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LAW OF TORTS STUDY MATERIAL

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PREFACE

The course material for the subject of "Law of Torts" includes the simplified version of the explanations of the subject according to the prescribed syllabus It has been revised as per the updated decisions of the Supreme Court, various High Courts and English cases As Law of Torts is a developing subject in India, this course material tries to approach the students jurisprudentially As the protection of private legal rights of every individual citizens and consumerism is the significant feature of the tort, this has been dealt in advance Vital areas like, General Defences, Vicarious Liability, Specific torts like, Nuisance, Negligence, Defamation and Strict Liability and Remedies are facilitate with recent judgments An over view about Compensation under Motor Vehicles Act, also discussed with

I believe that this material would be a best supportive document along with the prescribed text book for the students for the better understanding of the subject I would like to register my gratitude to Prof Dr P Vanangamudi, Hon'ble Vice-Chancellor, TheTamil Nadu Dr Ambedkar Law University, and Prof Dr S Narayana perumal, Director, U G. Course, School of Excellence in Law, for providing me this opportunity and for their valuable guidance and ideas to shape up material

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OBJECTIVES

The law of torts prescribes standard of human conduct and provides for the mechanism for redressal of civil wrong and injuries mainly through compensations and other remedies like injunctions etc The object of this paper is to provide understanding to the students about the nature, meaning and fundamental application of law of torts This particular paper, law of torts has its origin in English Common law which underwent various changes But the position of this law in India remains same without any codification, except in some areas like Consumer protection, Workmen Compensation, Motor Vehicle Act etc

Law of torts mainly depends on the interpretation of judges, so it is also equally important to learn and practice the skill of cases, and apply the principles involved in it This paper also includes other legislations like Motor Vehicles Act, CrPC, Constitution of India, as some of the provisions in these legislation includes principles and procedures for claiming compensation

Books for References

1 Dr R K Bangia— Law of Torts including Compensation under Motor Vehicle Act and Consumer Protection Act

2 B M Gandhi—Law of Torts with Law of Statutory Compensation and Consumer Protection

3 Avatar Singh & Harpreet Kaur—Introduction to Law of Torts and Consumer Protection

4 Ratanlal and Dhirajlal— The Law of Torts

5 A Lakshmikanth & M Sridhar— Ramaswamy Iyer's The Law of Torts

Websites to refer article, reports and cases

1 www lawcommissionofindia nic in—to ——refer reports passed bt the Law Commission of India relating to amendments in law of torts and compensatory jurisprudence

2 www indiakanoon com , www manuparta com—to refer cases

3 www heinonline org , www jstor org —to refer article related to torts both nationally and internationally

CHAPTER-I

THE NATURE OF TORT

Synopsis

a Nature and Definition,

b Definition of Tort,

c Difference Tort and Crime, Tort and Breach of Contract, Tort and Quasi Contract,

d Essentials of tort Damnum sine injuria, Injuria sine damno,

e Mental element and tortious liability,

f Malice in Law and Malice in fact

INTRODUCTION

The word "Tort" has been derived from the Latin term "tortum" which means "to twist or crooked" conduct and is equivalent to the English term 'Wrong' This branch of law includes various torts or wrongful acts whereby it violates some legal rights vested in another The law imposes a duty to respect the legal rights vested in the members of the society and the person making a breach of that duty is said to have done the wrongful act For example violation of a duty to injure the good name and reputation which results in defamation, interfering in to the property of others or possession of land again results in tort of trespass

As of now, there is no scientific definition for the elements of tort It is because different wrong included under this head have diverse ingredients which have its own elements As a matter of fact, it is an ever growing branch of law and has constantly developed and the area covered in its ambit is continuously increasing

DEFINITION.

There are various definitions, which indicates the nature of this branch of law, which includes,

a Tort means a civil wrong which is not exclusively a breach of contract or breach of trust"— U/s 2(m) of the Limitation Act,1963

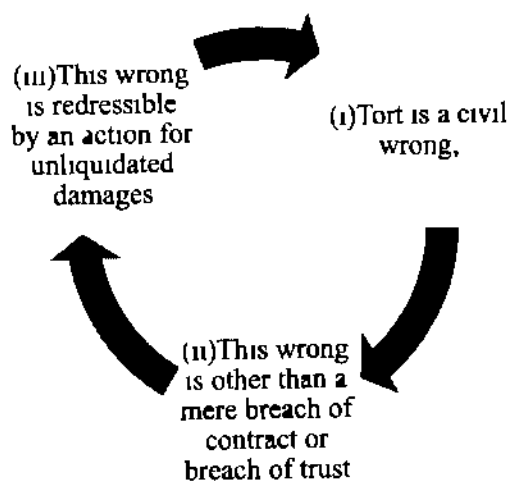
b It is a civil wrong for which remedy is a common law action for unliquidated damages and which is not exclusively the breach of contract or the breach of a trust merely equitable obligation—according to Salmond

c Tortious liability arises from the breach of a duty primarily fixed by the law this duty is towards persons generally and its breach is redressible by an action for unliquidated damages--- according to Winfield

d It is an infringement of a right in rem of a private individual giving a right of compensation at the suit of the injured party—according to Fraser

From the above definition it is clear that, though it may vary from person to person, the basic idea which is indicated by these definition is,

As stated earlier, no such definition of tort has been possible which could explain this wrong by mentioning various elements, the presence of which could be considered to be a tort We may define tort as a civil wrong which is redressible by an action for unliquidated damages and which is other than a mere breach of contract or breach of trust , which could be technically classified as follows,



(1) Tort is a civil wrong:

Tort belongs to the category of civil wrongs The basic nature of civil wrong is different from a criminal wrong In case of a civil wrong, the victim will institute a suit for damage against the wrongdoer The plaintiff (victim) is compensated by the defendant (wrongdoer) for the injury caused But in the case of criminal wrong, on the other hand, the criminal case has been initiated by the State against the criminal and more over the victim in the criminal case is not compensated Criminal Justice is administered by punishing the wrongdoer There are instances where, a similar act will fall under both the laws (tort and crime), in which the remedies are available concurrently There would be a civil action by which the plaintiff could be compensated and under criminal action, the wrong doer would be punished

(2) Tort is other than a mere breach of contract or trust

Though tort is a civil wrong, it is not exhaustively any other kind of civil wrong If the wrong is mere breach trust or contract, then it is not a tort First we have to see whether the wrong is criminal or civil, if it is civil wrong, further we have to decide whether that is recognized by any other category of civil wrong like breach of contract or trust If it is found that the wrong is neither mere breach of contract or trust, then the wrong is tort There are circumstances where a single transaction of wrong give rise to two or more civil

wrong, in which one of the wrong may be tort For eg A, gives his horse to B for custody for two weeks, and if B allows the horse to die because of starvation, here B is coming under commission of two wrongs as breach of contract of bailment and negligence under tort In this situation, A can avail remedy under both the laws (Contract and Tort), as in both the laws the remedy is compensation But A cannot claim remedy twice

(3) Tort is redressal by an action for unliquidated damages·

As damage (compensation) is the major remedy for tort, the wrong doer has to compensate (money compensation) the injured party after the commission of the wrong As the wrong committed by the defendant cannot be restored back, the only thing which can be done in such a case is to see what the money equivalent to the harm committed is In tort money compensation is not the only remedy available, sometimes other remedies are also available like "injunction", for eg, in case of nuisance, injured party would seek for immediate remedy so as to prevent such nuisance by way of restraining the wrong doer rather, than getting money compensation. Generally damage is the only remedy in law of tort and that is what distinguishs it from crime

Damages in the case of tort are unliquidated It is the fact which enables us to distinguish it from other civil wrong like breach of trust or contract, where the damages may be liquidated Liquidated damages means where the damages are previously determined or agreed by the parties But at the same time, if the compensation is left to the discretion of the court, the damages are said to be unliquidated damages Generally the parties are not known to each other until the tort is committed and moreover, it is difficult to visualize beforehand the quantum of loss in the case of a tort and, therefore, the damages to be paid are left to be determined at the discretion of the court. Such damages, therefore, are unliquidated

The nature of a tort can be understood by distinguishing:

(1) Tort and Crime distinguished·

Wrongs which are less serious in nature are considered to be private wrongs and have been labelled as civil wrong, and wrongs which are more serious have been considered as public wrong and are known as Crime There are wrongs which could fit in both crime and tort, like assault, defamation, negligence, conspiracy and nuisance If the victim wants to sue the wrongdoer under civil liability, he has to approach the rules of torts and if he decided to initiate criminal proceedings against the offender, criminal law will apply The rule applicable in tort is different from crime For eg in case of defamation, "truth" is the basic element in both the case, but the interpretation of it differ from crime and tort As tort is a private wrong, the injured party himself files a suit against him and claim compensation from him But in case of crime being a public wrong, though it is committed against the individual, it is considered to be committed against the State So the State initiates the proceedings against the culprit In case of tort, the injured party may entered into compromise with the wrong doer and withdraw the case after settlement But in case of crime, it is impossible in all cases to enter into compromise outside the court and with draw the complaint, unless the Act provide for compromise (Compoundable)

Generally in case of tort, the remedy is monetary compensation and the idea behind awarding compensation to the injured party is to make good the loss suffered by him The punishment under criminal law protects the society by preventing the offender from committing further offences and deterring him and other potential offenders from committing wrong Moreover, imprisonment and arrest under criminal law and under civil law are different Under criminal law, imprisonment and arrest are meant as penalty and under civil law, it is to pressurize the defendant to perform certain duty

CRIME	TORT
Public wrong	Private wrong.
Elements may vary from crime to crime	Elements are determined.
The proceedings against the accused brought by the State	Injured party himself files a suit against the wrongdoer.
No place for settlement, except in some cases	Compromise can be done at any stage of the case between the parties
Remedy is none other than punishment, except U/s 357 of Cr P C, paid out of fine	Remedy is monetary compensation
Imprisonment and arrest as penalty	Imprisonment and arrest as pressure to perform the duty

(2) Tort and Breach of Contract distinguished·

A breach of contract results from the breach of a duty *undertaken by the parties themselves.* The violation of the agreement which is made by the parties with their free consent is known as breach of contract In case of tort, the duties which are said to be breached is not undertaken by the parties, but which are *imposed by law* For eg I have a duty not to cause any nuisance or defame others, not because I have voluntarily undertaken anyone of these duties on me, but the law imposes such a duty on every members of the State

The duty imposed by law under law of tort is not against any individual but against the society at large However, the injured party alone is entitled to sue against the wrongdoer In case of Contract, the duty is based on Privity of Contract, where in each party owes a duty only to the other contracting party, and not to those who are strangers to the agreement For eg

A ——— (Entered into contract with) ——— B, A is answerable only to B, and B is answerable only to A, and not to any of the strangers For this the best example case is *Donoghue v Stevenson,* which is popularly known as Ginger beer case, in which the House of Lords has interpreted the concept of Privity of contract and law of tort. In this case, A went to a restaurant with his friend and bought one bottle of Ginger beer manufactured by the defendant. The women friend consumed half of the contents, and when the remaining part was poured in to a glass and they found the decomposed body of a snail As the beer was served in opaque bottle, A was not able to see the contents in the bottle The woman friend brought a suit against the manufacturer of the beer for negligence and serious illness as consequence The manufacturer contented that, they had no contract with the consumer but only with the restaurant who sold the drinks So they pleaded that, only the shop keeper is liable and not them The House of Lords rightly observed that, that the manufacturer owes a duty to all those who intend to consume his product Thus, in law of tort, the liability is based on duty imposed by law and not on the basis of contract

As the main remedy under both the laws is damages, in breach of contract, the damage may be *liquidated* and determined by the parties at the time of entering into contract But in case of tort, the damages are *unliquidated,* and it is at the liberty of the court to award any amount of damage

TORT	BREACH OF CONRTACT
Breach of duty imposed by law on members of the society	Beach of duty undertaken by the parties themselves through agreement
The duty is not based on Privity of Contract	The duty is based on Privity of Contract,
The damage is unliquidated	The damage is liquidated

Privity of Contract and Tortious liability

If there is a contract between 'A' and 'B', and as a result of which, if 'C' sustained loss because of breach of contract by 'A' and 'B', the question now is whether 'C' who is a stranger, can sue 'A' or 'B'? In law of Contract, C can sue A or B or both under Privity of Contract but under law of tort, we don't need such doctrine to establish the liability of the wrongdoer

Is it Law of Tort of Law of Torts?

Salmond posed this question in this regard, 'law of Torts consists of fundamental general principles that it is wrongful to cause harm to other persons in the absence of some specific ground of justification or excuse or does it consist of a number of specific rules prohibiting certain kind of harmful activity, and leaving all the residues outside the sphere of legal responsibility?'

In other words, the question is (1) is it law of tort, so that every wrongful act, for which *there is no justification or excuse to be treated as a tort,* or (2) is it the law of torts, *consisting only of a number of specific wrongs outside which the liability under this branch of law cannot arise*

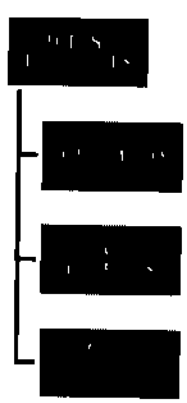
Winfield preferred the 1st of these alternative and argues it is law of tort and not law of torts Salmond opted the second alternative which argued that it is law of torts, under which the liability arises when the wrong is covered by anyone or the other nominate torts There is no general principle of liability and if the plaintiff can place his wrong in any of the pigeon-holes, each containing a labelled tort, he will succeed, and this theory is called "*Pigeon Hole*" theory *Ashby v. White* case clearly favors the Winfield's theory, by recognizing the doctrine *Ubi jus ibi remedium* which means where there is right, there is remedy The judges opined that "if man will multiply injuries, action must be multiplied too for every man who is injured ought to have recompense

ESSENTIALS OF TORTS

To constitute an act as tort, it is essential that the following two conditions are satisfied,

(1) There must be some act or omission on the part of defendant and,

(2) The act or omission should result in legal damages



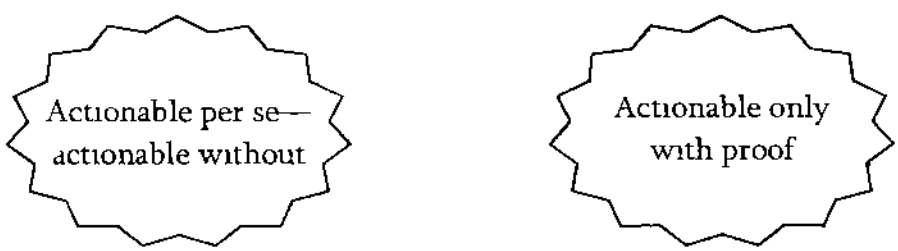
ACT OR OMISSION

To make a person liable for a tort, he must have done some act which he is not supposed to do or omitted to do some which he is supposed to do, either positive or negative For eg defamation, trespass or false imprisonment comes under "ACT" and negligence comes under "OMISSION" In *Glasgow Copr v. Taylor* case, the corporation which maintains a public park, fails to put proper fence to keep the children away from a poisonous tree and a child plucks and eats the fruits of the poisonous tree and dies The corporation would be liable for such omission Similarly in "*Municipal Corporation of Delhi v Subhagwanti*", it was clearly interpreted that due to the negligence of Delhi Municipal Corporation, the clock tower which was situated in the heart of the city, which was not maintained properly fell down and killed a number of people It may be noted that the wrongful act or omission must be one recognized by law and not based on moral or societal values

LEGAL DAMAGES (*injuria sine damno & damnum sine injuria)*

In order to be successful in an action for tort, the plaintiff has to prove that there has been a legal damage caused to him Unless there has been violation of a legal right vested in the plaintiff, there can be no action This is expressed by the maxim "*Injuria sine damno", injuria* means infringement of a right conferred by law on the plaintiff and *damno* means substantial harm, loss or damage in respect of money, comfort, health etc So when there has been violation of legal rights(*injuria)* but without causing any harm (*damnum/ damno),* the plaintiff can still go to the court of law because no violation of a legal rights should go unredressed Reciprocally, when there is any harm without violation of legal rights it is not actionable *pre se* Thus the test to determine whether the defendant should or should not be liable is not whether the plaintiff has suffered any loss or not, but the real test is whether any lawful rights vested in the plaintiff has been violated or not

Injuria sine damno (Violation of Legal Rights without causing harm)



Firstly those are torts which are *actionable per se* i e , actionable without the proof of the proof of any damages or loss, eg trespass Secondly, the torts which are actionable only on proof of some damages caused The two important cases which this could be under stood is, (1) *Ashby v. White & (2) Bhim Singh v. State of J&K* In the first case, the plaintiff who was a eligible candidate to vote but was not allowed to cast his vote by the returning officer, the defendant No loss was caused because of refusal by the defendant, as the candidate whom he intended to vote won the election But the House of Lords, has decided that defendant was liable when the plaintiff brought a suit against the defendant, as, if the plaintiff has a right, he must be permitted to enjoy it without any prevention and if so, the remedy should be provided

In the second case, the plaintiff who was an M L A of J&K Assembly was wrongfully detained by the police, while he was going to attend the Assembly session He was not produced before the JM within the prescribed time Because of this he was deprived of his Constitutional rights to attend the assembly session and also there was violation of fundamental rights of personal liberty which is guaranteed under Art 21 of the Constitution of India He was awarded with the compensation of Rs 50, 000/- along with his release from jail

From these two cases, it is clear that, loss suffered by the plaintiff is not relevant for claiming compensation from the defendant, but only the violation of legal rights

Damnum sine injuria (Causing harm without violating harm)

It means causing harm without violating legal rights of others Causing of damages however substantial to another person is not actionable in law unless there is also violation of legal rights of the plaintiff In *Grant v Australian Knitting Mills,* Lord Wright has rightly pointed out that, "The mere fact that a man is injured by another's act gives in itself no cause of action, if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is exercising a legal rights" The land mark case for this maxim is *Glouster Grammer School case*, the defendant, who was a school master, started a rival school opposite to plaintiff's school Because of this, the plaintiff had to reduce his school fees and due to that he suffered loss When he filed a suit to claim compensation from the defendant, the court held that, without violating the legal rights of a person, even there is loss, it is not maintainable The other important cases under this head are *Mogul Steamship co v McGregor Gow & Co , Action v. Blundell, Chesmore v.Richards, P Sethuramayya v. Mahalakshmamma, Dickson v Reuter's Telegram Co.*

In *Town Area Committee v Prabhu Dayal,* the plaintiff constructed 16 shops on the on the old foundations of the building The said construction was made without giving an notice to the municipality and without obtaining proper sanction The defendants, the municipality authorities demolished the building for the violation of the norms The plaintiff argued that the action of the defendant was not legal and it was with mala fide intention It was held that the defendants was not held liable as no "*injuria*" could be proved because the plaintiff constructs a building illegally and such demolition would not amount to causing "injuria" to the plaintiff And the similar was held in *Pagadala Narasimham v. Commissioner and Special Officer, Nellore Municipality"*

MENTAL ELEMENTS IN TORTIOUS LIABILITY

Mental element is an essential element in most of the forms of crimes Generally in criminal law *mens rea* or guilty mind is required to create the liability So, no one is punishable unless it is proved that he s intended to commit some act But it is not easy to make any such generalization about liability in tort

Fault when relevant (State of mind)

In many of the branches of torts like assault, battery, false imprisonment, deceit, malicious prosecution, the state of mind of a person is relevant to ascertain the liability Sometimes we may compare the conduct of the defendant with that of the defendant with that of a reasonable man and make him liable only if his conduct falls below the standard except of a reasonable man When the circumstance demand care and a person fail to perform the duty to take care, he is liable for the tort of negligence

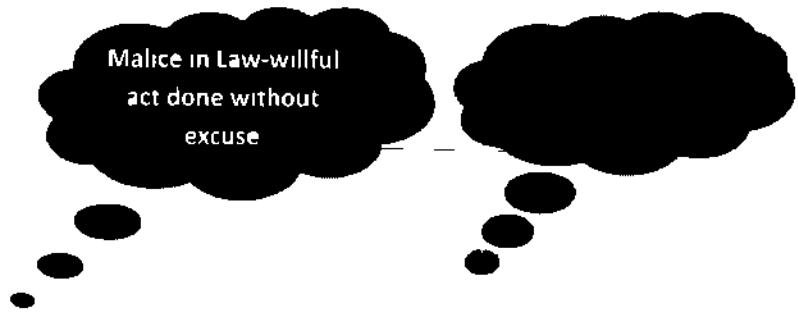
Mental element may become relevant in another way also If the defendant's conduct is innocent in so far as the act done was due to an inevitable accident, he may be excused from liability

Liability without Fault

Malice in Fact—evil motive

There are certain areas where the mental element is quite irrelevant and the liability arises even without any wrongful intention on the part of the defendant In such cases, innocence of the defendant or an honest mistake on his part is no defence, for eg Tort of Conversion (*Consolidated Co v Curtis),* defamation (*Cassidy v. Daily Mirror Newspaper Ltd)* and vicarious liability (*Rylands v Fletcher)*

Malice



The term 'malice' has been used in two different senses (1) in its legal sense, it means a willful act done without just cause or excuse and known as *malice in law*, and (2) in its narrow sense it means an evil motive, and the same is known as *malice in fact*

Malice in Law

In the technical legal sense, malice in law does not connate an act done with an improper or evil motive but simply signifies, " a wrongful act done intentionally without just cause or excuse' Malice, in its legal sense, thus means such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse or for want of reasonable or proper cause

Malice in Fact:

In its popular sense or as 'malice in fact' or 'actual malice', it means an evil motive for wrongful act When the defendant does a wrongful act with a feeling of spite or ill-will, the act is said to be done 'maliciously' Motive is not relevant to determine a person's liability in the law of torts A wrongful act does not become lawful merely because the motive is good Similarly, a lawful act does not become unlawful because of a bad motive

Exception to the Rule:

In the following exceptional cases, the malice or evil motive becomes relevant in determining liability under the law of torts,

(a) When the act is otherwise unlawful and the wrongful intention can be gathered from the circumstances of the case

(b) In tort of deceit, conspiracy, malicious prosecution one of the essentials to be proved by the plaintiff is malice of the defendant

(c) In certain cases of defamation, when qualified privileged or fair comment is pleaded as a defence, motive becomes relevant

(d) Causing of personal discomfort by an unlawful motive may turn an otherwise lawful act into nuisance

(e) Malice or evil motive may result in aggravation of damages

CHAPTER – II

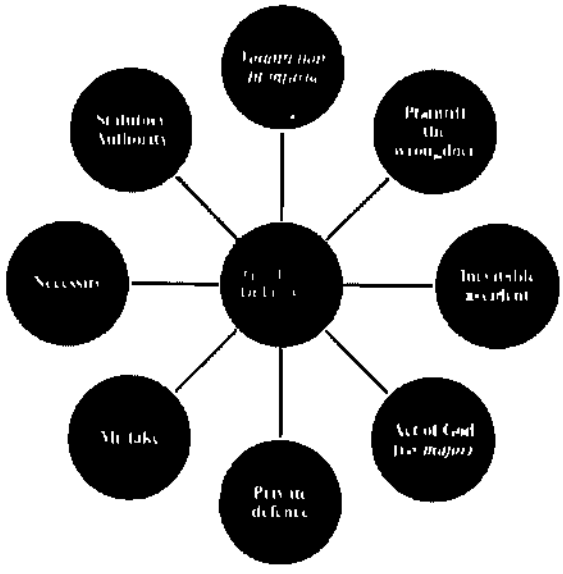
GENERAL DEFENCES

SYNOPSIS:

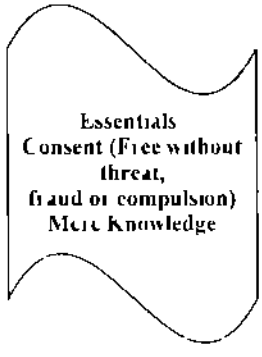
1. *Volunti non fit injuria,*
2. Plaintiff the wrong doer,
3. Inevitable accident,
4. Act of God (*vis major),*
5. Private Defence,
6. Mistake,
7. Necessity,
8. Statutory Authority

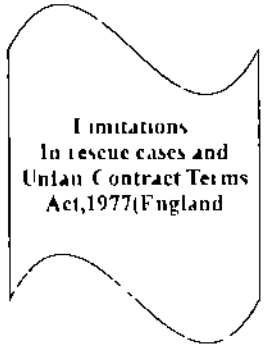
Introduction:

When the plaintiff brings an action against the defendant for a particular tort, providing the existence of all the essentials of that tort, the defendant would be liable for the same The defendant may however, even in such a case, avoid his liability by taking the plea of some defence There are some specific defences which are peculiar to particular offences There are some general defences which may be taken against action for number of wrongs The general defences discussed in this chapter are as follows,



I Volunti non fit injuria





When a person consents to the infliction of some harm upon himself, he has no remedy for that tort In such a case, the plaintiff who voluntarily agrees to suffer some harm, he is not allowed to complain for that and his consent serves as good defence Consent to suffer may be express or implied For eg if you invite any one to your house and you could not him for trespass Many a time, the consent may be implied or inferred from the conduct of the parties, eg players of any game like football and cricket is deemed to be agreeing to any hurt which may be likely in the normal course of the game, a person going on the high way is presumed to consent to the risk of pure accidents In the same way the spectators of any race or matches cannot succeed in claiming damages if they hit by any ball or car or any objects

For the defence of consent to be available, the act causing harm must not go beyond the limit of what has been consented Some important cases under this defence is as follows, *(a) Hall v Brooklands Auto Racing Club and (b) Padmavati v Dugganaika* In the 1st case, the plaintiff was a spectator at a motor car race being held in the defendants race track During the race, there was a collision between two cars, one of which was thrown among the spectators, thereby injured the plaintiff It was held that, the plaintiff impliedly took the risk of such injury, the danger being inherent in the sport which any spectator could foresee In the 2nd case, while the driver was taking the jeep to fill petrol, two strangers took lift in the jeep Suddenly one of the bolts connecting the front wheel to rhe axle gave way toppling the jeep The two strangers were thrown out and sustained injury and one of them died It was held that neither the driver nor his master is could be liable because it was a case of sheer accident and the strangers had voluntarily got into the jeep The other important cases are, *Woolridge v Sumner, Thomas v Quartermaine, Illot v. Wilkes.*

The consent must be free·

For the defence to be available, it is necessary to show that the plaintiff's consent to the act done by the defendant was free If the consent of the plaintiff has been obtained by fraud or under compulsion or under some mistaken impression, such consent does not serve as a good defence Moreover, the act done by the defendant must be the same for which the consent is given In *Lakshmi Rajan v. Malar Hospital Ltd,* case, the plaintiff who was a married women aged 40 years, noticed development of a painful lump in her breast During surgery her uterus was removed without any justification The defendant, the hospital authorities contented that, based on her consent only the surgery was conducted, so, they were not liable But, the consent was given only to cure the pain in breast and not to remove her uterus which has no effect with the pain So her consent cannot be taken into appropriate one When a person is incapable of giving his consent because of his insanity or minority, consent of such person's parent is sufficient

