for next journey" was itself in the course of employment i.e., the master's business and the driver was also sitting beside conductor but in the instant case, D gave the car to C to obtain his licence and C was doing it for himself and D was also not present when C negligently drove the car. In this case, the owner was not vicariously liable as he did not give the car to C for his driving test and C was not performing his master's duty at the time of accident and nor the driver at the time of lending the car was acting for the master's business.

Express prohibition by master

Sometimes, a master prohibits his servant to do certain acts and if the servant does the acts in defiance of the order as given by his master then his act can be said to have been done outside the course of employment and the master may not be liable.

In *Limpus v. London General Omnibus Co.*, (1862) 1 H&C 526, the driver of a bus was prohibited by his employers from obstructing buses of rival companies, and, in contravention of this order, driver obstructed one of the buses and overturned it. The master was held liable for the act of errant driver as at the time of accident, he was doing what he was employed to do.

In *Premwati v. State of Rajasthan*, MANU/RH/0019/1977 : AIR 1977 Raj 116, the driver of a vehicle took the jeep from a workshop and thereafter instead of keeping it in the garage, went on a spree, he allowed persons to sit in his jeep and during his joy ride met with an accident, injuring all the occupants of the vehicle and of them, two died. The Rajasthan High Court held that driver was in course of employment from workshop to garage but not further. He was not authorized to give lift to unauthorized persons in his jeep which was outside the course of employment and therefore the Government was not liable.

Servant and independent contractor

Q. Is master liable for any tort committed by independent contractor?

A servant is under the total control of his master. What he has to do and how it has to be done are decided by the master. Exceptions are where the work is technical or professional and the master is incompetent to supervise e.g., - surgery, pilot's job etc. Whereas an independent contractor is different from servant and agent. He is under a 'contract for service' i.e., 'what is to be done', 'how it is to be done' is in the hands of independent contractor completely. Since the independent contractor is free to choose his way to accomplish his job, his master is generally

not liable for any tort committed by independent contractor.

In *Ramu Tularam v. Amichand*, 1968 ACJ 54, Bombay High Court explained the concept of principal-agent relationship in a far-fetched manner:

"When the car is given to the garage for repairs, the control of the car certainly stands transferred to the owner of the garage. But the point is that in such a case the owner of the garage is constituted by the owner of the car as his agent. Everything done or omitted to be done by the agent will be something for which the principal will be vicariously liable..... (if) the owner of the garage makes various purchases for the purposes of the repairs of the car, the owner of the car has to pay for those purchases. If the doctrine of agency extends to this situation, there is no reason why it should not extend to other situation where the car is allowed by the agent to go out of garage berserk. The liability of the agent will have to be vicariously fastened even upon the principal in such a case."

In the above case, the Bombay High Court extended the principle of agency by holding the repairer as agent of the owner of the car. But later on it was realized that to extend the rule so wide would not be justified.

4. Doctrine of Common Employment

Q. What is doctrine of common employment?

This doctrine is an exception to the rule of vicarious liability. In *Priestly v. Fowler*, (1837) 3 M&W 1, it was held that a master was not liable for the negligent act committed by one servant to another fellow-servant acting in the course of employment. So, the doctrine of common employment is a defence for that employer who is able to prove that-

- (i) the wrongdoer and the injured person are fellow-servants under him, and
- (ii) at the time of accident they are engaged in common employment.

This doctrine was abolished by the Law Reform (Personal Injuries) Act, 1948, in England. But this doctrine is still in vogue in India although its scope has been limited by the Employer's Liability Act, 1939; the Workmen's Compensation Act, 1923; the Employees State Insurance Act, 1948 and the Personal Injury (Compensation Insurance) Act, 1963. Although its scope has been limited by the above Acts but it needs to be abrogated.

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CHAPTER 18

VICARIOUS LIABILITY OF THE STATE

1. Introduction

Q. What do you understand by the vicarious liability of State? Explain if with the help of relevant cases.

There is a liability on Government of India and Governments of the Indian States if its servants commit torts against individuals. The Constitution of India does not say much on this account but indirectly equates the liability of the present Government with the former liability of the East India Company.

Article 300, by implication, refers to section 176(i) of the Government of India Act, 1935.

Article 300 of the Constitution of India

"The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and corresponding provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted."

This article by implication refers to section 176(i) of the Government of India Act, 1935, which reads:

"The Federation may sue or be sued by the name of the Federation of India and the Provincial Governments may sue or be sued by the name of the Province, and, without prejudice to the subsequent provisions of this chapter, may, subject to any provisions which may be made by the Act of the Federation or Provincial Legislature enact by virtue of powers conferred on that legislature by this Act, sue or be sued, in relation to their respective affairs in the like case as the Secretary of State for India-in-Council might have sued or been sued if this Act has not been passed."

The implied reference is to section 32 of the Government of India Act, 1915-

- (1) The Secretary of State-in-Council may sue and be sued by the name of Secretary of State-in-Council, as a body Corporate.
- (2) Every person shall have the same remedies against the Secretary of State-in-Council as he might have had against the East India Company if the Government of India Act, 1858 and this Act had not been passed.

The above section of the Government of India Act, 1915 has reflections of section 65 of the Government of India Act, 1858 which reads as-

"The Secretary of State-in-Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State-in-council as a body corporate and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings legal and equitable against the Secretary of State and Council of India as they could have done against the said company; and the property and effects hereby vested in Her Majesty for the purposes of the Government of India, or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would while vested in the said Company have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company."

The liability of East India Company, to which the Act of 1858 referred, was not laid down anywhere, but has to be ascertained from the study of cases.

Q. Describe the Peninsular case. Is it justified to invoke the principle of this case as laid down by Sir Barves Peacock, C.J. today when the circumstances are different from that of 118 years back?

Peninsular and Oriental Steam Navigation Company v. Secretary of State for India-in-council, 1861 Bom HCR App A-1

(3).-

There was a government dockyard based at Kiderpore, situated partly both sides of the road. A river steamer belonging to Government was also lying nearby for repairs. One day, certain workmen (Govt. employees) were riveting a piece of iron funnel casing, 300 pound in weight, nine feet long and two feet high, slung on a pole, along the road. They were walking in between the road, although enough space was left on both sides of the road. Suddenly, a private carriage appeared. The coachmen and syces shouted a warning to workmen, the carriage also slowed down. The workmen seeing the carriage close to them, dropped the iron and ran away. A loud noise frightened the horses and they rushed forward against the iron and were injured. The damages were claimed to be Rs. 350. An action was brought for recovery of these damages against the Secretary of State for India-in-Council, as employer of the workmen.

The question was-"Whether the Secretary of State-in-Council was liable for the damage occasioned by the negligence of the servants of the Government, assuming them to have been guilty of such negligence, as would have rendered an ordinary employer liable."

The Chief Justice, Sir Barrens Peacock of the Supreme Court of Calcutta, held the Government liable. He observed:

"We are of opinion that for accidents like this, if caused by the negligence of servants employed by Government, the East India Company would have been liable..... and that the same liability attached to the Secretary of State-in-Council, who is liable to be sued for the purpose of obtaining satisfaction out of revenue of India. We are of opinion that this is a liability not only within the words, but also within the spirit of the..... (Government of India Act, 1858) and that it would be inconsistent with common sense and justice to hold otherwise."

Little latter he remarked-

"There can be no doubt that the East India Company would have been liable for the negligence of their servants or officers in navigating a river steamer or in repairing the same or in doing any act preparatory to such repairs".

Further he stated-

"that there was a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers and acts done in the conduct of undertaking which might be carried on by private individuals without having such powers delegated to them".

Also-".....where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign, or private individual delegated by a sovereign to exercise them, no action will lie."

Q. Describe the case Secretary of State v. Haribhanji and compare it with the peninsular case.

Rule laid down in the Peninsular case was followed in many cases. But in the year 1882, Chief Justice Turner in Secretary of State v. Haribhanji, ILR (1882) 5 Mad 273, did not follow the Peninsular case. In this case, during the transit of certain salt from Bombay to Madras Port, the rate of duty was increased and Haribhanji (merchant) was asked to pay the difference at the port of destination. Although he paid the amount with protest but brought a suit to recover the amount paid. The defence gave the plea (Secretary of State-in-Council) that this was an act of sovereign power and that therefore the Court had no jurisdiction. But, Chief Justice rejected this contention by saying-

"The East India Company was not sovereign.....The fact of the company having been invested with the powers usually called sovereign powers did not constitute them sovereign (and so) the personal exemption from suit, which is the attribute of sovereignty, did not attach to it.....And this is further shown by the circumstances that the company was held liable for the negligence or misconduct of its officers in cases in which the sovereign would not have been held liable even on petition of right."

Further he added-

"On the assumption by the Crown of the direct Government of British India it was provided that persons should have the same suits and remedies against the Secretary of State-in-Council as they had before been entitled to maintain and pursue against the Company. Consequently, the Secretary of State-in-Council cannot in this country claim on behalf of the Crown, the prerogative of immunity from suit."

Chief Justice Turner also pointed out that the Peninsular case held only that exemption from suit cannot be claimed in respect of "acts done in the conduct of undertakings which might be carried on by persons who enjoy no delegated powers of sovereignty." It expressed no opinion that all acts done in the exercise of powers usually termed sovereign 'would enjoy such immunity.'

Accordingly, "it will not be correct to say that the liability of the Government or its officers is restricted to acts of the former class".

This point was put forth by Turner C.J.: that acts of the Government may either be outside the province of Municipal Law or may fall within that law and that it is only of the former that the courts cannot take cognizance-

"The acts of the State of which Municipal Courts of British India are debarred from taking cognizance, are acts done in the exercise of sovereign powers which do not profess to be justified by Municipal Law. Where an act complained of is professedly done under the sanction of Municipal law and in the exercise of powers conferred by that law, the fact that it is done by the sovereign power and is not an act which would possibly be done by a private individual, does not oust the jurisdiction of civil courts."

Kasturi Lal v. State of Uttar Pradesh, MANU/SC/0086/1964 : AIR 1965 SC 1039: (1966) II LLJ 583 SC: (1965) 1 SCR 375.-

Q. Describe Supreme Court's approach in the case Kasturi Lal v.State of Uttar Pradesh regarding liability of State while exercising its sovereign powers.

The Supreme Court modified its approach and went back to the Sovereign and non-sovereign distinction as propounded in Peninsular case-

Facts-There was a firm named M/s. Kasturi Lal and Ralia Ram. Ralia Ram was one of the partners, a bullion merchant who was arrested by the police constable on some charge and gold and silver was collected from him. The police officer under law were supposed to keep the seized gold and silver under lock and key but it was kept in Malkhana under the charge of one Head Constable, Md. Amir, who misappropriated gold and fled to Pakistan. Ralia Ram after his release got the silver but not the gold. He brought an action against the State of Uttar Pradesh for loss of his asset due to negligence of the police officers employed by State Government.

Gajendragadkar C.J. read the unanimous opinion of the Supreme Court holding that the State Government was not liable as the act of negligence was committed by the police officers in the exercise of sovereign powers. He remarked-

"Now, the power to arrest a person, to search him, and to seize property found with him, are powers conferred on the specified officers by statute and in the last analysis, they are powers which can properly be characterized as sovereign powers; and so, we inevitably hark back to what Chief Justice Peacock decided in 1861 and hold that the present claim is not sustainable".

Gajendragadkar C.J.; accepted the distinction drawn by Peacock C.J. in Peninsular case between sovereign and non-sovereign function of the State, in determining its liability in tort. The appellant's contention to extend the principle of Vidyawati case was rejected by the Supreme Court. The court distinguished the present case with that of Vidyawati's case and observed-

"It is obvious that when the Government employee was driving the jeep car from the workshop for the collector's use, he was employed on a task or an undertaking which cannot be said to be referable to, or

ultimately based on, the delegation of sovereign or governmental powers of the State..... In fact the employment of a driver to drive the jeep car for the use of a civil servant is itself an activity, which is not connected in any manner with the sovereign power of the State at all. That is the basis on which the decision must be deemed to have been founded; and it is this basis which is absent in the case before us."

The Supreme Court then stated the rule for determining the liability of the State for the tort of its servants as follows:

"If a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is: was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant? If the answer is in affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power, an action for damages would lie. The act of the public servant committed by him, during the course of his employment is, in this category of cases, an act of the servant, who might have been employed by private individual for the same purpose."

Thus, in case of *Kasturi Lal*, Supreme Court accepted the principle as laid down by *Barnes Peacock C.J.* in *Peninsular case of 1861* and held that the Government would not be liable for the tortious act committed by its servants in course of exercising sovereign functions.

2. Acts Committed in Exercise of Sovereign Powers

Q. With the help of relevant cases define the acts committed by State or its officials while exercising sovereign powers.

State of Orissa v. Padmalochan, MANU/OR/0014/1975 : AIR 1975 Ori 41.-In apprehension of an attack on the office of the Sub-Divisional Officer. Orissa Military Police, under supervision of a Magistrate cordoned off the area. As expected a mob emerged on the scene and some police personnel manhandled some persons of the mob resulting in injury to plaintiff. The court observed that although police personnel manhandled the plaintiff without permission of the Magistrate but it occurred while exercising the sovereign power.

Baxi Amrik Singh v. Union of India, (1972) 1 MLJ 71.-There was an accident between a car and a military truck. Truck was driven by the driver who was an employee of military department. Amrik Singh, who was in the car, received serious injuries. He brought an action against the department. The court observed that the driver was on duty to check army-personnel-on-duty throughout the day. The Court's view was that checking of the Army-personnel-on-duty was a function intimately connected with the Army discipline and it could only be performed by a member of the Armed-forces who is detailed on such duty. Accordingly driver was discharging the sovereign function.

3. Acts Committed in Exercise of Non-sovereign Powers

Union of India v. Sugrabai, MANU/MH/0038/1969 : AIR 1969 Bom 13: (1968) 70 Bom LR 212: ILR 1968 Bom 998.-A military driver on a military truck was transporting machines and other equipments from military depot to training school. Bombay High Court asked a question - Was it absolutely necessary for the Government to have that work performed by its own employees? The Government could not prove it. Accordingly, the court held that it was a function which could be performed by a private person and hence the Government was liable.

Satyawati Devi v. Union of India, AIR 1967 Del 98: (1969) II LLJ 195 Del.-Two teams of Hockey and Basket-Ball of Air Force employees were driven on a vehicle which belonged to Air Force. It was also driven by Air Force Driver. Due to negligence of driver, the vehicle met with an accident and plaintiff's husband got killed in the accident. Widow of the deceased brought an action against the government. Defence plea was that physical exercises were necessary to keep the personnel in shape so such an act should be considered as sovereign function of the Government. But, the Court rejected the Government's contention and held that the act of carrying the teams to play matches could be performed by a private individual and, therefore, it was not sovereign function and the Government was liable.

4. New Development in Waiting

Even after suggestion made by the Supreme Court, the Parliament is yet to change the existing bad law, due to which citizens are still suffering. A new line of action under writ jurisdiction (Articles 32 and 226) has been adopted to render justice and compensate those whose fundamental right to life and personal liberty under Article 21 (or any other fundamental right) of the Constitution of India, are violated by the wrongful acts of Government officials while performing even sovereign functions.

e.g. Rudul Sah v. State of Bihar, MANU/SC/0380/1983 : AIR 1983 SC 1086: 1983 Cr LJ 1644: 1983 (2) SCALE 103: MANU/SC/0380/1983 : (1983) 4 SCC 141: (1983) 3 SCR 508; Sebastian M. Hongray v. Union of India, MANU/SC/0080/1984 : (1984) 3 SCC 82: 1984 Cr LJ 830: (1984) 3 SCR 544: 1984 (16) UJ 1021 (SC); Bhim Singh v. State of Jammu and Kashmir, MANU/SC/0064/1985 : AIR 1986 SC 494: 1986 Cr LJ 192: 1985 (2) SCALE 1117: MANU/SC/0064/1985 : (1985) 4 SCC 677: 1986 (1) UJ 458 (SC); and SAHELI v. Commissioner of Police, Delhi, MANU/SC/0478/1989 : AIR 1990 SC 513: 1990 ACJ 345: 1990 (1) Crimes 469 (SC): JT 1989 (4) SC 553: (1990) 98 PLR 609: 1989 (2) SCALE 1315: MANU/SC/0478/1989 : (1990) 1 SCC 422: (1989) Supp 2 SCR 488: 1990 (1) UJ 434 (SC), illustrates that while performing sovereign duties, fundamental right to life guaranteed under Article 21 of the Constitution of India is not available if it has been infringed by State or its officers.

In Nilabati Behra v. State of Orissa, MANU/SC/0307/1993 : AIR 1993 SC 1960: 1993 ACJ 787: 1993 Cr LJ 2899: JT 1993 (2) SC 503: 1993 (II) OLR (SC) 50: 1993 (2) SCALE 309: MANU/SC/0307/1993 : (1993) 2 SCC 746: (1993) 2 SCR 581, petitioner's son died as a result of injuries inflicted on him in police custody. The petitioner sent a letter to the Supreme Court regarding all this suffering. The Supreme Court treated it as a petition under Article 32 of the Constitution. Hon'ble Court held the State of Orissa liable and awarded a compensation of Rs. 1,50,000 to the petitioner. Justice Verma delivering the judgment observed-

"Award of compensation in a proceeding under Article 32 by this Court or by the High Court under Article 226 of the constitution is a remedy available in public law based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort."

Some more cases:

SAHELI v. Commissioner of Police, Delhi, MANU/SC/0478/1989 : AIR 1990 SC 513: 1990 ACJ 345: 1990 (1) Crimes 469 (SC): JT 1989 (4) SC 553: (1990) 98 PLR 609: 1989 (2) SCALE 1315: MANU/SC/0478/1989 : (1990) 1 SCC 422: (1989) Supp 2 SCR 488: 1990 (1) UJ 434 (SC) - Due to beating and assault by a police officer, a boy aged 9 died. On a writ petition, the Supreme Court awarded the compensation of Rs. 75,000 to the petitioner.

R. Gandhi v. Union of India, MANU/TN/0225/1989 : AIR 1989 Mad 205: (1988) II MLJ 493 - Under Article 226, the Madras High Court while hearing a public interest litigation allowed a compensation of Rs. 33.39 lakhs against the State to 39 Sikh families as it had failed to protect the properties of these families in a riot which erupted in Coimbatore after the assassination of former P.M. Smt. Indira Gandhi on 31st October, 1984.

Kalawati v. State of Himachal Pradesh, MANU/HP/0002/1989 : AIR 1989 HP 5 - In this case two persons died in a Government Hospital owing to negligence of hospital staff who administered nitrous oxide in place of oxygen to the patients. The High Court awarded compensation under Article 21.

5. Conclusion

There are two types of remedies available against the State-(i) Under Article 300 of the Constitution in Law of Tort under vicarious liability; and

(ii) Under Articles 32 and 226 of the Constitution in public law for the violation of fundamental rights by the State or its officials.

Although cases of violation of fundamental rights fall under Article 300 or Articles 32/226 of the Constitution, but compensation for violation of fundamental rights can be allowed only in exceptional cases under writ

jurisdiction i.e., under Articles 32/226 of the Constitution.

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CHAPTER 19

DEFAMATION

1. Introduction

Q. Discuss defamation distinguish in between libel and slander.

Every person has a right to live with dignity. This right of reputation is acknowledged as an inherent personal right of every person as part of the right of personal liberty. A man's reputation is an invaluable property. If a person's reputation is being damaged then this loss exceeds far compared to the damaged property. But the law is there to protect the reputation of a person if it is being infringed by someone. Truth and privilege protect the freedom of speech. The law related to defamation is a reasonable restriction on the fundamental right of freedom of speech and expression conferred by Article 19(1)(a) of our Constitution and is saved by clause (2) of Article 19.

Defamation may be committed either by way of writing, or its equivalent or by way of speech.

Defamation committed through writing is called as 'libel'.

Defamation committed through speech is known as 'slander'.

A defamatory statement is a statement calculated to expose a person to hatred, contempt or ridicule or the person is injured in his trade, business, profession or he is defamed in such a way that he be shunned or avoided in the society.

2. Distinction between Libel and Slander

Libel	Slander
(i) A libel is a defamation which has been caused in permanent form i.e., in written or printed form.	(i) Slander is a defamation in a transient form i.e., by speech or by gestures.
(ii) It is a criminal offence as well as a civil wrong.	(ii) It is a civil wrong only but the words may be blasphemous, seditious or obscene and this is a criminal offence under section 499 of IPC.
(iii) It is an infringement of a right and there is no need to prove the actual damage to sustain an action.	(iii) A slander is actionable only when special damage can be proved to have been its natural consequence, or when it conveys certain imputations.

Under English law, there are exceptions, where slander is actionable without proof of special damage. These exceptions are when the slander contains imputation of-

- (a) A criminal offence punishable with imprisonment; *Simmons v. Mitchell*, (1880) 6 AC 156: 43 LT 710 PC.
- (b) Unchastity or adultery to any woman.¹

3. Essentials of Defamation

To constitute an action for defamation following essentials are necessary:

- (i) The statement must be false and defamatory,
- (ii) It must be published, and
- (iii) It must refer to the plaintiff.

False and Defamatory Statement

Q. What are the essentials of constituting a defamation against someone? Discuss with the help of some relevant

cases.

The statement must be false and defamatory. In *Sim v. Stretch*, (1936) 2 All ER 1237, it was observed that the defamatory statement must be such which tends to lower a person in the estimation of right thinking members of society generally. A right thinking man is a reasonable man who is neither unusually suspicious nor unusually naive and he does not always interpret the meaning of words as in case of a lawyer since "he is not inhibited by a knowledge of the rules of construction."²

Some examples (cases)-

Yousoup v. Metro-Goldwyn Mayer Pictures Ltd., MANU/TN/0369/2000 : AIR 2001 Mad 225.-The plaintiff, a Russian Princess, was falsely imputed by a cinematograph film that she had been raped or seduced by the notorious monk Rasputin. The court observed that this tended "to make the plaintiff be shunned and avoided" in the estimation of right thinking persons of the society generally.

