INTRODUCTION

Law is any rule of human conduct accepted by the society and enforced by the state for the betterment of human life. In a wider sense it includes any rule of human action for example, religious, social, political and moral rules of conduct. However, only those rules of conduct of persons which are protected and enforced by the state do really constitute the law of the land in its strict sense. According to Salmond the law consists of rules recognized and acted on by courts of justice. The entire body of law in a state (corpus juris) may be divided into two, viz. civil and criminal.

Civil law: The term may be used in two senses. In one sense it indicates the law of a particular state as distinct from its external law such as international law. On the other side, in a restricted sense civil law indicates the proceedings before civil courts where civil liability of individuals for wrongs committed by them and other disputes of a civil nature among them are adjudicated upon and decided. Civil wrong is the one which gives rise to civil proceedings, i.e., proceedings which have for their purpose the enforcement of some right claimed by the plaintiff as against the defendant. For example, an action for the recovery of debt, restitution of property, specific performance of a contract etc. he who proceeds civilly is a claimant or plaintiff demanding the enforcement of some right vested in him and the remedy he seeks is compensatory or preventive in nature.

Criminal Law: Criminal laws indicate the proceedings before the criminal courts where the criminal liability of persons who have committed wrongs against the state and other prohibited acts are determined. Criminal proceedings on the other hand are those which have for their object the punishment of the wrong doer for

some act of which he is accused. He who proceeds criminally is an accuser or prosecutor demanding nothing for him but merely the punishment of the accused for the offence committed by him.

Definition of Tort

The term tort is the French equivalent of the English word 'wrong' and of the Roman law term 'delict'. The word tort is derived from the Latin word *tortum* which means twisted or crooked or wrong and is in contrast to the word rectum which means straight. Everyone is expected to behave in a straightforward manner and when one deviates from this straight path into crooked ways he has committed a tort. Hence tort is a conduct which is twisted or crooked and not straight. As a technical term of English law, tort has acquired a special meaning as a species of civil injury or wrong. It was introduced into the English law by the Norman jurists.

Tort now means a breach of some duty independent of contract giving rise to a civil cause of action and for which compensation is recoverable. In spite of various attempts an entirely satisfactory definition of tort still awaits its master. In general terms, a tort may be defined as a civil wrong independent of contract for which the appropriate remedy is an action for unliquidated damages. Some other definitions for tort are given below:

Winfield and Jolowicz- Tortuous liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages.

Salmond and Hueston- A tort is a civil wrong for which the remedy is a common action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other mere equitable obligation.

Sir Frederick Pollock- Every tort is an act or omission (not being merely the breach of a duty arising out of a personal relation, or undertaken by contract) which is related in one of the following ways to harm (including reference with an absolute right, whether there be measurable actual damage or not), suffered by a determinate person:-

a) It may be an act which, without lawful justification or excuse, is intended by the agent to cause harm, and does cause the harm complained of.

b) It may be an act in itself contrary to law, or an omission of specific legal duty, which causes harm not intended by the person so acting or omitting.

c) It may be an act violation the absolute right (especially rights of possession or property), and treated as wrongful without regard to the actor's intention or knowledge. This, as we have seen is an artificial extension of the general conceptions which are common to English and Roman law.

d) It may be an act or omission causing harm which the person so acting or omitting to act did not intend to cause, but might and should with due diligence have foreseen and prevented.

e) It may, in special cases, consist merely in not avoiding or preventing harm which the party was bound absolutely or within limits, to avoid or prevent.

Fraser- Tort is an infringement of a right ***in rem*** of a private individual giving a right of compensation at the suit of the injured party.

The Law of Torts in India

Under the Hindu law and the Muslim law tort had a much narrower conception than the tort of the English law. The punishment of crimes in these systems occupied a more prominent place than compensation for wrongs. The law of torts in India is mainly the English law of torts which itself is based on the principles of the common law of England. This was made suitable to the Indian conditions appeasing to the principles of justice, equity and good conscience and as amended by the Acts of the legislature. Its origin is linked with the establishment of British courts in India.

The expression justice, equity and good conscience was interpreted by the Privy Council to mean the rules of English Law if found applicable to Indian society and circumstances. The Indian courts before applying any rule of English law can see whether it is suited to the Indian society and circumstances. The application of the English law in India has therefore been a selective application. On this the Privy Council has observed that the ability of the common law to adapt itself to the differing circumstances of the countries where it has taken roots is not a weakness but one of its strengths. Further, in applying the English law on a particular point, the Indian courts are not restricted to common law. If the new rules of English statute law replacing or modifying the common law are more in consonance with justice, equity and good conscience, it is open to the courts in India to reject the outmoded rules of common law and to apply the new rules. For example, the principles of English statute, the Law Reform (Contributory Negligence) Act, 1945, have been applied in India although there is still no corresponding Act enacted by Parliament in India.