Consent obtained by fraud and compulsion·

Consent obtained by fraud is not real and that does not serve as a good defence This was clearly explained in the maxim, *ex trupi causa non oritur action* which means for an immoral cause, no action arises Consent given under circumstances when the person does not have freedom of choice is not the proper consent A person may be compelled by some situation to knowingly under take some risky work which, if he has a free choice, he would not have under taken This mainly arises in master-servant relationship Thus there is no *volunti non fit injuria,* when a servant compelled to do some work inspite of his protests

Mere knowledge does not imply assent

To avail the defence, two points has to be proved,

(1) The plaintiff knew that the risk is there,

(2) He, knowing the same, agreed to suffer the harm

In *Bowater v Rowley Regis Corporation* case, the plaintiff a car driver was asked by the defendant's foreman to drive a horse which to the knowledge of both was liable to be bolt The plaintiff protested but ultimately took out the horse in obedience to the order The horse bolted and the plaintiff was injured thereby

In *Smith v Baker* case, the plaintiff was a workman in the defendant's quarry, for the purpose of cutting a rock By the help of crane, stones were conveyed from one side to another, and every time the crane used to passes over the head of the plaintiff While he was busy in his work, a stone fell from the crane and injured him The employers were negligent in not warning him at the moment of a recurring danger, although the plaintiff had generally aware of the risk The plaintiff filed a suit against the defendant for compensation, the court order compensation for him by imposing the liability on the defendant The other most important case, which was clearly interpreted by the court, was *Dann v. Hamilton* A lady, knowing that the driver of a car was drunk chose to travel in it instead of an omni bus Due to drivers negligent driving, an accident was caused resulting in the death of the driver himself and injuries to the lady passenger In an action by the lady passenger against the representatives of the driver, the defence of *volunti non fit injuria,* was pleaded, but the same was rejected and the lady was awarded with compensation As because the level of intoxication of the driver was no to such an extent of causing accident, the defence was rejected The other important cases are *Imperial Chemical Industries v Shatwell*

Negligence of the defendant:

For the defence to be available, it is further necessary that the act done must be the same to which it is onsented When the plaintiff consents to some risk, the presumption is that the defendant will not be negligence f I submit to a surgical operation, I have no right of action if the operation is unsuccessful But if the operation s unsuccessful because of the surgeon's negligence, I can bring an action against him for that

Limitations on the scope of the doctrine

The scope of application of the doctrine of *volunti non fit injuria* has been curtailed,

(1) In rescue cases,

(2) By the Unfair Contract Terms Act, 1977 (England)

Rescue cases:

'Rescue cases' form an exception to the application of the doctrine of *volunti non fit injuria* When the plaintiff voluntarily encounters a risk to rescue somebody from an imminent danger created by the wrongful act of the defendant, he cannot be met with the defence The landmark case based on this exception is, *Haynes v. Harwood,* in this case, the defendant's servant left a two-horse van un attended in a street A boy threw a stone on the horses and they bolted, causing grave danger to women and children on the road A police man who was on the duty inside a nearby police station, on seeing the same, managed to stop the horses, but in doing so, he himself suffered serious personal injuries It being a 'rescue cases' the defence was not accepted and the defendant were held liable In *Baker v T.E Hopkins & Sons,* due to the employer's negligence, as well was filled with poisonous fumes of petrol driven pump and the two of his workmen were overcome by fumes Dr Baker was called but he was told not to enter the well in view of the risk involved Inspite of that, Dr Baker preferred to go in the well with a view to making an attempt to help the workmen already inside the well He tied himself with a rope around himself and went inside, while two women held the rope at the rope at the top The doctor himself was overcome by the fumes He was pulled from the well and taken to the hospital He however, died on way to the hospital The two workmen inside the well had already died Doctor's widow sued the workmen's employers to claim compensation for her husband's death, the defendants pleaded the defence It was held that the act of the rescuer was the natural and probable consequences of the defendant's wrongful act which the later could have foreseen, and therefore the defendant were liable

While availing this defence, some question arises Does the rule in *Haynes v Harwood* would apply in cases of rescue of property? The question was answered in *Hyett v Great Western Railway Co,* in this case, the plaintiff was injured in an attempt to save defendant's railway cars from fire which had occurred due to the negligence of the defendant The plaintiff's conduct was considered to be reasonable and on the basis of the doctrine of Haynes case would applied in this case also The question is about the act of

intervention of the rescuer *novus actus intervenines* which break the chain of causation so that the initial negligence of the defendant is considered to be a remote cause of the rescuer's injury From the Hynes case it was held that the act of the rescuer was not such an act which could make the defendant's negligence remote cause of the damage

Volunti non fit injuria and Contributory negligence—distinguish

1 *Volunti non fit injuria* is a complete defence In case of Contributory negligence, is based on the proportion of his fault in the matter Therefore damages which the plaintiff can claim will be reduced to the extent the claimant himself was to blame for the loss

2 In the defence of contributory negligence, both the plaintiff and the defendant are negligent In *volunti non fit injuria* the plaintiff may be *volens* but at the same time exercising due care for his own safety

3 In case of *volunti non fit injuria,* the plaintiff is always aware of the nature and extent of the danger which he encounters There may, however, be contributory negligence on the part of the plaintiff in respect of a danger which he did not, in fact, know although he ought to have known about it

II PLAINTIFF THE WRONG DOER:

Under the law of contract, one of the principles is that no court will aid a person who found his cause of action upon an immoral or an illegal act The maxim *Ex trupi causa non oritur action* which means, from an immoral cause no action arises It means that if the basis of the action of the plaintiff is an unlawful contract, he will not, in general, succeed to his action The principle seems to be that the mere fact that the plaintiff was a wrong doer does not disentitle him from recovering from the defendant for latter's wrongful act In *Bird v Holbrook,* case the plaintiff, a trespass over the defendant's land was entitled to claim compensation for injury caused by a spring gun set by the defendant, without notice, in his garden According to Sir Fredrick Pollock, when the plaintiff himself is a wrongdoer, he is not disabled from getting damages from the defendant unless some unlawful act or conduct on his own part is connected with harm suffered by him as part of the same transaction We have seen above that merely because the plaintiff is a wrongdoer is no bar to an action for the damage caused to him

III INEVITABLE ACCIDENT

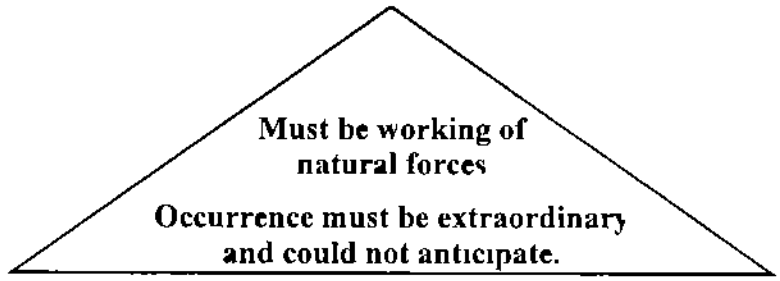
Accident means an unexpected injury and if the same could not have been foreseen and avoided, inspite of reasonable care on the part of the defendant, it is inevitable accident Pollack defines it as it does not means absolutely inevitable, but it means not avoidable by any such precaution as a reasonable man It is therefore a good defence neither if the defendant can show that he neither intended to injure the plaintiff nor could he avoid the injury by taking reasonable care In *Stanley v. Powell* case the plaintiff and the defendant are the members of the shooting club, when the defendant fired at a pheasant, but the shoot from his gun glanced off an oak tree and injured the plaintiff It was held that injury was accident and the defendant was not liable In *Shridhar Tiwari v. U P State Road Transport Corporation,* in this case, a bus belonging to the U P S R T Corporation reached near a village, a cyclist suddenly came in front of the bus It had rained and the road was wet As the driver tries to avoid hitting the cyclist applied break, as the road was slippery, the bus skidded on the road and hit the rear portion of another bus which was coming from the opposite direction It was found that at the time, both the buses were being driven at a moderate speed and the accident had occurred despite due care on the part of the drivers of both the buses It was held that the accident had occurred due to inevitable accident and therefore the defendant Corporation was held not liable for the same The other important cases are *Assam State Coop , etc Fedaration v. Smt. Anubha Sinha, Holmes v Mather, Brown v. Kendall, Padmavathi v Dugganaika.* In *Nitro Glycerine* and *National Coal Board v.Evans* has been dealt in detail as accidental damages to the property has been considered not actionable In *Nitro Glycerin*

case, the defendant, a firm carriers, were given a wooden case for being carried from one place to another The content of the box were not known Finding some leakage in the box, the defendants took the box to their office building to examine it While the box was being opened, the Nitro-Glycerin in the box exploded and the office building, belonging to the plaintiff was damaged It was held that since the defendants could not reasonably suspect that the box contained Nitro-Glycerin, they were not liable, as the case falls under the category of inevitable accident

IV. ACT OF GOD *(vis major).*

Act of God is a defence The rule of Strict Liability I,e, the rule laid down in ***Rylands v Fletcher***, also recognizes this to be a valid defence for the purpose of liability under that rule Act of God is a kind of inevitable accident with the different that in the case of Act of God, the resulting loss arises out of the working of natural forces like exceptionally heavy rainfall, storms, tempests, tides and volcanic eruptions

Two important essentials are needed for this defence



1 Working of Natural Forces:

In ***Ramalinga Nadar v. Narayan Reddiar,*** it has been held that the criminal activities of the unruly mob, which robbed the goods transported in the defendant's lorry cannot be considered to an act of god and the defendant is liable for the loss of those goods as a common carrier It was observed that "accidents may happen by reason of the play of natural forces or by intervention of human agency or by both But it is only those acts which can be traced to natural forces and which have nothing to do with the intervention of human agency that could be said to be Acts of god" The other important land mark case is ***Nicholas v. Marsland,*** in which the defence was successfully argued In this case the defendant created some artificial lakes on his land by damming some natural streams Once there was an ***extraordinary heavy rainfall,*** stated to be the heaviest in human memory, as a result of which, the embankments of the lakes gave way The rush of water washed away four bridges belonging to the plaintiff It was held that the defendant were not liable for the loss had occurred due to the act of god

2. Occurrence must be extraordinary·

In ***Kallulal v. Hemchand,*** the wall of a building collapsed on a day when there was heavy rainfall that resulted in the death of the respondent's two children The M P high Court held that the defendant could not take the defence of Act of God in this case, as that much of rainfall during the rainy season was not something extraordinary but only anticipated and guarded against

V: PRIVATE DEFENCE

The law permits use of reasonable force to protect one's person or property If the defendant uses the force which is necessary for self defence, he will not be liable for the hai m caused thereby There should be imminent threat to the personal safety or property It is also necessary that such force as is absolutely necessary to repel the invasion should be used For the protection of property also, the law permits taking of such measures as may be reasonably necessary for the purpose The cases are ***Bird v Hallbrook, Ramanuja Mudali v. M.Gangan*** deals with private defence In ***Collins v. Renison*** is an example for use of excess force In this case the plaintiff went upon a ladder for nailing a board to a wall in the defendant's garden The

defendant threw him of a ladder and when sued for assault, he took the pleas that he had "gently shook the ladder, which was a low ladder, and gently overturned it, and gently overturned it, and gently threw the plaintiff on the ground, thereby doing as little damage as possible to the plaintiff, after the plaintiff refused to come down It was held that the force used was not justifiable.

VI. MISTAKE:

Mistake, whether of fact or of law, is generally no defence to an action for tort When a person willfully interferes with the rights of another person, it is no defence to say that he had honestly believed that there was justification for the same, when in fact, no such justification existed In *Consolidated Co v Curtis,* an auctioneer was asked to auction certain goods by his customer Honestly believing that the goods belonged to the customer, he auctioned them and he paid the sale proceeds to the customer But, the goods auctioned by him were belonged to the plaintiff When he sued the auctioneer, the court held that he is liable for the tort of *Conversion*, though he raises the defence of mistake To this rule, there are some exceptions when the defendant may be able to avoid his liability by showing that he acted under an honest but mistaken belief Honest belief in the truth of a statement is a defence to an action for deceit

VII NECESSITY

An act causing damage, if done through under necessity to prevent a greater evil is not a actionable even though harm was caused intentionally Necessity should be distinguished from private defence

(a) In necessity there is an infliction of harm on an innocent person whereas in private defence, harm is caused to a plaintiff who himself is the wrongdoer

(b) Necessity is also different from inevitable accident because, in necessity, the harm is an intended one, whereas in inevitable accident, the harm is caused in spite of the best effort to avoid it

In *Leigh v Gladstone,* forcible feeding of a hunger striking prisoner to save her was held to be a good defence to an action for battery The other cases are *Cope v. Sharpe, Carter v. Thomas, Kirk v Gregory*. In *Carter v Thomas,* the court held that when the defendant enter in the plaintiff's house to extinguish the fire is held liable for trespass, as already the firemen are working inside

VIII. STATUTORY AUTHORITY

The damages resulting from an act, which the legislature authorities or directs to be done, is not actionable even though it would otherwise be a tort When an act is done, under the authority of an act, it is complete defence and the injured party has no remedy except for claiming such compensation as may have been provided by the statute Immunity under statutory authority is not only for the harm which is obvious, but also for that harm which is incidental to the exercise of such authority In *Vaughan v Taff Valde Rail Co ,* sparks from an engine of the respondent's railway company, which had been authorized to run the railway, set fire to the appellant's woods on the adjoining land It was held that since the respondents had taken proper care to prevent the emission of sparks and they were doing nothing more than what the Statute had authorized them to do they were not liable The same proportion was again stressed in *Hammer Smith Rail Co v. Brand,and Smith v Lond on and South Western Railway Co ,*

ABSOLUTE AND CONDITIONAL AUTHORITY

The Statute may give absolute or conditional authority for doing of an act In the former case, even though nuisance or some other harm necessarily results, there is no liability for the same When the authority given by the Statute is conditional, it means that the act authorized can be done provided the same is possible without causing nuisance or some other harm Such a condition may be expressed or implied In *Metropolitan Asylum District v. Hill,* the appellants a hospital authority were empowered to set up a small-pox hospital in the residential area and the same created danger of infection to the residents of that area So that it was held that to be a nuisance and the appellants were issued an injunction to the hospital

CHAPTER—III

CAPACITY

SYNOPSIS

1 Act of State.

2. Corporation.

3. Minor.

4. Independent and joint tortfeasor.

5 Husband and Wife

6 Persons having parental and quasi parental authority

7. Persons having judicial and Executive authority

INTORDUCTION:

Generally, every person has a capacity to sue, liability to be sued in tort This chapter will discuss about certain persons and their position about their capacity to sue and to be sued

(a) Act of State to be discussed how far the State is vicariously liable for the torts committed by their employee,

(b) Corporations its legal status to sue and to be sued,

(c) Minor,

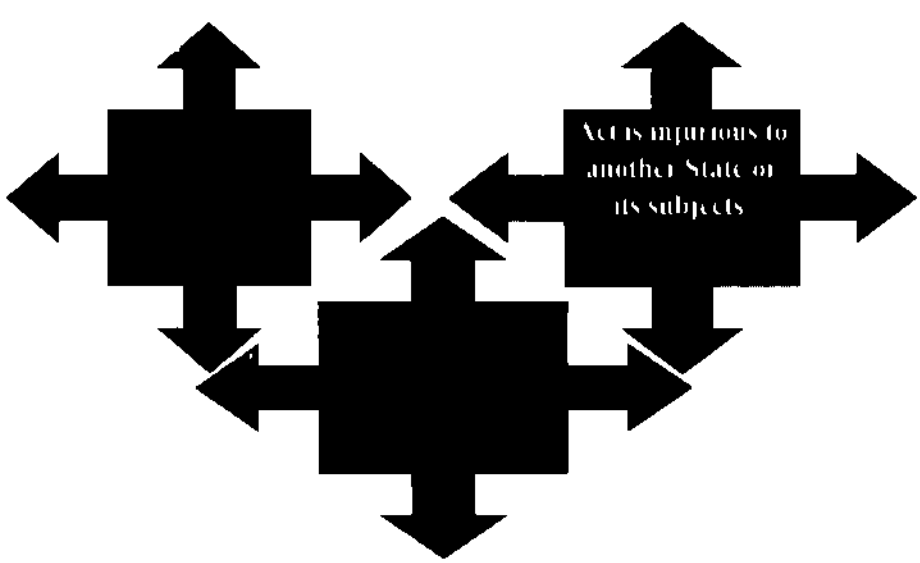
(d) Independent and Joint tortfeasor,

(e) Husband and Wife,

(f) Parental and quasi parental authority,

Judicial and Executive authority

I · ACT OF STATE:



In *Buron v. Denman* case, an action was brought against Captain Denman, a captain in the British Navy, for releasing slaves and burning the slave barracoons owned by the plaintiff on the West Coast of Africa (Outside British Dominion) The defendant had no authority to do so but his act was ratified by the British Government later It was held that it was the act of the State and no action lie The other important cases are *Duff Development Co Ltd v. Kelantan Government, Secretary of State in Council of India v. Kamachee Boye Saheba, Jahangir v Secretary of the State for India, Johnstone v Pedlar, Hardial Singh v State of Pepsu, State of Saurashtra v Memon Haji Ismail and State of Saurashtra(Now Gujarat) v Mohammad Abdulla and others*

II: CORPORATION

A Corporation is an artificial person distinct from its members Being an artificial person, it always acts through its agent and servants and as such, its liability is always vicarious for the acts done by others persons It was at one time doubtful whether a corporation could be sued for the torts like malicious prosecution, if the act is done within the course of their employment, a corporation is liable for their tort act like an ordinary employer

There is no doubt that a corporation is always liable if the scope of authority or employment of its agents or servants acting on its behalf was within the power (*intra vires)* of the corporation Whether the Corporation is liable for the act done beyond its power (*ultra vires)*? In *Poulton v L & S.W Ry,* case a railway company had the power to arrested the plaintiff for the non-payment of 'passenger fare', but the station master arrested the plaintiff for the non-payment of 'freight payable for the horse' It was held that the railway company was not liable for the decision appears to be that the station master did not have 'implied authority' to make such an arrest on behalf of the railway company and as such, the latter could not be vicariously liable for the same In another case, *Campbell v Paddington Corporation*, it was held that for the purpose of liability of the corporation for torts, there is no need to draw distinction between *intra vires* & *ultra vires* torts because a corporation is as much liable for both acts done by its representatives as for *intra vires* acts Thus a Corporation will not escape the liability in tort merely because the act done is ultra vires of the corporation and therefore, it can be made liable for both intra and ultra vires

III : MINOR

Capacity to sue

A minor has a right to sue like an adult with the only procedural difference that he cannot himself sue but has to bring an action through his next friend

Pre-Natal Injuries:

There are no English or Indian cases directly on this point In an Irish Canadian case, *Walker v. G.N Ry Co. Of Ireland,* the plaintiff, a child sued the railway company for damages on the ground that he had born crippled and deformed because the injury caused to him before his birth, by an accident due to railway's negligence, when the plaintiff pregnant mother travelled in it It was held that the defendant were not liable for two reasons, (a) the defendant's did not owe any duty to the plaintiff as they did not know about his existence, (b) the medical evidence to prove the plaintiff's claim was very uncertain But in *Montreal Tramways v Leveile,* the Supreme Court of Canada allowed an action by a child born with club feet two months after an injury to its mother by the negligence of the defendants Majority of the writers are in favor of the view that an action for pre-natal injuries should also be recognized, once that the act of the defendant is considered to be Tortious

Capacity to be sued

Minority is no defence in law of tort And a minor is liable in the same way and extent as that of adults But a minor is incompetent to contract, and his agreement is *void ab initio*, no action can be brought against him Under Criminal law, a child below the age of seven years, to be *Doli in capax*, and cannot be held liable for any offence Between 7 to 12 years of age, a child is not liable unless he had attained sufficient maturity of understanding to judge the nature and consequences of his conduct But the law of torts does not make any distinction on the basis of age However, if the tort in such as requires a special mental elements such as deceit, malicious prosecution, a child cannot be held liable unless his maturity for committing that the tort can be proved in his case

Tort and Contract:

It has been observed that a minor is liable for tort in the same way as an adult On the other hand an agreement entered into by the minor is void ab initio, so no action cannot be brought against the minor The question arises in such circumstances (1) can a minor be sued under the law of torts although permitting such an action may mean indirect enforcement of a void agreement? Or (2) will he be exempted from liability in tort, also, because his act is also breach of contract for which he can't be sued? This position was answered in *Johnson v. Pye,* a minor obtained a loan of 300 pounds by falsely representing his age It was held that he could not be asked to repay the loan in an action for deceit In *Jennings v. Rundall,* an infant, who had hired a mare to ride, injured her by overriding Held that, the minor was not liable as the action was, in substance, for a breach of contract and it could not be altered to an action for negligence in tort There may be certain cases of torts which may originate in a contract, in such a cases of tort, independent of contract, an action against a minor can lie *Burnard v Haggis*, Burnard, a minor, hired mare from Haggis on the express condition that it would not be used for ridding only and not for jumping or larking He lent it to a friend, who made it to jump over a high fence She was impaled on it and killed The minor was held liable for negligence, as the same was held to be independent of the contract

Liability of Parents for Children's tort

As a general rule, a parent or a guardian cannot be made, liable for the torts of a child There are two exceptions to this rule

(a) When the child is father's servant or agent, the father is vicariously liable

(b) When the father himself, by his own negligence, affords his child an opportunity to commit a tort, he is liable

In *Beebee v. Sales,* the father supplied an air gun to his son, aged 15 years Even after some complaints of mischief caused by use of the gun, he allowed the gun to remain with the boy, who thereafter accidently wounded the plaintiff The father was held liable

IV: Independant and Joint Tortfeasors

When two or more persons commit some tort against the same plaintiff, they may be either independent tortfeasor or Joint tortfeasor

Independent tortfeasor

When the more persons, acting independently, but concur to produce a single-damage, they are known as independent tortfeasor There is no concerted action on the part of independent tortfeasor For eg two motorist coming in opposite direction rashly, collide a cyclist, both the motorist are independently liable

Joint Tortfeasor.

Two or more persons are said to be joint tortfeasor when the wrongful act, which has resulted in a single damage, was done by them, not independently, of one another, but in 'furtherance' of a common design When two or more persons are engaged in a common pursuit and one of them in the course of and in furtherance of that commit a tort, both of them will be considered as joint tortfeasors and liable as such In *Brook v Bool,* A and B entered Z's resident to search for an escape of gas Each one of them, in turn, applied naked light to the gas pipe, A's application resulted in an explosion Though, it is an A's application, both A and B were held liable as joint tortfeasor The distinction between independent and joint tortfeasor depends upon the facts of the case. In the case of joint tortfeasor, there is a concurrence, not only in the ultimate consequences but also mental concurrence in doing the act, but in independent tortfeasor, there is merely a concurrence in the ultimate result of the wrongful act independently done In *Merryweather v Nixan,* the principles, contributions between joint tortfeasors

V: HUSBAND AND WIFE

Action between spouses.

Common Law, there be no action between husband and wife for tort Neither the wife could sue her husband nor does the husband sue his wife Where the husband, while acting as an agent or servant for some third party, committed a tort causing an injury to the wife, the wife could sue the third party Thus, where a husband while driving a car acting as an agent of his mother injured his wife, the wife could sue her mother-in-law, in this situation, the husband has two position (i) that of a husband, (ii) that of an agent for his mother The rule prohibiting actions between spouses has been abolished by the law Reforms (Husband and Wife) Act, 1962 Now the husband and wife can sue each other as if they were unmarried The Act, however, places, a restriction on an action during marriage by one spouse against another and the court has been given a power to stay the action if it appears that no substantial benefit will accrue to either party from the proceedings, or the case can be more conveniently disposed off

Husband's Liability for wife's tort:

Common Law, if the wife commits a tort, the defendant could sue both the husband and wife and the wife alone A husband was thus liable for the torts committed after marriage

VI· PERSONS HAVING PARENTAL AND QUASI-PARENTAL AUTHORITY.

Parents and quasi parent have a right to administer punishment on a child to prevent him from doing mischief to him or others The law is that a parent, teacher, or other person having lawful control or charge of a child or young person is allowed to administer punishment on him Parents are presumed to delegate their authority to the teachers when a child is sent to school Such an authority warrants the use of reasonable and moderate punishment only and for excessive use of force the defendant may be charged for assault, battery etc

VII. PERSONS HAVING JUDICIAL AND EXECUTIVE AUTHORITY

Judicial Officers Protection Act, 1850, grants protection to a judicial officer for any act done or ordered to be done by him in the discharge of his duty He is protected even though he exceeds his jurisdiction provided at that time he honestly believed that he had jurisdiction to do or order that the act complained of The protection of judicial privilege applies only to judicial proceedings as contrasted with administrative or ministerial proceedings, or administratively, the protection is not afforded to the acts done in the acts done in the later capacity In *State of U.P v Tulsi Ram,* the position has been explained clearly In this case, the question arises whether a judicial officer, who negligently ordered the wrongful arrest of a person, could be liable for the wrong of false imprisonment The appellants along with others were tried for and convicted three of them and

acquitted two of them, in appeal the High Court upheld the conviction of the three persons The Judicial Magistrate, without verifying the order, issues warrant against all the five persons and they were arrested by the police, handcuffed and taken to the police from their village, and lodged in the lock-up for 4 hours, and released They filed suit claiming compensation of Rs 2000 from the judicial officer for wrongful arrest in the front of their friends, relatives on the Holi day had caused humiliation The lower appellate court provided the protection under Judicial Officers Protection Act, 1850, but made the State liable under vicarious liability But the Allahad High Court, on appeal made by the State of U P held that, the State was not liable because the act done by its servant was discharge of his duties imposed by law The High Court held that, the Judicial Officer was liable for the wrongful arrest and held that he was not exercising any judicial function but only an executive function while issuing warrant, therefore, the protection could not be available in this case

CHAPTER IV

VICARIOUS LIABILITY

SYNOPSIS:

1 Principal and Agent.

2. Parents

3 Master and Servant

(a) Who is a servant?

(b) Course of employment

(c) Act outside the course of employment

(d) Effect of express prohibition

(e) The doctrine of Common Employment.