Ramdharma v. Phulwatibai, 1969 Jab LJ 582.-The plaintiff was a widow aged 45 years. She was falsely imputed by the defendant that she is a keep of maternal uncle of plaintiff's daughter-in-law. The court held that this imputation of chastity was a defamation,

S.N.M. Abidi v. Profulla Kumar Mohanta, MANU/GH/0021/2002 : AIR 2002 Gau 75 (DB).-One of the articles published in a weekly magazine 'The Illustrated Weekly' alleged that the former Chief Minister, Profulla Kumar Mohanta had misused man and muscle power. The Court found the allegation false, baseless and defamatory which harmed the plaintiff's reputation and awarded a damage to the tune of

Rs. 5,00,000.

Innuendo-

It means a remark with double meaning. Sometimes it happens that a statement does not convey any defamatory imputation in its natural meaning, but it may convey a defamatory owing to the particular circumstances and these particular circumstances by the plaintiff, is called innuendo.

In *Cassidy v. Daily Mirror*, (1929) 2 KB 331, the newspaper, Daily Mirror published a news with a photograph of Mr. M and Ms. C together with the news caption that Mr. M the race horse owner and Ms. C has announced their engagement. But, this news was false as they were already married.

1. S.I.C. 51 Slander of Women Act, 1891 (UK).

2. Winfield, Law of Tort, 10th Edn., p. 241.

Wife of M, the plaintiff brought an action against the daily on the ground that the publication was capable of conveying a meaning defamatory of the plaintiff. It meant that she was not lawful wife of Mr. M and she was living with Mr. M in immoral cohabitation. The defendants were held liable.

Knowledge or intention of defendant and its impact

Q. Knowledge or intention of defendant is how much important in the case of defamation?

In *Morrison v. Ritchie & Co.*, (1902) 4 F. 654 (Scotland), a statement was published in good faith by the defendant that the plaintiff had given birth to twins. But, the plaintiff was married only two months back and the defendant was unaware of this fact then even they were held liable.

In our country, whether intention to defame is necessary or not, has got different views. In *T.V. Ramasubba Iyer v. Ahmad Mohideen*, MANU/TN/0214/1972 : AIR 1972 Mad 398, the defendants published in their newspaper that a person from Tirunelveli, exporter of scented agarbattis to Ceylon instead smuggled opium into Ceylon in form of agarbattis and other news was that he was arrested in Ceylon and has been brought to Madras. On an action brought by the plaintiff,

the defendants pleaded ignorance about the plaintiff and submitted that they had no intention to defame him. In this case, the Madras High Court did not follow the English cases (*Morrison v. Ritchie & Co.* and *E. Hulton & Co. v. A. Jones*), and held that there was no liability for the statements published innocently.

But in the case *D.P. Chowdhery v. Manjulata*, MANU/RH/0038/1997 : AIR 1997 Raj 170, a news was published in a local daily *Dainik Navjyoti* that the plaintiff Manjulata, a 17 years old girl, a student of B.A. belonging to a distinguished family based at Jodhpur has eloped with a boy named Kamlesh on the pretext of attending night classes at her college. It was found that the news was untrue and was published negligently and with irresponsibility. The Court found the defendant liable and awarded a damage of Rs. 10,000 to plaintiff. If the defendant has defamed the plaintiff's reputation although unintentionally, he is liable. The words are actionable if false and defamatory, although published accidentally or inadvertently.

Publication of the statement

To get the statement published is another essential ingredient in constituting defamation. Here, publication does not mean giving the publicity but to make the statement known to other person than the person defamed. For example, if X writes to Y that Z is a cheat, then it is a publication since X has told it to someone other than Z i.e., to Y. But, if X writes to Z in a closed envelope that you (Z) are a cheat, it is not a publication. To send something via telegram or postcard that could be read by others can be claimed as publication.

And, if a person knowingly sends something in writing to defame a person in a closed envelope that it will be opened by someone else, then this amounts to publication; *Delacroix v. Thevenot*, (1817) 2 Stark 63.

If an addressee does not know the language in which something has been written to him or he is too blind to read it then what would be the position? In a case *Mahendra Ram v. Harnandan Pd.*, MANU/BH/0143/1958 : AIR 1958 Pat 445, the Patna High Court considered this dilemma. The defendant wrote a defamatory letter to the plaintiff in Urdu but the plaintiff did not know Urdu. The letter was then read by a third person. The court held that unless it was known to the defendant at the time of writing letter to plaintiff that Urdu was not known to him, he would not be held liable.

Q.In the eyes of law husband and wife are one but it will remain so if husband writes something defamatory against his wife. When they are estranged?

Husband and Wife-In the eyes of law, husband and wife are one entity hence something written defamatory by husband to his wife or vice-versa doesn't amount to publication. But communication of defamatory statement by a third party to either husband or wife are publication on the ground that although husband and wife are one person, they are not so for the purpose of having the honour and feelings of the husband assailed and injured by acts done or communication made to wife; *Wenman v. Ash*, (1953) 13 CB 844.

In *T.J. Ponnen M.C. v. Verghese*, MANU/SC/0054/1968 : AIR 1970 SC 1876: 1970 Cr LJ 1651: (1969) 1 SCC 37: (1969) 2 SCR 692, the husband wrote many letters to his wife which were defamatory, addressed to her father. Wife gave all the letters to her father M.C. Verghese. Verghese brought an action against his son-in-law. The court held that the letters were meant for defendant's wife and she or anybody else can't prove prejudice of her husband as such communication were precluded by the law to be disclosed under Section 122 of the Evidence Act. But, when the appeal reached the Supreme Court, it reversed the decision and Justice Shah said-"If the complainant seeks to support his case only upon the evidence of the wife of accused, he may be met with the bar of Section 122 of the Indian Evidence Act. Whether he will be able to prove the letters in any other manner is a matter which must be left to be determined at the trial and cannot be made the subject-matter of an enquiry at this stage".

In *Shilpa S. Shetty v. Magna Publishing Co. Ltd.*, MANU/MH/0211/2001 : AIR 2001 Bom 176 the plaintiff, an actress filed a suit claiming damages for the articles, published in the magazine published by the appellants called *stardust*, are defamatory in nature and would affect her career and for injunction restraining the appellants from publishing defamatory articles. The learned single Judge was of the prima facie view that the articles deal with the personal life and are defamatory in nature and granted interim injunction restraining the defendants from republishing the articles and/or from publishing any defamatory article alleging that the plaintiff is having relationship with other actors or a

married man.

Repetition of defamatory matter-In Duke of Brunswick v. Harmer, (1849) 14 QB 185, it was observed that each time the originator of a defamatory statement repeats it, it means he has published it anew and a fresh action arises for every repetition. Here, both the creator of defamatory statement as well as publisher who has repeated it will be liable.

Reference to the plaintiff

It is upto plaintiff to prove that the defamatory statement for which he has brought the action was certainly referred to him or reasonably made so that it would be understood by the people as referred to him.

In E. Hulton & Co. v. Artemus Jones, 1910 AC 20, the appellants were newspaper proprietors of 'Sunday Chronicle'. A humorous article was published in their newspaper regarding motor festival at Dieppe - in which Artemus Jones, a church warden, was accused of living with a mistress of ill-repute in France. The article was like this..... "whist! There is Artemus Jones with a woman who is not his wife, who must be, you know..... the other thing! Whispers a fair neighbour of mine..... Here, in the atmosphere of Dieppe..... (Jones) is the life and soul of a gay little bond that haunts the casino." This character was fictitious (imaginary) and was just drawn to exemplify the naughtiness of a respectable Englishman on holiday abroad.

But the writer and owner of the article was unaware of the facts that a person - Artemus Jones - exists (lives) in real, who was a barrister and not a church warden. Artemus Jones brought an action against the newspaper. The House of Lords held that a person charged with defamation "cannot defend himself by showing that he did not intend to defend the plaintiff. He has nonetheless imputed something disgraceful, and has nonetheless injured the plaintiff. A man may publish a libel in good faith believing it to be true, and it may be found by the jury that he acted in good faith believing it to be true, but that in fact the statement was false. Under those circumstances he has no defence to the action, however his excellent indentation was". The defendants were held liable.

4. Defamation of a class of persons

Q. What do you mean by defamation of a class of persons?

If, a statement is made which is referred to a class or group of people sufficiently large to leave the reputation of each unsullied then one of them of the group cannot single out that he is a victim. Thus, if a man writes that all doctors are cheats, then a single doctor cannot bring an action against the writer, unless there is something pointed towards him individually-

e.g. If, it said that in Kewal Park, Delhi, all doctors are cheats and there are only three doctors in this small colony and if any of the doctors or all three file the suit then the defendant will be held liable.

In D.N. Sen v. R.K. Bhadra, MANU/WB/0040/1970 : AIR 1970 Cal 216: 1970 Cr LJ 662, an editorial of a daily newspaper contained defamatory statement about a spiritual head of a community. A person belonging to that community filed a petition for defamation, could not succeed in his individual capacity.

5. Defamation of a deceased person

To defame a dead person is not a tort. In All India Anna Dravida Munnetra Kazhagam, Madras v. K. Govindan Kutty, it was held that to defame a deceased person is not a tort and here the maxim 'actio personalis moritur cum persona' applies in such kind of cases. To succeed in such kind of cases, it is essential to prove that the offending words were referred to him. If someone makes a defamatory statement that X was a prostitute and if Y deceased X's daughter files a suit of defamation then Y will succeed on the ground that it affects (defamatory statement) her reputation adversely and not on the ground that this statement affected her mother's reputation.

6. Defences

Q. What are the defences available against the case of defamation?

There are some specialized defences to an action for defamation which are as follows:

- (i) Justification
- (ii) Fair comment; and
- (iii) Privilege

Justification

The law will not permit a man to recover damages in respect of an injury to a character which he does not or ought not to possess. In criminal law truth alone is not sufficient to make a defence. In the case *Ashok Kumar v. Rakha K. Pandey*, MANU/WB/0054/1967 : AIR 1967 Cal 178, it was held that it has to be proved that the publication of the defamatory statement was in public interest or for public benefit.

The accused is required to prove under exception 1 of section 499 of the Indian Penal Code that the statement which was contended was true and at the same time, it was made in public interest or for the benefit of public.

In *Alexander v. N.E. Rly. Co.*, (1855) 6 B&S 340, the plaintiff was said to be convicted and sentenced to three weeks' of imprisonment but in fact, it was only for two weeks. So, the matter was substantially true and it is immaterial whether it was incorrect on some material details.

The Court found that there was sufficient justification.

Fair Comment

Fair and bona fide comment is the second defence to an action for defamation. Essential requisites of fair comment are-

- (a) there must be a comment and not a statement of facts,
- (b) the comment must be fair and bona fide,
- (c) the matter commented on must be of public interest.

(a) Comment-Comment usually means an expression of opinion which is based on certain facts. It is essential that the facts should be mentioned before making a comment. E.g. A takes/borrow money from others, does not return the same on time although he has money. He is a miser. Here the latter words are a comment based on the former facts.

(b) Comment must be fair-To bring the comment within the ambit of good defence, fair comment is necessary. Fair indicates here the meaning 'honest' at the same time relevant also. In the example given in sub-head (a) a miser is a fair comment. But instead of using the word 'miser' had we used 'dishonest man' then it would have been not a relevant comment.

In the case *Tushar Kanti Ghosh v. Bina Bhowmic*, 1953 CWN 378, the defence of fair comment has been explained as-

"(a) the comment must be fair in the sense that it must be honest and reasonably warranted by such facts;

(b) having stated the facts truly, some observations by way of comment may be added provided they consist an inference which might legitimately be drawn from the facts stated; and

(c) the exaggerations would be excused only if it is merely an excess of severity short of violent inventive and cannot take the form of an addition of untrue facts."

(a) Public interest-It is the third important essential of fair comment. The public interest usually covers the matter which is legitimately concerned with people at large. It is upto the judge to

decide whether matter is of public interest or not. Public interest matters include affairs of State public acts of ministers and other officials of State, the administration of justice, public institutions, local authorities, theatres, concerts etc.

Privilege

Q. What is privilege? What are its types? Discuss it with the relevant cases as its examples.

Besides defence of fair comment, on some other occasions on which freedom of communication without fear of an action for defamation is more important than the protection of an individual's reputation. These are privileged occasions and it may be either-

(a) absolute; and

(b) qualified.

(a) Absolute Privilege-Such privilege covers cases, in which complete freedom of communication is considered as of high importance and the actions for defamation is not entertained at all: a person who has been defamed on an occasion of absolute privilege has no redressal even when the statement made by the maker is so outrageous and malicious. It has following cases:

(i) Parliamentary proceedings.-Any statement made by any Member of Parliament or State Assembly is absolutely privileged and no action would lie against any member of the Legislature even in case of the statement what has been made is defamatory or malicious. Article 105(2) of the Constitution has got the provision that no Member of Parliament shall be liable to any proceedings in any court in respect of anything said by him in Parliament or any committee thereof. It is further provided in clause (2) of Article 105 that no person shall be so liable in respect the publication by or under the authority of either House of the Parliament of any report, paper, votes or proceedings. Article 194(2) has given the similar privileges to the State Legislatures.

(ii) Judicial proceedings.-Anything said or written in course of judicial proceeding is absolutely privileged even if the said thing is untrue and malicious. It is immaterial who is the maker - the judge, the jury, the parties, the witnesses or the advocates. If the words spoken by the counsel, witnesses, parties, or jury are entirely irrelevant to the subject-matter of judicial proceedings, the defence of privilege is not available to him. In *Jiwan Mal v. Lachman Dass*, AIR 1929 Lah 486, the defendant was a witness who remarked that so long as Jiwan Mal stands in the way, compromise cannot be effected. "He had looted the whole of Dinanagar and gets false case set up." The High Court found the above remark totally uncalled for as Jiwan Mal had nothing to do with the case. The Court therefore rejected the defence of privilege and held the defendant liable.

(iii) Communication by Public Officers.-Communications which have been made in the course of official duty by one officer of the State to another is also absolutely privileged on the ground of public policy.

(iv) Military and Naval Proceedings.-All acts which have been done by the military or naval authority, reports made in the course of official (military or naval) duty and statements, whether false or malicious made before a military or naval court-martial are absolutely privileged.

(b) Qualified Privilege.-If a defamatory statement maker proved untrue although he has acted honestly and without malice, then qualified privilege protects him. But, if plaintiff succeeds in proving his malice then the defendant would not be saved by the qualified privilege.

The defence of qualified privilege is available to defendant if he succeeds in proving two following points:

(i) Statement made in discharge of duty or in protection of common interest.-Sometimes duty is thrust upon the defendant to make communication to a third party. This duty may be legal, social or moral. Communications made pursuant to a duty owed to society may relate to the character of servants, confidential and private matters etc. In the case *Boxsius v. Golbert*, (1843) 1 KB 319, an advocate under instructions of his client, dictated to his typist, a letter addressed to B, containing defamatory statements about B. The letter was press copied by another clerk. B brought an action for defamation against the advocate. The Court observed that the privilege protecting a business communication made on a privileged occasion covers, "all incidents of its transmission and treatment which are in accordance with the reasonable and usual course of business." The Court further added that the publication to his clerks by the solicitor was covered by qualified privilege and, as such, Advocate was not held liable.

Q. Discuss the points discussed in the case of *Tushar Ghosh v. Bina Bhowmic* vis-a-vis statement published in protection of common interest.

In *Tushar Kanti Ghosh v. Bina Bhowmic*, 1953 CWN 378, Mrs. Bina Bhowmic filed a suit against the editor and others of *Amrit Bazar Patrika* for publishing a defamatory statement against her. The part of the defamatory statement was as-"Another day-light robbery was committed by Mrs. Bina Bhowmic's Union members and their hirelings early yesterday (Friday) morning when our van containing thousands of copies of *Amrit Bazar Patrika* and *Jugantar* were looted at the Hazara Road Junction distribution centre. As soon as the copies of two issues were taken out of the van, 20 to 25 men pounced upon them, destroyed some and carried away the rest presumably for selling them and pocketing the ill-gotten gains."

The Court, held that it was a defamatory statement, as the meaning of the libellous wordings was that an organization or men headed by the respondent had committed one or more day-light robberies in the past also.

The Court conceded that the matter was of common interest and the defence of fair comment could be availed of. It was observed-"It is one thing to comment upon, even with proved acts, of a public man and quite another to assert that he has been guilty of a particular act of misconduct. The publication of present case represents the plaintiff as a person who has also been guilty of trickery and employment of hirelings, and committing acts of violence including day-light robbery."

Judging by the facts, the Court held that it was not a fair comment but an assertion that the plaintiff was guilty of misconduct. So, the statement published in the paper was not defensible as protected by the right of fair comment.

Although the Court accepted the plea that the occasion was privileged but stated that the defence of qualified privilege could be granted only if it was of common interest and without express malice.

The court was of the view that there was common interest of the defendants, their subscribers and the advertisers because of the strike situation and consequent delay in newspaper. Chakravarti C.J. observed-"Common interest will apply in present case, because it was not another newspaper which had published the statement, but the '*Amrit Bazar Patrika*' itself which and the readers of which were equally and directly interested in the activities of the union of its workers which was trying to bring about a suspension of the paper. To that extent the occasion was protected by qualified privilege." But C.J., further added that the protection of qualified privilege will not be available to the defendant if the statement was made with express malice.

The Court explained the express malice as-"A defamatory statement not germane in any way to the privileged occasion and not pertinent to defendant's vindication is itself evidence of malice. In the case of a qualified privilege, the plaintiff must prove malice in fact, that is the express malice as distinguished from implied malice." Express malice means an actual wrong state of mind in which the defendant acted i.e., an indirect and wrong motive, such as, spite, ill-will or prejudice or with knowledge that the statement was untrue or recklessly careless whether it was true or false.

Q. "The intention was not to serve the public interest but to expose the plaintiff" Do you agree with the judge's observation in the case *R.K. Karanjia v. Krishna Raj M.D. Thackersey*?

The case *R.K. Karanjia v. Krishna Raj M.D. Thackersey*, MANU/MH/0073/1970 : AIR 1970 Bom 424: (1970) 72 Bom LR 94: ILR 1971 Bom 324, the Blitz, an English Weekly published an article in its September 24, 1960 issue which was directed against a Business House by the name of House Thackersey being headed by the plaintiff. The writer under the pen name of Blitz's Rocket Buster, intended to expose, how this Business House consisting of plaintiff, his brothers, their wives close relatives and friends amassed the wealth. The plaintiff who was then the chairman of the Textile Board used his position to get his company benefited and was involved in tax evasion on a colossal scales, financial jugglery, export-import rackets and customs and foreign exchange violations.

The action was brought by the plaintiff against the editor, owners and printer of the Blitz. The printer tendered an apology and the case was withdrawn against him. The defendant pleaded "qualified privilege". The Bombay High Court rejected this plea on the ground that the element of duty in communicating the statement was missing on the ground that even if the matter is of public interest, yet the person or the newspaper who wants to communicate to the general public must also have duty to communicate, and if no such duty, apart from the fact that the matter is one of the public interest can be spelt in the particular circumstances of the case, the publication could not be said to be upon a particular occasion. Secondly, it was also published maliciously. Here the intention was not to serve the public interest but to expose the plaintiff.

7. Publication of Parliamentary, judicial or other public proceedings

If the Parliamentary or State Legislatures reports are published by or under authority of respective houses, then they are absolutely privileged.

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CHAPTER 20

NUISANCE

1. Introduction

The term 'nuisance' is made up of French word 'nuire' and Latin word 'nocere' or 'nocumentum' which in legal sense means 'annoyance' or 'harm'. The element of unlawful 'annoyance' is the only thing common to all nuisances.

Everyone, today thinks that interference should not come from his neighbour in his way of life, but it is not possible in absolute manner. One has to endure some degree of noise, dust, smell, smoke, the escape of effluent etc., otherwise life would not move in the modern world.

Nuisance has been defined under two categories:

- (i) Public Nuisance, and
- (ii) Private Nuisance

2. Public Nuisance

Q. Define nuisance and discuss its types with the help of relevant cases.

If, an activity of a person annoys a large number of persons or class of persons then it is called as 'Public nuisance'. It is punishable under the law i.e., under section 268 of the Indian Penal Code which says-

"a person is guilty of public nuisance who does any act, or is guilty of an illegal omission, which causes any common injury, danger or annoyance to the public or the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right."

e.g. - to block the public highway which stops the movement for a number of people is a public nuisance.

But, if someone gets injured from public nuisance then he may file the action for damages against the offender or wrongdoer. So, a 'public nuisance' may become a 'private nuisance' when an individual gets injured.

In *Soltan v. De Held*, (1851) 2 Sim RS 133, De Held was the priest of a Roman Catholic Chapel. Throughout the day and night the bell was rung. The plaintiff was living just the next door to chapel. The bell disturbed everyone in the vicinity of the chapel. The plaintiff was disturbed most. The court held that it was a public nuisance and as far as the plaintiff was concerned, a private nuisance and the plaintiff was held entitled to an injunction.

In *Winter Bottom v. Lord Derby*, 1867 LR Exch 316, it was observed that where a public nuisance does not cause any special damage or particular injury, an individual being annoyed like others, cannot file a civil suit for private nuisance as he had suffered damage not more than any other member of the public.

In *Dr. Ram Raj Singh v. Babu Lal*, MANU/UP/0286/1982 : AIR 1982 All 285, the defendant installed a brick grinding machine. The plaintiff had a clinic in the adjoining premises. Due to brick-grinding the air in the vicinity was polluted, dust particle, red in colour was all visible on clothes. The plaintiff got special damage as proved in the Court and the Court also granted permanent injunction restraining the defendant from running his brick grinding machine there. The appropriate remedy was provided under section 268 of the Indian Penal Code coupled with sections 133 to 143 of the Criminal Code.