Introduction

Generally, a person is liable for his own wrongful acts and does not incur any liability for the acts done by others *Vicarious liability,* is the liability of one person for the acts done by another person The common examples of such liabilities are,

(a) Liability of the Principal for the tort committed by his agent,

(b) Liability of partners of each other's tort,

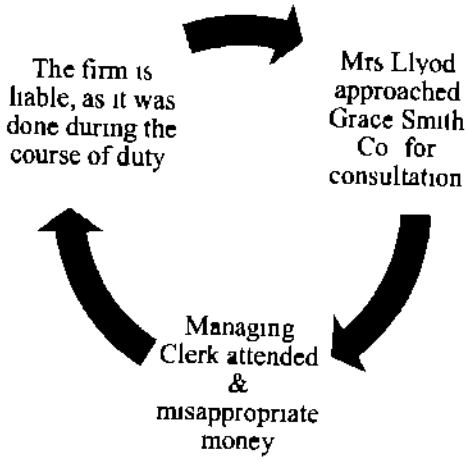
(c) Liability of the master for the tort committed by his servant

When the agent commits any tort during the course of performance as an agent, the principal is liable The principal is vicariously liable because of the existence of the relationship of Principal and Agent between both of them They are considered to be joint tortfeasor and their liability is joint and several In such cases, the plaintiff has a choice either to sue the principal or agent or both The same position applies to Partners in the Partnership firm

PRINCIPAL AND AGENT

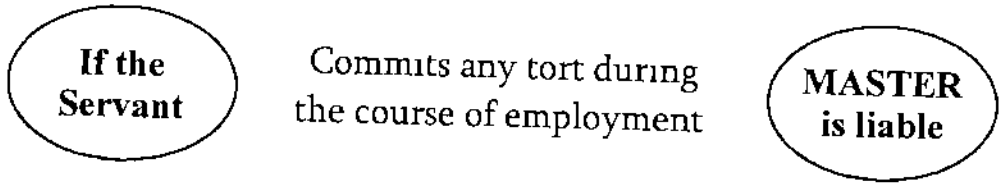
Qui facit per alium facit per se –which means "he who does an act through another deemed to be done by him" When one person authorize another to do an act, and if the another person commits a tort, the person who authorizes the act is liable vicariously The authority to do the act may be *expressed or implied* The two land mark cases in this situation were *Lloyd v. Grace Smith & Co* and *State bank of India v Shyama Devi* In the former case, Mrs Llyod owned two cottages, but not getting sufficient income from it So she approached Grace Smith & Co, a firm of Solicitors to get consultation The managing Clerk of the firm attended her and advised her to sell the two cottages and invest the money in better way She was asked to sign two documents which were supposed to be sale agreement, but the clerk got signature in a gift deed in his name He then disposed off the property and misappropriated the money This happened without the knowledge of the Firm It was held that, as the agent was acting in the course of his authority, the Principal is liable for his tort In the latter case, popularly known as Bank Case, Mrs Shyama Devi's husband handed over some amount and cheques to his friend, who was an employee of the bank, for being deposited in Shyama Devis's account But the friend misappropriated the amount. It was held by the Supreme Court that, the fraud was committed during the course of employment, but in his private capacity as friend of them So the bank is not liable for the tort committed by him

In *Trilok Singh v. Kailash Bharathi,* the younger brother took the bicycle of his elder brother when he was out of station and caused the accident It was held that, the younger brother was not the agent of the elder brother, so he was not held liable

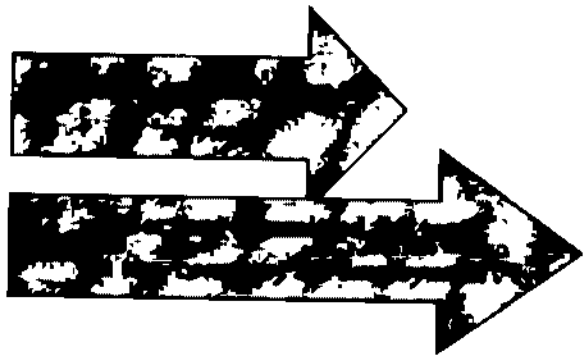


MASTER AND SERVANT

Liability based on respondeat superior



The wrongful act of the servant is deemed to be the act of the master as well Respondeat Superior is the base for vicarious liability, which means 'let the principal be liable' For the liability of the master to arise, the following essentials to be present,



Who is a Servant?—a person employed by another to do work under the direction and control of his master The master is not all the time liable for the tort committed by his servant For eg independent contractor The difference between servant and the independent contractor is as follows,

Servant and Independent Contractor	
A servant – under the control and supervision of the master	An independent contractor is not subject to any such control
The work should be done according to the direction of the master	No such direction required, as he is his own master
For eg your Car driver	For eg Taxi driver
Rajasthan State Road Transport Corp v K N Kothari, Hillyer v St Bartholomew's Hospital	Morgan v Incorporated Central Council, B Govindarajulu v M L A Govindaraju Mudaliar
Exception the master is not liable for the act of the servant, (i) if the servant is not under the control of the master, (ii) delegation of authority, (iii) fraud, theft, mistake, negligence, (iv) act outside the scope of employment, (v) express prohibition and (vi) common employment	Exception the master is liable for the act of the independent contractor (i) if the master either authorizes or ratifies the same, (ii) strict liability, (iii) accidents in highways, (iv) withdrawal of support and (v) breach of master's Common Law Duties

Servant not under the control of the master:

It is sometimes, not possible to follow the directions of the master by the servant For eg Captain of the Ship, Surgeon in a hospital, though they are the servants of the institution, they are not to be directed regarding the nature of the work The test to find out whether the servant is under the control of the master or not is, *Hire and Fire test* A person who employs another person and is his pay master, and has the power to '*fire*' him, is the master for the purpose of vicarious liability

Lending a Servant to another person:

When A lends his servant X to B, and if X commits tort against C, who is liable, A or X? The answer to this question depends upon various considerations, the main consideration being *as to who which of the two masters has the authority to tell the servant not only what is to be done by him, but also the way in which he his to work.* In *Mersey Docks & Harbour Board v Coggins & Griffiths (Liverpool) Ltd,* case, a harbour board owned a number of mobile cranes and had employed skilled workmen as drivers of the cranes It was usual for the board to let out the mobile cranes, each driven by the skilled driver employed by them Certain stevedores hired a crane with a driver for loading a ship Due to the negligence of the driver, while loading a ship, X was injured The House of Lords held that the harbour board, who was the general and permanent employer of the driver was liable to X the stevedores were not liable, even though at the time of the negligence, the driver was loading cargo for the stevedores The reason for the decision was that, *although at the time of the accident, the stevedores had immediate control over the crane-driver in so far as they could direct him to pick up and move a particular cargo, but that alone could not make them liable. They have no power to direct as to how the crane was to be operated.*

The same position was held in *Smt Kundan Kaur v. Shankar Singh,* Shankar Singh and Tarlok Singh, the partners of a firm, temporarily gave their truck along with a driver on hire to one Jawahar Transport for transporting certain goods from one place to another While transporting the goods, Jawahar Transport's

employ Kundan Kaur Singh was sitting beside to the driver Because of the rash and negligent driving of the driver, the truck met with an accident snd Kundan Kaur Singh was died on the spot When Kundan Kaur Singh's wife filed a suit to claim compensation the question arises whether Shankar Singh and Tarlok Singh who had given the driver and the truck on hire, be liable to Smt Kundan Kaur Singh? In this case it was held that *there was only a transfer of services and not of control of the driver from the general employer to the hirer of the vehicle and as such Shankar Singh and Tarlok Singh were liable*

Casual Delegation of authority When a person even for a single transaction, authorizes another to do something for him and the latter does it negligently, the former can be made liable for the same

The Course of Employment.

The liability of the master is not limited only to the acts which he expressly authorizes to be done but he is liable for such torts also which are committed by his servant *in the course of employment* An act is deemed to be done in the course of employment, if it is either, (i) a wrongful act authorized by the master, (ii) a wrongful and unauthorized mode of doing some act authorized by law So a master can be made liable as much for unauthorized acts as he is for the authorized In *National Insurance Co, Kanpur v Yogendra Nath,* the owner of the car, authorized his servants and orderlies to look after the car and to keep the same neat and tidy, while he was out of town for a long period of time One of the servants took the car to the petrol pump for getting the tyres inflated and for checking the oils, etc , and negligently knocked down and injured two boys, who were going on a cycle In this case the master was held liable as the accident was happened during the course of employment

Fraud, theft, mistake, negligent and Act outside the scope of employment·

When a servant, while in the course of employment if he commits fraud or theft or mistake or acted negligently, the master is liable The cases are *Barwick v English Joint Stock Bank, Llyods v Grace Smith & Co., State Bank of India v. Shyama Devi* For theft, the cases, the two categories are (i) goods bailed to the master, (ii) goods not bailed to the master, are *Cheshire v. Bailey, Morris v C W Martin & Sons.,* for the second category, *Roop Lal v Union of India,* popularly known as Army Jawan case In mistake of servant, the master is not liable if the servant exercise his authority excessively or erroneously In *Poland v. Parr & Sons, Bayley v Manchester, Sheffield and Lincolnshire Ry* cases If the servant is not careful to the performance of his duties and his conduct causes any loss to a third party, the master would be liable for the same, which was held in *Williams v. Jones* case For the acts committed by the servant outside the course of employment, the master is not liable In *Storey v Ashton*, the driver while on his way back to his employers office, was induced by another direction for picking up something for that employee While he goes in the new direction, he caused an accident with the plaintiff The master was not held liable, because the car man started a new journey on his own The case was, *Beard v London General Omnibus Co*

Negligent delegation of authority by the servant

The position as mentioned above has to be distinguished from a situation where a 3rd party performs the act at the instance of the servant himself In other words, if a servant negligently delegates his authority and instead of himself carefully performing a duty himself and allows it to be a negligently performed by another person, the master will be liable for such negligence of the servant In *Ricketts v. Thomas Tilling Ltd,* the driver of the bus seated himself by the side of the conductor to drive the bus for the purpose of turning the Omni bus in the right the direction for the next journey The conductor drove the bus so negligently that it mounted the pavement, knocked down the plaintiff and seriously injured him it was held that the master was liable for the negligence on the part of the driver in allowing the conductor to drive negligently The other important cases are, *Headmistress Govt .Girls High School v Mahalakshmi, Baldeo Raj v. Deowati, Indian Insurance Co , v Radhabai , Amrutha Dei v. State of Orissa, Gyarsi Devi v Sain Das, Ilkiw v Samuels*

Effect of Express Prohibition:

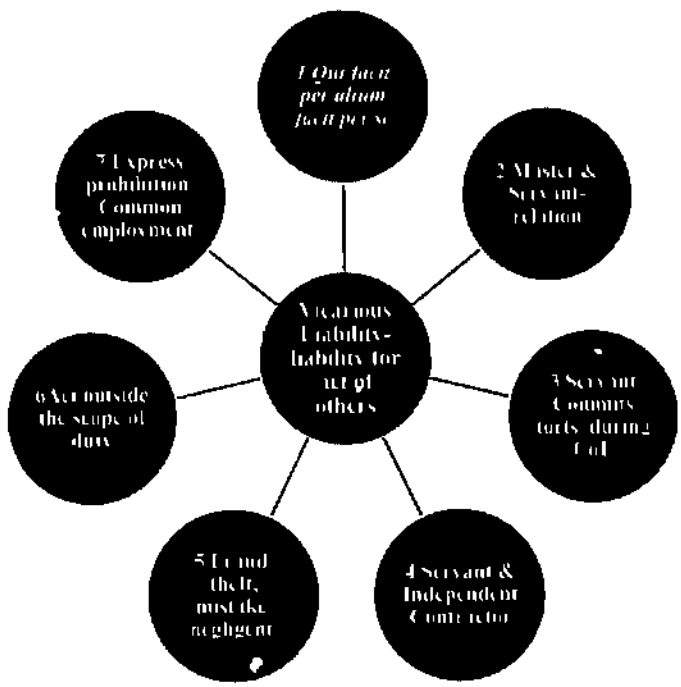
Sometimes the employer forbids his servant from doing certain acts It does not necessary follow that an act done in defiance of the prohibition is outside the scope of employment In *Limpus v London General Omnibus Co.,* case, defendant's driver, in defiance of the express instruction not to race with, or cause obstruction to, other omnibuses, tried to obstruct a rival omnibus, and thereby caused an accident The driver had been engaged to drive and his act was a negligent mode of driving and it was held to be within the course of employment, inspite of the express prohibition The defendant company held liable The other cases are *Twine v Beans Express Ltd, Conway v George Wimpsey and Co.Ltd, Mariyam Jacob v Hematal, Priti Singh v Brinda Ram*

The Doctrine of Common Employment:

Position in England. The rule known as the doctrine of Common Employment was an exception to the rule that a master is liable for the wrongs of his servant committed in the course of employment The rule was first applied in 1837 in *Pristley v Fowler,* and developed in *Hutchinston v York, New Castle and Berwick Rail Co* the doctrine was that a master was not liable for the negligent harm done by one servant to another fellow servant acting in the course of their common employment In *Pristley v. Fowler*case, the plaintiff, who was the defendant's servant, was injured at his thigh due to breaking down of an overloaded carriage in the charge of another servant of the defendant Since both the wrongdoer and the injured person were the servants of the same master, the doctrine of common employment was applicable and the master was held not liable The essentials of this doctrine, (i) the wrongdoer and the person injured must be fellow servants, and (ii) at the time of the accident, they must have been engaged in common employment The doctrine was supposed to be based upon an implied contract of service that the servant agreed to run risks of negligence on the part of his fellow employee

Position in India: In India the matter came up for discussion in cases In *Secretary of State v. Rukminibai,* case the plaintiff's husband and employee in the G I P Ry, was killed because of the negligence of a fellow employee Stone, the then Justice of Nagpur High Court viewed that, the rule was an unsafe guide for decision in India, and allowed the action The doctrine of Common Employment is, therefore, only of historical importance, both in India and England

SUMMARY



CHAPTER—V

VICARIOUS LIABILITY OF THE STATE

SYNOPSIS:

1. Position in England and in India.
2. Acts of Police Officials.
3. Negligence of Military Servants
4 Acts in the exercise of Sovereign and non-sovereign powers
5 Obligations imposed by law and exercise of sovereign functions
6. Kasturilal case, Sovereign immunity and Art 21of the Constitution.

Introduction

Position in England

At Common Law, the King could not be sued in tort, either for wrong actually authorized by it or committed by its servants, in the course of its employment No action could lie against the head of the department or the State, as the relationship between them is not as master and servant but only fellow servants So they are individually liable and could not take the defence of orders of the State or Crown Whereas an ordinary master was liable vicariously for the wrong done by his servant, the Government was not liable for a tort committed by its servant But the position has been changed after the passing of the Crown Proceedings Act, 1947 Now the Crown is liable for a tort committed by its servants, just like private individual

Position in India

Unlike the Crown Proceedings Act, 1947 (England), we do not have any statutory provision mentioning the liability of the State in India Art 300 of the Constitution of India deals about this position about State liability as, " the Govt of India may sue or to be sued by the name of the State, and may subject to any provision which may be made by Act of Parliament . . ..", Art 300 thus provides, that the Union Government and the States are juristic persons for the purpose of suit or proceedings, but the circumstances under which they can be sued remains silent In *Rup Ram v. The Punjab State,* Rup Ram, a motor cyclist, was seriously injured by the truck which was belonged to the PWD of Punjab The plaintiff brought an action against the State for injury caused by the driver's rash and negligent driving The State contented that, the truck was involved in carrying of materials for construction of Road Bridge, which was exercised only by 'Sovereign Power', as the Government alone could do it The Punjab High Court rejected this plea and held that the State was held liable The two landmark case in relation to vicarious liability of the State was (*Vidyawati v Lokuma) State of Rajasthan v Vidyawati, Kasturi Lal v. State of U.P* and *Kasturilal v. State of U.P*

In Vidyawati case, the plaintiff's husband died after being knocked down by a government jeep car which was driven rashly by an employee of the State of Rajasthan At the time of accident, the car was being taken from the workshop to the Collector's bungalow for the Collector's use In an action against the State of Rajasthan, the State was held liable The Rajasthan High court didn't find any reason for treating the State differently from an ordinary employer and held that the state of Rajasthan was held liable On appeal, the apex

confirmed the decision of the High Court and endorsed the view expressed by it Inspite of the decision of the Supreme Court, the decision was not satisfactory and certain In *Kasturilal* case, the court has again stated that if the act of the government servant was one which could be considered to be in delegation of sovereign powers, the state would be exempt from the liability, otherwise not In this case, Kasturi Lal Ralia Ram, one of the partners of the jewelers at Amristar happened to be go to Meerut, reached there on the midnight of 20th September, 1947 by Frontier Mail He had gone to Meerut in order to sell gold and silver etc,. in Meerut market While he was pending through one of the markets with his belongings, he was taken into custody by three police constables on the suspicion of possessing stolen property and then he was taken to the police station On search, it was found that he had been carrying 103 tolas of gold and over Munds of silver He was kept in police lock-up and his belongings were also kept in the custody of the police under the provision of Criminal Procedure Code Next day he was released on bail and sometimes thereafter the silver was returned to him The gold had been kept in the police Malkhana under the charge of the Head Constable Mohameed Amir The Head Constable misappropriated the gold and fled to Pakistan in October 1947 The plaintiff brought an action against the State of U P claiming either the return of the gold or in the alternative, compensation amounting to over rs 11,000/- in lieu thereof The State of U P held to be not liable on the grounds that, (i) the police officials were acting in discharge of statutory powers (ii) the power of the police official in keeping the property in the police Malkhana was a sovereign The other important cases were, *Headmistress, Govt Girls High School v Mahalakshmi, A.H Khodwa v. State of Maharastra, Shyam Sunder v The State of Rajasthan, Indian Insurance Co Assn.Pool v Radhabai, Mohameed Shafi v Dr Vilas.*

Acts of Police

In *Pagadala Narasimham v The Commissioner and Special Officer, Nellore Municipality,* a bus belonging to the plaintiff, which had been wrongly parked and caused obstruction to the traffic, was removed by the traffic police with the assistance of the municipal employees The act of the police officers was held to be justified and in discharged of sovereign functions, and therefore, they could not be held liable for the same In *State of Assam v Md Nizamuddin Ahmed,* the plaintiff was carrying on business in sale of seeds of different agricultural products such as jute, vegetables, oilseeds, etc the business was being carried on without a license, which was needed for such business The police authorities seized the seeds from the plaintiff's shop The seed got damaged because of storage facilities and the negligence, while they were in police custody The plaintiff claimed compensation from the State for the damaged caused to the seeds while in the custody of police It was held that the seizure of the seeds was in the exercise of sovereign power and the plaintiff was, therefore, not entitled to claim any damages for the same

Act done in exercise of sovereign Powers·

In *Union of India v Harbans Singh,* meals were being carried from the cantonment, Delhi for being distributed to military personnel on duty The truck carrying on meals belonged to the military department and was being driven by a military driver In caused an accident resulting in the death of a person It was held that the act was being done in exercise of sovereign power, and, therefore, the State could not be made liable for the same

Act done in exercise of non-sovereign powers

In *Satya Wati Devi v Union of India,* some Air Force personnel constituting hockey and basketball teams were carried by an air force vehicle and due to the driver, death was caused of the palintiff's husband The Delhi Court rejected the plea taken by the Govt that such physical exercises were necessary to take the army in proper shape and trim such as act should be considered to be a sovereign act It was held that since the

act of carrying teams to play matches could be performed by a private individual, it was not a sovereign function and, as such, the government was liable, The other important cases are, *Union of India v Savita Sharma, Nandram Heeralal v UOI, UOI v Smt Jasso, UOI v Sugrabai, UOI v Bhagwati Prasad Misra.*

Torts Committed by the servants of the State in discharge of the obligations imposed by law and in exercise of sovereign function

Position in England In England after the passing of the crown Proceedings Act, 1947, it is no defence for the State that the tort committed by its servants was in discharge of obligations imposed by law

Position in India

Tort committed while performing duty in discharge of obligations imposed by law has been considered to be defence in India The exemption of the State from liability to pay damages for the tortuous act of the servants, where a government servant carrying out duties imposed by law, has been justified on the ground that in such cases, the Government servants purports to carry out duties imposed by the letter of the law and is controlled by the law and not by the government This status has been discussed earlier in *Kasturilal & Vidyawati cases*

Kasturilal Case Bypassed

Although the decision of the apex court in this case still holds well, for practical purposes its force has been considerably reduced by a number of decisions of the Supreme Court Without expressly referring to Kasturilal or distinguishing it or overruling it a deviation in this case has been made Under the circumstances in which the State would have been exempted from liability if Kasturilal had been followed, the State has been held liable The state has been liable in respect of loss or damage either to the property or to a person

Loss of property

When the property is in possession of the State officials, there is deemed to be bailment of the property, and the state as the bailee has been held bound to either return the property or pay compensation for the same In *State of Gujarat v Memon Mohamed,* the customs authorities seized two trucks, a station wagon and goods belonging to the plaintiff on the grounds that the plaintiff had not paid import duties on the said trucks that they were used for smuggling goods, and that some of the goods were smuggled goods The customs authorities made false representation to the magistrate stating that these to be unclaimed property and disposed of the same under the orders of the magistrate Subsequently, the Revenue Tribunal set aside the said order of confiscation and directed the return of the property to the plaintiff The plaintiff claimed back his vehicle or in the alternative the value of the same amounting to about 30,000/- It was held by the Supreme Court that after seizure, the position of the Government was that of that the bailee The order of the magistrate obtained on false representation did not affect the right of the owner to demand the return of the property The Government, therefore, had a duty to return the property, and on its failure to do the same, it had a duty to pay compensation

Sovereign immunity is subject to fundamental rights

In *People's Union for Democratic Rights v State of Bihar,* about 600 to 700 poor peasants and landless persons had collected for a peaceful meeting Without any previous warning by the police or provocation on the part of those collected, the Superintendent of police surrounded the gathering with the help of the police

force and opened fire, as a result of which at least 21 persons, including children died and many more injured The People's Union of Democratic Rights filed an application before the Supreme Court under Art 32 of the Constitution, claiming compensation for the victims of the firing It was held by the Supreme Court that the State should pay compensation for the victims of the firing It was held by the SC that the State should pay compensation of Rs 20,000/- for every case of death and Rs 5,000/- for every injured person This amount was ordered to be pad within two months without prejudice to any just claim for compensation that may be advanced by the sufferers afterwards The other important cases are, *Sabastian M Hongray v UOI, Bhim Singh v State of J.K., Rudaj Shah v. State of Bihar, Saheli v CoP, Delhi* In these cases recognized the liability of the State to pay compensation, when the right to life and personal liberty as guaranteed under Art 21 of the Constitution had been violated by the officials of the State The other cases were *SoGujarath v Govindbhai, Smt Kumari v. So TN, Inder Singh v. S o Punjab* etc

In *Chairman, Railway Board v Cahndrima Das,* a Bangaladeshi women was gang raped by railway employess in Yatri Niwas, a railway building at Howrah railway Station It was held by the SC that the "*Right to Life"* contained n Art 21 is available not only to every citizens of the country, but also to every person, who may not be a citizen of the country Even a tourist coming to this country is entitled to the protection of his life Fundamental rights in India are in consonance with the Rights contained in the Universal Declaration of Human Rights adopted by United nations General Assembly It is unfortunate that the recommendations of the Law Commission made long back in 1956, and the suggestions made by the SC, have not yet been given effect to it The unsatisfactory state of affairs in this regard is against social justice in a welfare state It is hoped that the Act regarding State liability will be passed without mush further delay In the absence of such legislation, it will in consonance with social justice demanded by the changed conditions and the concept of welfare State that the court will follow the recent decisions of the SC rather than Kasturilal

CHAPTER—VI

REMOTENESS OF DAMAGE

Synopsis.

1 Remoteness of Damages—Problem

2 Remote and Proximate of damage—(1) the test of reasonable foresight, (2) the test of directness

3. Wagon Mound case

Introduction

After the commission of the tort, the question of defendant's liability arises The consequences of the wrongful act may be endless or there may be consequences of consequences For eg

A——hits B——collides with C who is carrying some explosive substances, which exploded and killed D and cause injuries to several person and nearby buildings also affected due to it Now the question is who is liable for these damages caused, A or B or C?