3. Private Nuisance

Winfield has defined Private nuisance as unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it. There are following elements, which have to be proved by the plaintiff in every case of nuisance:

- (i) Undue or unreasonable interference,

(ii) Interference must be with the use or enjoyment of land,

(iii) Damage.

Undue or unreasonable interference

Q. What is undue or unreasonable interference? Elaborate it with the help of relevant cases.

There are some unwarranted interferences which cause damage to the plaintiff and such interferences are termed as undue or unreasonable. Undue or unreasonable interference refers to that which exceeds the limited usage in the society. If someone is erecting/constructing a building and in doing so it creates too much noise and dust, here, the action may lie. The interference should be continuous or repetitive.

For example, A, everyday beats a drum from 10 p.m. to 1 a.m. which creates a lot of noise and disturbs the sleep of B, his neighbour. Here, the activity of A is unusual and it doesn't happen so frequently in the society and, thus, A unduly interferes with B's enjoyment of land and it is also unusual because it is not in accordance with the usage of mankind in the particular society.

Radhey Shyam v. Gur Prasad, MANU/UP/0023/1978 : AIR 1978 All 86. Gur Prasad filed a suit to restrain Radhey Shyam from installing a flour mill in his premises as Gur Prasad was residing in the same premises and by installing of mill he would cause nuisance to him as the plaintiff would lose his peace on account of the rattling noise of the flour mill and thereby his health would also be affected adversely. The court observed that the impugned machines would seriously interfere with the physical comfort of the plaintiff and as such it amounted to nuisance and the plaintiff was entitled to an injunction against the defendant.

Usha Ben v. Bhagya Laxmi Chitra Mandir, AIR 1978 Guj 13: (1977) GLR 424. In this case defendant was running the film titled "Jai Santoshi Maa" in his theatre. The plaintiff filed a petition for permanent injunction of screening this film by the defendant on the ground that in the film Goddesses Laxmi, Parvati and Saraswati have been ridiculed and were depicted jealous. It hurt her sentiments/feelings. The Court ruled that to hurt religious feelings was not actionable wrong and that the plaintiff was free not to see the movie again. It was not a case of nuisance.

Abnormal sensitive person or property-If a person is oversensitive to a particular thing but for others that particular thing is very normal, then it is not nuisance. In Heath v. Mayor of Brighton, (1908) 24 TLR 414, the incumbent and trustees of a church were annoyed by a "buzzing sound" from the defendant's power station. The court observed that the 'buzzing sound' was not distracting attention of ordinary person attending the church and did not cause any annoyance to other person.

Intention (Malice)

If defendant is intentionally doing something to cause annoyance to plaintiff, then defendant's intent is certainly a relevant factor in nuisance. We can also say that an act of the defendant which is otherwise lawful may become a nuisance if done with malice.

In the case of Christie v. Davey, (1893) 1 Ch 326 (327), plaintiff and defendant, both were neighbours. The plaintiff and their family were fond of music. They used to sing and play various instruments. It disturbed the defendant. He started hammering the wall, beating trays, shrieking and whistling. The Court held the defendant liable as he was doing it intentionally and maliciously for the purpose of annoying the plaintiff. The Court observed-"if what has taken place had occurred between two sets of persons both perfectly innocent, I should have taken an entirely different view of the case. But, I am persuaded that what was done by the defendant was done for the purpose of annoyance".

Interference with the use or enjoyment of property

In private nuisance, an interference may cause either (a) injury to property, or (b) injury to comfort or health of an occupier of land.

Q. Is it true that damage to property due to an unauthorized interference constitutes a nuisance?

(a) Injury to property.-If property gets damaged due to an unauthorized interference then it is actionable as nuisance. In *St. Helen's Smelting Co. v. Tipping*, (1865) 11 HL Cas 642, fumes were emitted from the defendant's factory which damaged plaintiff's tree and plants. The defendants were held liable since such damage was held as an injury to the property of the plaintiff.

In *Pakkle v. Aiyasami Ganapathi*, MANU/TN/0215/1969 : AIR 1969 Mad 351, a suit was filed by some villagers, in a representative capacity to seek an injunction from the Court in order to restrain the defendants from laying the salt pans in the tank. The villagers had their plea that the water of tank was meant for drinking as well as for their animals and if the salt pans are placed then it will make water undrinkable for them. The defendant contended on the ground that the plaintiff had no proprietary rights on the suit land as it was the property of the government. The Court was of the view that although the tank belonged to the government but the villagers had right to use the water of tank for drinking and bathing purposes and also for bathing and washing cattle. The Court observed-"Once it is established that the villagers have a common right over the water in the tank for purpose of using it for their bathing and drinking purposes, any interference with that right would give them a cause of action, even though the interference is not in respect of land belonging to the plaintiff. The action of the defendants would amount to nuisance."

It was further stated that "it may be that if the government permits the defendants to lay salt pans in the tank, circumstances might arise where the injunction might not be of any use. But till that contingency arises the plaintiffs are entitled to injunction prayed for."

Incorporeal Property-Actions for private nuisance also lie for interferences with easements, profits-a-prendre and certain rights which are generally called as "natural rights." It is inherent in the ownership to support of one's land by one's neighbour's land.

Interference with the right to support-Nature of support may be for the land or for the building. Nature of rights vary in both these cases.

(i) Support for land.-It is a natural right to have one's land supported by one's neighbour. But, if one's neighbour, removes such support either laterally or from beneath, then it amounts to nuisance. This natural right is available only in respect of land and not for any structure/building. But, where the damage to the building is consequential to the damage to natural right of support, an action for withdrawal of support may lie.

In *Stroyan v. Knowles*, (1861) 6 H&N 454, the defendants were carrying on mining operations which caused the plaintiff's land to subside. In consequence, it damaged plaintiff's factory. The Court found that the weight of the building did not contribute to the causing of the subsidence. The defendant was held liable.

Section 34 of the Indian Easement Act says-

"the removal of the means of support to which dominant owner is entitled does not give rise to a right to recover compensation, unless an until substantial damage is actually sustained."

(ii) Support for buildings by grant of prescription.-It was held in the case *Partiage v. Scott*, (1838) 3 M&W 222, that a man has no right to load his own soil, so as to make it require the support of that of his neighbour. By grant or prescription, this right of support may be acquired. Where this right has been acquired, a nuisance will be committed if the support is withdrawn.

In *Dalton v. Angus*, (1881) 6 App Cas 740, the plaintiff and defendant, both were having properties i.e., house not touching each other. Laterally, houses were supported by adjoining land. The plaintiff converted his house into a factory which, then became heavier and, therefore, required stranger lateral support compared to earlier. Some 20 years later defendant demolished his house and made excavations upon the site. In consequence, the building subsided. The plaintiff brought an action against the defendant. The Court held that the plaintiff had acquired a right by prescription to the support of

building. The plaintiff's claim was acceded to.

Interference with the right to light and air.-The right to light is not a natural right. It may be acquired by grant or prescription. But once it is acquired, any substantial interference invites action.

Section 25 of the Limitation Act, 1963 provides that the right of easement to light, air, way, water course, use of water etc. can be acquired by prescription if the right has been peaceably enjoyed as an easement and as of right without interruption and for twenty years.

Section 33 of the Indian Easements Act enables a person to bring an action against the defendant if there is a substantial infringement of an easement of light, air, way, water etc.

(b) Injury to comfort or health-If there is substantial interference with a man's comfort or health then the action for injury arises. Discomfort and inconvenience is determined, not by taking into account the particular plaintiff, but on the basis of average man residing in the same area. Carrying on an offensive trade as to interfere with another's health and comfort or his occupation of property is a nuisance. Accumulation of filth, sewage and stagnant water causing injury to health and discomfort may also amount to nuisance.

Q. If there is substantial interference with a man's comfort or health the action for injury arises. Substantiate it with elaboration in view of the judgment in the case Brijbala Prasad v. Patna Municipal Corporation?

In Brijbala Prasad v. Patna Municipal Corporation, MANU/BH/0074/1959 : AIR 1959 Pat 273, the plaintiff's houses were on a public lane, to the east of which an important drain in linking with other drains were running. The maintenance of drains was under the charge of City Municipal Corporation (Patna). The drain was broken at several places, due to which water with filth was overflowing and accumulating sewage, filth with foul smell all the way. It was difficult for residents there to live in such unhygienic condition. Even after repeated requests the drain was not repaired by the municipal corporation. The plaintiff brought an action on the ground that the stagnant water had become a breeding ground for the germs of different diseases and was emitting foul smell. The defence contended that it had done everything to improve the drainage system but could not do much due to limited financial provisions with the corporation. It further contended that the corporation should not be made liable for breach of the statutory duty which amounts to non-feasance.

The Lower Court observed that non-repairs and consequential nuisance amounted to misfeasance and therefore the corporation was liable. But on appeal, the lower sub-ordinate Court held that the present nuisance resulted from non-feasance for which the corporation was not liable.

The matter came to the High Court, and it found that the angle of approach which adopted by the lower appellate court was faulty and that the distinction between misfeasance and non-feasance was of not relevance in a case of nuisance. The Court observed that it was a well-recognized principle of law that where a person was guilty of a breach of duty to the public, an action could be maintained by any person who suffered special damage thereby. Such nuisance was not permissible under the Bihar and Orissa Municipal Act. Accordingly, the Court held the corporation liable for nuisance.

Damage

Actual damage is required to be proved, when the case of nuisance arises. In case of public nuisance, the action is brought against the defendant, when the plaintiff proves special damage to him. But when the nuisance is related to other than physical damage to property, damage is presumed by law without imposing upon the plaintiff the difficult task of furnishing strict proof of it.

4. Defences

Although, in various cases, nuisance due to act of others, reasonable care, plaintiff coming to nuisance etc. have been pleaded but these defences have been rejected by the Court.

Prescription and statutory authority are good defences.

Prescription

Prescription can legalise a nuisance. Prescription is a special defence and the right to continue a private nuisance may be acquired as easement by prescription. A person can acquire a right to commit a private nuisance as an easement provided it has been enjoyed as an easement peacefully and openly. At the same time it was continued for 20 years without interruption. After the expiry of 20 years, the nuisance becomes legalised as if it has been authorized by a grant of owner of servient land from the beginning.

In the case *Sturges v. Bridgemen*, (1879) 11 Ch D 852, defendant was a confectioner and had a kitchen in the back of his house. The plaintiff did not feel any noise and vibration from kitchen for over 20 years. After 20 years, plaintiff, who was a medical practitioner shifted his consulting room in the back garden of his house. After this shifting, the plaintiff felt the nuisance caused by kitchen's noise and vibration.

The plaintiff brought the suit and the Court granted injunction against the confectioner. Defendant's claim of prescriptive right failed because the interference had not been actionable nuisance for the preceding period of more than 20 years.

Statutory Authority

If a statute has authorized to do a particular act, all remedies, whether by way of indictment or action, are taken away, provided that every reasonable precaution consistent with the exercise of the statutory power have been taken. The liability for nuisance cannot be avoided where the act authorized by the statute has been done negligently.

5. Remedies

The remedies which are available to a person for nuisance are:

Abatement

It means the removal of nuisance by the person affected, but the removal must be peaceful and life or limb should not be endangered. A prior notice is necessary, if, to remove the nuisance, the defendant's territory has to be crossed.

Injunction

If nuisance is such that it is of permanent character, and is impending, then the injunction can be obtained from the court only.

Damages

Remedies are available to a person for nuisance if the plaintiff shows that he has suffered damage to his person or property.

6. Distinction between private and public nuisance

Private nuisance	Public nuisance
(i) It is an injury to individual in particular.	(i) It is an injury to public.
(ii) It affects only individual.	(ii) It affects public at large.
(iii) It may be done away with.	(iii) A public nuisance cannot be abated by an individual.
(iv) In case of private nuisance, the plaintiff may file a suit in civil court for damage or injunction.	(iv) The plaintiff has to prove that he has suffered particular damage beyond that which was suffered by entire community.
(v) It can be legalized by prescription.	(v) It can never be legalized.

(vi) In private nuisance, the plaintiff is awarded compensation.	(vi) In public nuisance, punishment is given.
(vii) The plaintiff must prove interference with the enjoyment of land.	(vii) It is not necessarily linked with the use of land.

7. Distinction between nuisance and trespass

Nuisance	Trespass
(i) Nuisance is an injury to some right necessarily connected with possession.	(i) Trespass is an injury to possession itself.
(ii) It is actionable only on proof of actual damage.	(ii) Trespass is actionable per se.
(iii) It involves unreasonable interference with other's land.	(iii) Entry upon another's land, which is unauthorized without causing any injury constitutes trespass.
(iv) In nuisance, interference may not be direct but consequential.	(iv) It involves direct interference.
(v) Interference may happen through the medium of intangible objects such as smell, vibration etc.	(v) The interference is always through some tangible object.

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Chapter 21

STRICT LIABILITY AND ABSOLUTE LIABILITY

1. Meaning

Q. What is the meaning of strict liability? Is it different from the absolute liability as propounded by Justice Blackburn in the case Rylands v. Fletcher? Explain it.

In absolute liability, a person is made liable even if he is neither negligent nor wilfully commits a tort. Absolute liability is an exception in the law of tort where the liability of a person arises even if he has not committed any tort.

Justice Blackburn in 1868, in the case of Rylands v. Fletcher, propounded the theory of 'Absolute liability'. Here, 'absolute' indicates liability in all the circumstances and that there should not be any exception. We can also say that the word 'absolute' signifies here 'complete' or 'unconditional' liability without any exception.

Although Blackburn called it 'absolute' liability, but Winfield corrected it as 'strict liability'.

Rule in Rylands v. Fletcher, 1868 LR 330.

In this case, Ryland was a mill owner and Fletcher was the lessee of coal mines. Ryland appointed an independent contractor, to construct a reservoir on his land to get water for his mill. Some old shafts were found by the contractor on Ryland's land during course of the work. These shafts were connected to the mines of Fletcher. After building the reservoir water was filled in it, the old shafts burst downward and water flowed through these old shafts into the coal mines of Fletcher. Fletcher suffered damages and brought suit against Ryland. It came to knowledge that there was negligence on the part of Ryland but the contractor had.

The Court of Exchequer, by majority, decided in favour of Ryland. But on appeal, the Court of Exchequer chambers unanimously reversed the decision of the lower court and held Ryland liable.

Justice Blackburn delivered the judgment of the Court as-

"We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape."

Further he added-"He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major* (act of God) but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient."

The House of Lords confirmed the above rule with two clarifications that the use of land should be non-natural (as in this case) and that the thing must have been brought on the land "which was not naturally, there".

It may be inferred that there must be two basic requirements in order to apply the rule laid down by Justice Blackburn alongwith the clarifications made by the House of Lords:

(a) Escape from one land to another

(b) Non-natural use of land

Escape

Q. What are those two rules which require to be proved in order to apply the rule as laid down by Justice Blackburn in the case of Rylands v. Fletcher?

It is essential to prove that a dangerous thing has actually escaped from the area outside the occupation and control of the defendant to apply the rule of strict liability. And, the escape of dangerous thing has actually caused damage.

Bhopal Gas Leak Tragedy is a case related to this topic. On the intervening night of 2nd and 3rd December, 1984, in

the city of Bhopal, a poisonous gas 'Methylisocyanate' leaked from the plant of Union Carbide Company. The leakage of gas was so powerful that it did not let the people flee their home and killed thousands of people and many who lived after, are suffering from various skin diseases, blindness and other carcinogenic effect of gas. The poisonous gas affected the people who were present on the lands other than the company's land on which gas plant was situated.

N. Narayanan Bhattathiripad v. Travancore Government, AIR 1956 Trav Co 225.

A dam was constructed across the stream for storing the water to be used for irrigation purposes. After a heavy rainfall, the water could not pass speedily through the sluices in the dam and spread over the paddy field of the plaintiff. The Court observed that there was no escape of water stored up or collected in the dam. The plaintiff's contention was that the rain water could have gone away easily if the dam was not there which stood in between as a wall and plaintiff lost the crop. At the same time, the Court also held that this was not a case of non-natural use of land in India.

Non-Natural use of land

Natural means which has originated from nature and it has not been adulterated and it has also got a second meaning "that which is ordinary and usual, even though, it may be artificial". The courts take the meaning of non-natural use in latter sense. In the case of Rickards v. Lothian, 1913 AC 263, the non-natural user has been defined in the following words:

"It must be some special use bringing with it increased danger to others and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community."

Another meaning which courts apply is that the use is similar to the idea of 'unreasonable' or abnormal risk in negligence cases and that ought not to be borne by the public. Thus, the court has got a device for determining liability in accordance with what they consider to be public policy. It also depends on courts to make its own value judgment of the defendant's conduct, its social utility etc.

If one keeps something which may cause 'increased danger' or 'abnormal risk' then it certainly comes under the category 'non-natural use of land'. There are numerous cases in which it was observed that to use land for the purpose of industrial water under pressure or gas¹ and electricity² in bulk fire, explosions,³ noxious fumes,⁴ vibrations,⁵ poisonous vegetation,⁶ colliery and even noxious persons was considered as un-natural use of land.

Non-natural things vary from place to place and according to circumstances. The rule of Ryland v. Fletcher, applies to dangerous things which an occupier brings on to his land and collects and keeps there and not to those things which are automatically on the land by the Act of God.

Regarding, natural use of land in India, a case Kana Ram Akhul v. Satidhar Chatterjee, (1912) 15 IC (Cal) 543, is worth mentioning - The defendant lowered the level of his land to get water from nearby tank for the purpose of cultivation. But, it overflowed to the adjoining lands of the plaintiff. The plaintiff's plea was that the defendant had no right to bring water to his land for cultivation as it overflowed his lands and he claimed the damage under the rule of Ryland v. Fletcher. The court rejected the contention of the plaintiff and observed that the Ryland and Fletcher rule is not applicable here as the defendant had not used their land in any artificial or unusual manner. There was no artificial construction and it was their right to obtain water from the tank for cultivation.

Negligence of an independent contractor

In Ryland v. Fletcher, although there was independent contractor, even then Ryland was held liable whereas there was no negligence on his part. In T.C. Balakrishnan Menon v. T.R. Subramanian, MANU/KE/0040/1968 : AIR 1968 Ker 151, an explosive 'Minnal Gundu' was used to be made out of a coconut shell filled with explosive substance, instead of rising into the sky, it bursted in the crowd and caused injuries to the respondent. The question before the court was whether the appellant was liable who had engaged an independent contractor to attend the exhibition of fire works. The Kerala High Court applied the rule as laid down in the case of Rylands v. Fletcher, and held that - The Minnal Gundu is an explosive and is therefore an "extrahazardous" object and persons who use such an object, which in its

very nature, involves special danger to others, must be liable for the negligence of their independent contractor. It is the duty of defendant to keep such a substance without causing injury to others and defendant can't escape the liability for the breach of such a duty by engaging an independent contractor.

2. Defences to the Rule (Exceptions to the Rule)

There are following defences (or exceptions) to the rule which have been recognized in Ryland v. Fletcher and later decisions.

Default of the plaintiff

Q. What are defences available to the rule which have been recognized in Rylands v. Fletcher case?

In case the escape occurred due to plaintiff's own fault, it is a good defence as in Rylands v. Fletcher. If the escape of water from Rylands' land would have been due to fault of Fletcher, he would not have succeeded for the damage caused to coal mines.

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1. Batcheller v. Tunbridge Wells Gas Co., (1901) 84 LT 765.
 2. National Telephone Co. v. Beaker, (1993) 2 Ch 186.
 3. Miles v. Forest Rock Co., (1919) 34 TLR 500.
 4. West v. Bristol Tramways, (1908) 2 KB 14.
 5. Hoare & Co. v. Mc Alpine, (1923) 11 Ch 167.
 6. Crewhurst v. Amersham Burial Board, 1878 Ex D 254.

Consent of the plaintiff

If plaintiff has given his consent either expressed or implied to the defendant to keep the dangerous thing on his land and if that material escapes and injures the plaintiff, the defendant would not be held liable. This exception falls under the general defence of the maxim 'volenti non fit injuria'.

Common Benefit

If dangerous thing is kept on the defendant's land for the benefit of plaintiff and defendant, the defendant is not liable for its escape and consequent injury to the plaintiff. In the case Carstairs v. Tylor, the defendant, a landlord, was staying in the upper storey of the house whereas the plaintiff, a tenant, was residing in the lower storey. The defendant maintained a water box for the use of himself as well as the plaintiff. One day the water box leaked since a rat made a hole in it. It was held by the court, that the water box was for the common benefit and here the defendant would not be liable.

Act of stranger

If a stranger does something which causes escape of a dangerous thing on which defendant doesn't have any control, then the rule of Rylands v. Fletcher does not apply.

Act of God

If something happens unanticipated and which has been caused by nature and which is practically impossible for defendant to check, then the defence of Act of God applies and the plaintiff cannot recover for the damage caused by that escape.

In the case Nichols v. Marsland, (1876) 2 Ex D1, Nichols was the surveyor of county bridges for Cheshire. Marsland, the defendant, was the owner of an estate, containing three lakes of ornamental water. These lakes were fed by a natural stream passing through the estate. A heavy down pour flooded the lakes which broke the artificial embankments.

Heavy flow of water carried away four bridges of the country. The Court of Exchequer Chamber held that the heavy rainfall was unanticipated and unprecedented and it was beyond the control of defendant to check water, hence defendant was not liable as it was the Act of God.

Statutory Authority

If, the defendant has been authorized by a law or statute to store dangerous thing on his land and if such dangerous thing escapes from his land then the defendant would not be liable unless and until his negligence is proved.

Q. Describe statutory authority with the help of relevant cases.

In the case *Madras Railway Company v. Zamindar of Carvatenagram*, 1874 IA 364, there were two tanks on the land of the defendant in a hilly district of Carvatenagram. These were very old but properly maintained and repaired. These tanks were used by cultivators for irrigation purpose. Due to excessive rainfall these tanks' embankment could not hold water and escaped damaging the property of the plaintiff's railway company. Plaintiff argued that the Rule as laid down in the case *Rylands v. Fletcher*, may be applied to this case. The Privy Council rejected this plea citing the ground "that the circumstances of the present case are essentially distinguishable" from *Rylands*' case. In the words of Lord Granworth-

"The tanks are ancient, and formed part of what may be termed a national system of irrigation, recognized by Hindus and Mohammedan law by regulations of the East India Company, and by experience older than history, as essential to the welfare, and, indeed to the existence of a large portion of India. The public duty, of maintaining existing tanks..... was originally undertaken by the Government of India, and upon settlement of the country has devolved on zamindars, of whom the defendant is one. The zamindars have no power to do away with these tanks, in the maintenance of which large number of people are interested, but are charged under Indian Law, by reason of their tenure, with the duty of preserving and repairing them. From this statement of facts..... the defendant in this case is in a very different position from the defendants in *Rylands v. Fletcher*."

"In the case, *Rylands v. Fletcher*, the defendant for their own purposes, brought upon their land and there accumulated a large quantity of water by what is termed by Lord Cairns "a non-natural use" of their land. They were under no obligation, public or private, to make or to maintain the reservoir and no rights in it had been acquired by other persons, and they could have removed if they had thought fit. The rights and liabilities of the defendant appear to their Lordships much more analogous to those of persons or corporations on whom statutory powers have been conferred and statutory duties imposed. The duty of the defendant to maintain the tanks appear to their Lordships a duty of very much of the same description as that of a railway company to maintain their railway, and they are of opinion that, if the banks of his tank are washed away by an extraordinary flood without negligence on his part, he is not liable for damage occasioned thereby."

3. Absolute Liability: A new beginning in India

Q. Describe absolute liability in the light of observation made by the Court in the case *M.C. Mehta v. Union of India (Shriram case)*. How does it differ from the rule as laid down in the case *Rylands v. Fletcher*

Rule in *M.C. Mehta v. Union of India*, MANU/SC/0092/1986 : AIR 1987 SC 1086: (1987) 1 Comp LJ 99 (SC): JT 1987 (1) SC 1: 1986 (2) SCALE 1188: MANU/SC/0092/1986 : (1987) 1 SCC 395: 1986 Supp (1) SCC 562: (1987) 1 SCR 819.

In the case, *M.C. Mehta v. Union of India*, Oleum gas leaked from one of the units of Shriram Food and Fertilizer Industries on 4th and 6th December, 1985. The Delhi Legal Aid and Advice Board and the Delhi Bar Association filed application for award of compensation to the persons who had suffered harm on account of escape of Oleum gas.

On 1st January, 1987 a new beginning started in India pertaining to the law of Strict Liability. Bhagwati C.J.; did not follow the principles laid down in the case of *Rylands v. Fletcher*.

The Court had to decide what was the measure of liability of an enterprise which was engaged in hazardous or

inherently dangerous industry if by reason of an accident occurring in such industry, persons die or are injured.

It was observed by the Court that the rule in *Rylands v. Fletcher*, was evolved in the year 1868 and which cannot be followed in the modern world. To develop in the modern world, development in science and technology is necessary and for which existence of hazardous and inherently dangerous industries becomes inevitable. Bhagwati, C.J., stated-

"This rule evolved in the 19th Century at a time when all these developments of science and technology had not taken place. It cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and needs of the present day economy and social structure. We need not feel inhibited by this rule which was evolved in the context of totally different kind of economy. Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country. As new situations arise, the law has to be evolved in order to meet the challenge of such new situations. Law cannot afford to remain static. We have to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialized economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for that matter in any other foreign country. We no longer need the crutches of a foreign legal order. We are certainly prepared to receive light from whatever source it comes, but we have to build up our own jurisprudence and we cannot countenance an argument that merely because the new law does not recognize the rule of strict and absolute liability in case of hazardous or dangerous, substances,..... liability or the rule as laid down in *Rylands v. Fletcher*, as is developed in England recognizes certain limitations and responsibilities. We, in India cannot hold our hands back and I venture to evolve a new principle of liability which English courts have not done. We have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy, there is no reason why we should hesitate to evolve such principle of liability merely because it has not been so done in England. We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the person harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other related element that caused the harm,..... must be held strictly liable for causing such harm as a part of the social cost for carrying on the hazardous or inherently dangerous activity for its profit. The law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item of its overheads..... This principle is also sustainable on the ground that the enterprise alone has the resource to discover and guard against hazards or dangers and to provide warning against potential hazards. We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting for example, in escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in *Rylands v. Fletcher*."

So, it is seen here that the rule of strict liability laid down in *Rylands v. Fletcher*, in 1868 was found unsuitable to the modern industrial society and, therefore, the Supreme Court made a new rule of absolute liability which is very much different from the existing rule of strict liability.

Some inferences from this decision-

- (i) the enterprises engaged in hazardous or inherently dangerous activity would be liable and those not falling under this category, the rule as laid down in the case *Rylands v. Fletcher*, would be applicable.
- (ii) the escape of dangerous thing from one's land to another land is not necessary so the rule will be applied to

both the persons who remain outside the premises as well as inside.

(iii) the rule is without any exception.

(iv) the quantum of damages depends upon the magnitude and the financial capacity of the defendant's enterprise. Here, the Supreme Court veered away from the principles of tortious liability.

The case of Indian Council for Enviro-Legal Action v. Union of India, MANU/SC/1112/1996 : AIR 1996 SC 1446: (1996) 3 GLR 272: JT 1996 (2) SC 196: (1996) 2 SCR 503: 1996 (5) SCALE 412: MANU/SC/1112/1996 : (1996) 3 SCC 212, is an important case on 'environmental pollution' where the Supreme Court followed its earlier decision of M.C. Mehta v. Union of India, imposing absolute liability on enterprises carrying on hazardous and inherently dangerous activity. In this case, the hazardous chemical industries had released highly toxic sludge and toxic untreated waste water which had percolated deep into the soil rendering the soil unfit for cultivation and water unfit for irrigation, human or animal consumption resulting in misery to the villagers of surrounding areas.

A writ was filed under Article 32 before the Supreme Court and also fundamental right under Article 21 of the Constitution compelling the Government and Pollution Control Board to perform their statutory duties. On this petition, the Supreme Court directed the Government to recover the cost of remedial measures from the defendant by attaching all their assets so that the Ministry of Environment could restore the water, soil and environment to its former state. These industries were characterized by the Supreme Court as 'rogue industries' and Supreme Court also directed them to be closed down. The Hon'ble Court recognized the principle of absolute liability in M.C. Metha's case, the Supreme Court also held that the liability of the rogue industries was based on the principle of 'polluter pays'.

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CHAPTER 22

LIABILITY FOR DANGEROUS ANIMALS

1. Introduction

What are the types of animals which can be held responsible if they make a trespass?

There are two categories of animals-

(i) *ferae naturae* -

animals belonging to dangerous species, e.g.-lion, tiger, bear, wolf, elephant, ape etc., and

(ii) *mansuetoe naturae* -

animals belonging to non-dangerous species, e.g.-dog, horse, cow, ram, cat, etc.

An animal-keeper is strictly liable, independently of negligence, for damage done by the animals of both the categories.

In the case *Behrens v. Bertram Mills Circus, Ltd.*, (1857) 1 All ER 583, Devlin J., illustrated the types of animals as-

If a person has this knowledge that the animals which he has kept can do harm, and if the same escapes and causes harm, then the keeper is strictly liable for damage. He is bound to keep such animals under control so that it would not do harm to others. In the case of animals falling under *ferae naturae*, they are conclusively presumed to have such a tendency hence there is no need of proving scienter. Whereas animals falling under the second category i.e., *mansuetoe naturae*, are presumed to be harmless unless and until it has acquired a savage or vicious nature, then proof of such a manifestation is proof of scienter and serves to transfer the animal from natural class to class - *ferae naturae*.

Examples:

- In *May v. Burdett*, (1846) 9 QB 101, the defendant was held liable for keeping a monkey which bit the plaintiff on the ground that the monkey is a dangerous animal.
- In *Hudson v. Roberts*, (1851) 6 Ex 697, the defendant was known to this fact that bull always irritates from the red colour, the plaintiff was wearing red and was walking on the highway, when the bull attacked him. The defendant was held liable.
- In *Read v. Edwards*, (1864) 17 CBNS 245, the dog of defendant had a peculiar habit of chasing and destroying pheasants. Defendant was held liable when dog chased and destroyed plaintiff's pheasants.

2. Cattle Trespass

Scienter Rule

Define the scienter Rule with the help of relevant cases.

If an animal causes damage after making a trespass, then the keeper of the animal will have strict liability and will be held liable even in case he did not know any of the particular propensities in that animal. Here, it is not needed to prove the negligence of the defendant as the liability is strict which means without fault. Cow, pigs, ass, horse, bull, sheep and poultry belong to category cattle but cats and dogs are not considered as cattle. Hence cats and dogs do not figure in cattle trespass.

In *Buckle v. Holmes*, (1926) 2 KB 125, defendant's cat entered into plaintiff's house and killed 13 pigeons. The Court did not hold defendant as liable since it was not peculiar to this cat alone. Here, the liability under the scienter rule arises only when the defendant had knowledge. If a cat is known to have a tendency of causing injury to human beings and if it injures someone, then the plaintiff has to prove this habit of that particular case. Even if he proves a single instance of its ferocity, it is sufficient.

In *Read v. Edwards*, (1864) 17 CBNS 245, defendant's dog chased and killed some pheasants belonging to plaintiff. The defendant was held liable on the ground that the defendant had knowledge of the particular propensity of his dog.

In the case, *Theyer v. Purnell*, (1918) 2 KB 333, the defendant's sheep was infected with scab trespassed on to the plaintiff's land and transmitted the disease to plaintiff's sheep. Under the government order, all these sheep were interned and thus plaintiff suffered a loss. The Court held the defendant liable for cattle trespass and its natural consequences irrespective of his knowledge as to the infected condition of the sheep.

Animals Act, 1971

Describe in brief the salient features of the Animals Act, 1971 with the help of relevant cases.

The Animals Act, 1971 has modified/amended the common law rules relating to cattle trespass, in England. Section 4 says that the owner of trespassing cattle would be held strictly liable if the animals trespass to another's land and causes damages. Proof of damage is essential here to hold the defendant liable. The immunity for damage ensuing from straying of cattles on to the highway has been abolished in England by the Animals Act, 1971 and the question of liability is to be decided on ordinary principles of negligence.

In *Ellis v. Loftu Iron Co.*, (1874) LR 10 CP 10, defendant's horse injured the plaintiff's mare by biting and kicking her through the fence. The plaintiff's and defendant's land were separated. The defendant was held liable on the ground that it was a trespass.

In *Wormald v. Cole*, (1954) 1 All ER 683, although defendant was not negligent but his cattle ran away to plaintiff's garden and plaintiff got hurt while protecting her garden from ravaging cattle. The defendant was held liable for plaintiff's personal injury.

In *Brock v. Richards*, (1951) 1 All ER 261, the plaintiff was riding a motorcycle along the highway, when a mare jumped over a hedge bordering the highway and fell on motorcycle resulting in rider's injury. The animal had a propensity to stray, but she did not belong to dangerous category. The Court held that the occupier of land bordering the highway was under no duty to prevent his animals from straying on the highway unless they were dangerous. The fact that the mare had a special proclivity towards straying did not impose such a duty on the defendant, and therefore, he was under no liability to the plaintiff.

The common law remedy i.e., distress damage feasant is abolished. There is a provision as given in section 7 of the Animals Act provides a right to detain the livestock and to sell it at the end of fourteen days. Section 5 of the Act recognizes the well-established law as laid down in *Tellet v. Ward*, (1882) 10 QBD 17.-

'the occupier of premises adjoining a highway is presumed to have accepted the risks incidental to the passage of ordinary traffic along that highway.'

Cattle Trespass Act, 1871

In our country, The Cattle Trespass Act, 1871 has provision that the trespassing cattle can be taken to the pounds, made at different places. The cattle owner can come and take their cattle back from the pound keeper after paying the pound fees. But defendant is not bound to pay the sum which the plaintiff has lost due to cattle. Cattle means - pig, elephants, camels, buffaloes, horses, ponies, mares, colts, fillies, mules, asses, rams, ewes, sheep, lamb, goats and birds etc., as given in the Cattle Trespass Act, 1971.

In the Act, other provisions are like delivery and sale of cattle, illegal seizure, detention, payment of penalties etc. The cultivator has the right of seizing cattle if it damages the crop but cultivator has to produce and send the cattle within 24 hours of its seizure to pounds.

CHAPTER 23

MALICIOUS PROSECUTION

1. Introduction

Define malicious prosecution.

Malicious prosecution is an institution with malice against another of unsuccessful criminal or bankruptcy without a reasonable cause. It has two competing principles, namely the freedom that every person should have in bringing criminals to justice and the need for restraining false accusations against innocent persons.

2. Following are the essential conditions that plaintiff has to prove in an action for malicious prosecution:

- (i) he was prosecuted by the defendant,
- (ii) the proceedings complained of terminated in favour of the plaintiff if from their nature they were capable of so terminating,
- (iii) the prosecution was instituted against him without any reasonable or probable cause,
- (iv) the prosecution was instituted with malicious intention, and
- (v) he has suffered damage to his reputation.

2. Malice, Malice in fact and Malice in law

The word "Malice" in common acceptance means and implies "Spite" or "ill-will". The legal meaning of "Malice" is "ill-will or spite towards a party and any indirect or improper motive in taking an action". This is sometimes described as "Malice in fact". Legal "Malice" or "Malice in law" means "something done without lawful excuse". In other words, "it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill-feeling and spite. It is deliberate act in disregard of the rights of others".

3. Essentials of Malicious Prosecution

There are two elements for the prosecution-

first the plaintiff has been prosecuted and second, the defendant has prosecuted the plaintiff. Legal proceedings have thus started with the judicial authority.

Proceedings may envelope both types of prosecution i.e., criminal as well as civil. Here we can understand this aspect that at what stage the proceedings start with the illustration of case *Bolandanda Premayya v. Ayaradara*, MANU/KA/0097/1966 : AIR 1966 Kant 13.-

Defendant made a complaint with the police that plaintiff has committed a theft in his house. Police called both i.e., plaintiff as well as defendant in the police station and recorded their statements. The

sub-inspector then made a search in plaintiff's house. But the police found the complaint to be false. The plaintiff filed a suit for damages against the defendant in the civil court for malicious prosecution. The court rejected this plea on this ground that mere filing of complaint with the police doesn't amount to prosecution. It starts only, when some judicial authority is set in motion as a consequence of such complaint. The suit failed.

So, at what stage, the prosecution commences before the judicial authority, there are two views on this point:

- (a) the prosecution starts as soon as the complaint is made or charge is laid before the judicial authority. In *Balbhaddar Singh v. Badri Shah*, AIR 1926 PC 46, it was observed that the charge should have been acted upon and process issued by the judicial authority.
- (b) the prosecution commences not at the stage when the complaint is made or charge is laid before the judicial authority, but at the stage when some process has been issued by such authority for the

plaintiff to appear.

In the case *Mohd. Amin v. Jogender Kumar Banerjee*, AIR 1947 PC 108, the plaintiff agreed to sell certain property to defendant who was going to form a company, but later on he backtracked to do so. On a complaint from defendant, the Magistrate after examining it on oath, held an inquiry in the open court under section 202 of the Criminal Procedure Code, 1898. The plaintiff was accordingly summoned and he appeared with his lawyer. Thereafter, the Magistrate dismissed the complaint as a result of preliminary enquiry. The plaintiff brought a suit against the defendant for damages for malicious prosecution. The Privy Council held-

"the action for damages for malicious prosecution is part of the common law of England, administered by the High Court at Calcutta. The foundation of the action lies in abuse of process of the court by wrongfully setting the law in motion and it is designed to discourage the perversion of the machinery of justice for an improper purpose."

After stating the basis for the tort of malicious prosecution, Sir John Beaumont, J; of the Privy Council laid down the principle of determining the stage at which prosecution commences. He said-

"To find an action for damages for malicious prosecution based upon criminal proceeding, the test is not whether the criminal proceedings may be correctly described as prosecution, the test is whether such proceedings have reached a stage at which damage to the plaintiff results. In this case the Magistrate took cognizance of the complaint, examined the complainant on the oath, held an enquiry in open court under section 202 which the plaintiff attended, and, at which the learned judge had found he incurred costs in defending himself. The plaintiff alleged the institution of criminal proceedings of a character necessarily involving damage to reputation and gave particulars of special damage alleged to have been suffered by the plaintiff. Their Lordships think that action was well founded, and on the findings at the trial the plaintiff is entitled to judgment."

In criminal proceedings, malicious prosecution commences, when such proceedings have reached a stage at which damage to plaintiff results.

Describe prosecution with the help of relevant cases.

What are the essentials that have to be proved by the plaintiff in an action for malicious prosecution?

Prosecution by the defendant

The plaintiff has to prove that the prosecution against him was instituted by the defendant. Prosecutor is a person who is actively instrumental in putting the law in force: *Dandy v. Beardsley*, (1880) 43 LT 603.

If a person does not file a complaint himself but through the instrumentality of an agent or counsel, he will be termed as a prosecutor.

A private person at whose instance and report the prosecution is launched by the police, is a prosecutor.

A person is not a prosecutor when the defendant has just given an account of honest suspicion about the plaintiff to the police and the police without any further enquiry started a case against the plaintiff.

Proceedings terminated in favour of Plaintiff

As discussed above, the plaintiff has to prove that he was prosecuted by the defendant and if this prosecution results in conviction of the plaintiff then no suit would lie against the defendant. A cause of action arises if the prosecution fails to convict the plaintiff.

Prosecution instituted against plaintiff without any reasonable and probable cause

Citing the case of *Hicks v. Faulkner* describe about prosecution without reasonable and probable cause.

Hawkins J. in *Hicks v. Faulkner*, (1878) 8 QBD 167, has defined 'reasonable and probable' as-

"an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed".

So, it may also be said that 'reasonable and probable cause' means honest belief in the guilt of accused based upon reasonable grounds. In the case *Jogendra v. Lingraj*, MANU/OR/0036/1970 : AIR 1970 Ori 91:

1970 Cr LJ 819, the question was that whether in every case plaintiff is required to prove that the defendant prosecuted him "in the absence of reasonable and probable cause."

The Orissa High Court made out difference by distinguishing 'acquittal on merits' and 'acquittal on benefits of doubts.' The Court said that in both the types of acquittals, plaintiff has to prove defendant's lack of 'reasonable and probable cause' but where "the accusation against the plaintiff purports to be in respect of an offence which the defendant claimed to have seen him commit, and the trial ends in an acquittal on the merits, the presumption will be not only be that plaintiff was innocent, but also there was no reasonable and probable cause for the accusation".

There is one exception to this rule i.e., where the defendant claims to have seen the plaintiff committing the crime, and the trial ends in acquittal on merit. The presumption in such cases will be that there was no reasonable and probable cause for his prosecution. In such a case the plaintiff will not be required to prove that the defendant prosecuted him without reasonable and probable cause.

Prosecution was instituted with malicious intention

The plaintiff has again to prove that the defendant acted maliciously in prosecuting him. Malice means indirect and improper motive. In the case *Jogendra v. Lingraj*, MANU/OR/0036/1970 : AIR 1970 Ori 91: 1970 Cr LJ 819, the Court described 'malice' as-

"As already stated, bad blood existed between defendant and members of the Brahmin Nijog. Therefore, when defendant found that some members of the Brahmin Nijog were responsible for committing certain acts in relation to his properties, it is not unlikely that he availed of the opportunity of implicating others even though they were not present and did not participate in any of the acts..... is in the circumstances indicative of improper and wrongful motive and the necessary inference is that it was malicious."

In *Abdul Majid v. Harbansh Choube*, MANU/UP/0034/1974 : AIR 1974 All 129, the Police Station Officer, in a conspiracy hatched by two other defendants concocted a story that the plaintiff was involved in a dacoity and the 'hansauli' used in the dacoity was recovered from the house of plaintiff. The court acquitted the plaintiff on giving him the benefit of doubt. The plaintiff then brought the action against the defendants. The Court observed that the defendants adopted improper and wrongful motive to prosecute the plaintiff on the basis of concocted story. The Court held defendants liable.

Damages for malicious prosecution

The plaintiff has to prove that he has suffered damage as a result of his prosecution. There are three types of damages-

- (i) damage to man's reputation i.e., if person has been accused of scandalous matter;
- (ii) damage to the person i.e., when the person is put in danger of losing his life, liberty or limb;
- (iii) the damage to man's property i.e., where he is forced to spend money to defend himself of the crime of which he is prosecuted.

In *Ram Lal v. Mahender Singh*, MANU/RH/0300/2007 : AIR 2008 Raj 8 the plaintiff and his father had been implicated in an offence of murder and they were acquitted by the court. Thereafter, the plaintiff filed suit for malicious prosecution. It was held that merely because the plaintiffs came to be acquitted or discharged by the criminal court as

the prosecution failed to prove the case beyond doubt as is required in criminal law, it does not mean that such acquittal or discharge could necessarily boomerang upon the defendant as a case for malicious prosecution. The burden of proof squarely lied upon the plaintiffs to prove that the prosecution was malicious, mala fide and done with an intention to harass and defame the plaintiffs. No such case was made out by the plaintiffs, much less proved. Therefore, the plaintiffs were not entitled to claim any damages.