He is liable only for those consequences which are not too remote from his conduct No defendant can be made liable *ad infinitum* for all the consequences which follow his wrongful act

Remote and Proximate damage

How and where such a line is to be drawn? To answer this question, we are to see whether the damage is too remote a consequence of the wrongful act or not If it is too remote, the defendant is not liable If on the other hand, the act and the consequences are so connected that they are not too remote but are proximate, the defendant will be liable for the consequences It is not necessary that the event which is immediately connected with the consequences is proximate and that further from it s too remote

In *Haynes v. Harwood,* the defendant's servants negligently left a horse van unattended in a crowded street By throwing of stones at the horse by a child, they ran away and a policeman was injured in an attempt to stop them with a view to rescuing the women and children on the street One of the defences pleaded by the defendant was *novus actus interveniens,* or remoteness of consequences I,e is the mischief of the child was the proximate cause and the negligence of the defendant's servants was the remote cause It was held that the defendant was liable even though the horses had bolted when a child threw stones on them, because such a mischief on the part of the children was anticipated The other important cases are, *Lynch v Nurdin, Lampert v Eastern v National Omnibus Co,*

The two tests to determine whether the damage is remote or not,

(i)The test of the reasonable foresight—according to this test, if the consequences of the wrongful act could have been foreseen by a reasonable man, they are not too remote If, on the other hand a reasonable would not have foreseen the consequences, they are too remote

(ii) The test of directness— a person is liable for all the direct consequences which directly follow a wrongful act, whether he could have foreseen them or not, because consequences which directly follows a

wrongful act or not too remote In *Re Polemis & Furnes, Withy & Co Ltd* case, the test of reasonable foresight was rejected by the court of Appeal In that case, the defendants chartered a ship The cargo to be carried by them included a quantity of Benzene and of petrol in tins Due to leakage in those tins, some of their contents collected in the hold of the ship Owing to the negligence of the defendant's servants, a plank fell into the hold, a spark was caused and consequently the ship was totally destroyed by fire The owner of the ship were held entitled to recover the loss-nearly pounds 200,000, being the direct consequence of the wrongful act although such a loss could not have been reasonably foreseen

The test of directness has been considered to be incorrect and was rejected by the Judicial Committee of the Privy Council in *Overseas Tankship (U.K) Ltd V Morts Dock & Engg Co Ltd, (Wagon Mound Case)*, an appeal from the New South Wales and it was held that the test of *reasonable foresight* is the better test

The Test of reasonable Foresight Wagon Mound Case

The Wagon Mound, an oil burning vessel, was charted by the appellant by the appellants, Overseas Tankship ltd, and was taking oil from Sydney port At a distance about 600 feet, the respondents, Morts Docks Company, owned a wharf, where the repairs of the ship including some welding operations were going on Due to the negligence of the appellant's servants, a large quantity of oil spilt in to the water The oil which was spread over the water was carried to the respondent's wharf About 60 hours later, molten metal from the respondent's wharf fell on the floating cotton waste, which ignited the fuel oil on the water and the fire caused great damage to the wharf and equipments It was also found that the appellants could not foresee that the oil spilt would catch fire On appeal, the Privy Council held that Re Polemis was no more good law and reserved the decision of the Supreme Court Since a reasonable man could not foresee such injury, the appellants were not held liable in negligence, even though their servant's negligence was the direct cause of damage The other cases which followed the decision of Wagon Mound case were, *Hughes v Lord Advocate, S C M (U.K) v W J. Whittall & Sons*

CHAPTER—VII

TRESPASS TO THE PERSON

SYNOPSIS

1 Assault and Battery

2 Use of force without lawful justification

3 False imprisonment

4 Total restraint

5 Lawful & Unlawful detention

6 Remedies

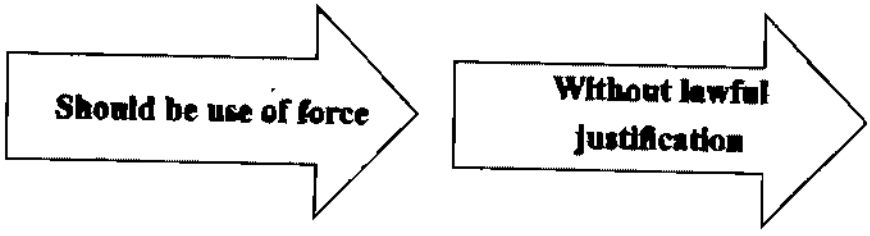
7 Action for damages

8 Self Help

9 *Habeas Corpus*

Introduction

Trespass to person, is nothing but interfering in to or committing something against one's human body and liberty



Assault and Battery

Battery

Without lawful justification

Should be use of force

The wrong of battery consists in intentional application of force to another person without any lawful justification Its essential elements are

(I) Use of Force

Though use of force is trivial and does not cause any harm, the wrong is still constituted Physical hurt need not be there Least touching of another in anger is a battery Force may be used without bodily contact Use of stick, bullet, or any other missile or throwing of water or spitting in a man's face, pulling the chair while a person about to sit, etc

(II) Without lawful justification·

It is essential that the use of force should be intentional and without any lawful justification Harm voluntarily suffered is not battery The use of force may also be justified, in pulling a drowning man out of

water, forcibly feeding a hunger-sticking prisoner to save his life or performance of operation of an unconscious person by a competent surgeon to save the former's life Harm which is unintentional or caused by pure accident is also not actionable In *Stanley v Powell,* the defendant was a member of shooting party, fired at a peasant but the pellet from his gun glanced off the tree and accidently wounded Stanley, another member of the party. It was held that Powell was not liable, if the act is willful, or negligent, the defendant would be liable The same was again established in *Pratap Daji v B B C.I Rly* case Use of force to oust a trespasser from certain premises is perfectly justified It should not be more force than is necessary to repel the invasion In *P Kader v. K A Alagarswami,* case the High Court of Madras held that putting handcuffs to an under trial prisoner and then chaining him like a dangerous animal with a neighboring window in a hospital during his medical treatment is an unjustifiable use of force and the police responsible for the same

Assault

It is an act of the defendant which causes to the plaintiff reasonable apprehension of the infliction of a battery on him by the defendant If the defendant by his act creates an apprehension in the mind of the plaintiff that he is going to commit battery against the plaintiff, the wrong of assault s completed Assault is only attempting battery In *R.v George,* the defendant shows the unloaded pistol towards the plaintiff as if it were loaded and created an apprehension that it would cause injury to him It is a clear case of assault The test is whether an apprehension has been created in the mind of the plaintiff that battery is going to be committed against him In the above case, if the plaintiff knows that the pistol is unloaded, there is no assault It is also essential that the plaintiff has to prove that there is *prima facie* against the defendant Mere verbal threat is not assault unless it creates reasonable apprehension in the plaintiff's mind that immediate force will also be used This was discussed in *Bavisetti Venkata Surya Rao v. Nandipati Muthayya* case If a person advances in a threatening manner to use force, there is assault, as held in *Stephens v Myers* case Generally assault precedes battery It is however, not essential that every battery should include assault

False Imprisonment

It consists in the imposition of a total restraint for some period, may be for short, upon the liberty of another, without sufficient lawful justification To constitute false imprisonment, imprisonment in the ordinary sense is not required Deprivation of personal liberty whether confined within four walls, or by preventing from leaving the place it is false imprisonment The essential element to constitute this wrong are,

(1) There should be total restraint on the liberty of a person,

(2) It should be without any lawful justification

Total restraint·

Under Criminal law, whether the restraint is full or partial is actionable If the free movement of the person is restrained total and if he was prevented from going out of certain limits, it was a crime of "Wrongful Confinement", U/s 340 of I P C If the restraint is partial and if the person is prevented from moving on certain direction alone, it is "Wrongful Restraint", U/ s 339 of I P C But under Civil Law, the position is different Under law of tort, unless it is a total restraint it is not false imprisonment To constitute false imprisonment, a person must have been completely deprived of his liberty to move beyond certain limits The duration of false imprisonment may be short to constitute a tort In *Mee v Cruikshank,* the plaintiff after his acquittal, taken down to the cells and detained there for few more minutes while some questions were put to him by the warders, there the defendant was held liable For false imprisonment it is not necessary that a person has to be confined in prison or within four walls, if such deprivation prevents a person from having the liberty of going beyond certain circumscribed limits there is false imprisonment Detention may on highways, train or bus etc Means of Escape If there is means of escape, the restraint cannot be termed as total and that not constitute false imprisonment

Knowledge of the Plaintiff

There has been a difference of opinion on the point whether the knowledge of the plaintiff, that there has been restraint on his freedom, is essential to constitute the wrong of false imprisonment In *Herring v Boylre,* case it was held that, such knowledge is essential In this case, a school master wrongfully refused to permit a boy to go with his mother unless the mother paid an amount alleged to be due from him This conversation was not known to the boy and he was not cognizant of the restraint It was held that the refusal to the mother in the boy's absence, and without his being cognizant of the restraint, could not amount to false imprisonment But in *Meering v. Grahame-white Aviation Co ,* case it has been held that, such knowledge is not an essential element for bring an action for false imprisonment because the wrong could be constituted even without a person having the knowledge of the same In this case, the plaintiff, an employee of the defendant's company was suspected of having stolen the company's property He was called to the company's office and was asked to stay in the waiting room He was told that his presence there was required for investigation in connection with the property which had been stolen One or two employees remained, outside the room where the plaintiff had been made to sit In the mean time the police was called and the plaintiff was arrested on the charge of theft He was acquitted and then he sued the defendant for false imprisonment It was held that the policemen were not acting as the company's agent and arrest of the plaintiff by them, on sufficient reasonable grounds of suspecting theft, was not wrongful It was, however also held that the detention of the plaintiff by the officers of the company before the arrival of the police was wrongful and that amounted to false imprisonment In these two cases, the knowledge of confinement ought to be required, because, the interest protected seems a mental one, as an assault, and *Meerings* case appeared to be logical

Unlawful Detention.

To constitute the wrong of false imprisonment, it is necessary to show that the restraint should be unlawful or without lawful justification If a person is not released from jail after his acquittal but is continued to be detained thereafter, the detention cannot be considered to be lawful In *Rudul Shah v State of Bihar,* the petitioner was acquitted by the court in 1986 but was released from the jail in 1982 The State tried to justify the detention by pleading that the detention was for the medical treatment of the petitioner for his mental disorder The plea was rejected As an ancillary relief, in a writ petition, a sum of Rs 35,000 was granted as compensation as an interim measure by the Supreme Court, without precluding the petitioner from claiming further compensation The other important cases were, *Bhim Singh v. State of J & K, Garikipati v. Araza Biksham, Kundan Lal v Dr. Des Raj.*

Lawful Detention.

When there is some justification for detaining a person, there is no false imprisonment Thus, if a man entered certain premises subject to certain reasonable conditions, it is no wrong to prevent, him from leaving those premises and unless those conditions are fulfilled The important cases are, *Robinson v. Balmain New Ferry co, Ltd, Weardale Steel, Coal and Coke Co Ltd.* If a person commits any offence, law permits arrest of such person by the police officer, magistrate and even private person It has been noted that when a lawful arrest has been made by a private person, the detainee must be handed over to the police as soon as it is reasonably possible thereafter The detention from a private person will amount to false imprisonment event if such a person is not found guilty at a subsequent trial This was held in *John Lewis & Co v. Tims* case

Remedies for damages:

(1) Action for damages:

Whenever the plaintiff has been wrongfully detained, he can always bring an action to claim damages Compensation may be claimed not only for injury to the liberty but also for disgrace and humiliation which may cause thereby

(ii) Self-Help

This is the remedy which is available to a person while he is still under detention A person is authorized to use reasonable force in order to have an escape from detention instead of waiting for a legal action and procuring his release thereby

(iii) *Habeas Corpus*

It is a faster remedy for procuring the release of a person wrongfully detained Such a writ may be issued either by the Supreme Court under Art 32 of the Constitution or Art 226 before the High Court By this writ, the person detaining is required to produce the detained person before the court and justify the reason If the court finds that the detention is unlawful, it will order that the person detained should be immediately released Eg *Rudhal Sah v. State of Bihar, Bhim Singh v. State of J & K*

Chapter—VIII

DEFAMATION

Synopsis

1 Libel and Slander

2. Essentials of defamation

3 Injunction against publication

4 Communication between husband and wife

5 Defences

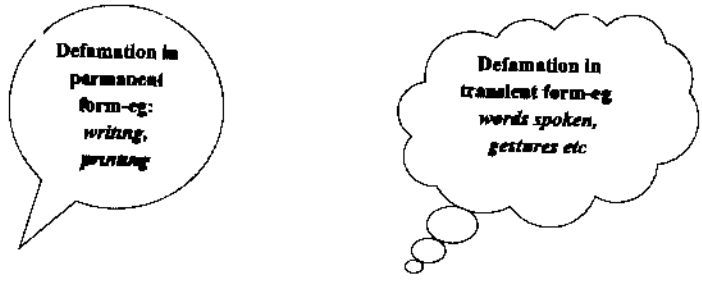
Introduction

Reputation of a person considered being his asset and any injury to his asset is entitled to be justified Defamation is injury to the reputation of a person It is amount to trespass against a person If a person injures the reputation of another, he does so at his own risk

Defamation may be in two different ways, they are,

Libel

Slander



In *Youssoupoff v. M G M.Pictures Ltd,* case, it was held that, not only the photographic part of it is considered to be libel, but also the speech which synchronizes with it also a libel In this case, the lady Princess Natasha was shown as having relations of seduction or rape with the man Rasputin, a man of worst character It was held by the judges that, "there can be no doubt that, so far as the photographic part of the exhibition is concerned that it is a permanent matter to be seen by eye, and is the proper subject of an action for libel" Libel is addressed to eye and slander is addressed to ear Under English Law, the distinction between libel and slander is material for two reasons

(1) Under criminal law, only libel has been recognized as an offence Slander is no offence

(2) Under law of torts, slander is actionable, save in exceptional cases, only on proof of special damages Libel is always actionable *per se* without the proof of any damage

Indian Law

It has been noted that under English criminal law, a distinction is made between libel and slander There libel is a crime, but slander is not Slander is only a civil wrong in English law But both libel and slander are criminal offences U/s 499 and 500 of IPC In *D P Choudhary v Majulata,* the plaintiff Manjulatha, about 17 years of age, belonged to a distinguished educated family of Jodhpur She was a student of B A There was publication of a news item in a local daily, Dainik Navjyoti by stating that Manjulatha had ran away with a boy, after she went out of her house on the pretext of attending night classes in her college The news was

untrue and was published negligently with utter irresponsibility It was held that all defamatory words are *actionable per se* She was entitled to an award of Rs 10,000/- by way of general damages

Essentials:

(1) The statement must be defamatory;

(2) Must refer to the plaintiff,

(3) Statement must be published

I The Statement must b defamatory

Defamatory statement is one which tends to injure the reputation of the plaintiff Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally The defamatory statement could be made in different ways Whether a statement is defamatory or not depends upon how the right thinking members of the society are likely to take it In *S.N.M Adbi v. Prafulla Kumar Mohanta,* case, it was held that it is not necessary that the statement need not show a tendency of imputation to prejudice the plaintiff in the eye of everyone in the community or all of his associates Mere hasty expression spoken in anger, or vulgar abuse to which no hearer would attribute any set purpose to injure character would not be actionable In *South Indian Railway Co v Ramakrishna,* the railway guard, who was an employee of the defendant went to a carriage for checking the tickets and while calling upon the plaintiff to produce his ticket said to him in the presence of the other passenger "I suspect you are travelling with a wrong ticket" The plaintiff produced the ticket which was in order He then sued the railway company contending that those words uttered by the railway guard amounted to defamation It was held that the words spoken by the guard were spoken bona fide and under the circumstances of the case, there was no defamation and the railway company could not be made liable for the same

The *Innuendo*

A statement may be *prima facie* defamatory and that is so when its natural and obvious meaning leads to that conclusion Sometimes, the statement may *prima facie* be innocent but because of some latent or secondary meaning, it may be considered to be defamatory When the natural and ordinary meaning is not defamatory but the plaintiff wants to bring an action for defamation, he must prove the latent or the secondary meaning, I,e the *innuendo* which makes the statement defamatory In *Capital and Counties Bank v Henty & Sons,* there was a dispute between the defendant and one of the branch managers of the plaintiff bank The defendants who used to receive cheques drawn on various branches of the Capital and Counties bank sent a circular letter to a large number of their customers as follows "*Henty & Sons hereby give notice that they will not receive payment in cheques drawn on any of the branches of the Capital Counties Bank*" The circular became known to various other persons also and there was a run on the bank The bank sued the defendant company for libel alleging that the circular implied an insolvency of the bank Held that, the words of the circular taken in their natural sense did not convey the supposed imputation and the reasonable people would not understand it in the sense of the *innuendo* suggested There was, therefore no libel

Intention to defame is not necessary:

When the words are considered to be defamatory by the persons to whom the statement is published, there is defamation, even though the person making the statement believed it to be innocent It is immaterial that the defendants did not know of the facts because of which a statement otherwise innocent is considered to be defamatory This was held in *Cassidy v. Daily Mirror Newspaper Ltd,* case In this case Mr Cassidy also known as Mr Corrigan, was married to a lady who called herself Mrs Cassidy or Mrs Corrigan She was known as the lawful wife of Mr Cassidy, who did not live with her but occasionally came and stayed with her at her flat The defendant published in their news paper a photograph of Mr Corrigan and Miss 'X', with the

following words, "*Mr M Corrigan, the horse race owner, and Miss 'X', whose engagement has been announced*" Mrs Corrigan sued the defendants for libel alleging that the *innuendo* was that Mr Corrigan was not her husband and he lived with her in immoral cohabitation, and this formed a bad opinion of her as a result of the publication The court found that the *innuendo* was established and the defendants held liable In *Morrison v Ritchie & Co,* the same was established again

The Statement must refer to the plaintiff

In an action for defamation, the plaintiff has to prove that the statement of which he complains referred to him It is immaterial that the defendant did not intents to defame the plaintiff This was elaborately discussed in *Hulton Co. v. Jones* case In *T V Ramasubha Iyer v. A.M.A Mohideen* case, it was checked out whether there was a liability on the part of defendant, if he publishes anything without intention The High Court of Madras after referring the English authorities and also the Defamation Act, 1952, came to the conclusion that the English case of *Hulton Co. v. Jones* wherein the majority of the Court of Appeal and the House of Lords had stated that innocent publishers of a defamatory statement was liable, was against justice, equity and good conscience, and the same was not applicable in India Moreover in the opinion of the Court, English Law had been altered by section 4 of the Defamation Act, by which the publishers of an innocent but defamatory statement can avoid his liability It was, therefore, held that the in India there was no liability for the statements published innocently

Defamation of Class of person

When the words refer to a group of individuals or a class of persons, no member of that group of individuals or a class of persons, no member of that group or class can sue unless he can prove that the words could reasonably be considered to be referring to him In *Knuffer v. London Express Newspapers Ltd,* the appellant was the member of the party, the membership of which about 2000 out of which 24 members including the plaintiff where in England The respondents published a statement of the party as a whole Some of the appellant's friends considered the article to be referring to him It was, however, held that since the article referred to such a big class, most of the members of which were resident abroad, it could not reasonably be considered to be referring the appellant and the respondents were not liable In *Dhirendra Nath Sen v. Rajat Kanti Bhadra, & Fanu Malcomson,* it was followed again A partnership firm is not a legal entity The partners collectively are known as a firm Defamation of a partnership firm may therefore mean the defamation of partners of that firm as it is not a legal person No suit is maintainable for defamation by a firm as it is not legal person, and suit has to be brought by the individual partner In *P K.Oswal Hosiery Mill v Tilak Chand ,* case, the Punjab High Court explained the position

Defamation of deceases:

Defaming a deceased person is no tort Under Criminal Law, however, it may amount to defamation to impute anything to a deceased person If the imputation would harm the reputation of that person, if living and is intended to be hurtful to the feelings of his family or other near relatives

The Statement must be published.

Defamation means making the defamatory matter known to some person other than the person defamed, and unless that is done, no civil action for defamation lies Communication to the plaintiff himself is not enough because defamation is injury to the reputation consists in the estimation in which others hold him and not a man's own opinion of himself This was discussed in *Pullman v. Hill, Mahendra Ram v Harnandan Prasad, Arumuga Mudaliar v Annamalai Mudaliar, Powell v Gelston.* If a defamatory letter sent to the plaintiff is likely to be read by somebody else, there is a publication When the matter is contained in a postcard or a telegram, the defendant is liable even without a proof that somebody else read it, because a telegram is read by the post office officials who transmit and receive it If the matter is in a language which the addressee does not understand or he is too blind to read it or he could not hear, being a deaf man

Injunction against publication of a defamatory statement

In *Prameela Ravindran v P Lakshmikutty Amma,* it was held by the High Court of Madras, that if a statement regarding the validity of the marriage of a person is uncalled for under circumstances of the case and is likely to injure the reputation of a person, the person making such statement can be restrained from doing so In the above mentioned case, the applicant filed an application requesting for an order to restrain the respondents from making any defamatory statement about the applicant The respondent, who disputed the marriage, had sending letters to various persons relating to the marital status of the applicant Such letters were held to be defamatory and the respondent was restrained of making statements and sending letters of the kind she had been doing

Communication between husband and wife

In the eyes of law, husband and wife are one person and the communication of a defamatory matter from the husband to the wife or vice versa is no publication In *T J Ponnen v M C Verghese,* the question which had arisen was whether a letter from the husband to the wife containing defamatory matter concerning the father-in-law, (wife's father) could be proved in an action by the father-in-law against son-in-law In that case, on T J Ponnen wrote a number of letters to his wife, Rathi, containing some defamatory imputations concerning Rathi's father, and she passed on those letters to her father The father-in-law launched a prosecution against his son-in-law complaining the defamatory matters contained in those letters Ponnen contended that the letters addressed by him to his wife are not, except with his consent, admissible in evidence by virtue of Sec 22 of IEA, and since the wife, is permitted to disclose those letters, no offence of defamation could be made out The Kerala High Court held that, the letters meant for the wife could not be proved in the court either by her or through any relation of her to prejudice of her husband because such communication are precluded by the law to be disclosed and what cannot be or is not proved in a court has to be assumed as non-existence in the eyes of law Ponnen, therefore, not held liable Communication of a matter defamatory of one spouse to the other is sufficient publication This was held in *Theaker v Richardson* case

Repetition of the defamatory statement

The liability of the person who repeats a defamatory matter arises in the same way as that of the originator, because every repetition is a fresh publication giving rise to a fresh cause of action In *Emmens v Pottle,* this was held with the following exemption, (i) when the publisher not known about the facts, (ii) inspite of reasonable diligence could not have known that they were circulating was defamatory

DEFENCES

The defences to an action for defamation are

1 Justification of truth,

2 Fair comment,

3 Privilege, which may be either absolute or conditional

I Justification of Truth·

In a civil action for defamation, truth of the defamatory matter is complete defence Under Criminal Law, merely proving that the statement was true is no defence Under the Civil Law, merely, proving that the statement was true is a good defence The reason for the defence is that, "the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess In *Alexander v. North Eastern Ry,* explains the point There the plaintiff sentenced to a fine of 1 Dollar, or 14 days of imprisonment in the alternative, for travelling on a train without appropriate ticket The defendant published a notice stating that the plaintiff had been sentenced to a fine of 1 Dollar or three weeks imprisonment

in the alternative Held, that the defendants were not liable, the statement being substantially accurate If the defendant is not able to prove the truth of the facts, the defence cannot be availed This was held in *Radheshyam Tiwari v Eknath*, case

II Fair Comment

Making fair comment on matters of public interest is a defence to an action for defamation For this defence to be available, the following essentials are required

1 It must be a *Comment,* an expression of opinion rather than assertion of facts,

2 The comments must be *fair,* and

3 Matter commented upon must be of *public interest*

(1)Fair Comment

Comment means an expression of opinion rather to an action for defamation It should be distinguished from making a statement of facts A fair comment is a defence by itself whereas if it is a statement of facts that can be excused only if justification or privilege is proved regarding that Whatever a statement is a fact or a comment on certain facts depends on the language used or the context in which that is stated Since it is necessary that the comment must be related to certain facts, it is also essential that the facts commented upon must be either known to the audience addressed or the commentator should make it known along with his comment

(2)The Comment must be fair

The comment cannot be fair when it is based upon untrue facts If the facts are substantially true and justify the comment of the facts which are truly stated, the defences of fair comment can be taken even though some of the facts stated may not be proved Whether fair comment is fair or not depends upon whether the defendant honestly held that particular opinion It is not the opinion of the court as to the fairness of the comment but the opinion of the commentator which is material In *Silkin v Beaverbook Newspaper Ltd., Gregory v. Duke of Brunswick* case this point was discussed clearly

(3)The matter commented upon must be of public interest:

Administration of Govt, departments, public companies, courts, conduct of public men like ministers or officers of State, public institutions and local authorities, public meetings, pictures, theatres, public entertainments, text books, novels etc are considered to be matters of public interest

III· Privilege.

There are certain occasions when the law recognizes that the right of free speech outweighs the plaintiff's right to reputation the law treats such occasions to be privileged and a defamatory statement made on each occasions is not actionable Privilege is of *absolute* and *qualified.*

Absolute Privilege

In matters of absolute privilege, no action lies for the defamatory statement even though the statement is false or has been made maliciously In such cases, the public interest demands that an individual's right to reputation should gave way to the freedom speech Absolute privilege is recognized in the following cases

(a) Parliamentary proceedings,

(b) Judicial proceedings,

(c) State communications

(a) Parliamentary Proceedings.

Article 105(2) of our Constitution provides that (a) statements made by a member of both House of Parliament in Parliament, and (b) the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings, cannot be questioned in a court of law A similar privilege exists in respect of State legislature

(b) Judicial Proceedings:

No action for libel or slander lies, whether against judges, counsels, witnesses, or parties, for words written or spoken in the course of any proceedings before any court recognized by law, even though the words written or spoken maliciously, without any justification or excuse and from personal ill-will and anger against the person defamed Protection to the judicial officers in India has been granted by the Judicial Officers Protection Act, 1850 Cases like *Jiwan Mal v. Lachhman, Rajinder Kishore v. Durga Sahi, T.G Nair v. Melepurath Sankunni, V. Narayana v E Subbanna,* the question of judicial proceedings has been dealt elaborately

(c) State Communication

A statement made by one officer of the State to another in the course of official duty is absolutely privileged for reasons of public policy

Qualified Privilege.

Unlike absolute privilege, the defence of qualified privilege is also available In that case it is necessary that the statement must have been made without malice For such a defence to be available, it is further necessary that there must be an occasion for making the statement To avail this defence, the defendant has to prove the following two points

(a) The statement was made on a privileged occasion, i e , it was in discharge of duty or protection of an interest, or it is fair report of parliamentary, judicial or other public proceeding,

(b) The statement was made without any malice

(1) Statement should be made in discharge of a duty or protection of an interest.