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CHAPTER 24

DEATH IN RELATION TO TORT

1. Introduction

Sometimes it happens that due to other's wrongful act one dies and thus leaving behind him-his estate and his relatives. So, it is a loss for both-

his estate and his relatives. The question arises here that whether action could be taken against the defendant, for the loss suffered by the estate of the deceased and his family/relatives.

Under following headings we may deal with this topic:

(a) Survival of actions, (b) Loss to dependents

2. Survival of actions

Describe 'survival of actions' in the light of provisions given in section 360 of the Indian Succession Act, 1925.

The common law maxim is *actio personalis moritur cum persona* i.e., a personal right of action dies with the person. But, this rule was abolished by the Law Reform (Miscellaneous Provisions) Act, 1934 in England which now governs the law relating to survival of rights of action. In our country, this rule was abolished by the Indian Succession Act, 1925. Section 360 of the Indian Succession Act says-

"All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries causing the death of the party; and except also cases; where after the death of the party; the relief sought could not be enjoyed or granting it would be nugatory."

Under this section i.e., 360 of the Indian Succession Act, 1925, the maxim "*actio personalis moritur cum persona*" still applies where the injury is in relation to his defamation, assault, personal injuries, or where the relief sought could not be enjoyed or granting it would be nugatory. Actions for the above injuries do not survive and die with the death of the party.

As far as personal injuries is concerned, the opinion is divided over the matter that personal injuries include only physical injuries or other injuries also like malicious prosecution. These differences were sorted out by the Supreme Court in the case *M. Veerappa v. Evelyn Sequeira*, MANU/SC/0259/1988 : AIR 1988 SC 506: 1989 (1) BLJR 11: JT 1988 (1) SC 120: 1988 (1) SCALE 107: MANU/SC/0259/1988 : (1988) 1 SCC 556: (1988) 2 SCR 606: (1988) (1) UJ 720 (SC). The Supreme Court held that the expression "personal injuries" is to be read *eiusdem generis* with the words 'defamation' and 'assault' and not with assault alone. So judgment of Supreme Court established the view that the expression 'personal injuries' does not mean only injuries to the body but all injuries to a person other than those which cause death.

In the case *Zargham Abbas v. Hari Chand*, MANU/UP/0219/1980 : AIR 1980 All 259, a suit of defamation was filed on the basis of malicious prosecution against the father and his son. The father died at the appellate stage. The Allahabad High Court held that the cause of action cannot be maintained against the father who died but it can be against his legal heir. It was further observed that death of father did not affect the maintainability of the appeals from the decree.

Under the Indian Succession Act, on the death of a person, his successors are free to take an action in respect of those rights which were vested in the deceased prior to his death except where the action was for defamation, assault, personal injuries causing the death or where after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.

3. Loss to dependants

Define loss of dependants with the help of relevant cases.

Besides the maxim 'actio personalis moritur cum persona' there was also a rule in English common law that "the death of a human being could not be complained of as an injury" in civil court. It may be inferred from the above that a person might have a claim for the death of a cow or a dog but under common law, he could not maintain a civil action for the death of a human being.

This was a harsh reality till the Fatal Accidents Act, 1846 was came into being in England known as Lord Campbell's Act. Later on, it was repealed and replaced by the Fatal Accidents Act, 1976.

In our country, in the year 1855, the Fatal Accident Act was passed based on the English Fatal Accidents Act. Section 1 of this Act says-

"Whenever the death of a person shall be caused by wrongful act, neglect or default and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action or suit for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime.

Every such action or suit shall be for the benefit of the wife, husband parent and child, if any, or the person whose death shall have been so caused, and shall be brought by and in the name of the executor, administrator or representative of the person deceased and in every such action the Court may give damages as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting all costs and expenses, including the cost not recovered from the defendant, shall be divided amongst the before-mentioned parties or any of them, in such shares as the Court by its judgment or decree shall direct."

Section 1 of the Fatal Accidents Act, 1855, enables pecuniary benefit to the husband, wife, parent and child and to no body else. In the case *Municipal Corporation of Delhi v. Subhagwanti*, MANU/SC/0010/1966 : AIR 1966 SC 1750:

(1960) 3 SCR 649, three persons died when a clock tower, 80-year old fell due to negligence of Municipal Corporation (ill-maintenance). The dependants of deceased filed the petition for damages. The Court calculated the damages for a period of 15 years to be given to legal representatives.

The question arises from such cases is whether a pecuniary loss suffered by the legal representatives i.e., dependants by reason of victim's death could be adjusted against the pecuniary advantage from whatever source comes to him. The same was considered by the Supreme Court in the case of *Gobald Motor Service Ltd. v. Veluswami*, MANU/SC/0016/1961 : AIR 1962 SC 1: (1962) 1 SCR 929.

The facts were that Gobald Motor was plying buses on Dharapuram and Palni route in the State of Madras. On 20th September, 1947 one of the buses met with an accident due to negligence of its driver. Some of the passengers got injured and Rajaratnam was one of them but he succumbed to his injuries on 23rd September, 1947 and died. His father, his widow and his five sons filed a suit for compensation under section 1 of the Fatal Accidents Act, 1855.

The lower court held defendants liable for the negligence of their servant i.e., driver and awarded damages as-

1. Father (First plaintiff) - Rs. 3,600 under section 1 of the Act.
2. Plaintiffs (2 to 7) i.e., widow and five sons - Rs. 25,200 under section 1 of the Act.
3. Plaintiffs (2 to 7), Rs. 5,000 under section 2 of the Act.

The Madras High Court modified the above compensation as awarded by the lower court by reducing the amount Rs. 3,600 to 1,000 for the first plaintiff. On appeal, the Supreme Court stated-

"The general principle is that the pecuniary loss can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefit by reason of the death and on the other any pecuniary advantage which from whatever source comes to them that is, the balance of loss and gain to a dependant by the death must be ascertained."

Another important question was that whether the award of Rs. 5,000 under section 2 of the Act to plaintiffs from 2 to 7 should go into reduction of Rs. 25,200 awarded under section 1 of the Act to the same persons on the ground that it would be duplication of damages. The Supreme Court while referring the section 2 of the Act stated that the cause of action under

section 1 and that under section 2 are different. Under section 1 damages are recoverable for the benefit of the persons mentioned above while compensation under section 2 goes to the benefit of estate. Persons entitled to benefit under section 1 may be different from those claiming under section 2. The claimants, whether the same or different, would be entitled to recover compensation separately under both the heads. The Supreme Court further observed-

"The right of action under sections 1 and 2 of the Act are quite distinct and independent. If a person taking benefit under both the sections is the same, he cannot be permitted to recover twice over for the same loss. In awarding damages under both the heads, there shall not be duplication of the same claim, that is, if any part of the compensation representing the loss to the estate goes into the calculation of the personal loss under section 1 of the Act, that portion shall be excluded in giving compensation under section 2 and vice versa."

The Supreme Court then held that compensation awarded by the lower court as Rs. 25,200 for plaintiffs (2 to 7) by taking into consideration the reasonable provision the deceased, if alive, would have made for them. Under section 2, the Court awarded damages for the loss to the estate, a sum of Rs. 5,000. This sum is for the mental agony, suffering and loss of expectation of life. There was, therefore, no duplication in awarding damages under both the heads. The Supreme Court upheld the judgment of the lower court.

4. Deductions

In the case *Davies v. Powell D.A. Collieries Ltd.*, 1942 AC 601 (HL), it was observed that the damages to be awarded to the dependants under the Fatal Accident Act must take into account any pecuniary benefit accruing to the dependants in consequence of the death of the deceased. It was held in the case of *Gobald Motor Service Ltd. v. R.M.A. Veluswami*, MANU/SC/0016/1961 : AIR 1962 SC 1:

(1962) 1 SCR 929, that the pecuniary loss can be ascertained only by balancing on the one hand, the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which from whatever source comes to them by reason of the death, so, the balance should be maintained between the loss and gain to a dependant by the death while deciding the damages.

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CHAPTER 25

REMEDIES

1. Introduction

Define remedies and discuss its types.

(A) Judicial obtained through courts Examples (a) damages (b) injunction (c) specific restitution of property	(B) Extra-judicial obtained through self-help Examples (a) abatement of nuisance (b) reception of goods (c) distress damage feasant (d) expulsion of trespasser (e) re-entry on land
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2. Damages

When a person suffers loss or injury due to some other person then he is entitled to receive damages from the defendant. We can also say that damage is the loss which is the cause of the award of the damages. Damages are of four kinds-

- (i) contemptuous;
- (ii) nominal;
- (iii) ordinary; and
- (iv) exemplary.

Contemptuous damages/Derisory damages

Describe damages and discuss its types.

In contemptuous damages, damage is awarded by the court when the plaintiff has technically a legal claim but there is no moral justification for it. The court may award a penny or a paise showing disapproval of the conduct of the plaintiff. Such damages are awarded when the plaintiff should not have brought an action against the defendant.

For example - A sues B for assault and it is found by the court that A's remarks had provoked B then in such circumstances A may be awarded only a minimal sum whereas, had he (A) not made the remark, his damages might have been heavy. In such a case, the plaintiff might be denied costs.

Nominal damages

Nominal damages are awarded, when the plaintiff has not suffered any actual loss. For example if A has trespassed on B's land but A has committed a trespass. But B has not suffered any actual loss. In the case *Ashby v. White*, 1703 (2) Lord Rayam, 938, the defendant wrongfully refused to register a duly tendered vote of the plaintiff in the parliamentary elections in England. The plaintiff suffered no loss as the candidate to whom he wanted to cast his vote, got elected. The Court held the defendant liable for a sum of £ 5 alongwith costs of the case. Chief Justice Holt said-

"If a man gives another a cuff on the ear, though it costs him nothing, not so much as a little dischylon yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it did no actual damage, for it is an invasion of the property and the other has no right to go there."

Ordinary, aggravated and exemplary damages

Ordinary damages are awarded to compensate the injured party fairly by allowing him money compensation equivalent to the loss suffered by him.

In case, if tort has been committed in aggressive manner, the court is then supposed to award aggravated damages.

So, cases of assault, an act done wilfully, wantonly, maliciously or with undue consideration may attract higher compensation. In the case *Mc Carey v. Asso. Newspaper Ltd.*, 1964 AC 1129, Pearson LJ., illustrated 'aggravated damages' as-"compensatory damages in a case in which they are at large may include several different kinds of compensation to the injured party. They may include not only actual pecuniary loss, or any social disadvantages which result..... from the wrong..... They may also include natural injury to the plaintiff's feelings; the natural grief and distress which he may feel in being spoken of in defamatory terms; and if there has been high handed or oppressive or insulting..... behaviour by the defendant which increases the mental pain and suffering which is caused, ...and which may constitute injury to the plaintiff's pride or self-confidence, those are proper elements to be taken into account where damages are at large. There is, however, a sharp distinction between damages of that kind and..... exemplary damages."

Exemplary damages are also known as 'punitive', 'vindictive' or 'retributive' damages.

In some special circumstances, exemplary damages are allowed, Devlin LJ., in *Rookes v. Barnard*, 1964 AC 1129, held that in following circumstances exemplary damages can be awarded-

- (i) Where the plaintiff has been aggrieved by oppressive, arbitrary or unconstitutional action by servants of the Government, "though not when he is subjected to similar treatment by corporation's or private individuals."
- (ii) Where the defendant's conduct "has been calculated by him to make a profit for himself which may well exceed the compensation payable by him to the plaintiff..... Exemplary damages can properly be awarded when it is necessary to teach a wrongdoer that tort does not pay".
- (iii) Where exemplary damages are authorized by the Statute.

Prospective damages

Compensation is made not only for present loss, but also as best it can be for future loss in the form of 'prospective damages.' In the case *Y.S. Kumar v. Kuldip Singh*, AIR 1972 P&H 326, the respondent was Excise and Taxation Officer. He was hit by a motorcycle, resulting in physical injuries to his ankle. He was permanently disabled due to this accident. A prospective compensation of Rs. 7200 calculated at the rate of Rs. 50, per month for 12 years was awarded by the Punjab and Haryana High Court.

Assessment of damages for personal injuries

In the tortious liability redressal to plaintiff is met with the damages. Damages depend upon the quantum loss suffered by the plaintiff. In the case *Rehana v. Ahmedabad Municipal Transport Service*, MANU/GJ/0071/1976 : AIR 1976 Guj 37, it was held that damages for personal injury may be given under the following heads-

- (i) Personal pain, suffering and loss of enjoyment of life.
- (ii) Actual pecuniary loss including any expenses reasonably incurred by the plaintiff.
- (iii) The probable future loss of income by reason of incapacity or diminished capacity for work.

In this case, *Rehana* was a 16-year old girl, who got injured and received a permanent limp. She was entitled to get a compensation of Rs. 10,000 under the first head, and under second head she got Rs. 2500 for medical expenses and Rs. 7,600 under the third head. Out of the total sum of Rs. 20,000, 25% was deducted leaving a sum of Rs. 15,000 as total compensation. The Court also considered the diminished prospect of marriage due to this injury.

Damages for shortened expectation of life

Sometimes in an accident a person receives such injury which shortens the life. This anomalous head was sanctioned for the first time by the Court of Appeal in *Flint v. Lovell*, 1935 All ER Rep 200 CA. In 1941, in the case *Benham v. Gambling*, 1941 AC 157, considered the quantum of damages for shortened expectation of life and ruled that damages under that head are to be moderate and to be measured by a conventional scale. But, in 1982, this head of damage has been abolished by the Administration of Justice Act, 1982.

In our country, the Supreme Court held in the case *Gobald Motor Service Ltd. v. R.M.A. Veluswami*, MANU/SC/0016/1961 : AIR 1962 SC 1:

- (1962) 1 SCR 929, that damages under this head are assessed by putting a money value on the prospective balance of happiness in the years the injured might otherwise lived and having regard to the uncertainties of life and difficulties in assessment, very moderate sums are awarded. (This case has been discussed.)

Damages for loss of consortium

In England, a husband is allowed to claim compensation for the loss of consortium of his wife. But, it is not so, if the wife dies. No such claim is allowed to succeed if wife loses the consortium of her husband.

In India, a husband is entitled to claim compensation for the loss of consortium of his wife, even in the event of her death; Abdul Kadar v. Kashi Nath, MANU/MH/0150/1968 : AIR 1968 Bom 267:

(1967) 69 Bom LR 848.

3. Injunction

An injunction is an order of the court commanding or prohibiting the doing of some act or restraining the commission or continuance of some wrongful act, or we can say that an injunction is an order of the court commanding or prohibiting the doing of some act.

Types of Injunction:

(1) Mandatory and Prohibitory Injunction

- granted to compel the performance of some act.

(2) Interlocutory and Perpetual Injunction

- a temporary injunction granted to restrain the commission or continuance of some wrongful act, pending the determination of an issue in the court.

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CHAPTER 26

THE CONSUMER PROTECTION ACT, 1986

1. Objects and Reasons

The Consumer Protection Act, 1986 received the assent of the President on December, 24, 1986 but it was implemented w.e.f. 15th April, 1987. Its objects can be divided into two parts:

First.-

It seeks to promote and protect the rights of consumers, viz

- (a) the right to be protected against marketing of goods which are hazardous to life and property;
- (b) the right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices;
- (c) the right to be assured, wherever possible, access to an authority of goods at competitive prices;
- (d) the right to be heard and to be assured that consumers interests will receive due consideration at appropriate forums;
- (e) the right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers; and
- (f) right to consumer education.

Second.-

It aims at helping the consumers in getting quicker or speedy redressal of their grievances through specially established quasi-judicial agencies instead of filing a suit in civil court. Court-fee is not required to be paid for filing the complaint.

This Act consists of 31 sections, covering various aspects of consumer protection rights.

The Act enables a consumer to fight with the wrongdoers who has cheated him by misleading information or inferior service or commodities.

2. Definitions and scope

As other Acts, this Act too gives meaning (definition) of certain words/phrases to elaborate it.

So, before proceeding to the provisions of this Act, it is necessary to explain certain terms and phases here.

Complainant

Section 2(1)(b) defines complainant. It means:

- (i) a consumer; or
- (ii) any voluntary consumer association registered under the Companies Act, 1956 (1 of 1956) or under any other law for the time being in force; or
- (iii) the Central Government or any State Government; or
- (iv) one or more consumers, where there are numerous consumers having the same interest;
- (v) in case of death of a consumer, his legal heir or representative.

So, the literal meaning of complainant is a person who has some grievance or injury and makes an allegation against another. Section 2(1)(b) has a wider connotation and not just its literal meaning. It includes not only a consumer but

also a voluntary consumer association registered under law under Central/State Government or one or more consumers who or which makes the complaint.

Complaint

What is the difference between unfair trade practices and restrictive trade practices?

It means a grievance, distress, dissatisfaction, objection, wrong or injury. Under the Act, the term complaint has specified meaning and is limited by the definition given in section 2(1)(c), by which it means any allegation by the complainant in writing with a view to obtaining any relief in regard to the following matters:

"(c) "complaint" means any allegation in writing made by a complainant that-

- (i) an unfair trade practice or a restrictive trade practice has been adopted by any trader or service provider;
- (ii) the goods bought by him or agreed to be bought by him suffer from one or more defects;
- (iii) the services hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect;
- (iv) a trader or the service provider, as the case may be, has charged for the goods or for the services mentioned in the complaint, a price in excess of the price-
 - (a) fixed by or under any law for the time being in force;
 - (b) displayed on the goods or any package containing such goods;
 - (c) displayed on the price list exhibited by him by or under any law for the time being in force;
 - (d) agreed between the parties;
- (v) goods which will be hazardous to life and safety when used are being offered for sale to the public,-
 - (a) in contravention of any standards relating to safety of such goods as required to be complied with, by or under any law for the time being in force;
 - (b) if the trader could have known with due diligence that the goods so offered are unsafe to the public;
- (vi) services which are hazardous or likely to be hazardous to life and safety of the public when used, are being offered by the service provider which such person could have known with due diligence to be injurious to life and safety;

with a view to obtaining any relief provided by or under this Act;"

So, the complaint under the Consumer Protection Act must contain allegation in writing with a view to obtain relief only in relation to the following matters-

- (a) unfair trade practice adopted by a trader;
- (b) defects in purchased goods;
- (c) deficiency in services hired;
- (d) charging of price in excess; and
- (e) goods hazardous to life and property without giving any information as required by the provisions of any law.

In U.T. Chandigarh Administration v. Amarjeet Singh, MANU/SC/0389/2009 : AIR 2009 SC 1607, the court held that

with reference to a public auction of existing sites, the purchaser is not a "Consumer", the owner is not a "trader" or "service provider" and the grievance does not relate to any matter in regard to which a complaint can be filed. Therefore, any grievance by the purchaser will not give rise to a complaint or consumer dispute and the fora under the Act will not have jurisdiction to entertain or decide any complaint by the auction purchaser against the owner holding the auction of site.

In *Sujit Kumar Banerjee v. Rameshwaran*, MANU/SC/7790/2008 : AIR 2009 SC 1188, the Apex Court held that the agreement between the parties is an agreement for construction of a residential building and delivery of an agreed percentage of the constructed area to the landowners and not a joint venture agreement. Consequently, the appellant is a consumer and respondents are 'service providers' and the complaint of the appellant is maintainable.

Unfair Trade Practice or Restrictive Trade Practice

Unfair Trade Practice or Restrictive Trade Practice have been inserted by the Amendment Act of 1993.

In section 2(1)(r) of the Consumer Protection Act, Unfair trade practice has been defined as-

"unfair trade practice" means a trade practice which, for the

purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair

or deceptive practice including any of the following practices, namely:-

(1) the practice of making any statement, whether orally or in writing or by visible representation which,-

(i) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;

(ii) falsely represents that the services are of a particular standard, quality or grade;

(iii) falsely represents any re-built, second-hand, renovated, reconditioned or old goods as new goods;

(iv) represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have;

(v) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;

(vi) makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;

(vii) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof:

Provided that where a defence is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defence shall lie on the person raising such defence;

(viii) makes to the public a representation in a form that purports to be-

(i) a warranty or guarantee of a product or of any goods or services; or

(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,

if such purported warranty or guarantee or promise is materially misleading or if there is no

reasonable prospect that such warranty, guarantee or promise will be carried out;

(ix) materially misleads the public concerning the price at which a product or like products or goods or services, have been or are, ordinarily sold or provided, and, for this purpose, a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold or services have been provided by the person by whom or on whose behalf the representation is made;

(x) gives false or misleading facts disparaging the goods, services or trade of another person.

Explanation.-

For the purposes of clause (1), a statement that is-

- (a) expressed on an article offered or displayed for sale, or on its wrapper or container; or
- (b) expressed on anything attached to, inserted in, or accompanying, an article offered or displayed for sale, or on anything on which the article is mounted for display or sale; or
- (c) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public,

shall be deemed to be a statement made to the public by, and only by, the person who had caused the statement to be so expressed, made or contained;

(2) permits the publication of any advertisement whether in any newspaper or otherwise, for the sale or supply at a bargain price, of goods or services that are not intended to be offered for sale or supply at the bargain price, or for a period that is, and in quantities that are, reasonable, having regard to the nature of the market in which the business is carried on, the nature and size of business, and the nature of the advertisement.

Explanation.-

For the purpose of clause (2), "bargaining price" means-

- (a) a price that is stated in any advertisement to be a bargain price, by reference to an ordinary price or otherwise, or
- (b) a price that a person who reads, hears or sees the advertisement, would reasonably understand to be a bargain price having regard to the prices at which the product advertised or like products are ordinarily sold;

(3) permits-

- (a) the offering of gifts, prizes or other items with the intention of not providing them as offered or creating impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole;
- (b) the conduct of any contest, lottery, game of chance or skill, for the purpose of promoting, directly or indirectly, the sale, use or supply of any product or any business interest;

(3A) withholding from the participants of any scheme offering gifts, prizes or other items free of charge, on its closure the information about final results of the scheme.

Explanation.-For the purposes of this sub-clause, the participants of a scheme shall be deemed to have been informed of the final results of the scheme where such results are within a reasonable time published, prominently in the same newspapers in which the scheme was

originally advertised;

(4) permits the sale or supply of goods intended to be used, or are of a kind likely to be used, by consumers, knowing or having reason to believe that the goods do not comply with the standards prescribed by competent authority relating to performance, composition, contents, design, constructions, finishing or packaging as are necessary to prevent or reduce the risk of injury to the person using the goods;

(5) permits the hoarding or destruction of goods, or refuses to sell the goods or to make them available for sale or to provide any service, if such hoarding or destruction or refusal raises or tends to raise or is intended to raise, the cost of those or other similar goods or services;

(6) manufacture of spurious goods or offering such goods for sale or adopting deceptive practices in the provision of services."

In the case, *Godrej and Boyce Mfg. Co. Ltd.*, (1991) 7 Camp Cas 224, unfair trade practice has been explained by Luthra J. as-"It is apparent from a plain reading of the aforesaid definition that unfair trade practice consists of making any statement, whether orally or in writing, or by visible representation in respect of any particular standard, quality or grade of goods, or which amounts to warranty or guarantee of a product. There is unfair trade practice, if aforesaid such statement or representation is wrong or false or the warranty or guarantee is not based on any adequate or proper test." Therefore, the unfair trade practice is completed as soon as the aforesaid statement is made.

Restrictive trade practice-Section 2(1)(m) has defined restrictive trade practice as-

"any trade practice which requires a consumer to buy, hire or avail of any goods or, as the case may be, services as a condition precedent to buying, hiring or availing of other goods or services."

In the case, *Modern Suiting Ltd.*, the offering of equity shares linked to debenture was held to be *prima facie* a restrictive trade practice in the nature of a tie-up. Similarly, insisting that a consumer should buy a gas stove with the release of gas connection amounts to restrictive trade practice or sale of a back view mirror with the delivery of motorcycle is restrictive trade practice.

'Goods' suffer from defects

The Consumer Protection Act defines the term 'goods' in section 2(1)(i) as it has been defined in the section 2(7) of the Sales of Goods Act, 1930 which means - Goods is every kind of movable property other than actionable claims and money and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

Defect has been defined in Consumer Protection Act in 2(1)(f) as - any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or implied, or as is claimed by the trader in any manner whatsoever in relation to any goods.

Defect in goods means lack or absence of something essential for its completeness. If a seller fails to deliver the goods which he agreed to sell.

Deficiency in service

In order to succeed in an action on the 'deficiency in service' there is a need to have service. It has been defined in section 2(1)(o) as-

"service" means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.'

The question emerged after passing of the Act whether 'professional' services like medical, have also been included in the above definition of 'service'.

The Supreme Court in the case Indian Medical Assn. v. V.P. Shantha, MANU/SC/0836/1995 : (1995) 6 SCC 651: MANU/SC/0836/1995 : AIR 1996 SC 550: 1996 (1) BLJR 281: (1996) 98 Bom LR 343: (1996) 86 Comp Cas 806 (SC): 1996 (1) CTC 119: (1995) 2 GLR 1806: JT 1995 (8) SC 119: 1996 (6) Kar LJ 689: (1996) 112 PLR 1: 1995 (6) SCALE 273: (1995) Supp 5 SCR 110: 1996 (1) UJ 664 (SC): (1996) 1 UPLB EC 227, held that the 'potential users' mentioned in the definition were employed to emphasise services which are in public use and thereby to cover all professions.

In the section 2(1)(o) 'free of charge' means when any organization or person who renders service without any charge whatsoever to every person availing of the service would not fall within the ambit of service and consequently, would be exempted from liability.

Another expression in the section "contract of personal service" cannot be confined to contracts or employment of domestic servants only. The expression 'personal service' has a well-known connotation and has been construed in the context of the right to seek enforcement of such a contract under the Specific Relief Act.

Trader charged price in excess

The term price has not been defined in the Consumer Protection Act, 1986. But, it has been defined in section 2(10) of the Sales of Goods Act which says that "money consideration for a sale of goods". A complaint can be made by the complainant under section 2(1)(c)(iv) where a trader has charged for the goods mentioned in the complaint a price in excess of the price fixed by or under any law for the time being in force or displayed on the goods or any package containing such goods.

Hence, a complaint can be made against a trader where he has charged price in excess of the price fixed by or under any law or displayed on the goods or any package containing such goods. But, it also happens that sometimes, price has not been fixed or the seller has sold the goods in loose then it appears that there is no remedy under the Act.

In a case, Dr. S.P.T. Rao v. M.D. Karnataka State Road Transport Corp., 1991 CPJ 641 (Karn), the Karnataka State Commission held that the correctness or otherwise of bus fare cannot be questioned before the consumer forum. It said-

"The fixation of fare is a matter to be decided by the State Transport Authority subject to the rules made by the Government according to section 67 of the Motor Vehicles Act, 1939. The correctness or otherwise of the bus fare fixed by the S.T.A. cannot be questioned before this Forum and it cannot be decided by the Commission. Charges in respect of the service cannot be questioned under the Act. It is only excess charges paid in respect of goods alone contrary to the fare fixed under any law, that can be ordered to be refunded by this Commission. Hence, we are clearly of the view that we cannot grant any relief to the complainant under the Act."

Goods hazardous to life and safety

This is the last ground on which the complaint can be made and it has been inserted in section 2(1)(c)(v) by the Amendment Act of 1993. It says that goods hazardous to life and safety when used, if, offered for sale to the public in contravention of the provision of any law for the time being in force requiring traders to display information in regard to the contents, manner and effect of use of such goods.

Consumer

The main emphasis of this Act is an consumer and entire Act revolves around the consumer. Section 2(1)(d) of the Act defined consumer as-

"consumer" means any person who,-

- (i) buys any goods for a consideration which has been paid or promised or partly paid and partly

promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purpose;

Explanation.-For the purposes of this clause, "commercial purpose" does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment;'

From the above provision, it appears that there are two distinct types of consumers-

First 2(1)(d)(i) -

those who buy any goods for consideration and

Second 2(1)(d)(ii) -

those who hire any services for consideration.

2(1)(d)(i) extends the concept of consideration not merely to one actually paid, but one which is merely promised or partly paid or partly promised and includes within its ambit every system of deferred payments.

2(1)(d)(ii) includes not only the actual hirer of the services but also any beneficiary of such services, if they are availed with the approval of the first mentioned person.

Goods Purchased for consideration [Section 2(1)(d)(i)]

Under this category three kinds of persons are considered as consumers, viz.-

- (a) person buying goods for consideration and consideration having been paid in full or promised or partly paid or partly promised;
- (b) person buying goods under any system of deferred payment; and
- (c) any user of such goods which has been purchased as under (a) or (b) above.

Goods Purchased for re-sale or commercial purpose

A person who obtains or buys goods for resale or for any commercial purpose is not a consumer within the meaning of section 2(1)(d)(i). Such persons have been excluded from the purview of this Act. Thus, a buyer of taxi who has purchased it for plying it on hire, or a purchaser of prototype setting machine for commercial purposes or any equipment for commercial use were not held consumers under section 2(1)(i) and they cannot get relief under this Act.

Amendment in section 2(1)(d)(i) in 1993-In section 2(1)(d)(i), an explanation has been added as-

Explanation.-

For the purposes of sub-clause (i), 'commercial purpose' does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment.

So, where a person purchases a sewing machine, or a taxi, or an auto-rickshaw, or a photostat machine or any other

goods which are to be used by him exclusively for the purpose of earning his livelihood by means of self-employment, that will not be considered as 'commercial purpose' and such persons will be a consumer under this Act.

3. Deficiency in services: Some cases

Airlines

In the case Chief Commercial Officer, Indian Airlines v. P. Lal Chand, III (1995) CPJ 134, the complainant, purchased the ticket from the Indian Airlines on which departure time was mentioned as 10.45 a.m. and when he reached the airport at 9.45 a.m. to catch the flight he came to know that the flight had already taken off at 9.20 a.m. The District Forum held the opposite party guilty of deficiency in service.

Cancellation of flight

Define 'deficiency in services' with the help of some relevant cases.

In Satish Bagdoria v. Airdoot International, III (1996) CPJ 96 (Chand SCDRC), the complainant purchased a ticket from the respondents, but the flight was cancelled and the complainant was not informed. The Forum held the respondent liable to refund the price of the ticket and pay compensation of Rs. 5000.

Bank

In the case, N.R. Nair v. Branch Manager, State Bank of India, I (1991) CPJ 648, a bank draft was dishonoured because it did not bear the signatures of two officials of issuing Bank. The Consumer Forum held it as deficiency in service. In another case Sankar v. Vijaya Bank, (1996) 1 CPJ (Kant SCDRC) it was held that dishonouring of cheque without any justification amounts to deficiency in service, and the Bank was held liable to pay compensation for the same for deficiency in the service.

Electricity

Defective Meter

In Gita Rani Chakraborty v. S.S.B. W.B.S.E.B., I (1997) CPJ 450 (WB) SCDRC, inspite of repeated requests, defective meter was not replaced. It was a case of negligence and deficiency in service and compensation of Rs. 1000 was awarded to the complainant for harassment and mental agony caused to him.

Disruption of electricity

In the case Haryana State Electricity Board v. T.R. Poultry Farm, II (1996) CPJ 15 (NC), an electric transformer got burnt and the same was not replaced for 25 days. Due to lack of supply of electricity, 3080 birds in poultry farm of complainant died. The State Commission found it a case of negligence and deficiency in service and awarded a compensation of Rs. 75,000 to the complainant. On appeal, the National Commission affirmed the order of the State Commission and further awarded a cost of Rs. 2000 to the complainant-respondent.

Fluctuations in voltage

In the case of Escon Pvt. Ltd. v. Karnataka Electricity Board, 1991 CPJ 450 (Kant), it was observed that when an electric supply company fails to supply electric energy at a particular voltage causing loss to the complainant, it amounts to deficiency in the supply of energy, no matter whether the energy is being supplied for commercial purpose, the complainant is not a consumer under section 2(1)(d)(ii) of the Act, but maintenance of electricity connection at minimum charges is a service, and even if supply of energy is for commercial purpose, complainant is a consumer within the meaning of section 2(i)(d)(ii) of the Act.

But, it was also held that mere fluctuation in the voltage by itself will not be treated as 'deficiency in service' without proof of negligence.

Insurance

Insurance Claims

In *Umedilal v. United India Assurance Co.*, III (1996) CPJ 112 (Chand. SCDRC), it was observed that fault of negligence in settling the claim by the insurance company constitutes deficiency. But, where the insurance company rejected a claim after investigation on the ground that the claim was false, it was held by the Forum that such a controversy between the parties could not be decided by the Forum. However, when the policy of insurance becomes inoperative due to the act of the State, any dispute between the insured and the insurer as to the amount payable to the insured due to the policy becoming prematurely inoperative cannot be construed as deficiency in service.

Medical Profession

Whether to keep the 'medical profession' in the category of 'service' is justified? Elaborate if in term of the provision given in section 12(1)(o) of the Consumer Protection Act. Give some examples of cases related with it.

It was long debated whether medical profession should be covered under the expression 'service' as defined in section 2(1)(o) has been put to rest by the Supreme Court in the case *Indian Medical Association v. V.P. Shantha*, III (1995) CPJ 1 (SC): MANU/SC/0836/1995 : AIR 1996 SC 550. The Supreme Court held that section 14(1)(d) indicates that the compensation to be awarded is for loss or injury suffered by the consumer due to the negligence of the opposite party. A determination about deficiency in service for the purpose of section 2(1)(g) has, therefore, to be made by applying the same principle as is applied in an action for damages for negligence. As the expression regarding negligence was given in the section 2(1)(g), medical practitioners must be included within the ambit of the act and the service rendered by them is covered under

section 2(1)(o).

So, a patient who is aggrieved by the services or deficiency in treatment, either from private clinics or Government Hospital, is entitled to seek damages under the Consumer Protection Act. From the case, it emerged-

(1) Service rendered to patient by a medical practitioner by way of consultation, diagnosis and treatment, both medical and surgical would come within the ambit of 'service' under section 2(1)(o).

If, the medical service is rendered -

(a) free of charge of,

(b) under a contract of personal service, that will not fall within the ambit of 'service' under section 2(1)(o).

The service rendered by a medical officer to his employer under the contract of employment would be outside the purview of 'service' as defined in section 2(1)(o) of the Act.

Following are the examples of 'deficiency in service'-

(i) a pair of scissors was left in the stomach of the patient during operation who died later on; *Nihal Kaur v. Director, PGI Chandigarh*, III (1996) CPJ 112 (Chand. SCDRC).

(ii) Uterus of a lady aged 40 years was removed without any justification; *Lakshmi Rajan v. Malar Hospital Ltd.*, III (1998) CPJ 586 (TN SCDRC).

(iii) a patient had some difficulty in passing urine and his penis was cut off without any justification; *C. Siva Kumar v. Dr. John Arthur*, III (1998) CPJ 436 (TN SCDRC).

In a case *Harjot Ahluwalia v. Spring Meadows Hospital*, II (1997) CPJ 98 (NC): MANU/SC/1014/1998 : AIR 1998 SC 1801, the facts of the case were that the complainant was the only child of his parents, suffering from high fever, hospitalized in the Spring Meadows Hospital, New Delhi. There he was administered certain medicines, and intravenous chloroquine injection by an unqualified nurse without prior test. Immediately after, the child suffered cardiac arrest. No oxygen could be given as it was not available in the hospital. The child suffered irreparable brain damage and consequently became immobile for whole of his life. The Supreme Court upheld the decision of National Commission where negligence of hospital was established and it was directed to pay compensation of Rs. 12.5 lacs to the minor child for his brain damage and Rs. 5 lacs to the parents. The Supreme Court further observed that the parents of the

child were consumers having hired the services, and the child was 'a consumer' as the beneficiary of such services. Free services in hospitals and nursing homes where medical services are rendered free of charge to every body, and not to a few, will be excluded or will not fall within the ambit of the definition under section 2(1)(o) and the doctors/hospital will not be liable under the Consumer Protection Act, 1986.

In the case, Addl. Director, CGHS. v. Dr. R.L. Bhutani, the complainant was a retired Government servant who used to pay Rs. 9 per month towards Central Government Health Scheme. He and his wife were beneficiaries of CGHS. His wife was getting treatment for some ailment for which surgery was done. But, instead of improving, she got paralyzed. The National Commission held that the services under CGHS are rendered free of charge to everybody and under contract of service; such service is excluded from section 2(1)(o) and the complainant was not a consumer within the meaning of section 2(1)(d). The complaint was dismissed. The court further observed that the payment of Rs. 9 per month was only regarding administrative charges and not for treatment.

Legal Profession

The Karnataka State Commission in K. Rangaswamy v. Jaya Vittal, 1991 CPJ 685 (Karn), held that the service offered by an advocate to his client is one under a contract of personal service. It cannot be service within the meaning of clause (o). Therefore, in such a situation as provision given in section 2(d) of the Act, the client will not be a consumer. In the case, R.R. Pal Gupta v. Ranjana, the National Commission held that if a lawyer who has charged the fees from his client but fails to appear on his clients' behalf in a court or tribunal, then it is a deficiency in service on his part.

Railways

Passenger's death

In a case Union of India v. Nathmal Hansaria, 1 (1991) CPJ 308, the daughter of the complainants fell down while walking from one compartment to another through inter-connecting passage and died. The passage was not protected by grill. The State Commission awarded the compensation of Rs. 2 lacs for death of the girl-Kabita and Rs. 25,000 for mental agony to the parents of the girl. It was observed that there was deficiency in service of Railways. On appeal, the National Commission upheld the decision of the State Commission and also held that the death was accidental and not due to railway accident and that the jurisdiction of the consumer fora was not barred under sections 13 and 15 of the Railway Claims Tribunal Act, 1987.

Telephone

In the case, Distt. Engineer, Telecom v. Dr. T.N. Sharma, 1995 CPJ 225, the complainant paid the dues of telephone bill after the due date. After 22 days of making the payment, the telephone connection was disconnected without serving any notice or reminder on phone. The disconnection continued for 15 days. The District Forum held that it was deficiency on the part of Telephone service provider and awarded Rs 800 as economic loss and Rs. 2000 as compensation for mental distress, agony and loss of reputation.

4. Consumer Protection Councils

The provision of establishing a Consumer Protection Council has been given in section 4 of the Act. It has provisions for establishing it both at the Centre and State levels. The provision is as follows-

The Central Consumer Protection Council (Section 4).-

The Central Government shall, by notification, establish with effect from such date as it may specify in such notification, a Council to be known as the Central Consumer Protection Council (hereinafter referred to as the Central Council).

(2) The Central Council shall consist of the following members, namely:-

(a) the Minister-in-charge of the consumer affairs in the Central Government, who shall be its Chairman, and

(b) such number of other official or non-official members representing such interests as may be prescribed.

So, the appointment of official and non-official members have thus been left to the rule making power of the Government. Central Government issued a notification which contained a set of rules in 1987. Section 4 of this Consumer Protection Rules 1987, deals with the constitution of Central Council.

Members of Consumer Protection Councils

It provides that the Central Council shall consist of the following 150 members:

(a) Chairman:

❧ The Minister-in-charge of Consumer Affairs shall be the Chairman of the Council.

(b) Vice-Chairman:

❧ The Minister of State (where he is not holding Independent Charge) or Deputy Minister in the Department of Consumer Affairs, shall be the Vice-Chairman of the Council.

(c) Members:

❧ The Minister-in-charge of Consumers Affairs;

❧ Eight members of Parliament-five from the Lok Sabha and three from Rajya Sabha;

❧ The Secretary of National Commissioner for Scheduled Castes and Tribes;

❧ Representatives of the Central Government Departments and Autonomous Organisations concerned with consumer interest ... not exceeding twenty;

❧ The Registrar, National Consumer Disputes Redressal Commission;

❧ Representative of the Consumer Organisations or Consumers-not less than thirty five;

❧ Representatives of women-not less than ten;

❧ Representatives of farmers, trade and industries-not exceeding twenty;

❧ Persons capable of representing consumers interests not specified above-not exceeding 15;

❧ The Secretary in the Department of Consumer Affairs shall be the Member-Secretary of the Central Council.

Term of the Council

Term of the Council is three years. But any member can resign by giving his written resignation to the Chairman and the vacancy thus created will be filled from the person belonging to same category for the remaining period.

Meetings

The meeting of the Central Council shall be presided over by the Chairman. In the absence of Chairman, the Vice-Chairman will preside the meeting and in absence of both the Chairman and the Vice-Chairman the committee shall elect a member to preside over that meeting of the Council.

State Consumer Protection Council

Section 7 of the Consumer Protection Act authorises the State Government to establish the State Consumer Protection Councils in their respective States.

5. Consumer Disputes Redressal Agencies

Establishment of Consumer Disputes Redressal Agencies (Section 9).-There shall be established for the purposes of this Act, the following agencies, namely:-

(a) a Consumer Disputes Redressal Forum to be known as the "District Forum" established by the State Government in each district of the State by notification:

Provided that the State Government may, if it deems fit, establish more than one District Forum in a district;

(b) a Consumer Disputes Redressal Commission to be known as the "State Commission" established by the State Government in the State by notification; and

(c) a National Consumer Disputes Redressal Commission established by the Central Government by notification.

As mentioned above, section 9 of the Consumer Protection Act envisages provision of establishing the Consumer Disputes Redressal Agencies.

Thus, the Act establishes a hierarchy of three redressal forums-

- (i) District Forums
- (ii) State Commissions
- (iii) National Commission

District Forum

The provision for constituting a District Forum has been given in

section 10 of the Consumer Protection Act, 1986.

Composition of the District Forum

What is the composition of the District Forum and procedure of appointment of its President and two other Members?

(1) Each District Forum shall consist of,-

(a) a person who is, or has been, or is qualified to be a District Judge, who shall be its President;

(b) two other members, one of whom shall be a woman, who shall have the following qualifications, namely:-

(i) be not less than thirty-five years of age,

(ii) possess a bachelor's degree from a recognised university,

(iii) be persons of ability, integrity and standing, and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration:

Provided that a person shall be disqualified for appointment as a member, if he-

(a) has been convicted and sentenced to imprisonment for an offence which, in the opinion of the State Government, involves moral turpitude; or

(b) is an undercharged insolvent; or

(c) is of unsound mind and stands so declared by a competent court; or

(d) has been removed or dismissed from the service of the Government or a body corporate owned or controlled by the Government; or

(e) has, in the opinion of the State Government, such financial or other interest as is likely to affect prejudicially the discharge by him of his functions as a member; or

(f) has such other disqualifications as may be prescribed by the State Government.

Procedure of appointment

Every appointment as mentioned above shall be made by the State Government on the recommendation of a selection committee.

This committee shall consist of the following:

- (i) President of the State Commission;
- (ii) Secretary of the Law Department;
- (iii) Secretary in-charge of the Department dealing with Consumer Affairs in the State.

Terms and conditions of office

The Members of the District Forum shall hold office for a term of five years or up to the age of 65 years whichever is earlier and shall not be eligible for re-appointment.

The salary or honorarium and other allowances payable to, and the other terms and conditions of service of the members of the District Forum shall be such as may be prescribed by the State Government.

Jurisdiction of District Forum (Section 11)

Pecuniary Jurisdiction-the District Forum shall have jurisdiction to entertain complaints where the value of the goods or services and the compensation, if any, claimed does not exceed rupees twenty lakhs.