The occasion when there is a qualified privilege to make defamatory statement without malice are either when there is existence of a duty, legal, social or moral to make such a statement or existence of some interest for the protection of which the statement is made This was further interpreted in *R K. Karanjia v. Thackersey* case The decision in the above case was followed in *Radheshyam Tiwari v. Eknath* case It was held that the reciprocity of duty or interest is essential Such a duty or interest must be actually present It is not sufficient that the maker of the statement honestly believed in the existence of such interest or duty in the receiver of the statement

(2) Reports of Parliamentary, judicial or other public proceedings:

The proceedings published by or under the authority of the either house of the Parliament are subject of absolute privilege If the proceedings are being published without the authority of the house, may claim qualified privilege, if such publication has been made without malice intention Publications of judicial or quasi-judicial proceedings and proceedings of public meetings are also enjoying the qualified privilege

CHAPTER—IX

NUISANCE

Synopsis·

1 Kinds of nuisance—(a) Public and (b) Private Nuisance

2. Unreasonable interference

3 Interference with use or enjoyment of land

4. Damages

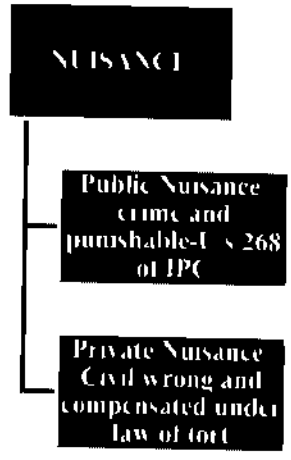
5 Defences—(a) Effectual and (b) Ineffectual

Introduction:

Nuisance as a tort means an unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it Acts interference with comfort, health or safety is the examples of it

Nuisance should be distinguished from trespass,

Nuisance	Trespass
The interference is consequential	A direct physical interference
With plaintiff's use or enjoyment of land without any interference with the possession	With plaintiff's possession of land
Nuisance can be committed through some medium of intangible object like, vibration, gas, noise etc	Through some material or tangible object
Damages has got to be proved	Actionable per se



Public Nuisance:

Public nuisance is a crime whereas private nuisance is a civil wrong Public nuisance is interference with the right of public in general and is punishable as an offence Obstruction may cause inconvenience to many person but none can be allowed to bring a civil action for that, otherwise there may be hundreds of actions for a single act of public nuisance To avoid multiplicity of suits the law, makes public nuisance only an offence punishable under Criminal Law In certain cases, when any person suffers some *Special or*

Particular damages, different from what is inflicted upon public as a whole, a civil right of action is available to the person injured In order to sustain a civil suit in respect of a public nuisance, proof of special damage is essential The proof of special damage entitles the plaintiff to bring a civil action for what may be otherwise a public nuisance In *Campell v Paddington Corporation,* case, the plaintiff was the owner of a building in London The funeral procession of King Edward II was to pass from a highway just in front of the plaintiff's building An uninterrupted view of the procession could be had from the windows of the plaintiff's building The plaintiff accepted certain payments from certain persons and permitted them to occupy seats in the first and second floor of her building Before the date of the said procession, the defendant corporation constructed a stand on the highway in front of the plaintiff building to enable the members of the Corporation and its guests to have a view from the plaintiff's building Because of the obstruction, the plaintiff was deprived of the profitable contract of letting seats in her building She filed a suit against the corporation contenting that the structure on the highway, which was a public nuisance, had caused special loss to her It was held that the Corporation was held liable The same was discussed in *Dr. Ram Raj Singh v Babulal, Rose v. Milles, Winterbottom v Lord Derby* cases

Private Nuisance or Tort of Nuisance

Essentials

To constitute the tort of nuisance, the following essentials are required to be

(a) Unreasonable interference,

(b) Interference is with the use of enjoyment of land,

(c) Damage

I. Unreasonable interference

Interference may cause damage to the plaintiff's property or may cause personal discomfort to the plaintiff in the enjoyment of property Every interference is not a nuisance To constitute nuisance, the interference should be unreasonable Every person must put up with some noise, some vibrations, some smell, etc, so that members of the society can enjoy their own rights In *Radhey Shyam v Gur Prasad* case, Gur Prasad and another filed a suit against Radhey Shyam and others for a permanent injunction to restraint them from installing and running flour mill in their premises It was alleged that the said mill would cause nuisance to the plaintiff's who were occupying the first floor portion of the same premises in as much as the plaintiff's would lose their peace on account of rattling noise of the flour mill and thereby their health would also be adversely affected It was held that substantial addition to the noise in a noisy locality, by the running of the impugned machines, seriously interfered with the physical comfort of the plaintiff and as such it amounted to nuisance The other cases were, *Shanmugavel Chettiar v Sri Ramkumar Ginning Firm, Ushaben v Bhagyalakshmi Chitra Mandir, Health v Mayor Brighton* etc

Nuisance generally a continuing wrong An isolated act of escape cannot be considered to be a nuisance, this was held in *Stone v Bolton* case

Malice

Does an act, otherwise lawful, become a nuisance if the act of the defendant has been actuated by an evil motive to annoy the plaintiff? In *Mayor of Bradford Corporation v. Pickels,* the House of Lords held that if an act is otherwise lawful, it does not become unlawful merely because the same has been done with an evil motive However, if the act of the defendant which is done with an evil motive becomes an unreasonable interference, it is actionable This was discussed in *Allen v Flood, Christie v Davey, Gaunt v Funney,* and followed in *Hollywood Silver Fox Farm Ltd., v Emmett*

II Interference with the use or enjoyment of land

Interference may cause either (i) injury to the property itself, or (ii) injury to comfort or health of occupants of certain property

I Injury to property

An unauthorized interference with the use of property of another person through some object, tangible or intangible, which causes damage to the property, is actionable as nuisance It may by allowing the branches of a tree to overhang on the land of another person, or the escape of the roots of a tree, water, gas, smoke etc In *St Helen's Smelting Co v. Tipping* case, fumes from the defendant company's works damage plaintiffs' trees and shrubs Such damage being an injury to property, being held that the defendant's were liable

Nuisance to incorporeal property

Interference with the right of support of land and buildings

A person has a "natural right" to have his land supported by his neighbour's and therefore removal of support, lateral or from beneath is nuisance The natural right of support from neighbor's land is available only in respect of land without buildings Therefore, such a right is not available in respect of buildings or other structure on land Although the law does not recognize the right of support of a building, yet if the damage to the building is consequential to the damage to natural right of support of land, an action for withdrawal of support can lie In *Stroyan v Knowles,* damage was caused to the plaintiff's factory by withdrawal of support of land over which the factory had been constructed The subsidence of land had been caused by the mining operations by the defendant and the weight of the factory had not contributed to the same It was held that although there was no right of prescription for the support to the factory yet the loss was consequential to the subsidence of land on which the factory was constructed and, therefore, the plaintiff was entitled to recover the damages This was covered under U/s 34 of Indian Easements Act, that, "removal of the means of support to which a dominant owner is entitled does not give rise to a recover compensation, unless and until substantial damage is actually sustained"

Right to support by grant or prescription:

In respect of buildings, the right of support may be acquired by grant or prescription Regarding the right of support for buildings, it was observed in *Partridge v Scott,* that, "Rights of this sort, if they can be established at all, must, we think, have their origin in grant " This was again discussed in *Dolton v. Angus* case also

Interference with right to light and air

Position in England Right to light is also not a natural right and may be acquired by grant or prescription When such a right has been thus acquired, a substantial interference with it is an actionable nuisance In *Colls v. Home and Colonial Stores Ltd,* case, it was held that in order to be actionable, substantial diminution in the light or air has to be proved

Right to Air

It is possible to acquire a right of air by grant and prescription After such a right has been acquired, its infringement is a nuisance It is, however, not possible to acquire a right to access of air over the general unlimited surface of a neighbour's land In *Webb v. Bird,* case, the construction of a building by the defendants blocked the passage of air to the plaintiff's ancient windmill, held that the plaintiff did not acquire any prescriptive e right to prevent the construction of the building and therefore, there was no cause of action

Position in India

In India also, the right to light and air may be acquired by an easement Sec 25 of the Limitation Act, 1963 and Section 15 of the Indian Easement Act, 1882, makes similar provisions regarding the mode and period of enjoyment required to acquire this prescriptive right The prescriptive right of easement of access and use of light and air can be acquired if the light has been,

(a) Peacefully enjoyed,

(b) As an easement,

(c) As of right,

(d) Without interruption, and

(e) For 20 years

Injury to comfort or health:

Substantial interference with the comfort and convenience in using the premises is actionable as a nuisance A mere trifling or fanciful inconvenience is not enough The rule ***de minimus non curat lex,*** which means that the law does not take account of very trifling matters Disturbance through throughout the night by the noises of horses in a building which was converted into a stable was a nuisance

Damages:

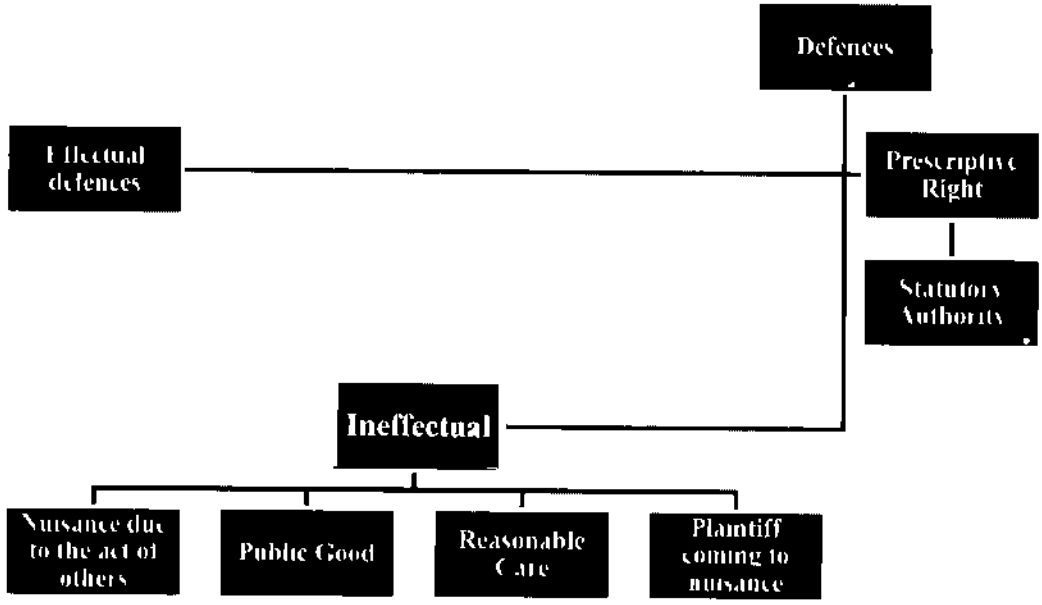
Unlike trespass, which is actionable per se, actual damage is required to be proved in an action for nuisance

Nuisance on Highway:

Obstructing a highway or creating dangers on it or in its close proximity is a nuisance Obstruction need not be total The obstruction must, however, be unreasonable In *Barber v. Penley, Dwyer v. Mansfield, Ware v Garston Haulage Co. Ltd,Leanse v Egerton* cases, the situation on nuisance on highways has been interpreted clearly

Projection

As regards projections on the highway by objects like overhanging branches of a tree or a clock, etc from the land or building adjoining the highway, no action for nuisance can brought for such projections unless some damages is caused thereby It has been noted that the mere fact that there is some projection on a highway does not make the occupier of the premises liable for nuisance In *Noble v. Harrison,* the branch of a peach tree growing on the defendant's land hung on the highway to a height of about 30 feet above the ground In fine weather, the branch of the tree suddenly broke and fell upon the plaintiff's vehicle, which was passing along the highway For the damage to the vehicle, the plaintiff sued the defendant to make him liable either for nuisance, or alternatively, for the rule in *Rylands v. Fletcher* It was held that there was no liability for nuisance because the mere fact that the branch of the tree was overhanging was not nuisance, nor was the nuisance created by its fall as the defendant neither knew nor could have known that the branch would break and fall There was no liability under the rule in *Rylands v Fletcher,* either as growing a tree was natural use of land The same has been discussed in *Caminer v. Northern & London Investment Trust Ltd, Tarry v Ashton* cases



Effectual Defences:

1. Prescriptive right to commit nuisance

A right to do an act, which would otherwise be a nuisance, may be acquired by prescription If a person has continued with an activity on the land of another person for 20 years or more, he acquires a legal right by prescription, to continue therewith in future also On the expiration of these 20 years, the nuisance becomes legalized *ab ignition* as if it has been authorized by a grant of the owner of serviant land from the beginning This period of 20 years cannot commence to run until the act complained of beings to be had a nuisance In *Sturges v. Bridgman,* the defendant, a confectioner had a kitchen in the rear of his house For every 20 years, confectionery materials were pounded in his kitchen by the use of large pestles and mortars, and the noise and vibrations of these were not felt to be nuisance during that period by the plaintiff, a physician, living in the adjacent house The physician made a consulting room in the garden in the rear in his house and then for the first time, he felt that the noise and vibrations caused in the confectioner's kitchen was the nuisance, and they materially interfered with this practice The court granted an injunction against the confectioner, and his claim of prescriptive right to use mortars and pestles there, failed because the interference had not been an actionable nuisance fro preceding period of 20 years

2 Statutory Authority.

An act done under the authority of a Statute is a complete defence If nuisance is necessarily incident to what has been authorized by a statute, there is no liability for that under the law of torts Thus, a railway company authorized to run railway trains on a track is not liable, if inspite of due care, the spark from the engine set fire to the adjoining land

Ineffectual Defences

1. Nuisance due to acts of others.

If two or persons acting independently and if any one of their act causes nuisance, an action may brought against any one of them and it is no defence that he act of the defendant alone would not be a nuisance, the nuisance was caused when other had also acted in the same way

2 Public Good

It is no defence to say that what is a nuisance to a particular plaintiff is beneficial to the public in general, otherwise no public utility could be held liable for the unlawful interference with the rights of individuals In *Shelfer v. City London Electrical Lighting Co , Adams v. Ursell, R v Train* cases it was discussed

3 Reasonable care

Use of reasonable care to prevent nuisance is generally no defence In *Rapier v. London Tramways Co.*, case this point was discussed

4 Plaintiff coming to nuisance

It is no defence that the plaintiff himself came to the place of nuisance A person cannot be expected to refrain from buying a land on which a nuisance already exists and the plaintiff can recover even if nuisance has been going on long before he went to that place The maxim *volenti non fit injuria* cannot be applied in such case *Bill v Hall* case speaks about this

CHAPTER—X

NEGLIGENCE

Synopsis

1 Essentials

2 Duty of care

3 Duty depends on reasonable foresee ability of injury

4 Breach of duty

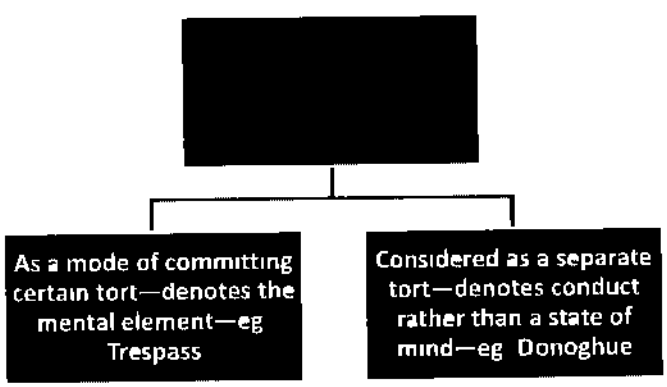
5. Damage

6 Res ipsa loquitor

7. Nervous shock

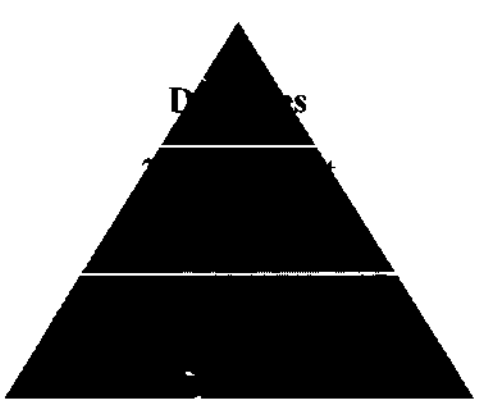
Introduction

Negligence has two meanings in law of torts



It is the second sense that it has been discussed in Heaven v Pender, actionable consists in the neglect of the negligent use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to person or property

Essentials of Negligence



1 Duty of care to the plaintiff.

It means legal duty rather than a mere moral, religious or social duty The plaintiff has to establish that the defendant owed to him a specific legal duty to take care of which he has made a breach There is no general rule of law defining such duty It depends in each case whether rule of law defining such duty In *Donoghue v. Stevenson*, case, one of the defences pleaded by the defendant was that he did not owe any duty of care towards the plaintiff The House of Lords held that the manufacturer owed her a duty to take care that the bottle did not contain any noxious matter, and that he would be liable on the breach of the duty

Duty of care depends on reasonable foreseeability of injury.

Whether the defendant owes the duty to the plaintiff or not depends on reasonable foerseeability of the injury to the plaintiff If at the time of the act or omission, the defendant could reasonably foresee injury to the plaintiff, he owes a duty to prevent that injury and failure to do so, make him liable Duty to take care is the duty to avoid doing or omitting to do anything, the doing or omitting to do which may have as its reasonable and probable consequences injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed

To decide the culpability, the test to determine the reasonable foerseeability would have based on the behavior of the defendant under those circumstances, and to enquire how obvious the risk must have been to an ordinary prudent man

Important cases on negligence during various circumstances:

Glasgow Corp v. Muir, Dr. M. Mayi Gowda v. State of Karnataka, Booker v. Wenborn, S. Dhanaveni v. State of TN, T.G.Tahyumanavar v. Secy ., P.W.D.of State of TN, Rural Transport Services v. Bezlum Bibi, Ishwar Devi v. Union of India, Makbool Ahmed v Bhura Lal, Jauhri lal v P.C H. Reddy, Sushma Mitra v MPSRTC, Y S Kumar v Kuldip Singh Jaspal, Dhangauriben v M. Mulchandbhai, Carmarthenshire County Council v Lewis, Municipal Corporation of Delhi v. Subhagwanti, Municipal Coprporation of Delhi v. Sushila Devi, The Municipal Board, Jaunpur v Brahm Kishore, Ramdas & Sonsv Bhuwaneshwar Prasad Singh, UOI v. Supriya Ghosh and others, Mata Prasad v UOI, Orissa Road Transport Co. Ltd v Umakant singh etc

The cases for No liability when injury not foerseeable:

Cates v. Mongini Bros, Krishnappa Naidu v UOI, Ryan v. Youngs, Mysore SRTC v Albert Dias and others

Reasonable foerseeability does not mean remote possibility

To establish negligence it is not enough to prove that the injury was foreseeable, but a reasonable likelihood of the injury has to be shown because "foerseeability does not include any idea of likelihood at all" The duty is to re guard against probabilities rather than bare possibilities This was discussed in *Fardon v Harcout-Rivington, Sukhraji v SRTC, Calcutta, S.K Devi v Uttam Bhoi, Supreintendent of Police, Dharwar v Nikil Bindurao, Bolton v Stone, Blyth v. Birmingham Water Works Co ,*

Cases of Negligence in profession (legal, medical etc)

Duty of Counsel towards Client:

The counsel should be careful in performing his professional duties If a counsel by his acts or omission, causes the interest of the party engaging him, in any legal proceedings to be prejudicially affected, he does so at his peril The cases are, *Manjit Kaur v. Deol Bus Services Ltd., R.Janardhana Rao v. G Lingappa*

Duty in Medical Profession

A person engaged in some particular profession is supposed to have the requisite knowledge and skill needed for the purpose and he has a duty to exercise reasonable degree of care in the conduct of his duties The standard of care needed in a particular case depends on the professional skill expected from persons belonging to a particular class The cases were *Sishir Rajan Saha v The State of Tripura* In *Dr L B.Joshi v. Dr T B Godbole,* apex court explained about duty of care as, (i) in deciding whether to undertake the care, (ii) deciding what treatment to give and, (iii) administration of the treatment The other case were *State of Gujarat v. Laxmiben Jayanthilal Sikligar, Philips India Ltd v. Kunju Punnu, Ram Bihari Lal v. Dr. J.N Srivastava, Dr P. Nara. Jayaprakasu, Dr. T.T.Thomas v Elissar, Rajmal, State of Rajasthan, M L.SInghal v. Dr Pradeep Mathur, Jasbir Kaur v. State of Punjab, A.H. Khodwa v. State of Maharashtra* etc

The apex court in *Jacob Mathew v State of Gujarat,* explained that the jurisprudential concept of negligence differed in civil and criminal law What might be negligence in civil law might not necessarily be negligence in criminal law Test for professional negligence, laid down in *Bolem case*, has been held applicable in India, the court ruled

In *Indian Medical Association v. V P Shantha,* the Supreme Court recognize the liability of medical practitioners for their negligence and held that the liability to pay damages for such negligence was not affected by the fact that the medical practitioners are professionals, and are subject to disciplinary control the Medical Council The Supreme Court in this case reversed the earlier decision passed by the High Court of Madras in *Dr C Subramaniam v. Kumaraswamy,* and held that the services rendered by the medical practitioners was covered by The Consumer Protection Act, 1986, and actionable in the Dispute Redressal Forums

The other important cases are, *State of Haryana v Smt Santra, Joint Director of Health Services, Shivaganga v. Sonal, Vemkatsh Iyer v. Bombay Hospital Trust, Pushpallela v State of Karnataka, Suraj Mal Chhajer v State,* etc

Duty must be owed to the plaintiff:

Mere carelessness on the part of the defendant does not entitle the plaintiff to sue him, it has to be proved that the defendant owes a duty of care to person other than the plaintiff; the plaintiff cannot sue even if he might have been injured by the defendant's act The cases on this point were *Palsgraaf v Long Island Railroad Co ,* and *Bourhill v Young* In the 2nd case, the plaintiff, a fisher folk lady, alighted from a tram car and while she was engaged in removing the fish-basket from the driver's platform, a speeding motor cyclist passed on the other side of the tramcar and immediately after wards collided with a motor car and was killed The fisher wife did not see the motor cyclist or the accident which occurred about fifty feet ahead of her tramcar but she simply heard the noise of the collision Later, after the motor cyclist's dead body had been removed, she approached the spot and saw the blood left there. In consequences, she sustained nervous shock and after one month gave birth to a still born child The plaintiff sued the motor cyclist's executor did not owe any duty of care towards the fisher wife and he was not negligent towards her

II Breach of Duty.

Breach of duty means non-observance of due care which is required in a particular situation What is the *standard* of care required, is, that of a reasonable man or of an ordinarily prudent man If the defendant has acted like a reasonably prudent man, there is no negligence

Standard of Care

The law requires taking of two points into consideration to determine the standard of care required (a) the importance of the object to be attained, (b) the magnitude of the risk, and (c) the amount of consideration for which services, are offered

(a) Standard of Care

The law does not require greatest possible care but the care required is that of a reasonable man under certain circumstances The law permits taking chance of some measure of risks so that in public interest various kinds of activities should go on A balance has therefore, to be drawn between the importance and usefulness of an act and the risk created thereby The cases in this point are, *Latimer v A E C Ltd*, *K Nagireddi v Government of A P*

(b) Magnitude of risk

The degree of care requires varies according to each situation What may be a careful act in one situation may be negligent act in another The law does not demand the same amount of care under all situations The kind of risk involved determines the precautions which the defendant is expected to take The degree of care depends upon the magnitude of risk which could have been foreseen by a reasonable prudent man This was held in *Mysore State Road Transport Corporation v Albert Disa* case Greater care is required to be taken in transporting inflammable and explosive materials than in transporting ordinary goods The important cases are, *Nirmala , Kerala State Electricity Board v Suresh Kumar, Sagar Chand v State of J & K , Bhagwat Sarup v Himalaya Gas Co , State of M P v Asha Devi , Champalal Jain v B P Benkataraman ,* etc

(c) The amount of consideration for which services, etc , are offered

The degree of care depends also on the kind of services offered by the plaintiff and the consideration charged therefore from the plaintiff The case in this point was, *Klaus Mittelbachter v East India Hotels Ltd*

III Damages

It is also necessary that the defendant's breach of duty must cause damage to the plaintiff The plaintiff has also to show that the damage thus caused is not too remote a consequence of the defendant's negligence

Proof of Negligence. *Res Ipsa Loquitur.*

As a general rule, it is for the plaintiff to prove that the defendant was negligent The initial burden of making out at least a *prima facie* case of negligence as against the defendant lies heavily on the plaintiff, but once this onus is discharged, it will be for the defendant to prove that the incident was the result of inevitable accident or contributory negligence on the part of the plaintiff If the plaintiff is also not able to prove negligence on the part of the defendant, the defendant cannot be made liable

Direct evidence of the negligence, however, is not always necessary and the same may be inferred from the circumstances of the case But when the plaintiff fails to establish a *prima facie* case, either by direct or circumstantial evidence that the defendant was negligent, the plaintiff's action must fail There is a presumption of negligence accordingly to the maxim, '*res ipsa loquitur*' which means, "The thing speaks for itself" When the accident explains only one thing and that is that the accident could not ordinarily occur unless the defendant had been negligent, the law raises a presumption of negligence on the part of the defendant In such a case, it is sufficient for the plaintiff to prove accident and nothing more The accident may however avoid his liability by disproving negligence on his part For the maxim *res ipsa loquitur* to apply, it is also necessary that the event causing the accident must have been in control of the defendant

This maxim is not a rule of law It is a rule of evidence benefiting the plaintiff by not requiring him to prove negligence The cases are, *Municipal Corporation of Delhi v Subhagwanti, Pillutal Savithri v G K Kumar, Alka v UOI, Nirmala v. TNEB, Chairman, M.P E B, Rampur, Jabalpur v Bahjan Gond , Niha Kaur v Director, P G I , Chandigrah, Mrs Aparna Dutt v Apollo Hospital Enterprises, A H Khodwas V. State of Maharashtra ,* etc

Maxim not applicable if different inferences possible

The maxim *res ipsa loquitur* applies when the only inference from the facts is that the accident could not have occurred but for the defendant's negligence The cases are, *Sk Aliah Bakhas v Dhirendra Nath, Walkelin v London and South Western Railway Co , Syed Akbar v State of Karnataka*

Rebuttal of the presumption (Defence for *res ipsa loquitur)*

The rule of *res ipsa loquitur* only shifts the burden of proof and instead of the plaintiff proving negligence on the part of the defendant is required to disprove it If the defendant is able to prove that what apparently seems to be negligence was due to some factors beyond his control, he can escape liability The cases are, *Nagamani v Corporation of Madras, S Vedantacharya v Highways Department of South Arcot, Kallulal v. Hemchand* etc

NERVOUS SHOCK

This branch of law is comparatively of recent origin It provides relief when a person may get physical injury not by an impact, but merely by a nervous shock through what he has seen or heard The judicial decision in *Victorian Railway Commissioner v Coultas,* the Judicial Committee of the Privy Council did not recognize injury caused by a shock sustained through the medium of eye or ear without direct contact They thought an action could not be sustained unless there was a physical impact or something akin to it But in 1897, in *Wilkinson v Downton,* case, the defendant held liable when the plaintiff suffered nervous shock and got seriously ill on being told falsely, by way of practical jokes, by the defendant that her husband had broken both the legs in an accident In the following cases, the doctrine of nervous shock was interpreted in detail, *Hambrook v Storkes, Dulieu v. White, Dolley v Commell Laird and Co , Owens v. Liverpool Corporation, Bourhill v. Young* and *King v Phillips.*

CHAPTER—XI

CONTRIBUTORY NEGLIGENCE & COMPOSITE NEGLIGENCE

SYNOPSIS

1. Contributory Negligence —
2. As a defence
3. Rules
4. Doctrine of Alternative damage
5. Doctrine of Identification
6. Composite negligence
7. Distinction

Introduction:

When the plaintiff by his own want of care contributes to the damage caused by the negligence or wrongful conduct of the defendant, he is considered to be guilty of contributory negligence This is a defence in which the defendant has to prove that the plaintiff failed to take reasonable care of his own safety and that was a contributing factor to harm ultimately suffered by the plaintiff In *Rural Transport Services v Bezlum Bibi,* the conductor of an overcrowded bus invited passengers to travel on the roof of the bus The driver ignored the fact that there were passengers on the roof and tried to overtake a cart As he swerved the bus on the right for the purpose and went on the kucha road, a passenger sitting on the roof was hit by a branch of a tree, he fell down, received sever injuries, and then died It was held that both the driver and the conductor were negligent towards the passengers, who were invited to sit on the roof, there was also contributory negligence on the part of the passengers including the deceased, who took the risk of travelling on the roof of the bus The other cases are, *Davies v. Swan Motor Co Ltd., Yoginder Paul Chowdry v. Durgadas, Harris v. Toronto Transit Commission, Sushma Mitra v. MPSRTC,* etc

How far Contributory negligence is a defence?

At Common Law contributory negligence on the part of the plaintiff was considered to be a good defence and the plaintiff lost his action Plaintiff's own negligence disentitled him to bring any action against the negligent defendant Here the plaintiff's negligence does not mean breach of duty towards the other party, but it means absence of due care on his part about his own safety This was held in *Butterfield v Forrester* case This rule worked a great hardship particularly for the plaintiff because for a slight negligence on his part, he may lose his action against a defendant whose negligence may have been the main cause of damage to the plaintiff The courts modified the law relating to contributory negligence by introducing the so called rule of "*Last Opportunity*".

The Rule of Last Opportunity

According to this rule, when two persons are negligent, that one of them, who had the later opportunity of avoiding the accident by taking ordinary care, should be liable for the loss It means that if the defendant is negligent and the plaintiff having a later opportunity to avoid the consequences of the negligence of the defendant does not observe ordinary care, he cannot make the defendant liable for that Similarly, if the last opportunity to avoid the accident is with the defendant, he will be liable, for the whole of the loss to the plaintiff In *Davies v Mann* case, this was held clearly The other cases are, *Radley v L & N W.R. Ry, British Columbia Electric Co , v Loach.*

Circumstances when Contributory Negligence cannot be pleaded

The Motor Vehicles Act fixes the quantum of compensation for death and injury of the accident victim In such a claim, the right to claim compensation is not affected by any wrongful act, neglect or default of the accident victim, and the quantum of compensation payable shall not be reduced on account of contributory negligence on the part of such a person

Rules to determine Contributory Negligence:

The Contributory Negligence Act of England prescribes the rule when there is contributory negligence on the part of the plaintiff Whether there is contributory negligence or not has to be determined by the following rules,

1 Negligence of the plaintiff in relation to the defence of contributory negligence does not have the same meaning as is assigned to it as a tort of negligence All that is necessary to establish contributory negligence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by his own want of care, to his own injury, *Bhagwat Swarup v. Himalaya Co.*

2 It is not enough to show that the plaintiff did not take due care of his own safety It has also to be proved that it is his lack of care which contributed to the resulting damages, *Agya Kaur v. Pepsu Road Transport Corporation, National Insurance Co v. Kastoori Devi, MPSRTC v. Abdul Rahman.*

Doctrine of Alternative Danger:

Although the plaintiff is supposed to be careful inspite of the defendant's negligence, there may be certain circumstances when the plaintiff is justified in taking some risk where some dangerous situation has been created by the defendant The law, therefore permits the plaintiff to encounter an alternative damage to save himself from such danger, created by the defendant If the course adopted by him results in some harm to himself, his action against the defendant will not fail In *Jones v Boyce* case, the plaintiff was a passenger in the defendant's coach and the coach was driven so negligently that the plaintiff alarmed With a view to save himself from the danger created by the defendant, he jumped off the coach and broke his leg If the plaintiff had remained in his seat, he would not have suffered much harm because the coach under was soon after stopped It was held that the plaintiff had acted reasonably under the circumstances and he was entitled to recover The same followed in *Shyam Sunder v State of Rajasthan, Sayers v. Harlow Urban District Council, Brandon v. Osborne, Gerret & CO , Morgan v. Aylen.*

Contributory Negligence of the Children.

What amounts to Contributory negligence in the case of a mature person may not be so in the case of a child because a cannot be expected to be as careful as a grown-up person, therefore, has no to be taken into account to certain whether a person is guilty of contributory negligence or not The cases are, *R Srinivasan v K M.Paramasivamurhty, Motias Costa v. Roque Augustinho Jacinto, MPSRTC v. Abdul Rehmna,* etc

The Doctrine of Identification

The defence of contributory negligence can be taken only when the plaintiff himself has been negligent but also when there is negligence on the part of the plaintiff's servant or agent, provided that the master himself would have been liable for such negligence if some harm had ensured out of that The doctrine related to contributory negligence about the independent contractor and liability of the master was answered that in such a case the plaintiff identified himself with such an independent contractor and negligence of the independent contractor could be pleaded as a defence to an action brought by the plaintiff This was known as *doctrine of Identification.* The concept was overruled in *Bernina v Armstrong, Dharshani Devi v Shoe Ram.*

Composite Negligence

When the negligence of two or more person results in the same danger, there is said to be "Composite Negligence" and the person responsible for causing such damage are known as "Composite Tortfeasor" In England, such tortfeasors could be classified into two categories joint tortfeasors and independent tortfeasor, and there were different rules governing the liability of these two categories of tortfeasors The Courts in India have not necessarily followed the English Law, and they have adopted the rules which are in consonance with justice, equity and good conscience, according to Indian condition The term "Composite Negligence" has been used to cover cases whether they are of negligence by joint tortfeasors or independent tortfeasors

Nature of liability in cases of Composite Negligence.

The liability of the composite tortfeasors is joint and several No one of the tortfeasor is allowed to say that there should be apportionment (sharing), and he is liability should be limited to the extent he is fault The judgment against the composite tortfeasor is for a single sum without any sharing in accordance with the fault of various tortfeasors, and the plaintiff can enforce the whole of his claim against anyone of the defendants, if he so chooses The defendant, who has paid more than his share of the liability, may claim contribution from the other defendants The cases are, ***The State of Punjab v Phool Kumari, Karnataka SRTC v Krishnan, Hira Devi v. Bhaba Kanti Das,*** etc

Contributory and Composite Negligence—Distinction

The plaintiff himself is negligence as regards his own safety and his own lack of care contributes to the harm which he has suffered, he is guilty of contributory negligence	The plaintiff is injured because of the negligence of two or more persons
The loss to the plaintiff is the combined result of two factors	Liability of the person is joint and several
It is a defence	It is not a defence
Apportionment of damage is there	No apportionment of damages

CHAPTER—XII

ABUSE OF LEGAL PROCEDURE

Synopsis:

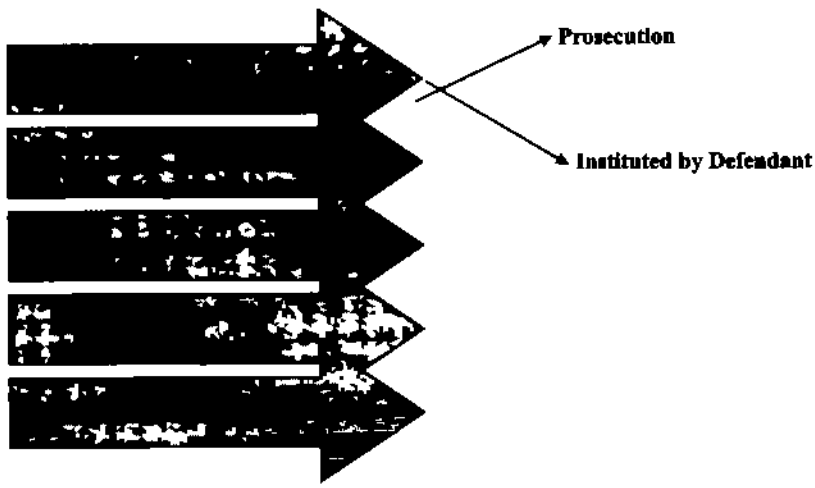
1. Malicious Prosecution
2. Malice
3. Termination of proceedings in favor of the plaintiff
4. Maintenance and Champerty

Malicious Prosecution.

Malicious Prosecution is a tort for which action can be brought The law authorizes to bring criminals to justify by instituting proceedings against them If this authority is misused by somebody by wrongfully setting the law in motion for improper purpose, the law discourages the same To prevent false accusations against innocent persons, an action for malicious prosecution is permitted

Essentials:

The plaintiff has to prove the following essentials in a suit for damages for malicious prosecution;



I: Prosecution by the defendant·

This essential ingredient requires the proof of two elements, (i) that there was "Prosecution" and (ii) the same was instituted by the defendant

(a)Prosecution it should be a criminal prosecution rather than a civil action Prosecution means criminal proceedings against a person in a court of law A prosecution is there when a criminal charge is made before a judicial officer or a tribunal Proceedings before the police authorities are proceedings anterior to prosecution The cases are, *Nagendra Nath Ray v. Basanta Das Bairagya, Bolananda Pemmayya v Ayaradara.*

When does the prosecution commence. The prosecution is not deemed to have commenced before a person is summoned to answer a complaint In *Kapoor Chand v. Jagdish Chand,* the Punjab and Haryana High Court has held that the proceedings before the Boards of Ayurvedic and Unani System of Medicines amount to prosecution

(b)Prosecution should be instituted by the defendant

A Prosecutor is a man who is actively instrumental in putting the law in motion for prosecuting another Although criminal proceedings are conducted in the name of the State, but for the purpose of malicious prosecution, a prosecutor is the person who instigates the proceedings The mere giving of information, even though it was false, to the police cannot give cause of action to the plaintiff in a suit for malicious prosecution if the defendant is not proved to be the real prosecutor by establishing that he was taking active part in the prosecution, and that he was primarily and directly responsible for the prosecution The cases are, *Dattatraya Panduranga Datar v Hari Keshav, Pannalal v Shrikrishna, Gaya Prasad v Bhagat v Singh, T.S. Bhatta v A K Bahtta*

Absence of reasonable and probable care

The plaintiff has also to prove that the defendant prosecuted him without reasonable and probable cause Reasonable and probable cause has been defined as "an honest belief in the guilt of the accused upon a full conviction, founded upon reasonable grounds, of the existence of circumstances, which assuming them to be true would reasonably lead any ordinarily prudent man placed in the place of the accused to the conclusion that the person charged was probably guilty of the crime imputed The cases are, *Satyakam v. Dallu, Wyatt v White, Abrath v North Eastern Railway Co , Girija Prasad Sharma v. Umashankar Pathak*

III: Malice·

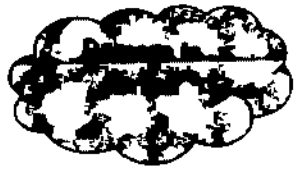
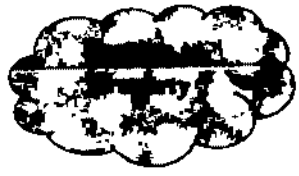
It is also for the plaintiff to prove that the defendant acted maliciously in prosecuting him, I,e , there was malice of some indirect and illegitimate motive in the prosecutor , I,e , the primary purpose was something other than to bring the law into effect It means that the defendant is actuated not with the intention of carrying the law into effect, but with an intention which was improper and wrongful motive, that is to say, intent to use the legal process in question for some other than its legally appointed or appropriate purpose The cases are, *Kamta Prasad Gupta v National Buildings Construction Corpn Ltd., Abdul Majid v. Harbansh Chaube, Bhogilal v. Sarojbahen.*

IV. Termination of the proceedings in favour of the palintiff

It is also essential that the prosecution terminated in favour of the plaintiff If the plaintiff has been convicted by a court, he cannot bring action for malicious prosecution, even though he can prove his innocence and also that the accusation was malicious and unfounded Termination in favour of the plaintiff does not mean judicial determination of his innocence, it means absence of judicial determination of his guilt The proceedings are deemed to have terminated in favour of the plaintiff when they do not terminate in favour of the plaintiff if he has been acquitted on technicality, conviction has been quashed, or the prosecution has been discontinued, or the accused is discharged

V· Damages

It also to be proved that the plaintiff has suffered damage as a consequence of the prosecution complained of Even though the proceedings terminate in favour of the plaintiff, he may have suffered damage as a result of the prosecution In a claim for malicious prosecution, the plaintiff can thus claim damages on the following three counts

In assessing damages, the court to some extent, will have to rely on the rules of Common sense Over and above that, the court will have to consider, (1) the nature of the offence which the plaintiff was charged of, (2) the inconvenience to which the plaintiff was subjected to, (3) monetary loss, and (4) the status and position of the person prosecuted

Distinction between false imprisonment and malicious prosecution

Malicious Prosecution	False Imprisonment
Imprisonment is procured by a judgment or other judicial order by a court of justice	Unlawful arrest or detention which is violative of the procedure of Code of Criminal Procedure and fundamental rights
Prosecution is not so	Imprisonment is *prima facie* a tort
The plaintiff has to prove *malice* on the part of the defendant	The plaintiff needs not to prove *malice*

Malicious Civil Proceedings:

Unlike malicious criminal prosecution, no action can be brought, as a general rule, in the case of civil proceedings even though the same are malicious and have been brought without any reasonable cause Since an unsuccessful plaintiff in any civil suit has to generally bear the cost of litigation that is considered to be sufficient deterent factor this may discourage false civil proceedings In exceptional cases, however, where the cost of litigation may not adequately compensate the defendant, he can sue to recover the damages for the loss arising out of such civil proceedings For eg insolvency proceedings against a businessman, winding up proceedings against a company.

CHAPTER—XIII

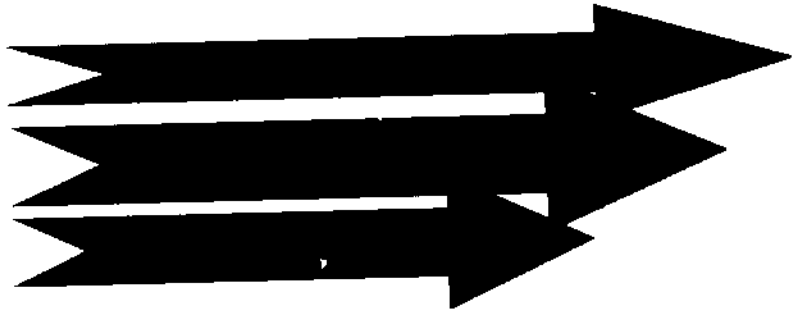
LIABILITY FOR DANGEROUS PREMISIS

Synopsis:

1. Obligations towards lawful visitors
2. Liability of landlord
3. Who is a trespasser?
4. Obligation towards children

Obligation towards lawful visitors

An occupier of premises or other structures like cars, ships, aero planes or lifts, owes an obligation to the persons who enters those premises or structure in respect of personal safety and the safety of their property there The nature of an occupier's obligation varies according to the kinds of the premises and, therefore, the occupier's obligation will be considered under the following three heads



I· Obligation towards lawful visitors·

Prior to the passing of the Occupiers Liability Act, 1957, the position was governed by the Common Law rules Common Law classified the lawful visitors into two categories—(i) invitees and (ii) licensees When the occupier of the premises and the visitors had a common interest or the occupier had an interest in the visit of the visitor, the visitor was known as *"Invitee"*, and when the occupier had no such interest, the visitor was known as *"Licensee"*. A customer who entered a shop was an invitee even though he actually did not purchase anything, but a guest who had been invited for a dinner was a licensee

Duty towards an invitee

The occupier was supposed to take reasonable care to prevent any damage to the invitee from any *unusual danger* on his premises, which he knew or ought to have known Thus, towards an invitee, the occupier's liability was for loss caused by an unusual danger not only in respect of which was the occupier actually aware, but also of such danger which he ought to have known The above stated rule was laid down in *Indermaur v. Dames*, the plaintiff, who was a gas fitter, entered the defendant's premises for testing certain gas fittings there While doing so, he fell from an unfenced opening on the upper floor and was injured The plaintiff, being an invitee on those premises, the defendant was held liable for the injury caused to him The other cases are, *Cates v. Mongini Bros, Pillutla Savitri v. G K Kumar.*

Duty towards a licensee:

It has been held that a licensee is a person who enters the premises, with the express or implied permission of the occupier, for his own purpose rather than for the occupier's interest The occupier had a

duty to give due warning of any latent defect or concealed danger in the premises of which he was aware He had no liability for the loss caused by dangers not known to him He was also not liable for any danger which was obvious and the licensee must have appreciated the same The cases relating to this point was, *Fairman v. Perpetual Investment Building SocietyLtd , Roles v Nathan, City of Ferguson v. Marrow, Darrel I Cummings v. Borough of Nazareth, Klaus Mittlebachert v East India Hotels Ltd , M C Mehta v. UOI, Municipal Corporation of Delhi v. Subhagwanti, Kallulal v Hemchand* etc

II Duty towards trespassers

The Occupier's Liability Act, regulates the liability of an occupier towards lawful visitors only The occupier's liability towards a trespasser, therefore, continues to be the same as before, under Common Law

Who is a Trespasser?

A trespasser has been defined as "one who goes upon land without invitation of any sort and whose presence is either unknown to the proprietor, or, if known, is particularly objected to" If the occupier acquiesces to the frequent acts of trespass, he is deemed to have tacitly licensed the entry of others on the land Such visitors become entitled to the rights of licensee on the land The cases in this point were, *Lowrey v. Walker, Mokshada Sundari v UoI, Pearson v. Coleman Brothers.*

III obligations towards children:

What is an obvious danger for an adult may be a trap for the children Moreover, the children may be allured by certain dangerous objects where the adults may like to avoid The occupier must guard the child visitors even against such dangers from which the adults did not need any protection The cases were, *Glasgow Corporation v. Taylor, Cooke v. Midland Great Western Railway of Ireland.*

CHAPTER XIV

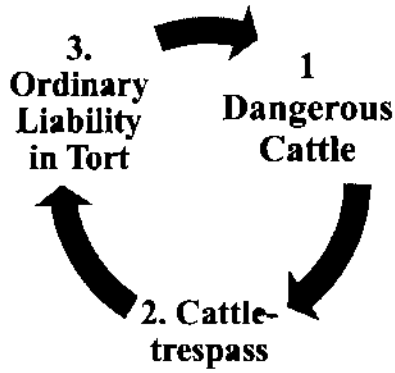
LIABILITY FOR ANIMALS

Synopsis:

1. The Scienter Rule
2. Liability for animals '*ferae naturae*'
3. Death or injury caused by wild animals
4. Liability for keeping animals '*mansuetae naturae*'
5. Cattle trespass and ordinary liability in Tort

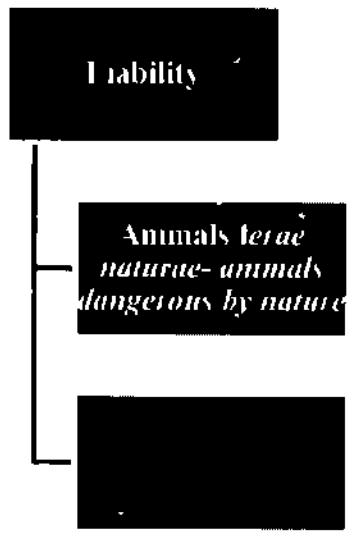
Introduction

The liability for the damages done by the animals can be studied under the following three heads,



The Scienter Rule:

The liability of the defendant under this rule depends upon the knowledge of the dangerous character of the animals If the defendant has not been able to properly control the animals which he knows or ought to have known to be having a tendency to do the harm, he is liable For the purpose of this rule, the animals have been divided into two categories



According to the *Scienter rule* the liability for the animals of the first category is based on the knowledge as to its dangerous nature is conclusively presumed and the person having their control will be liable for the damage caused by their escape even without any proof of negligence on his part Harmless animals and the persons having their control is not liable for damage done by them unless it can be proved that the particular animal in question had a vicious or savage propensity and the person having its control had knowledge of the same This position was discussed in *Behrens v Bertram Mills Circus Ltd*, case

Liability for keeping animals '*ferae naturae*

There is conclusive and irrebuttable presumption that the keeper of the animals *ferae naturae* knows of their dangerous nature and if such an animal gets out of control and causes damages, he will be liable The keeper keeps such an animal at this peril and his liability is strict The liability arises even without the proof of negligence it is no defence to say that the animal in question, though belonging to the category of *ferae naturae*, is in fact a tame one or even circus trained and the animal was acting out of fright rather than vicious The related cases to this points were, *Dr M Mayi Gowda v. State of Karnataka, State of Himachal Pradesh v. Halli Devi.* Moreover there is no provision in the Wild life Protection Act, 1972, for providing reliefs to the victims of wild animals Further, providing *ex gratia* reliefs in such cases did not amount to admission of liability by the State and that also did not create any State liability to pay compensation in such cases

For making the defendant liable in respect of the damage by an animal belonging to the class of harmless or domestic animals, have two things have to be proved,

Vicious nature which is not common in same species of animal

Defendant had the actual knowledge of viciousness

The position was explained in *Bukle v. Holmes* case, in which the defendant's cat entered in to the plaintiff's land and there killed 13 of the plaintiff's pigeon and two bantams Since the cat in doing so had followed the ordinary instincts of its kind and there was no vicious propensity to this cat, its owner was not held liable The other cases were, *Manton v. Brokelebank, Read v. Edwards.*

II Cattle Trepass:

Apart from the *Scienter Rule,* the owner of the cattle may also commit trespass on the land of another person The liability in such a case is strict and the owner of the cattle is liable even if the vicious propensity of the cattle and, owner's knowledge of the same are not proved There is also no necessity of proving negligence on the part of the defendant Cattle for the purpose includes bulls, cows, sheep, pigs, horses, asses etc dogs and cats are not includes in the term and, therefore, there cannot be cattle trespass by dogs and cats This was held in *Buckle v. Holmes.* The liability for cattle trespass is strict, *Scienter rule,* or negligence on the part of the owner of the cattle is not required to be proved When there is a cattle trespass, the defendant is liable for the damage which directly results from the trespass It may be noted that the action for cattle trespass can be brought only by the occupier of land Persons other than the occupier, such as his family members, guests, stranger on his land can sue under the *Scienter Rule* or for cattle trespass The related cases were, *Ellis v Loftus Iron Co., Theyer v. Purnell, Wormald v. Cole, Cox v Burbidge.*

III· Ordinary liability in tort

It may also be possible to commit various torts through the instrumentality of animals Keeping dogs in some premises which cause unreasonable interference with the neighbour's enjoyment of his property is a nuisance Similarly, nuisance could be committed through the stench of pigs, or making stable near a neighbour's house or obstructing a right of way through animals The tort of assault and battery can be committed by setting a dog on the passer-by and tort of negligence by not keeping proper control of animals on the high ways In ***Searle v. Wallbank*** case, the rule relating to the liability of keeping animals on highways has been issued, and they are, (i) if a person has an animal under his control on a highway, he will be liable if he negligently fails to have reasonable control over the animal there., and (ii) liability for the escaping animal may also arises under the *Scienter rule*.

CHAPTER—XV

LIABILITY FOR DANGEROUS CHATTELS

Synopsis

1 Liability towards the immediate and ultimate transferee

2. Liability for fraud

3. Liability for negligence

4 Application of the rule in *Donoghue v. Stevenson*

Introduction:

II: Liability towards ultimate transferee.

Liability for fraud. it is a tort against the person for misleading by false statement.

(i) A makes false statement to B and on that belief, if either B or C acted upon and A will be liable to C though he passed the statement to B

(ii) Langridge v. Levy.

Liability for negligence

(i) Things dangerous *per se*

(ii) Dangerous *per se* but actually dangerous, and known to the transferor,

(iii) things neither dangerous *per se* nor known to be dangerous by the transferor, but dangerous in fact

I. Liability towards immediate transferee:

- The chattel may be transferred from one person to another either under a contract or by way of gift/loan
- If transferred under contract, the liability of the parties regulated through terms, which may be express or implied, and the parties are free to negative the liability
- *Ward v. Hobbs*
- Even if the liability of the person arose through contract, the liability sometimes available concurrently under torts also *Clarke v Army and Navy Co-Operative Society ltd*

If X transfers some chattels to Y, Y may be injured by the chattels transferred to him Sometimes, the chattels may be further transferred, eg from Y to Z and it is Z who may be injured by the chattel This liability may fall under two category, they are,

I: Liability towards immediate transferee·

- The chattel may be transferred from one person to another either under a contract or by way of gift/loan
- If transferred under contract, the liability of the parties regulated through terms, which may be express or implied, and the parties are free to negative the liability
- Ward v Hobbs
- Even the of the person arose through contract, the liability sometimes available

II: Liability towards ultimate transferee

Liability for fraud: it is a tort against the person for misleading by false statement

(i) A makes false statement to B and on that belief, if either B or C acted upon and A will be liable to C though he passed the statement to B

(ii) Langridge v Levy

Liability for negligence

(i) Things dangerous per se

(ii) Dangerous per se but actually dangerous, and known to the transferor,

(iii) things neither dangerous per se nor known

Things dangerous *per se*

Things have been considered to be either dangerous *per se*, dangerous in themselves or dangerous *suo modo*, dangerous according to the circumstances of a particular case There is a peculiar duty to save others who are likely to come in contact with things which are dangerous *per se* the case law in this point, *Thomas v. Winchester, Dixon v. Bell* The difference between dangerous *per se* and dangerous *suo modo* has been criticized It is thought that the degree of care varies with the circumstances of each case and the law that negligence consist in the absence of reasonable care according to the circumstances of each case can answer all such problems, there is therefore, no need of classification of chattels into dangerous *per se* and dangerous *suo modo* The case in this aspect was, *Beckett v Newalls Insulation, Read v. Lyons.*

Things not dangerous *per se* but known to be so by the transferor:

We have seen above that if the seller knows that the thing which he is selling is dangerous, he has a duty to warn the buyer about the danger so that the buyer can requisite precaution against that Failure to give such a warning makes the transferor liable for that Every transferor owes a similar duty to a transferee Such a duty to warn about the known dangers has owed a similar by the transferor not only to his immediate transferee but also to all the persons who are likely to be endangered by that thing The related case law was, *Farrant v Barnes, Holmes v Ashford.* The transferor's responsibility comes to an end when he transfers the goods to his immediate transferee with due warning

Things neither dangerous *per se* nor known to be dangerous to the transferor but dangerous in fact

Before 1932, it was thought that when X transferred a chattel to Y and Y transferred the same to Z and Z was injured thereby and the chattel belonged to the category of goods neither dangerous *perse* nor known to be dangerous to X, X could not liable to Z except when a contract could be shown between X and Y This Privity of contract fallacy was exploded in 1932 in the case of *Donoghue v. Stevenson,* and after the decision , X can be liable even towards Z for his negligence, even though there is no contract between X and Z

Application of the rule in *Donoghue v Stevenson*

The liability under the above stated rule in *Donoghue v. Stevenson* case, has not remained limited only to the manufacturers of products, it has been extended to include repairs, assemblers, builders, and suppliers It has also been held to include erections The important case in this point was, *Haseldine v. Daw, Howard v. Furness Houlder Ltd, Sharpe v. E.T. Sweepings & Sons Ltd., Read v. Croydon Corporation, Brown v Cotterill, Andrews v Hopkinson*

The application of the rule has also been extended in respect of the subject-matter It is no more limited to articles of food and drink only It has been held to include underwear, motor cars, hair-dyes, tombstones and lifts The cases in this respect was, *Grant v. Australian Knitting Mills, Evans v Triplex Safety Glass Co ltd* the rule in *Donoghue v Stevenson* applies when the things is to reach the ultimate consumer or users as it is, without any possibility of intermediate examination The manufacturer may shift the responsibility from himself by a notice that the article must be read tested before use It was held in the case, *Kubach v. Hollands, Holmes v. Ashford.*

CHAPTER—XVI

TRESPASS TO LAND

Synopsis

1 Trespass

2 Trespass void ab initio

3 Entry with license

4. Remedies

5. Re-entry

6. Action for ejection, mesne profits

7 Distress damage feasant

What is trespass?