Territorial Jurisdiction-A complaint shall be instituted in a District Forum within the local limits of whose jurisdiction,-

- (a) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides or carries on business or has a branch office or personally works for gain; or
- (b) any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office, or personally works for gain, provided that in such case either the permission of the District Forum is given, or the opposite parties who do not reside, or carry on business or have a branch office, or personally work for gain, as the case may be, acquiesce in such institution; or
- (c) the cause of action, wholly or in part, arises.

So, a complaint can be filed either at the place where the opposite party resides or where each or whole number of the opposite parties reside or carry on business.

Who can file complaint (Section 12)

A complaint in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided may be filed with a District Forum by-

- (a) the consumer to whom such goods are sold or delivered or agreed to be sold or delivered or such service provided or agreed to be provided;
- (b) any recognised consumer association whether the consumer to whom the goods sold or delivered or agreed to be sold or delivered or service provided or agreed to be provided is a member of such association or not;
- (c) one or more consumers, where there are numerous consumers having the same interest, with the permission of the District Forum, on behalf of, or for the benefit of, all consumers so interested; or

(d) the Central or the State Government, as the case may be, either in its individual capacity or as a representative of interests of the consumers in general.

For the purpose of above provisions, "recognized consumer association" means any voluntary consumer association registered under the Companies Act, 1956 or any other law for the time being in force.

Procedure on receipt of complaint (Section 13)

(1) The District Forum shall, on admission of a complaint, if it relates to any goods,-

(a) refer a copy of the admitted complaint, within twenty-one days from the date of its admission to the opposite party mentioned in the complaint directing him to give his version of the case within a period of thirty days or such extended period not exceeding fifteen days as may be granted by the District Forum;

(b) where the opposite party on receipt of a complaint referred to him under clause (a) denies or disputes the allegations contained in the complaint, or omits or fails to take any action to represent his case within the time given by the District Forum, the District Forum shall proceed to settle the consumer dispute in the manner specified in clauses (c) to (g);

(c) where the complaint alleges a defect in the goods which cannot be determined without proper analysis or test of the goods, the District Forum shall obtain a sample of the goods from the complainant, seal it and authenticate it in the manner prescribed and refer

the sample so sealed to the appropriate laboratory along with a direction that such laboratory make an analysis or test, whichever may be necessary, with a view to finding out whether such goods suffer from any defect alleged in the complaint or from any other defect and to report its findings thereon to the District Forum within a period of forty-five days of the receipt of the reference or within such extended period as may be granted by the District Forum;

(d) before any sample of the goods is referred to any appropriate laboratory under clause (c), the District Forum may require the complainant to deposit to the credit of the Forum such fees as

may be specified, for payment to the appropriate laboratory for carrying out the necessary analysis or test in relation to the goods in question;

(e) the District Forum shall remit the amount deposited to its credit under clause (d) to the appropriate laboratory to enable it to carry out the analysis or test mentioned in clause (c) and on receipt of the report from the appropriate laboratory, the District Forum shall forward a copy of the report along with such remarks as the District Forum may feel appropriate to the opposite party;

(f) if any of the parties disputes the correctness of the findings of the appropriate laboratory, or disputes the correctness of the methods of analysis or test adopted by the appropriate laboratory, the District Forum shall require the opposite party or the complainant to submit in writing his objections in regard to the report made by the appropriate laboratory;

(g) the District Forum shall thereafter give a reasonable opportunity to the complainant as well as the opposite party of being heard as to the correctness or otherwise of the report made by the appropriate laboratory and also as to the objection made in relation thereto under clause (f) and issue an appropriate order under section 14.

(2) The District Forum shall, if the complaints admitted by it under section 12 relates to goods in respect of which the procedure specified in sub-section (1) cannot be followed, or if the complaint relates to any services,-

(a) refer a copy of such complaint to the opposite party directing him to give his version of the case within a period of thirty days or such extended period not exceeding fifteen days as may be granted by the District Forum;

(b) where the opposite party, on receipt of a copy of the complaint, referred to him under clause (a) denies or disputes the allegations contained in the complaint, or omits or fails to take any action to represent his case within the time given by the District Forum, the District Forum shall proceed to settle the consumer dispute,-

(i) on the basis of evidence brought to its notice by the complainant and the opposite party, where the opposite party denies or disputes the allegations contained in the complaint, or

(ii) on the basis of evidence brought to its notice by the complainant where the opposite party omits or fails to take any action to represent his case within the time given by the Forum;

(3) No proceedings complying with the procedure laid down in sub-sections (i) and (ii) shall be called in question in any court on the ground that the principles of natural justice have not been complied with.

(4) For the purposes of this section, the District Forum shall have the same powers as are vested in a civil court under Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:-

(i) the summoning and enforcing the attendance of any defendant or witness and examining the witness on oath,

(ii) the discovery and production of any document or other material object producible as evidence,

(iii) the reception of evidence on affidavits,

(iv) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source,

(v) issuing of any commission for the examination of any witness, and

(vi) any other matter which may be prescribed.

(5) Every proceeding before the District Forum shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860), and the District Forum shall be deemed to be a civil court for the purposes of section 195, and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

Here, it would be noted that every proceedings before the District Forum shall be deemed to be a judicial proceedings within the meaning of section 193 and 228 of the Indian Penal Code i.e., punishment for false evidence and intentional insult or interruption to public servant sitting in judicial proceedings.

Findings of District forum (Section 14)

(1) If, after the proceeding conducted under section 13, the District Forum is satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to do one or more of the following things, namely:-

(a) to remove the defect pointed out by the appropriate laboratory from the goods in question;

(b) to replace the goods with new goods of similar description which shall be free from any defect;

(c) to return to the complainant the price, or, as the case may be, the charges paid by the complainant;

(d) to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party;

(e) to remove the defects in goods or deficiencies in the services in question;

(f) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;

(g) not to offer the hazardous goods for sale;

- (h) to withdraw the hazardous goods from being offered for sale;
- (i) to provide for adequate costs to parties.
- (j) to pay such as may be determined by it, if it is of the opinion that loss or injury has been suffered by a large number of consumers who are not identifiable conveniently;
- (k) to issue corrective advertisement to neutralize the effect of misleading advertisement of the cost of the opposite party responsible for issuing such misleading advertisement;

The Act was amended in 1993 and 2002 and some abovementioned clauses were added in course of conferring greater powers on the consumer forum in respect of its findings.

Conduct of Proceedings and Quorum

The Act provides that every proceeding referred to in section 14(1) shall be conducted by the President of the District Forum and at least one member thereof sitting together. However, if the member is unable to conduct the meeting due to some reason till it is completed, the President and the other member shall conduct the proceedings by continuing it from the stage at which it was last heard by the previous member.

The Quorum-As per the provision given in sections 14(2) and 14(2)(A), proceedings are to be conducted by the President of the District Forum and at least one member thereof sitting together. Hence, the President and at least one sitting member of the District Forum constitute the Quorum.

Appeals (Section 15)

Any person aggrieved by an order made by the District Forum may prefer an appeal against such order to the State Commission within a period of thirty days from the date of the order, in such form and manner as may be prescribed:

Provided that the State Commission may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not finding it within that period:

Provided further that no appeal by a person, who is required to pay any amount in terms of an order of the District Forum, shall be entertained by the State Commission unless the appellant has deposited in the prescribed manner fifty per cent. of that amount or twenty-five thousand rupees, whichever is less.

In the case *Delhi Development Authority v. I.S. Narula*, 1995 (III) CPJ 333, certified copy of the order was received by the appellant on 13-7-1994. The appeal was filed on 27-9-1994. The delay was stated to be due to public holidays on 14th and 15th August, 1995, strike in Tis Hazari Courts and procedural delay in obtaining sanction of D.D.A., for filing the appeal. The Supreme Court while condoning the delay for sufficient cause, observed that the power of condonation should be exercised liberally.

Ex parte order-Ex parte order is passed by the District Forum when the opposite party fails to appear on the date of hearing. But, if sufficient/genuine reason is given or shown then the District Forum can set aside the ex parte order.

In the case *Maya Mitra v. K.P. Equipment*, (1996) I CPJ 330 (WB SCDRC), it was held that the District Forum, which has the right to pass an ex parte order has also the power to set aside the same provided sufficient cause is shown and the prayer is made early, without any undue delay.

State Commission (Section 16)

Composition of the State Commission

What is the composition of State Commissions

(1) Each State Commission shall consist of-

- (a) a person who is or has been a Judge of a High Court, appointed by the State Government, who shall be its President;

Provided that no appointment under this clause shall be made except after consultation with the Chief Justice of the High Court;

(b) two other members, who shall be persons of ability, integrity and standing and have adequate knowledge or experience of, or have shown capacity in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration, one of whom shall be a woman.

(1A) Every appointment under sub-section (1) shall be made by the State Government on the recommendation of a Selection Committee consisting of following members, namely:-

(i) President of the State Commission.....Chairman;

(ii) Secretary of the Law Department of the State.....Member;

(iii) Secretary incharge of the Department dealing with Consumer Affairs in the State.....Member:

(2) The salary or honorarium and other allowances payable to, and the other terms and conditions of service of, the members of the State Commission shall be such as may be prescribed by the State Government.

Provided that the appointment of a member on whole-time basis shall be made by the State Government on the recommendation of the President of the State Commission taking into consideration such factors as may be prescribed including the work load of the State Commission.

(3) Every member of the State Commission shall hold office for a term of five years or up to the age of sixty-seven years, whichever is earlier:

Provided that a member shall be eligible for re-appointment for another term of five years or up to the age of sixty-seven years, whichever is earlier, subject to the condition that he fulfils the qualifications and other conditions for appointment mentioned in clause (b) of sub-section (1) and such re-appointment is made on the basis of the recommendation of the Selection Committee:

Provided further that a person appointed as a President of the State Commission shall also be eligible for re-appointment in the manner provided in clause (a) of sub-section (1) of this section.

(4) Notwithstanding anything contained in sub-section (3), a person appointed as the President or as a member, before the commencement of the Consumer Protection (Amendment) Act, 2002, shall continue to hold such office as President or member, as the case may be, till the completion of his term.

Salary and Terms of the Office

The salary or honorarium and other allowances payable to, and the other terms and conditions of service of the members of the State Commission shall be such as may be prescribed by the State Government.

Jurisdiction (Section 17)

Jurisdiction of the State Commission is given in Section 17 of the Act as below:

The State Commission shall have jurisdiction in the following matters:

(a) (i) To entertain complaints where the value of the goods or services and compensation, if any, claimed exceeds rupees twenty lakhs but does not exceed rupees one crore; and

(ii) To entertain appeals against the orders of any District Forum within the State; and

(b) To call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Forum within the State, where it appears to the State Commission that such District Forum has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested or has acted in exercise of its jurisdiction illegally or with material irregularity.

Appeals (Section 19)

Any person aggrieved by an order made by the State Commission in exercise of its powers conferred by sub-clause (i) of clause (a) of section 17 may prefer an appeal against such order to the National Commission within a period of thirty days from the date of the order in such form and manner as may be prescribed:

Provided that the National Commission may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period:

Provided further that no appeal by a person, who is required to pay any amount in terms of an order of the State Commission, shall be entertained by the National Commission unless the appellant has deposited in the prescribed manner fifty per cent. of the amount or rupees thirty-five thousand, whichever is less.

Hearing of appeal.-An appeal filed before the State Commission or the National Commission shall be heard as expeditiously as possible and an endeavour shall be made to finally dispose of the appeal within a period of ninety days from the date of its admission:

Provided that no adjournment shall be ordinarily granted by the State Commission or the National Commission, as the case may be, unless sufficient cause is shown and the reasons for grant of adjournment have been recorded in writing by such Commission:

Provided further that the State Commission or the National Commission, as the case may be, shall make such orders as to the costs occasioned by the adjournment as may be provided in the regulations made under this Act:

Provided also that in the event of an appeal being disposed of after the period so specified, the State Commission or the National Commission, as the case may be, shall record in writing the reasons for the same at the time of disposing of the said appeal. [Section 19]

6. National Commission (Section 20)

Explain in in length the Composition of National Commission.

The composition of the National Commission has been given in the section 20 as below:

(1) The National Commission shall consist of-

(a) a person who is or has been a Judge of the Supreme Court, to be appointed by the Central Government, who shall be its President:

Provided that no appointment under this clause shall be made except after consultation with the Chief Justice of India;

(b) not less than four, and not more than such number of members, as may be prescribed, and one of whom shall be a woman, who shall have the following qualifications, namely:-

(i) be not less than thirty-five years of age;

(ii) possess a bachelor's degree from a recognised university; and

(iii) be persons of ability, integrity and standing and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration:

Provided that not more than fifty per cent. of the members shall be from amongst the persons having a judicial background.

Explanation.-For the purposes of this clause, the expression "persons having judicial background" shall mean persons having knowledge and experience for at least a period of ten years as a presiding officer at the district level court or any tribunal at equivalent level:

Provided further that a person shall be disqualified for appointment, if he--

(a) has been convicted and sentenced to imprisonment for an offence which, in the opinion of the Central Government, involves moral turpitude; or

(b) is an undercharged insolvent; or

(c) is of unsound mind and stands so declared by a competent court; or

(d) has been removed or dismissed from the service of the Government or a body corporate owned or controlled by the Government; or

(e) has, in the opinion of the Central Government, such financial or other interest as is likely to affect prejudicially the discharge by him of his functions as a member; or

(f) has such other disqualifications as may be prescribed by the Central Government:

Provided also that every appointment under this clause shall be made by the Central Government on the recommendation of a Selection Committee consisting of the following, namely:-

(a) a person who is a Judge of the Supreme Court, -Chairman;

to be nominated by the Chief Justice of India

(b) the Secretary in the Department of Legal -Member;

Affairs in the Government of India

(c) Secretary of the Department dealing with -Member.

consumer affairs in the Government of India

(1A) (i) The jurisdiction, powers and authority of the National Commission may be exercised by Benches thereof.

(ii) A Bench may be constituted by the President with one or more members as the President may deem fit.

(iii) If the members of a Bench differ in opinion on any point, the points shall be decided according to the opinion of the majority, if there is a majority, but if the members are equally divided, they shall state the point or points on which they differ, and make a reference to the President who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other members and such point or points shall be decided according to the opinion of the majority of the members who have heard the case, including those who first heard it.

(2) The salary or honorarium and other allowances payable to and the other terms and conditions of service of the members of the National Commission shall be such as may be prescribed by the Central Government.

(3) Every member of the National Commission shall hold office for a term of five years or up to the age of seventy years, whichever is earlier:

Provided that a member shall be eligible for re-appointment for another term of five years or up to the age of seventy years, whichever is earlier, subject to the condition that he fulfils the qualifications and

other conditions for appointment mentioned in clause (b) of sub-section (1) and such re-appointment is made on the basis of the recommendation of the Selection Committee:

Provided further that a person appointed as a President of the National Commission shall also be eligible for re-appointment in the manner provided in clause (a) of sub-section (1):

Provided also that a member may resign his office in writing under his hand addressed to the Central Government and on such resignation being accepted, his office shall become vacant and may be filled by appointment of a person possessing any of the qualifications mentioned in sub-section (1) in relation to the category of the member who is required to be appointed under the provisions of sub-section (1A) in place of the person who has resigned.

(4) Notwithstanding anything contained in sub-section (3), a person appointed as a President or as a member before the commencement of the Consumer Protection (Amendment) Act, 2002 shall continue to hold such office as President or member, as the case may be, till the completion of his term.

(3) Every member of the National Commission shall hold office for a term of five years or upto the age of seventy years, whichever is earlier and shall not be eligible for re-appointment.

(4) Notwithstanding anything contained in sub-section (3), a person appointed as a President or as a member before the commencement of the Consumer Protection (Amendment) Act, 2002 shall continue to hold such office as President or member, as the case may be, till the completion of his term.

Jurisdiction of the National Commission (Section 21)

Subject to the other provisions of this Act, the National Commission shall have jurisdiction-

(a) to entertain-

(i) complaints where the value of the goods or services and compensation, if any, claimed exceeds rupees one crore; and

(ii) appeals against the orders of any State Commission; and

(b) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any State Commission where it appears to the National Commission that such State Commission has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity.

Powers and Procedure of National Commission (Section 22)

The powers and procedure of the National Commission shall be the same as applicable to a District Forum under sections 13 and 14 of the Act. It means that the working procedure of the National Commission is the same as that of the District Forum under sections 13(4), (5) and (6). It has also the power to issue an order to the opposite party directing him to do any one or more of the things referred to in clauses (a) to (i) of sub-section (1) of section 14.

22A. Power to set aside ex parte orders.-

Where an order is passed by the National Commission ex parte against the opposite party or a complainant, as the case may be, the aggrieved party may apply to the Commission to set aside the said order in the interest of justice.

22B. Transfer of cases.-

On the application of the complainant or of its own motion, the National Commission may, at any stage of the proceeding, in the interest of justice, transfer any complaint pending before the District Forum of one State to a District Forum of another State or before one State Commission to another State Commission.

22C. Circuit Benches.-

The National Commission shall ordinarily function at New Delhi and perform its functions at such other place as the Central Government may, in consultation with the National Commission, notify in the Official Gazette, from time to time.

The Central Government has notified that the National Commission shall perform its functions at the following places other than New Delhi:-

- | | | |
|--------------|--------------|------------|
| 1. Ahmedabad | 5. Chennai | 9. Lucknow |
| 2. Allahabad | 6. Hyderabad | 10. Nagpur |
| 3. Bangalore | 7. Jodhpur | 11. Pune |
| 4. Bhopal | 8. Kolkata | |

Vide S.O. 974 (E), dated 31st August, 2004, published in the Gazette of India, Extra., Pt. II, Sec. 3(ii), dated 31st August, 2004.

22D. Vacancy in the office of the President.-

When the office of President of a District Forum, State Commission, or of the National Commission, as the case may be, is vacant or a person occupying such office is, by reason of absence or otherwise, unable to perform the duties of his office, these shall be performed by the senior-most member of the District Forum, the State Commission or of the National Commission, as the case may be:

Provided that where a retired Judge of a High Court is a member of the National Commission, such member or where the number of such members is more than one, the senior-most person amongst such members, shall preside over the National Commission in the absence of President of that Commission.

Appeal (Section 23)

Against the order of the National Commission, an appeal lies before the Supreme Court. The appeal should be made to the Supreme Court within 30 days from the date of the order of the National Commission. But, if Supreme Court thinks that the case is fit for the appeal even after the expiry of 30 days, seeing the sufficient cause of delay, it can allow the appeal.

Finality of Order (Section 24)

Every order of a District Forum, State Commission or the National Commission shall, if no appeal has been preferred against such order under the provisions of this Act, be final.

Section 24A has been added by the Amendment Act, 1993. It gives the provision for period of limitation for filing the complaint as under:

(1) The District Forum, the State Commission or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen.

(2) Notwithstanding anything contained in sub-section (1), a complaint may be entertained after the period specified in sub-section (1), if the complainant satisfies the District Forum, the State Commission or the National Commission, as the case may be, that he had sufficient cause for not filing the complaint within such period:

Provided that no such complaint shall be entertained unless the National Commission, the State Commission or the District Forum, as the case may be, records its reasons for condoning such delay.

Prior to the Amendment Act, 1993, the limitation period for filing the complaint was in accordance with the provisions of Limitation Act.

Administrative Control by National Commission (Section 24B)

(1) The National Commission shall have administrative control over all the State Commissions in the following matters, namely:-

- (i) calling for periodical returns regarding the institution, disposal, pendency of cases;
- (ii) issuance of instructions regarding adoption of uniform procedure in the hearing of matters, prior service of copies of documents produced by one party to the opposite parties, furnishing of English translation of judgments written in any language, speedy grant of copies of documents;
- (iii) generally overseeing the functioning of the State Commissions or the District Fora to ensure that the objects and purposes of the Act are best served without in any way interfering with their quasi-judicial freedom.

(2) The State Commission shall have administrative control over all the District Fora within its jurisdiction in all matters referred to in sub-section (1).

7. Enforcement of Orders (Section 25)

As per the amended provisions as to enforcement of orders of the District Forum, the State Commission or the National Commission are as mentioned below:

- (1) Where an interim order made under this Act is not complied with, the District Forum or the State Commission or the National Commission, as the case may be, may order the property of the person, not complying with such order to be attached.
- (2) No attachment made under sub-section (1) shall remain in force for more than three months at the end of which, if the non-compliance continues, the property attached may be sold and out of the proceeds thereof, the District Forum or the State Commission or the National Commission may award such damages as it thinks fit to the complainant and shall pay the balance, if any, to the party entitled thereto.
- (3) Where any amount is due from any person under an order made by a District Forum, State Commission or the National Commission, as the case may be, the person entitled to the amount may make an application to the District Forum, the State Commission or the National Commission, as the case may be, and such District Forum or the State Commission or the National Commission may issue a certificate for the said amount to the Collector of the district (by whatever name called) and the Collector shall proceed to recover the amount in the same manner as arrears of land revenue.

In *Raheemunnisa v. District Consumer Forum, Ongole*, MANU/AP/0857/2008 : AIR 2009 AP 100, it is contended by the petitioner that the District Forum has no jurisdiction to entertain the execution petition for cancellation of the sale deed in favour of the writ petitioner. The court held that sub-section (3) of section 25 shows that the collector has to proceed to recover the amount on the basis of a certificate issued by the District Forum on an application made by the person entitled to the said amount. Thus, an application for enforcement of a final order has to be made before the District Forum and thereupon it is for the District Forum to make the necessary enquiry and issue the certificate as contemplated under section 25(3) of the Act where any amount found to be due from any person under an order made by it. Hence, there is absolutely no reason to hold that an execution petition cannot be maintained before the District Forum.