Trespass to land means interference with the possession of land without lawful justification In trespass, the interference with the possession is direct and through some tangible object If the interference is not direct but consequential, the wrong may be a nuisance Planting a tree on another's land is a trespass but if a person plants a tree over his land and its roots or branches escapes on the land of the neighbor that will be a nuisance Trespass could be committed either by a person himself entering the land of another person or doing the same through some material objects Allowing cattle to stray on another's land is also a trespass It is, however no trespass when there is no interference with the possession and the defendant has been merely deprived of certain facilities like a gas and electricity Going beyond the purpose for which a person has entered certain premises or crossing the boundary where he has the authority to go amounts to trespass Where there is a justification to enter the premises of another person, it is no trespass, and this point was held in *Madhav Vithal Kudwa v. Madhavdas Vallabhdas.*

Trespass is a wrong against possession rather than ownership A person who is an actual possession of the land can bring an action even though, against the true owner, his possession was wrongful The trespasser is not as allowed to take the defence of *'jus terti'* Trespass being a wrong against the possession, it has been seen above that a person in possession, even if he himself is not the owner, can bring an action Converse of it is also true, which means that an owner of land, who neither has possession nor any immediate right to possess it, cannot bring an action for trespass A reversionary may, however, sue if by the trespass injury of some permanent nature, which will affect his reversionary interest, is likely to respect Trespass is possible not only on the surface of the land, it is equally possible by an intrusion on the subsoil Taking minerals from the subsoil is an example of the same It is possible that he surface may be in possession of one person and the subsoil of another In such a case, if the trespass is on the surface, the person in possession of the surface alone, and not the possessor of subsoil, can sue for that

Trespass is actionable *per se* and the plaintiff need not prove any damage for an action of trespass "Every invasion of property is it ever so minute, is a trespass" Neither use of force or showing any unlawful intention on the part of the defendant is required Even an honest mistake on the part of the defendant may be no excuse and a person may be liable for the trespass when he enters upon the land of another honestly believing that it to be in his own Probably inevitable accident will be a good defence as it is there in case of trespass to person on chattels

Trespass *ab initio*

When a person enters certain premises under the authority of some law and after having entered there abuses that authority by committing some wrongful act there, he will be considered to be a trespasser ***ab initio*** to that property. The plaintiff, can, therefore claim damages, not only for the wrongful act which is subsequently done by the defendant but even in respect of original entry which is now considered to be a trespass In *Six Carpenters case,* six carpenters entered an inn and there ordered for some wine and bread After having taken the same, they refused to pay for that They had done no act of misfeasance and mere non-payment being only non-feasance, there was held to be no trespass ***ab initio***

Entry with license

Entering certain premises with the authority of the person in possession amounts to a license and the defendant cannot be made liable for trespass and Sec 52 of the Indian Easement Act, 1882 defines, "License" After the license is revoked, the license becomes a trespasser on land and must quit that place within that reasonable time How far a licensor has the power to revoke the license? For the purpose of the right of the licensor to revoke the licenses are considered to be two kinds (i) a bare license and (ii)a license coupled with a grant A bare license can be revoked and the license which is coupled with grant cannot be revoked The important decision in relation to this point was, *Wood v. Leadbitter* and *Hurst v picture Theatres Ltd.*

Remedies

1. Re-entry:

If a person's possession had been disturbed by a trespasser, he has a right to use reasonable force to get a trespass vacated A person, who being thus entitled to the immediate possession, uses reasonable force and regains the possession himself, cannot be used for a trespass Ousting a trespass by a person having a lawful right to do so is no wrong

2. Action for ejection:

Section 6, Specific Relief Act, 1963 gives a speedy remedy to otherwise than in due course of law

3 Action for mesne profit:

Apart from the right of recovery of land by getting the trespasser ejected, a person who was wrongfully dispossessed of his land may also claim compensation for the loss which he has suffered during the period of dispossession An action to recover such compensation is known as an action for mesne profits

4. Distress damages pheasant:

The right to distress pheasant authorizes a person in possession of land to seize the trespassing cattle or other chattels and he can detain them until compensation has been paid to him for the damage done The idea is to force the owner of the chattel to pay compensation and after the compensation has been paid, that chattel is to be returned. The right is available only when the object in question is unlawfully there on certain land Moreover, the above stated right can be exercised when the trespassing animals or chattels is still creating a trespass. There is no right to follow the things after it has gone out of those premises or to recover them after the owner has taken them away It is also necessary that the things seized must be the very thing which had trespassed and caused the damage

CHAPTER—XVII

TRESPASS TO GOODS, DETINUE AND CONVERSION

Synopsis

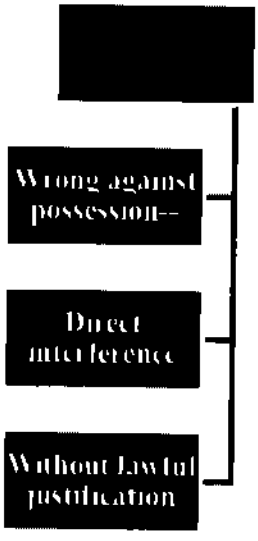
1 Trespass to goods

2. Detinue

3. Conversion

I: Trespass to Goods:

It consists in direct physical interference with the goods which are in the plaintiff's possession, without any lawful justification It may take numerous forms, such as throwing of stones on a car, shooting birds, beating animals or infecting them with the diseases Trespass to goods is actionable *per se,* that is, without the proof of any damages



1. It is a wrong against possession:

Any person, whose possession of goods is directly interfered with, can bring this action A person may be either in the direct physical possession of the goods or may have their constructive possession But wher the owner has given up his possession, such a right cannot be exercised Trespass being a wrong against possession rather than ownership, a person in possession can maintain an action even though somebody else is the owner of those goods A person in possession can sue even without any proof of his title to the goods A trespasser cannot take the defence of *jus tertii,* that is, he cannot be allowed to say that some 3rd party and not the possessor of it had a good title to the goods

2 Direct interference:

Direct physical interference without lawful justification is a trespass The wrong may be committed intentionally, negligently, or even by an honest mistake In *Kirk v. Gregory* case this was discussed clearly

3. Without lawful justification·

When the interference is without any lawful justification, an action for trespass will lie. There is justification, when the defendant has seized the plaintiff's goods or cattle under the exercise of his rights of distress damage pheasant There is also a justification when the damage to another person's goods is caused in exercise of the right of private defence Inevitable accident has also been held to be a good defence to an action for trespass to goods The important cases on this point were, *Cresswell v. Sirl, National Coal Board v Evans.*

II Detinue

When the defendant is wrongfully detaining the goods belonging to the plaintiff and refuses to deliver the same on lawful demands, the plaintiff can recover the same by bringing an action for Detinue It is thus a n action for recovery of goods unlawfully detained by the defendant Thus if the bailee refuses to deliver the goods after the accomplishment of the bailment, he is liable for Detinue

In such an action, the defendant has to either return the specific chattel or pay its value to the plaintiff This remedy is however, of no help when the goods are returned to the plaintiff in a damaged condition

An action for Detinue may be distinguished from trespass In an action for Detinue, the defendant assumes the possession of the goods whereas there could be a trespass to the goods while the same continue to be in the possession of the plaintiff In England, Detinue has been abolished, however, the tort of conversion has been extended to include those situations also which were termed as Detinue In India, although 'detinue' as such has not been mentioned as a wrong but similar action fr recovery of specific movable property has been recognized by The Specific Relief Act, 1963 Sec 7& 8 of the Act enable the recovery of specific movable property In *Banshi v Goverdhan,* the defendant having taken a cycle on hires from the plaintiff and failed to return the same He was held liable for detinue

III· Conversion:

Conversion also known as "*trover*", consists in willfully and without any justification dealing with the goods in such a manner that another person, who is entitled to immediate use and possession of the same, is deprived of that It is dealing with the goods on a manner which is inconsistent with the right of the owner The same must have been done with an intention on the part of the defendant to deal with the goods in such a way that amounts to denial of plaintiff's right to it The important cases were, *Richardson v Atkinson, M.S.Chockalingam v.State of Karnataka, Moorgate Mercantile Co.Ltd v Finch.*

Wrongful intention not necessary.

A person dealing with the goods of another person in a wrongful way does so at his own peril and it is no defence that he honestly believed that he has a right to deal with the goods or he had no knowledge of the owner's right in them The related cases were, *Rooplal v UOI, Hollins v. Fowler, Consolidated Co , v, Curtis.*

Immediate right of a possession or use necessary

For an action for conversion, it is also necessary that the plaintiff must have a right to the immediate possession of the goods at the time of their conversion If the plaintiff cannot prove his right of possession, an action for conversion will fail Since possession or immediate right to possession is an essential for an action for conversion, even an owner of the goods, who has suspended his possession, cannot bring an action

Denial of plaintiff's right to goods necessary

It has been noted above that the defendant's intended act must amount to denial to the plaintiff's right to the goods to which he is lawfully entitled Removing the goods from one place to another may be trespass, but it is a conversion

CHAPTER—XVIII

RULES OF STRICT AND ABSOLUTE LIABILITY

Synopsis

1. The rule of Strict liability—*Rylands v Fletcher rule.*
2. Exception to this rule
3. The rule of Absolute liability

Introduction:

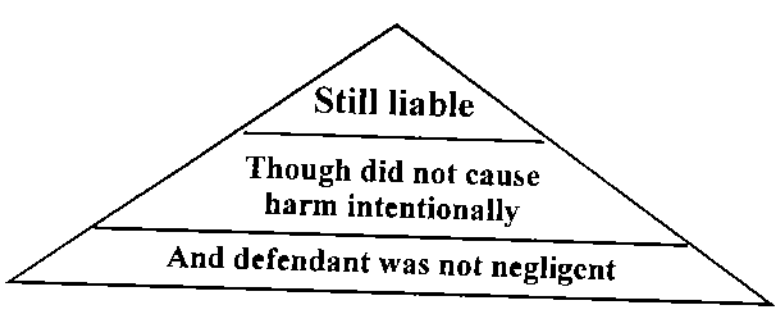
There are situation when a person may be liable for some harm even though he is not negligent in causing the same or there is no intention to cause the harm, or sometimes he may have even made some positive efforts to avert the same In other words, in sometimes the law recognizes '*No fault* liability In this connection, the rules laid down in two cases, firstly, in the decision of the House of Lords in *Rylands v. Fletcher,* and secondly, in the decision of the Supreme Court of India in '*M.C. Mehtha v UOI",* may be noted

The rule laid down in *Rylands v. Fletcher,* is generally known as the *Rule in Rylands v. Fletcher,* or *Rule of Strict Liability* Because of the various exceptions to the applicability of the rule, it would be preferable to call it the *Strict Liability,* rather than the rule of *Absolute Liability.* While formulating the rule in *M.C.Mehtha v. UOI,* the Supreme Court itself termed the liability recognized in that case as *Absolute Liability,* and expressly stated that such liability will not be subjected to any exceptions as have been recognized under *Rylands v. Fletcher*

The Rule of Strict Liability

(The Rule in Rylands v Fletcher)

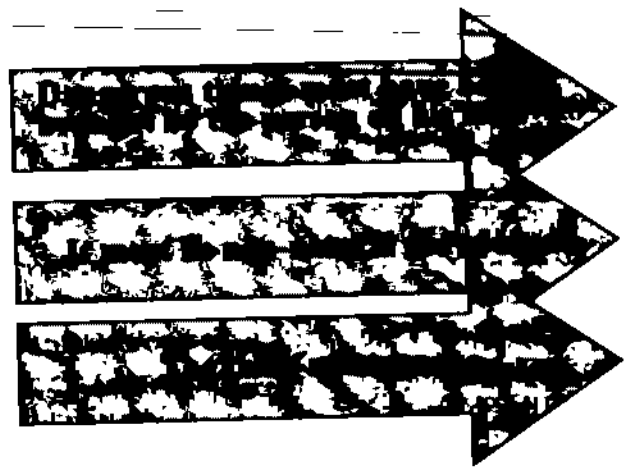
It has been noted above that in *Rylands v Fletcher,* the House of Lords laid down the rules recognizing *'No Fault'* liability The liability was recognized was *'Strict Liability'* even if the defendant was not negligent or rather, even if the defendant did not intentionally cause the harm or he was careful, he could still be made liable under the rule



In *Rylands v. Fletcher,* the defendant got a reservoir constructed, through independent contractors, over his land for providing water to his mill There were old discussed shafts under the site of the reservoir, which the contractors, failed to observe and so did not block them When the water was filled in the reservoir, it burst through the shafts and flooded the plaintiff's coal-mines on the adjoining land Te defendant did not know of the shafts and had not been negligent although the independent contractors had been Even though the defendant had not been negligent, he was held liable

Dangerous things must have been brought by the person on his land

To laid down the above rule, the another qualification was made by the House of Lords and it was held that for the liability under the rule, the use of land should be non-natural as was the position in the case For the application of the rule, therefore the following three essentials should be there,



I· Dangerous thing:

The liability for the escape of the thing from one's land arises provided the thing collected was dangerous thing, or likely to do mischief if it escapes In the said case, the thing so collected was a large body of water The rule has also been applied to gas, electricity, vibrations, sewage etc

II: Escape:

For the rule in the said case to be applicable, it is also essential that the thing causing the damage must *escape* to the area outside the occupation and control of the defendant

III: Non-Natural Use of Land:

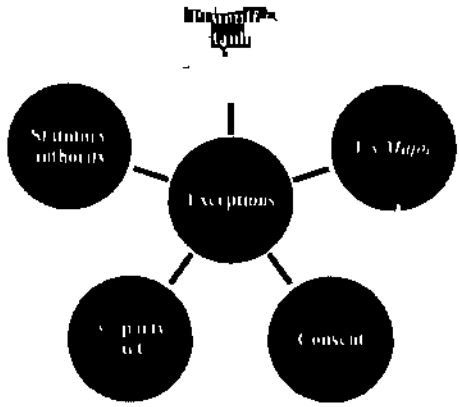
Water collected in the reservoir in such a huge quantity, was held to be non-natural use of land Keeping water of ordinary domestic purpose is 'natural use' For the use of non-natural, it must be some special use bringing with it increased danger to others and must not merely by ordinary use of land or such a use as is proper for the general benefit of community. The related cases are, *T.C.Balakrishnan Menon v. T.C.Subramanian, Noble v. Harrison.*

Act done by an independent contractor:

Generally, an employer is not liable for the wrongful act committed by an independent contractor However, it is no defence to the application of this rule that the act causing damage had been done by an independent contractor In *Rylands v Fletcher*, itself, the defendants were held liable even though they had got the job done from the independent contractors

Exception to the rule:

The following exceptions to the rule have been recognized by *Rylands v. Fletcher* and some later cases,



All the above exceptions are already being discussed in the earlier chapter

Position in India

The rule of Strict Liability is applicable as much in India as in England There has, however, been recognition of some deviation both ways, in the extension of the scope of the rule of strict liability as well as the limitation of its scope The liability without fault has been recognized in case of motor vehicle accidents Earlier the Supreme Court had held in *Minu B. Mehta v Balakrishna* that the liability of the owner or the insurer of the vehicle could not arise unless there was negligence on the part of the owner or the driver of the vehicle The Motor Vehicles Act, 1938, recognizes the '*liability without fault*' to a limited extent In *Madras Railways Co v. Zamindar*, it has been held by the Privy Council that because of peculiar Indian conditions, the escape of water collected for agricultural purposes may not be subject to strict liability The owner of whose land such water is collected is liable only if he has not taken due care The related case is, *K. Nagireddi v. Government of Andra Pradesh.*

The rule of Strict Liability

(The rule in M C Mehta v UOI)

In *M C Mehta v. UOI,* the apex court of dealing with claims arises from the leakage of oleum gas on 4th and 6th December, 1985 from one of the units of Shriram Foods and Fertilizers Industries, in the city of Delhi, belonging to Delhi Cloth Mills Ltd As a consequences of this leakage, it was alleged that one advocate practicing in the Tis Hazari Court had died and several others were affected by the same The action was brought through a writ petition under Article 32 of the Constitution of India by way of public interest litigation The court had in mind that within a period of one year, this was the second case of large scale leakage of deadly gas in India, as a year earlier due to leakage of MIN(Methyl Iso cynate) gas from Union Carbide plant in Bhopal, more than 3,000 people died and lakhs of others were subject to serious diseases of various kinds If the rule of Strict Liability laid down in *Rylands v Fletcher* was applied to such like situation, then those who had established 'hazardous and inherently dangerous' industries in and around thickly populated areas could escape the liability for the havoc caused thereby pleading some exception to the rule in *Rylands v. Fletcher.* The Supreme Court took a bold decision holding that it was not bound to follow the 19th century rule in England Law, and it could evolve a rule suitable to the social and economic conditions prevailing in India at the present day It evolved the rule of *Absolute Liability* as a part of Indian Law in preference to the rule of strict liability in Rylands case It expressly declared that the new rule was not subject to any of the exemptions of the rule in Rylands case

Environmental Pollution:

The Supreme Court in *Indian Council for Enviro-Legal Action v UOI* followed its earlier decision in *M.C.Mehta v. UOI* case imposing absolute liability on enterprises carrying hazardous and inherently dangerous activities Refer *BHOPAL GAS LEAK DISASTER CASE (Union Carbide Corporation v. UOI)*

CHAPTER—XIX

DEATH IN RELATION TO TORT

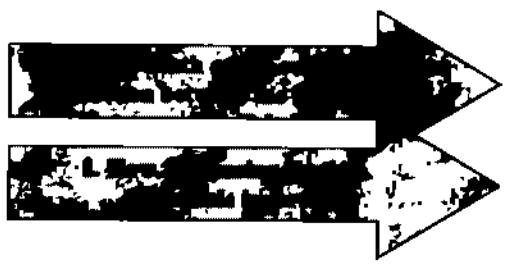
Synopsis

1. Effect of death on subsisting cause of action
2. Shortening of expectation of life
3 The Rule in *Baker v Bolton* case
4 Exception to the Rule
5 Compensation payable under a Statue

Introduction.

1 Effect of death on the subsisting cause of action between the two parties.

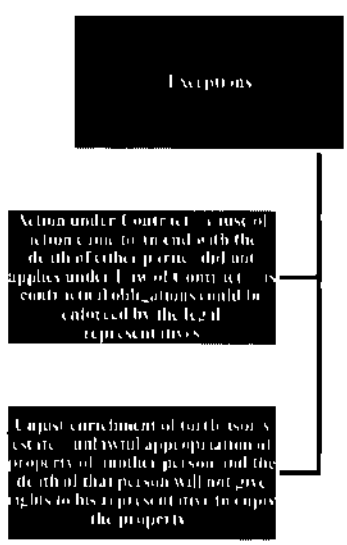
This topic will be studied under the two heads



1. Effect of death on a subsisting cause of action:

A personal cause of action against a person comes to an end when he dies. The rule was contained in the maxim, *Actio personalis moritur cum persona"*, which means that a personal cause of action dies with the person, where if either the plaintiff or the defendant died, the cause of action to an end The rule is relevant in India also the same may be explained by a decision of the National Commission in a consumer complaint in *Balbir Singh Makol v Sir Ganga Ram Hospital.*

The following exceptions have been recognized to the above rule,



Thus after the passing of the Law Reforms Act, 1934, the general rule is that if a cause of action comes into the existence in the lifetime of the parties, the death of either party does not affect the cause of action

Shortening of the expectation of life·

If the expectation of the life reduces due to the injury suffered by a person, he is entitled to claim compensation for the same under this head Damages under this head, for the first time, were allowed in 1953 in the case of *Flint v. Lovell.* The person, whose life span has been shortened, has not been able to bring an action due to his death, the cause of action survives and his representatives are allowed to bring an action for the same under the Act of 1934 Survival of such a cause of action was recognized by the House of Lords in *Rose v. Ford.* The other cases are *Morgan v. Scoulding, Benham v. Gambling* and *Yorkshire Electricity Board v. Naylor.* In *Benham v. Gambling* case, the death of 21/2 of year old child was caused The child was normal and had been living in favorable circumstances The House of Lords awarded only 200 Pounds by way of compensation. The basis of compensation was held to be not the number of years of life lost but the prospects of predominantly happily life The court was in favor of awarding very moderate damages in such a cases and even less in cases of death of a child because of the prospectus of his life and happiness are very uncertain

Action for defamation, assault and *personal injuries* do not survive on the death of one of the parties The cases related to this point was, *Supreme Bank v P.A. Tendolkar, Nrusingha Charan v. Ratikanta, Zargham Abbas v. Hari Chand, Global Motor Services v. Veluswami*

How far causing of death is actionable in tort?

In England, although an action for similar injuries lies in civil law, the Common Law Rule was that, "in a civil court, the death of human could not be complained of as an injury" We have seen above that on the death of a person, his legal representative can bring an action in respect of those rights which had become vested in the deceased before his death because the cause of action survives under the Law Reforms Act, 1934

The Rule in *Baker v. Bolton*

The rule that the causing of death of a person is not a tort was laid down in *Baker v. Bolton*, and is therefore, also known as the rule in *Baker v. Bolton.*

Exception to the Rule in Baker v. Bolton:

Death due to breach of contract.

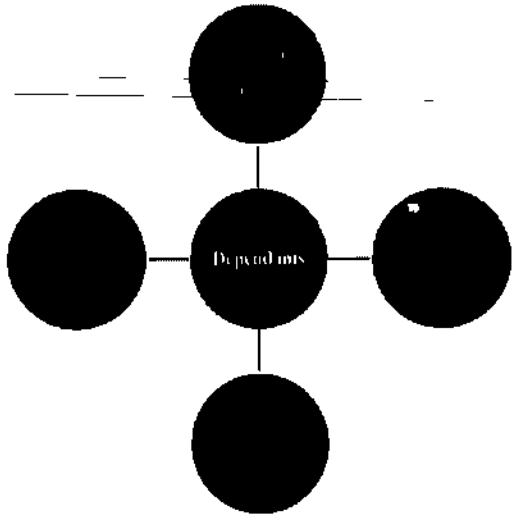
Causing the death of the person is not actionable as a tort, but if the death is the result of the breach of contract, the fact of death may be taken into account in determining the amount of damages payable on the breach of contract This may be illustrated by referring to the decision in *Jackson v. Watson.*

The Fatal Accidents Act, 1976·

Due to enormous increase in the number of accidents with the advent of railways, the need for compensating he dependants of the accident victims was felt and that led to the enactment of the Fatal Accidents Act, 1846, which is also known as Lord Campell's Act The Act enabled certain dependants of the deceased to claim compensation for the loss arising to the dependants from such death For an action under the Act, it is necessary that the person on account of whose death the action has been brought must himself have been entitled to bring an action if his death had not ensured In an action by the representatives, the defendant can take the same defences as he would have taken if the action was brought by the deceased

Dependants entitled to claim compensation

The Act recognizes as action only for the benefit of certain dependants of the deceased They were,



What is recoverable?

The compensation is payable for the pecuniary loss suffered by the dependant Nothing can be recovered by way of *Solatium* for mental suffering and anguish Moreover, when the death of a person has resulted in no pecuniary loss, no action lies The important cases on this point was, *Pym v. Great Norhtern Railway Co., Taff Vale Rail Co v Jenkins, Curwen v. James.* In assessing the future loss which is likely to arise, the prospectus of the dependants may also be taken into account

Position in India·

Regarding an action for compensation on the death of the person, the position in India is not much different from that in England An action for compensation is permitted only on the basis of various statutes Fatal Accidents Act, 1855, recognizes an action for the benefit of certain dependants, on the death of a person Thus, if the loss is caused to the representative of a person by his death in accident, the person at fault has to compensate them The representatives recognized under our Act are wife, husband, parent and child Brothers and sisters are not legal representatives within the meaning

Compensation payable under a Statute

If the statute stipulates the payment of some compensation in the event of the death of a person, compensation for death can be claimed on that basis The case was *Shashikalabai v. State of Maharashtra*

Compensation for death –Change in approach needed

As a general rule, causing of death is not considered to be a wrong under civil law and ever since *Baker v. Bolton*, if A had suffered any loss due to death of B, A could not recover any compensation for the same The question arises as to whether the rule in *Baker v. Bolton* laying down that causing of death is not actionable in tort, but whereas a smaller harm is, is irrelevant and valid today There appears to be no justification for the rule laid down about two centuries ago Moreover, Indian Courts are not bound by the law of another country, particularly when the same is unjust The correct interpretation of the law should be that although the Fatal Accidents Act permits compensation in a limited way that does not mean that the plaintiff is debarred from the right to compensation from that

CHAPTER—XX

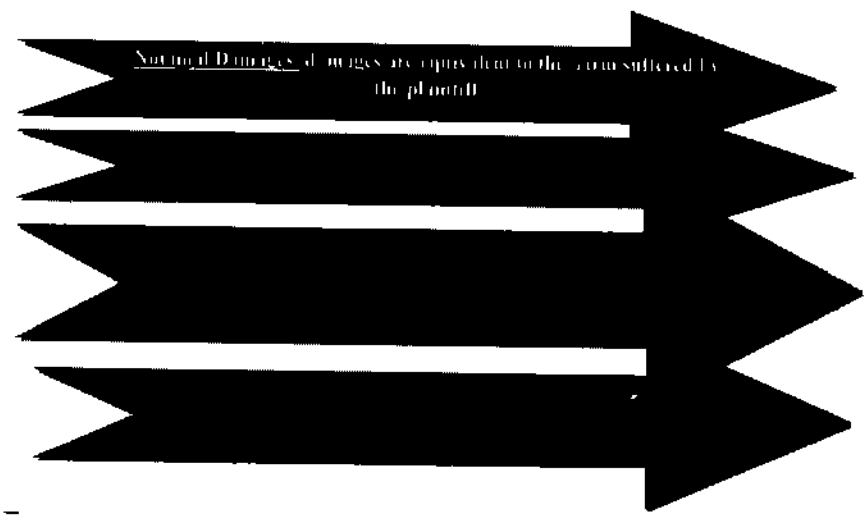
REMEDIES

Synopsis:

1. Damages—Nominal, contemptuous, aggravated, exemplary and prospective damage
2. Measure of damages in personal injuries
3. Damages for shortening expectation of life
4. Injunctions
5. Specific Restitution of property
6. Extra Judicial remedies

Introduction

Damages are the most important remedy which the plaintiff can avail of after the tort is committed They are of various kinds



Nominal damages:

The sum awarded may be nominal, as dealt in *Constantine v. Imperial London Hotels Ltd.* When a wrong is actionable per se, as for example, the damage to the plaintiff is presumed and an action lies even though in fact the plaintiff may not have suffered any loss

Contemptuous damages:

The amount awarded is very trifling because the court forms a very low opinion of the plaintiff's claim and thinks that the plaintiff although has suffered greater loss, does not deserve to be fully compensated Contemptuous damages are awarded when the plaintiff has suffered some loss but he does not deserve to be fully compensated

Compensatory, aggravated and exemplary damages·

Generally the damages are compensatory in nature to compensate the plaintiff for the loss suffered When the court take into account the motive for the wrong and award an increased amount of damage, such damages are called, aggravated damages When the damages are in excess of the loss suffered with the view to prevent similar behavior in future, the damages are exemplary This was held in *Rookes v Barnard,* in which, Lord Devlin listed the important cases to get such damages They are,

(a) Where the damages has been caused by oppressive, arbitrary, unconstitutional action by the servants of the government,

(b) Where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff

(c) —Where the exemplary damages are expressly authorized by the statute.

The cases were, *Bhim Singh v. State of J & K, Rudal Sah v State of Bihar,* and *Sebastian S Hongary v. UOI.*

Prospective damages:

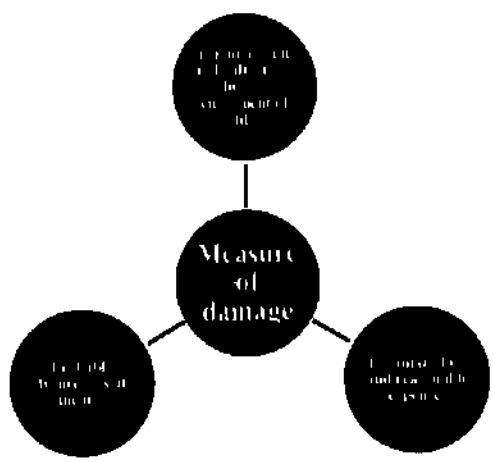
Compensation for damages which is likely the result of the defendant's wrongful act but which has not actually resulted at the time of the decision of the case are called prospective damages *Subash chander v. Ram Singh, Y.S.Kumar v. Kuldip Singh, Fiter v Veal.* In some exceptional cases successive actions are permitted,

1 Where two distinct rights are violated by the same wrongful act, for eg: accident due to negligent and cause damage to both the driver and the car Here the plaintiff is having both the remedy to get compensation for the damage caused to his car and for himself also in two distinct cases.

2 When the tort is a continuing one, successive actions permitted

Measure of damages:

Based on the personal injury, the compensation may be given for,



Damages under this head not only include physical pain but also mental agony due to the plaintiff's knowledge of the fact of the shortening of his expectation of life Severity and the duration of the pain and suffering have also to be taken into account The important cases in this point were *Karnataka SRTC v. Krishna, Klaus Mittelbachter v East India Hotels Ltd., E I.Ltd., v. Klaus Mittelbachter*

Attendant's expenses

Such damage also includes payment to produce the presence of somebody whose service become reasonably necessary as consequences of the accident Thus in *Veeran v. Krishnamoorthy,* due to the negligent driving of a bus by the defendant, a 6 year old boy was knocked down A sum of Rs 2 odd was spent as a cost of mixture given to the mother of the boy when she felt uneasy. As mother's services were necessary to the boy at the nursing home, this amount of Rs 2 odd was awarded as special damages to the plaintiff The other cases were, *Schneider v. Eisovitch, Donnelly v. Joyce.*

Interest on damage: In addition to the damages allowed under the various heads, the plaintiff may be allowed interest on the amount of damages from the date of his filing the petition or suit till the date of payment of compensation

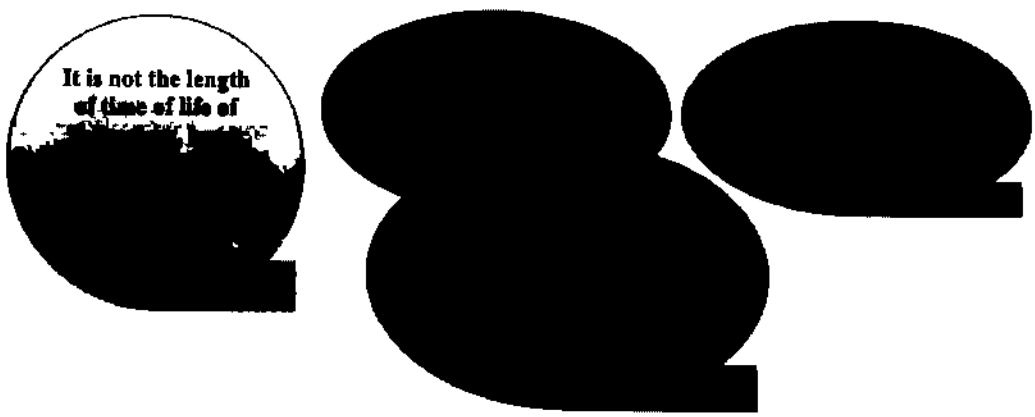
Damages in case of shortening of expectation of life

Moderate damages should be allowed for an action under this head.

Happiness of life is not to be subjective, but the test is an objective one

It is not the length of time of life of the person, but it should be the prospect of predominantly happy life

As discussed above, when a person's normal span of life is shortened due to the negligence of the defendant, he can claim compensation for the same In case, he dies before claiming compensation under this head, the right to claim compensation devolves on the legal representatives and they can claim compensation on behalf of the deceased In *Benham v. Gambling,* the House of Lords laid down the following rules,



The important cases in this aspect are, *Yorkshire Electricity Board v. Naylor, Gobald Motor Services Ltd v. Veluswami,, Govt of India v Jeevraj Alva, Dhangauriben v M.Mulchandbhai*

Assessment of the value of dependency·

How to assess the loss to any dependant in the event of the death of the person, and award him compensation which will make good that loss invariably posed a problem before the courts Two different theories, the *Interest Theory, and The Multiplier Theory,* which could possibly help in assessing the quantum of compensation payable to the plaintiff

Interest Theory·

According to this theory, the dependants may be paid such lump sum the interest from which would be equivalent to the loss suffered by them The theory is subject to two flaws (i) it does not take into account the erosion in the value of money due to inflation, and (ii) the theory is based in the assumption that the claimant will make a sound investment in long term fixed deposits, but that is not likely to happen because of illiteracy and ignorance of a common man according to the condition prevailing in India The cases were, *Joki Ram v Smt. Naresh Kanta, Padmadevi v. Kabalsingh*

Multiplier Theory

According this theory, the likely further loss is assessed by multiplying the likely loss due to occur every year with a multiplier which indicates the number of years for which the loss is likely to continue Certain factors like age, dependants are also taken into consideration while assessing the compensation The cases on this point were, *Davies v. Powell Duffryn Associated Collieries Ltd., C.K.Subramania Iyer v. T.Kunhittan Nair, Municipal Corporation of Delhi v. Subhagwanti, UOI v. Sugrabai, Ganaram v Kamlabai* etc

Deduction from the capital amount.

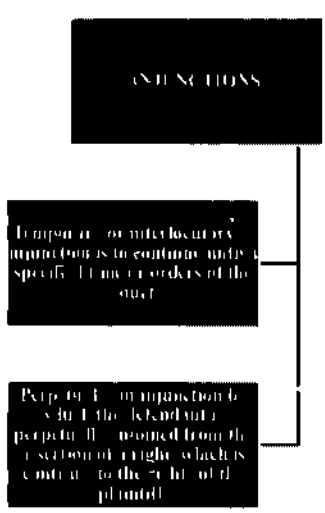
In some cases, the court deducts a percentage of the capitalized amount in view of the fact of uncertainties like the deceased or the dependant's chance of dying before the expiry of the years for which the multiplier has been used This was discussed in *Gangaram, Iswar Devi,* and *Radha Agarwal's* cases. It may be observed that there is no set of principles or uniform practice either regarding the multiplier to be used or deduction of percentage from the lumps sum payment Thus there is a need for rationalizing the same The cases were, ***Asa Singh v State of H P., Brahmananda Sahu v Halla Kunda***

Damages when deceased not earning:

In order to succeed in an action for damages under the Fatal Accidents Act, is it necessary that the plaintiff was either being supported by the deceased or had a legal claim to be supported? Can the plaintiff claim compensation if the deceased was not earning anything? One of the defences pleaded by the defendant was that the deceased was doing only household duties and was not an earning member of the family, no pecuniary loss was suffered by the other members of the family by reason of her death and so damages should not be awarded under this head It was held that in such a case, the husband is entitled to compensation for monetary loss incurred by replacing the services rendered by the wife gratuitously In this case as it was found that the husband had to incur Rs 50 per month, additional expenditure on the cook in place of his wife, the expected loss during the years of expected loss during the years of expected life of the deceased The plaintiff was awarded Rs 6,000/- as damage under this head This decision was followed in ***Adbulkadar v Kashinath.*** On the death of a person, his dependants who are entitled to receive compensation may receive gratuity, provident fund, family pension, insurance money, some benefit from a charitable institution, or some other benefit The question arises that, whether this amount will be deducted from the compensation payable by the defendant? It was held under the Fatal Accidents Act, 1976, (England) and India, that, that amount need not to be taken into account while awarding the compensation This was clearly made out in ***Kashiram mathur v. Sardar Rajendra Singh, Krishna Sehgal v. UPSRTC, Manjushri v. B.L.Gupta,*** case

INJUNCTIONS

An injunction is an order of the court directing the doing of some act or restraining the condition of some act The court has the discretion to grant or refuses this remedy and when remedy by way of damages is a sufficient relief, injunction will not be granted The two types of injunctions are,



A temporary or interlocutory injunction is generally granted before a case has been heard on merits and it is only provisional and, as such continues until the case is heard on its merits or until further orders of the court It does not mean determination in favor of the plaintiff but simply shows that there is a substantial question requiring consideration

Prohibitory and mandatory injunction:

Prohibitory injunction forbids the defendants from doing some act which will interfere with the plaintiff's lawful rights Mandatory injunction is an order which requires the defendant to do some positive act

Specific restitution of property:

When the plaintiff has been wrongfully dispossessed of his movable or immovable property, the court may order that the specific property should be restored back to the plaintiff

EXTRA JUDICIAL REMEDIES

Apart from the above stated remedies of damages, injunction and specific restitution of property which are also known as judicial remedies, a person may have recourse to certain remedies are known as extra-judicial remedies The remedies are, ***re-entry of land, reception of chattels, distress damage feasant, and abatement of nuisance.*** In the first two cases, a person by the use of reasonable force has the right to recover back the property to seize the goods or cattle which have trespassed

Abatement of nuisance:

An occupier of land is permitted to abate, i e., to terminate by his own act, nuisance which is affecting his land, for eg· cutting off the branches or roots of neighbours trees which have escaped to his land Generally before abatement is made, notice to the other party is required unless the nuisance is one which, if allowed to continue, will be a danger to the life or property

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COMPENSATION UNDER MOTOR VEHICLE ACT[1]

INTRODUCTION

With the development of civilization, act of negligence have become actionable wrong In the English Law any person or the legal representative of deceased person who expired on account of negligent act of other can besides instituting criminal proceeding, recover damages under the Law of Torts Accountable negligence consist in the neglect of use of ordinary care or skill towards a person to whom the defendant owes due of observing ordinary care and skill by which neglect the plaintiff have suffered injury to his person or property Thus, negligence accompanied with losses to the other party give rise to an action

In order to give effective rights to the person injured or expired in an accident, Fatal Accidents Act, 1885 was enacted in India This Act provided only a procedure and a right to named legal heirs to claim compensation from the person committing negligence This enactment has worked in India for a comfortable long period Because of increase in automation and consequential losses of life and property in accident, it was considered that to give relief to the victims of accident claims an effective law should be brought in

To facilitate this, provisions have been inserted for compulsory third party insurance and to provide a machinery of adjudication of claim in Motor Vehicle Act by amending Act No.110 of 1956, by which Section 93 to 109 with reference to third party insurance and Section 110(A) to 110(F) with reference to creation of Motor Accident Claims Tribunal and procedure for adjudication of claim has been provided Initially the liability was restricted to a particular sum but after 1982 the liability of the Insurance Company has been made unlimited and even the defences of the Insurance Companies have been restricted so as to ensure payment of compensation to third parties

In the year 1982 a new concept of providing interim compensation on 'No Fault' basis have been introduced by addition of Section 92(A) to 92(E) By the same amendment, relief has also been given those persons who expire by hit and run accidents, where the offending vehicles are not identified

In 1988 a new Motor Vehicle Act has been introduced and in new Motor Vehicle Act's Chapter 10 provides for interim award Chapter 11 provides for insurance of motor vehicle against third party risk and Chapter 12 provides for the constitution of Claims Tribunal and adjudication of claim and related matters This law is still in an era of serious changes Supreme Court has number of times held that this is a welfare legislation and the interpretation of provision of law is required to be made so as to help the victim. In this process Supreme Court has passed various judgments in recent past, which have restricted the statutory defences to the Insurance Company to a greater extent as law relating to burden of proof has been totally changed Limited defenses as to not holding valid driving license, use of vehicle for hire and reward, use of transport vehicle for the purpose not allowed by permit are required to be proved in so stringent manner that insurer are not getting advantage of these defences

Scheme of Chapter 10 and 11 of Motor Vehicle Act:

Chapter 10 with Sections 140 to 144 provides for interim compensation on 'No Fault' Basis Accordin to this provision Rs 50,000/- is to be given to the kith and kin of the deceased and Rs 25,000/- to the grievousl injured victim The compensation under Section 140 is made payable if prima facie evidence of following i available,

(1) Accident by the offending vehicle,

(2) Offending vehicle being insured,

(3) Death or grievous injuries have been caused

Unlike to main claim petition, negligence is not required to be proved and this compensation is not refundable even if negligence is not proved in the main claim application Under Chapter 10 for interim award insurer is not even permitted to raise any defence relating to negligence of applicant or permitted under Section 149 of Motor Vehicle Act But, if ultimately it is held that insurer is not liable to pay compensation victims can receive it from owner

Chapter 11 (Section 145 to 164) provides for compulsory third party insurance, which is required to be taken by every vehicle owner. It has been specified in Section 146(1) that no person shall use or allow using a motor vehicle in public place unless there is in force a policy of insurance complying with the requirement of this chapter Section 147 provides for the requirement of policy and limit of liability Every vehicle owner is required to take a policy covering against any liability which may be incurred by him in respect of death or bodily injury Injury may be to owner of goods or his authorized representative carried in the vehicle or damage to the property of third party and also death or bodily injury to any passenger of a public service vehicle According to this section the policy not require covering the liability of death or injuries arising to the employees in the course of employment except to the extent of liability under Workmen Compensation Act. Under Section 149 of the Act, the insurer have been statutorily liable to satisfy the judgment and award against the person insured in respect of third party risk.

Insurance Companies have been allowed following defences:

(1) Use of vehicle for hire and reward not permit to ply such vehicle.

(2) For organizing racing and speed testing,

(3) Use of transport vehicle not allowed by permit

(4) Driver not holding valid driving license or have been disqualified for holding such license

(5) Policy taken is void as the same is obtained by non-disclosure of material fact

Section 163A has been added in this Chapter by amending Act 54 of 1994 w e f. 14 11 94 whereby special provision as to payment of compensation on structural formula basis has been provided This provision is being introduced to provide compensation to the third party victims without proving negligence or Tortious act Schedule-II has been appended to the Act to give such structural formula Hon'ble Supreme Court has held that award under Section 163A is final, independent and not in addition of award in claim petition under Section 166 where claim is sought on negligence basis. Thus, one can claim compensation in either of the Section.

Claim Application:

Claim application can be filed under Section 163A for claim to be determined on structural formula basis provided in Schedule-II Schedule-II has been adjudged as suffering from severe mistakes and the Supreme Court has held that total reliance cannot be placed on this schedule Further the Schedule do not provide any computation chart for the persons having more than Rs 40,000/- annual income Claim petition can also be filed under Section 166 of Motor Vehicle Act pleading negligence where the claim shall be assessed by the Judge not on the basis of structural formula but on the basis of evidence led

The injured or the legal representatives of deceased can file claim application in a prescribed format making driver, owner and insurer as party Driver is not a necessary party in some states For e g in the Rajasthan Motor Accident Claims Tribunal Rules only owner and insurer are required to be party No limitation has been prescribed for filing of the claim application. Initially when the law has come into force the limitation was 6 months which was later increased to one year and ultimately in the garb of welfare legislation the provision of limitation has been deleted In my humble view when there is limitation prescribed for all type of causes, some limitation of 2 or 3 years must be prescribed for filing of claim application It should not be made indefinite, as it will cause serious problems to the defendant The procedure has been prescribed as a summary procedure for determining the compensation

Accidents arising out of use of Motor Vehicle·

Section 165 provides the form of constitution of Claim Tribunal in adjudging claims of compensation in respect of accidents involving the death of bodily injury to persons "arising out of the use of Motor Vehicle" Being welfare legislation the scope of this term has been widened which includes accident by a stationery vehicle, injuries suffered by passengers in bomb blast, injuries due to fire in petrol tanker Murder in a motor vehicle has also been covered as a motor accident.

Assessment of Claim:

The assessment of compensation, however, be made good but cannot be said to be fool proof In every such assessment certain assumptions are to be made and there is all possibility of variance from Judge to Judge in applying the various principles enunciated by the Courts from time to time Lord Viscount Simon has evolved a method of assessment known as "Nance's method" more popularly as "discounting method" The popular method, which is known as Davis Method was evolved by Lord Wright

Hon'ble Supreme Court while dealing with a matter evolved a formula Yearly Income Yearly expenditure on Deceased gives the sum expended on legal representatives If this amount is capitalized subject to certain deductions, pecuniary loss to the family can be assessed While improving the above formula Supreme Court in CKS Iyer's case has stated that there is no exact uniform rule for measuring the value of human life and measure of damages can not be arrived at by a mathematical calculation but the amount recoverable depends upon life expectancy of legal representative beneficiaries In the same period Lord Diploc has evolved Interest Capitalization method by calculating net pecuniary loss on annual basis and multiplied with number of years purchase The Hon'ble Supreme Court of India with the development of accident claims has decided the landmark case of Susamma Thomas has started giving appreciation to the annual income of deceased

This appreciation ranges to the double of income depending upon the nature of job, age, future prospects etc Supreme Court has held that after determining and doubling annual income, 1/3 should be deducted towards the expenses to be incurred on the deceased and the remaining amount should be multiplied by a multiplier depending on the age of deceased and beneficiary. The maximum multiplier approved by Supreme Court in this case was 16 Later, Supreme Court's 3 Judges Bench have approved the Davis formula along with determination of dependency on unit basis in which the adults have been taken as 2 units and the minors has been taken as 1 unit The multiplier, which was approved as 16 in Sushma Thomas case, was increased to maximum of 18 In this case the court did not allow double of the amount except that a premium may be given looking to the future prospects

But, in a recent Supreme Court judgment, in order to make compensation just and to take consideration of overall factors multiplier was reduced from 16 to 12 in case of deceased of 38 years In same facts and circumstances, in another case Supreme Court has said for determination of multiplier depends upon (1) age of deceased (2) age of claimants (3) marital status (4) education and employment of the claimants, and (5) loss of pecuniary benefits The Supreme Court has also held that criteria of awarding compensation include some guess work, some hypothetical consideration and some amount of sympathy linked with the nature of disability caused are all involved But, all such elements are required to be viewed with the objective standard

In view of the above case laws, one can say that the assessment of compensation is to be guided by way of applying precedents on the facts and circumstances of a particular case It should not be misunderstood that an injured or legal representatives of the deceased should be given exorbitant claim, but the law restrict them to be "just compensation" so as to save the injured or legal representatives of deceased from possible pecuniary and non-pecuniary losses guided by the above judgments

Legal defence available to the Insurance Companies towards third party.

The Insurance Company cannot avoid the liability except on the grounds and not any other ground, which have been provided in Section 149(2) In recent time, Supreme Court while dealing with the provisions of Motor Vehicle Act has held that even if the defence has been pleaded and proved by the Insurance Company, they are not absolve from liability to make payment to the third party but can receive such amount from the owner insured The courts one after one have held that the burden of proving availability of defence is on Insurance Company and Insurance Company has not only to lead evidence as to breach of condition of policy or violation of provisions of Section 149(2) but has to prove also that such act happens with the connivance or knowledge of the owner If knowledge or connivance has not been proved, the Insurance Company shall remain liable even if defence is available

Driving License:

Earlier not holding a valid driving license was a good defence to the Insurance Company to avoid liability It was been held by the Supreme Court that the Insurance Company is not liable for claim if driver is not holding effective & valid driving licence It has also been held that the learner's licence absolves the insurance Company from liability, but later Supreme Court in order to give purposeful meaning to the Act have made this defence very difficult In Sohan Lal Pasi's case it has been held for the first time by the Supreme Court that the breach of condition should be with the knowledge of the owner If owner's knowledge with reference to fake driving licence held by driver is not proved by the Insurance Company, such defence, which was otherwise available, can not absolve insurer from the liability Recently in a dynamic judgment in case of Swaran Singh, the Supreme Court has almost taken away the said right by holding;

(i) Proving breach of condition or not holding driving licence or holding fake licence or carrying gratuitous passenger would not absolve the Insurance Company until it is proved that the said breach was with the knowledge of the owner

(ii) Learner's licence is a licence and will not absolve Insurance Company from liability

(iii) The breach of the conditions of the policy even within the scope of Section 149(2) should be material one which must have been effect cause of accident and thereby absolving requirement of driving licence to those accidents with standing vehicle, fire or murder during the course of use of vehicle

This judgment has created a landmark history and is a message to the Government to remove such defence from the legislation as the victim has to be given compensation

Gratuitous Passenger·

A gratuitous or fare paying passenger in a goods vehicle or fare paying passenger in private vehicle has been proved to be a good defence In Motor Vehicle Act 1939 the gratuitous passenger was not covered under the insurance policy but a fare passenger in a goods vehicle was considered to be covered by 5 Judges Bench judgment of Rajasthan High Court In new Motor Vehicle Act, a Division Bench of Supreme Court held that Insurance Company is liable for a passenger in goods vehicle In another judgment of 3 Judges Bench of Supreme Court it was held that the Insurance Company is not liable for the gratuitous passenger traveling in the goods vehicle In number of other cases this judgment has been reiterated with a direction that the Insurance Company shall first make payment of the compensation to the claimant and then recover it from the owner

Dishonour of cheque of insurance premium:

It has been held by the Supreme Court that once the Cover Note is issued the Insurance Company is bound to make payment to a third party and can recover amount from owner This judgment deserves to be reviewed else Section 64 VB of Insurance Act will become non-existent This judgment can give momentum

to those persons who will get the insurance and will get their cheque been bounced as the liability of Insurance Company will run for another one year without there being a premium This may be oppose to public policy also Further there will be clash between the two provisions

Transfer of Vehicle:

Transfer of a vehicle prior to accident has been held to be not valid defence for the purpose of third party liability It can be a defence for own damage but as far as third party liability, even the vehicle has been transferred and policy has not been transferred, liability of Insurance Company shall remain there

Right of recovery from owner to Insurance Company:

With the development of law, liability of the insurance Company has been made strict to the third party even if there is no negligence or defence to the Insurance Company are available A right has been given to the Insurance Company by way of legal precedents incorporating various provisions to recover the said amount paid to third party from owner This recovery can be made by mere filing of an execution application and not by a separate civil suit

Appeal:

Provision of appeal has been provided under Section 173 of Motor Vehicle Act But the courts have held that the right to appeal is available only to the driver and owner against whom the award is passed. The right of Insurance Company to file appeal is not permitted on the ground of quantum or negligence Insurance Company can file appeal only on the ground of statutory defences available

In circumstances where the application under Section 170 has been rejected, the insurance Company has got right of one judicial review on the reasons of rejection either by filing writ petition or to agitate the matter in appeal Similarly, in all other circumstances where no order has been passed by the court or no reasons have been recorded by the Tribunal Such act cannot be accountable to the insurer and the insurer must get an opportunity to challenge the same. I am impressed by a judgment passed by Himachal Pradesh High Court in which the court has referred the 3 Judges Bench Supreme Court judgment of Nicolletta Rohtagi and has held that in these circumstances the insurer can file appeal and agitate these issues in appeal before the Court and if the court found it proper will permit to continue the appeal and to decide the appeal on merit

In my humble opinion this provision (section 173) is not of benefit to anybody because it do not provide the right to appeal to one of the litigating party who has to make payment of compensation i e insurer If the owners are not participating or presenting themselves in order to help the claimants, the insurer would not be in a position to control the high awards in want of cross examination of income and other issues Legislature has already restricted the right of defense but a further restriction of not participating in the trial would not be just There is imminent need of amendment to permit the insurer to contest the claims as they are the persons who have to make payment of the compensation Once the insurance cover is available, the owner feels safe and do not help the Insurance Company in the process of contesting the claim Further, now a days, if seriously quantified, a good number of cases are coming as a flood in the courts of law for compensation. This is because of huge sum of compensation are allowed to the claimants and for that purpose fake accidents, fake drivers are planned with the connivance of the police The police in connivance do not investigate the matter of delay in lodging of F I R , delay in recording of statements. In these circumstances, a right to contest on merit and quantum should be provided to the Insurance Company in order to make the contest just and equitable.

The law of accident claims is fast growing and the amendments to suit the requirement of the object are necessitated but at the same time interest of those should be watched who are disbursing the compensation i e. Insurance Companies Without affording them right to contest, imposing liability to make payment cannot

be approved by law Section 170 provides for seeking permission but this provision can be misused by the owners and claimants in collusion Presently because of increasing scale of compensations almost 10 to 15% or even more cases presented to the Claim Tribunals are fake or the other accidents have been converted into road accidents with connivance of the police authorities It is necessary that while increasing the burden of the Insurance Companies they must get a right of proper contest to mitigate fake cases and also the quantum The time is matured for bringing legislation for award of the fixed compensations as in case of rail or airways A person dying in rail accident cannot get beyond Rs 4 lakh but a person dying in road accident can get Rs 4 crore The payment of compensation based on the vehicle is not reasonable and a structural basis compensation formula without reference to income or age may be brought in so that each and everybody can get compensation of their life irrespective of his poverty or richness A Scheme should be formulated with the State Police Authorities and the Insurance Companies by which the Insurance Company must know immediately after happening of accident and can make necessary investigations Insurance Company comes in picture when the claim petition is filed and by that time the evidence can be created to convert the non-accident into accident and also on quantum The intention of legislation is to provide just compensation and not exorbitant compensation This should always be kept in mind

(Footnotes)

[1] Article by Kunal Metha, NLUJ ,

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