8. Dismissal of frivolous or vexatious complaints (Section 26)

Where a complaint instituted before the District Forum, the State Commission or, as the case may be, the National Commission is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, dismiss the complaint and make an order that the complainant shall pay to the opposite party such cost, not exceeding ten thousand rupees, as may be specified in the order.

9. Penalties (Section 27)

Where a trader or a person against whom a complaint is made or the complainant fails or omits to comply with any order made by the District Forum, the State Commission or National Commission, as the case may be, such trader or person or complainant shall be punishable as under:

- (a) with fine not less than Rs. 2000 and not more than Rs. 10,000; or
- (b) with imprisonment for a minimum period of one month and maximum period of 3 years; or
- (c) with both i.e., imprisonment and fine as mentioned above.

10. Some Miscellaneous Provisions (Section 28)

No suit, prosecution or other legal proceedings shall lie against the members of the District Forum, the State Commissions or the National Commission or any officer or person acting under the direction of the District Forum, the State Commission or the National Commission for executing any order made by it or in respect of anything which is in good faith done or intended to be done by such member, officer or person under this Act or under any rule or order made thereunder.

11. Power to remove difficulties (Section 29)

(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the difficulty:

Provided that no such order shall be made after the expiry of a period of two years from the commencement of this Act.

(2) Every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.

(3) If any difficulty arises in giving effect to the provisions of the Consumer Protection (Amendment) Act, 2002, the Central Government may, by order, do anything not inconsistent with such provisions for the purpose of removing the difficulty:

Provided that no such order shall be made after the expiry of a period of two years from the commencement of the Consumer Protection (Amendment) Act, 2002.

(4) Every order made under sub-section (3) shall be laid before each House of Parliament.

12. Vacancies or defects in appointment not to invalidate orders (Section 29A)

No act or proceeding of the Districts Forum, the State Commission or the National Commission shall be invalid by reason only of the existence of any vacancy amongst its members or any defect in the constitution thereof.

13. Powers to make rules (Sections 30, 30A & 31)

Section 30 of the Act empowers the Central and State Governments to make rules in their respective spheres of power. Section 30A provides that the National Commission may, with the previous approval of the Central Government, make regulations not inconsistent with the Act to provide for all matters for which provision is necessary or expedient for the purpose of giving effect to the provisions of the Act. Section 31 requires that every rule made by the Central Government under this Act, shall be laid, as soon as possible, before each House of Parliament who may approve, modify or annul the rule. Similarly, every rule made by the State Governments under this Act shall be laid, as soon as possible before the State Legislature.

CHAPTER 27

MODEL QUESTIONS WITH ANSWERS

Q.1. Define legal damage. Discuss its types with examples of relevant cases.

Ans. Legal damage is second important ingredient in constituting a tort. Damage means the harm or loss suffered or presumed to be suffered by a person as a result of some wrongful act done by another person. The sum of money which is awarded by the court to compensate 'damage' is called "damages."

On the basis of presumption of damage, rights are of two types-

(a) absolute; and (b) qualified.

In case of violation of absolute right, the law conclusively presumes damage although the person wronged may have suffered no pecuniary loss whatsoever. The damage so presumed is legal damage. In qualified rights, there is no presumption of legal damage and the violation of such right is actionable only on proof of actual or special damage. In this case, injury or wrong is not complete unless and until actual damage has been caused by violating the rights.

In the case, *Ashby v. White*, (1703) 2 Lord Raym, 938, the plaintiff's legal right to vote in the parliamentary election was maliciously violated by the defendant and the defendant was held liable although the plaintiff did not incur any pecuniary loss. Lord Holt, C.J., observed-

"Every injury imparts a damage through it does not cost the party one farthing, and it is impossible to prove the contrary for a damage is not merely pecuniary, but an injury imparts a damage when a man is thereby hindered of his right."

In another case, *Marzetti v. Williams*, (1830) 1 B & AD 415, the banker refused to honour the cheque of the customer although the banker had sufficient funds in his hand. Here the customer did not sustain any actual loss or damage, even then the banker was held liable.

Q.2. Discuss the maxim-'Damnum sine injuria' with the help of relevant cases.

Ans. The maxim-'damnum sine injuria' has a meaning which speaks about the damage or loss without breach or infringement of legal right. It can also be understood that no action lies for damage or loss even when it is substantial in nature but has been caused by an act which does not breach or infringe some legal right of the plaintiff.

Here we may discuss some of the cases which give a good example of this maxim.

In the case, *Gloucester v. Grammar School*, 1441 YB 11 Henry IV, 47, plaintiff was running a school, and in the neighbourhood defendant also set up a school for children. Plaintiff had to reduce the tuition fees of children since they were leaving the school of plaintiff and joining the school of defendant. It was held that even though the plaintiff has suffered substantial loss due to rival school but plaintiff had no cause of action against the defendant on the ground that bona fide competition cannot afford ground for action, whatever damage it has caused to plaintiff.

Q.3. Define the maxim 'volenti non fit injuria' with the help of relevant cases and discuss its application.

Ans. If a person suffers a harm voluntarily then it does not constitute a legal injury and is not actionable. The maxim 'volenti non fit injuria' signifies this meaning. A man cannot make an excuse for an injury which he has received in fulfilment of his desire or willingly accepted to take the risk. If the person has consented either expressly or impliedly then he can't sue for a tort. So, this maxim can also be translated as the injury voluntarily suffered is not fit for action. So, no breach of legal right can be said to be committed against the person who is a willing party or who has given his consent for the harm/injury to be received in consequence of the furtherance of his act. Such injury is not actionable. Following are the basic points which constitute the maxim 'volenti non fit injuria' and these are required to be proved for justifying one's tort-

(a) Knowledge of risk.-

At first instance, the plaintiff should have the knowledge about the nature of act/work and the risk involved in performing the act. If, he lacks the knowledge about the nature of work and quantum of risk what it will be when the work is performed, it will be presumed that he had no knowledge of the risk. The knowledge of the plaintiff is significant here and if it is missing, the defence of *volenti non fit injuria* cannot be availed by the defendant.

(b) Free consent.-

Besides the knowledge of the nature of act as well as extent of risk in an act, free consent to run the risk is also necessary for the plaintiff. The consent must be voluntarily and with free will. Consent given by the plaintiff under coercion or force, fraud and mistake can't be treated as free consent.

(c) Consent to illegal act.-

It was observed in the case, *R. v. Donovan*, (1934) 2 KB 49, that no person can give license to another person to commit a crime.

(d) Consent of minors or insane persons.-

Consent given by minors or insane persons are generally not taken as consent since both are considered immature as far as knowledge is concerned and in such cases, consent by their guardians are taken as sufficient.

(e) Breach of Statutory duty.-

In many cases, a number of duties are being imposed on the employer. When there is a breach of statutory duty by the employer, he is liable even when the employee has given the consent. Hence consent to a breach of statutory duty is not acknowledged.

Application of this maxim.-

In the case, *Ilott v. Wilkes*, (1820) 3 B & Ald 304, the defendant had put spring guns in a wood on his ground to protect the game. The plaintiff had full knowledge about placement of spring guns he trespassed on the defendant's land and got injured. On a suit of plaintiff the court observed that although defendant had exceeded his right of private defence he was not liable since the plaintiff had taken the risk of trespassing even after knowing that the spring gun was placed on defendant's land. The court observed that he having wilfully courted the danger himself his case fell within the maxim '*volenti non fit injuria*'.

In another case, *Maung Sein v. Emperor*, AIR 1935 Rang 82, Ma Thin, wife of Maung Sein, died giving the birth of a child. An unqualified mid-wife attended Ma Thin during delivery of the child. Ma Thin, knowing completely about her qualification consented to appoint her as mid-wife. It was held that the maxim '*volenti non fit injuria*' is applied here as the plaintiff had taken the risk to appoint unqualified mid-wife with full knowledge, hence, not entitled for damages.

Q.4. Define trespass 'A person is thrown upon the other man's land by someone else'-can it be said that it is a trespass?

Ans. Trespass means to cross over other's territory without taking the permission of the land's owner on which trespasser has no authority to cross. But, if a person enters a land assuming it as his own although it belongs to someone else, he has committed the wrong of trespass. Any voluntary intrusion upon land without the consent of the person having possession or right of immediate possession is a trespass to land. It is actionable even without proof of damage. Trespass of land is committed by intrusion of any sort of entry or contract directly from an act of defendant.

Placing a ladder against premises, driving a nail into a wall of another, growing a creeper upon other's wall etc., are the examples of trespass. It was said in the case, *Smith v. Stone*, (1647) Style 65, that if the entry is involuntary then it does not amount to trespass. When a person is thrown upon other man's land by someone else then it is not a trespass.

A person who has got permission to enter one part of a building or enclosure has got a licence to visit that particular part and not the entire building. If a person who has been allowed to sit in the drawing room goes to bedroom without any justification, it is called a trespass.

If A plants a tree on his own land and its roots and branches spread on B's land then it is trespass. If a person X owns a land then its sub-soil also belongs to him and if another person Y makes a tunnel beneath the land owned by X then it is a trespass.

Q.5. Define negligence. What are the essential ingredients of constituting a negligence?

Ans. When there is no intention of causing harm to the person complained of then it is called a negligence. Carelessness on the part of defendant constitutes negligence. In the words of Swayne J.-

negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation.

Essential ingredients of negligence are as follows:

- (a) it was a legal duty of defendant to take reasonable care towards the plaintiff to avoid the damage complained of;
- (b) the defendant committed a breach of duty; and
- (c) due to breach of duty plaintiff suffered damage.

Duty to take care.-

A person is supposed to behave in a reasonable manner but if he deviates from acting as a reasonable person then he is said to be careless. But, for every careless act a man cannot be held responsible in law.

Criterion of duty.-

To determine whether duty to take care was there or not is upto judge. It becomes easier to decide where there is already earlier decision which have established the duty. In the case, Heaven v. Pender, (1883) 11 QBD 509, Brett MR attempted to formulate a principle for the first time. It was established in this case that under certain circumstances, one man may owe a duty to another, even though there is no contract between them.

"One man is near to another, or is near to the property of another; a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property".

In another renowned case, Donoghue v. Stevenson, 1932 AC 562, Lord Atkin laid down the important principle of determining a duty. In this case, the defendant was a manufacturer of ginger beer who sold the beer in a sealed and opaque bottle. A person bought it and presented to his friend Miss Donoghue. She drank the beer. In the bottle, she found decomposed body of a snail. She fell ill and sued the manufacturer for negligence.

It may be noted here there was no contract between the plaintiff and the defendant. Delivering the majority judgment, Lord Atkin laid down the rule of determining the duty in following words-

"The liability for negligence is no doubt based upon a general public sentiment of moral wrong doing for which the offender must pay. But acts or omission which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief". While laying down the principle of notional duty, also stated that under what circumstances a manufacturer owes a duty of care towards the consumer in following words-

".....a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the

preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care".

It was held that although there was no contractual duty on the part of the defendant but the defendant owed her a duty to take care that the bottle did not contain noxious matter and that he would be liable if that duty was broken.

Q. 6. What are the duties of occupier to visitors as per Section 2(2) and 2(3) of the Occupier's Liability Act, 1957? Discuss it with the help of relevant cases.

Ans. Section 2(2) of the Occupier's Liability Act, 1957 states that the common duty of care which an occupier owes to all his visitors is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there.

Section 2(3) of the said Act says that the circumstances relevant for the purpose will include 'the degree of care, and of want of care which would ordinarily be looked for in such a visitor.'

In the case, *City of Ferguson v. Marrow*, 210 Federal Report (II series) 520, the plaintiff a youth of 21 years of age was an experienced but not an expert swimmer, took a dive in a swimming pool and got his head hit in the bottom of swimming pool. It was found as a matter of fact that there was danger due to insufficiency of depth of water in the pool. The court held the pool authorities liable.

In another case, *Klaus Mittlebachert v. East India Hotels Ltd.*, AIR 1997 Del 201, the victim was a German National who while taking a dive in a swimming pool of a 5-star hotel hit his head against the bottom of the pool, which resulted in severe head injuries which caused paralysis to the victim and after 13 years of accident he died. It was found that in the swimming pool, water was not sufficient. The court held that the hotel was liable for defective design of the swimming pool. The court observed as follows:

"A 5-star hotel charging a high or fancy price from its guests as regards quality and safety of its structure and services it offers and makes available. Any patent defect in its structure or services, which is hazardous to guests, would add strict liability to compensate for consequence flowing from its breach of duty to take care. The 5-star price tag hanging on the service pack attracts and costs an obligation to pay exemplary damages if an occasion may arise for the purpose. A 5-star hotel cannot be heard to say that its structure and services satisfied the standard of safety of the time when it was built or introduced. It has to update itself with the latest and advanced standard of safety."

Q.7. Describe the maxim 'Qui facit per alium facit per se'. Elaborate the liability of a person who allows his vehicle to be driven by someone else.

Ans. The maxim *Qui facit per alium facit per se* means 'he who does an act through another is deemed in law to do it himself on which the vicarious liability of principal for the tort of his agent is based.' A principal is vicariously liable for the tort of his agent committed within the course of his authority.

Here, we can understand with the example-

If A authorizes B to drive his car and if B somehow makes an accident and injures someone, then A will be held vicariously liable. Here, authorization is an important ingredient to hold the master liable.

In the case *Ormrod v. Crosville Motor Services Ltd.*, (1953) 2 All ER 753, the defendant was about to compete in the car rally asked his friend to drive his car from Birkenhead to Monte Carlo so as to meet the defendant at the end of rally there. The friend had to carry a bag in the car for defendant as both of them had to go on a holiday after completion of competition. When the friend, departed from Birkenhead for Monte Carlo met with an accident and collided with an omnibus. The court held the defendant liable for his friend who was using his car. Lord Denning while delivering the judgment observed as follows-

"The law puts a special responsibility on the owner of a vehicle who allows it to go on road in charge of

someone else, no matter whether it is his servant, his friend or any one else. It is being used wholly or partly on the owner's business or for the owner's purpose, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern."

Q.8. What are the essentials of constituting a defamation against someone? Discuss with the help of some relevant cases.

Ans. A man's reputation is an invaluable property. If a person's reputation is being damaged then this loss exceeds far compared to the damaged property. Loss of reputation and dignity come under the heading 'defamation'. To constitute an action for defamation following essentials are necessary:

- (i) The statement must be false and defamatory,
- (ii) It must be published, and
- (iii) It must refer to the plaintiff.

(i) False and Defamatory Statement.-

The statement must be false and defamatory. In the case, *Sim v. Stretch*, (1936) 2 All ER 1237, it was observed that the defamatory statement must be such which tends to lower a person in the estimation of right thinking members of society generally. A right thinking man is a reasonable man who is neither unusually suspicious nor usually naive and he does not always interpret the meaning of words as in case of a lawyer since 'he is not inhibited by a knowledge of the rules of construction.'

Some examples may be cited here as follows-

- (a) In the case, *Yousoup v. Metro-Goldwyn Mayer Pictures Ltd.*, (1934) 50 ILR 581, the plaintiff, a Russian Princess was falsely imputed by a cinematograph film that she had been raped or seduced by the notorious monk Rasputin. The court observed that this tended 'to make the plaintiff be shunned and avoided' in the estimation of right thinking persons of the society generally.
- (b) *S.N.M. Abidi v. Profulla Kumar Mohanta*, MANU/GH/0021/2002 : AIR 2002 Gau 75 (DB), in the case, in a weekly magazine-'the Illustrated Weekly', it was alleged that the former Chief Minister Profulla Kumar Mohanta had misused man and muscle power. The court found the allegation false, baseless and defamatory which harmed the plaintiff's reputation and awarded a damage to the tune of Rs. 5,00,000.

(ii) Publication of the statement.-

To get the statement published is another essential ingredient in constituting defamation. Here, publication does not mean giving the publicity but to make the statement known to other person than the person defamed. For example, if X writes to Y that Z is a cheat, then it is a publication since X has told it to someone other than Z i.e. to Y. But, if X writes to Z in a closed envelope that you (Z) are a cheat, it is not a publication. To send something via telegram or postcard that could be read by others-can be claimed as publication.

But if an addressee does not know the language in which something has been written to him and if he goes to someone else to get it read then the third person will also come to know about the contents of the letter, then it would be considered as publication. But, if the person who has written the contents did not know about the addressee's knowledge about the language then it would not be a publication. (*Mahendra Ram v. Harmandan Prasad*), MANU/BH/0143/1958 : AIR 1958 Pat 445.

(iii) Reference to the plaintiff.-

It is upto plaintiff to prove that the defamatory statement for which he has brought the action was certainly referred to him or reasonably made so that it would be understood by the people as referred to him. Here we may cite the example of case,

E. *Hulton & Co. v. Artemus Jones*, 1910 AC 20, where Artemus Jones was a barrister. A humorous article was published in a newspapers that a Church warden named Artemus Jones is enjoying his holiday at Dieppe with a woman who is not his wife. All these matters were fictitious.

But, the writer and owner of the article were unaware of the facts that a person-

Artemus Jones exists in real who is a barrister and not a Church warden. Jones brought an action against the newspaper. It was the observation of House of Lords that a person charged with defamation "cannot defend himself by showing that he did not intend to defend the plaintiff. He has nonetheless imputed something disgraceful, and has nonetheless injured the plaintiff. A man may publish a libel in good faith believing it to be true, but that in fact the statement was false. Under those circumstances he has no defence to the action, however his excellent intention was". The defendants were held liable.

Q. 9. Describe Private nuisance. What are the essentials which constitute a private nuisance? Discuss alongwith some relevant cases.

Ans. In the words of Winfield - Private nuisance is an unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it. There are following elements, which have to be proved by the plaintiff in every case of nuisance:

- (i) Undue or unreasonable interference,
- (ii) Interference must be with the use or enjoyment of land,
- (iii) Damage.

(i) Undue or unreasonable interference.-

There are some unwarranted interferences which cause damage to the plaintiff and such interferences are termed as undue or unreasonable. Undue or unreasonable interference refers to that which exceeds the limited usage in the society. If a person is erecting a wall and in doing so he creates too much noise and dust then certainly here the action lies. The interference should be continuous or repetitive.

For example, A, everyday beats a drum for 10 p.m to 1 a.m. creating a lot of noise and disturbs the sleeps of B, his neighbour. Here, A's behaviour is unusual and generally it doesn't happen in the society and in this process A unduly interferes B's enjoyment of land.

In the case, *Radhey Shyam v. Gur Prasad*, MANU/UP/0023/1978 : AIR 1978 All 86, latter file a suit to restrain Radhey Shyam from installing a flour mill in the same premises where he lives and by installing of mill it would create rattling sound thus causing big nuisance to him and it may affect his health adversely. The court observed that the impugned machines would seriously interfere with the physical comfort of the plaintiff and as such it amounted to nuisance and the plaintiff was entitled to an injunction against the defendant.

Abnormal sensitive person or property-

if a person is oversensitive to a particular thing but for others that particular thing is very normal, then it is not nuisance. In the case, *Heath v. Mayor of Brighton*, (1908) 24 TLR 414, the incumbent and trustees of a Church were annoyed by a "buzzing sound" from the defendant's power station. The court observed that the 'buzzing sound' was not distracting attention of ordinary person attending the Church and did not cause any annoyance to other persons.

(ii) Interference with the use or enjoyment of property.-

In a private nuisance, an interference may cause either (a) injury to property, or (b) injury to comfort or health of an occupier of land.

Injury of property.-

If property gets damaged due to an unauthorized interference then it is actionable as nuisance. In the case, *St. Helen's Smeltins Co. v. Tipping*, (1865) 11 HL Cas 642, fumes were emitted from the defendant's factory which damaged plaintiff's tree and plants. The defendants were held liable since such damage was held as an injury to the property of the plaintiff.

Incorporeal Property.-

Actions for private nuisance also lie for interferences with easements, profits-a-prendre and certain rights which are generally called as 'natural rights'. It is inherent in the ownership to support of one's land by one's neighbour's land. Support for land - It is a natural right to have one's land supported by one's neighbour. But, if one's neighbour removes such support either laterally or from beneath, then it amounts to nuisance. This natural right is available only in respect of land and not for any structure/building.

Interference with the right to light and air.-

The right to light is not a natural right. It may, be acquired by grant or prescription. But once it is acquired, any substantial interference invites action.

Section 25 of the Limitation Act, 1963 provides that the right of easement to light, air, way water course, use of water, etc., can be acquired by prescription if the right has been peaceably enjoyed as an easement and as of right without interruption.

(iii) Damage.-

Actual damage is required to be proved when the case of nuisance arises. In case of public nuisance, the action is brought against the defendant, when the plaintiff proves special damage to him. But when the nuisance is related to other than physical damages to property damage is presumed by law without imposing upon the plaintiff the difficult task of furnishing strict proof of it.

Q.10. Describe the rule as laid down in the case, '*Ryland v. Fletcher*' by Justice Blackburn.

Ans. In the case, *Rylands v. Fletcher*, 1868 LR 3 (HL) 330, Ryland was a mill owner and Fletcher was the lessee of coal mines. Ryland appointed an independent contractor to construct a reservoir on his land to get water for his mill. Some old shafts were found by the contractor on Ryland land during course of the work. These shafts were connected to the mines of Fletcher. After building the reservoir, water was filled in it, the old shafts burst downward and water flowed through these old shafts into the coal mines of Fletcher. Fletcher suffered damages and brought suit against Ryland. It came to the knowledge that there was negligence on the part of Ryland but the contractor had left.

The court of Exchequer, by majority, decided in favour of Ryland. But on appeal, the court of Exchequer Chambers unanimously reversed the decision of the lower court and held Ryland liable.

Justice Blackburn delivered the judgment of the court as-

"We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape."

Further, it was added-

"He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major (Act of God) but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient."

The House of Lords confirmed the above rule with two clarifications that the use of land should be non-natural (as in this case) and that the thing must have been brought on the land "which was not naturally, there".

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