The development in Indian law need not be on the same lines as in England. In M.C. Mehta v. Union of India, Justice Bhagwati said, we have to evolve new principles and lay down new norms which will adequately deal with new problems which arise in a highly industrialized economy. We cannot allow our judicial thinking to be constructed by reference to the law as it prevails in England or for the matter of that in any foreign country. We are certainly prepared to receive light from whatever source it comes but we have to build our own jurisprudence.

It has also been held that Section 9 of The Code of Civil Procedure, which enables the civil court to try all suits of a civil nature, impliedly confers jurisdiction to apply the Law of Torts as principles of justice, equity and good conscience. Thus the court can draw upon its inherent powers under Section 9 for developing this field of liability.

In a recent judgment of Jay Laxmi Salt Works (p) Ltd. v. State of Gujarat, Sahai, J., observed: truly speaking the entire law of torts is founded and structured on morality. Therefore, it would be primitive to close strictly or close finally the ever expanding and growing horizon of tortuous liability. Even for social development, orderly growth of the society and cultural refinedness the liberal approach to tortious liability by court would be conducive.

NATURE OF TORTS

A. Tort and crime

Historically tort had its roots in criminal procedure. Even today there is a punitive element in some aspects of the rules on damages. However, tort is a species if civil injury or wrong. The distinction between civil and criminal wrongs depends on the nature of the remedy provided by law. A civil wrong is one which gives rise to

civil proceedings. A civil proceeding concerns with the enforcement of some right claimed by the plaintiff as against the defendant whereas criminal proceedings have for their object the punishment of the defendant for some act of which he is accused. Sometimes the same wrong is capable of being made the subject of proceedings of both kinds. For example assault, libel, theft, malicious injury to property etc. in such cases the wrong doer may be punished criminally and also compelled in a civil action to make compensation or restitution.

Not every civil wrong is a tort. A civil wrong may be labeled as a tort only where the appropriate remedy for it is an action for unliquidated damages. Thus for example, public nuisance is not a tort merely because the civil remedy of injunction may be available at the suit of the attorney general, but only in those exceptional cases in which a private person may recover damages for loss sustained by him in consequence thereof. However it has to be born in mind that a person is liable in tort irrespective of whether or not an action for damages has been given against him. The party is liable from the moment he commits the tort. Although an action for damages is an essential mark of tort and its characteristic remedy, there may be and often other remedies also.

A.1. Difference between crime and tort

Being a civil injury, tort differs from crime in all respects in which a civil remedy differs from a criminal one. There are certain essential marks of difference between crime and tort they are:

- Tort is an infringement or privation of private or civil rights belonging to individuals, whereas crime is a breach of public rights and duties which affect the whole community.

- In tort the wrong doer has to compensate the injured party whereas in crime, he is punished by the state in the interest of the society.
- In tort the action is brought about by the injured party whereas in crime the proceedings are conducted in the name of the state.
- In tort damages are paid for compensating the injured and in crime it is paid out of the fine which is paid as a part of punishment. Thus the primary purpose of awarding compensation in a criminal prosecution is punitive rather than compensatory.
- The damages in tort are unliquidated and in crime they are liquidated.

A.2. Resemblance between crime and tort

There is however a similarity between tort and crime at a primary level. In criminal law the primary duty, not to commit an offence, for example murder, like any primary duty in tort is in rem and is imposed by law. The same set of circumstances will in fact, from one point of view, constitute a crime and, from another point of view, a tort. For example every man has the right that his bodily safety shall be respected. Hence in an assault, the sufferer is entitled to get damages. Also, the act of assault is a menace to the society and hence will be punished by the state. However where the same wrong is both a crime and a tort its two aspects are not identical. Firstly, its definition as a crime and a tort may differ and secondly, the defences available for both crime and tort may differ.

The wrong doer may be ordered in a civil action to pay compensation and be also punished criminally by imprisonment or fine. If a person publishes a defamatory article about another in a newspaper, both a criminal prosecution for libel as well as a civil action claiming damages for the defamatory publication may be taken against him. In P. Rathinam v. Union of India, the Supreme Court observed, In a

way there is no distinction between crime and a tort, in as much as a tort harms an individual whereas a crime is supposed to harm a society. But then, a society is made of individuals. Harm to an individual is ultimately the harm to the society.

There was a common law rule that when the tort was also a felony, the offender would not be sued in tort unless he has been prosecuted in felony, or else a reasonable excuse had to be shown for his non prosecution. This rule has not been followed in India and has been abolished in England.

B. Tort and contract

The definition given by P.H. Winfield clearly brings about the distinction between tort and contract. It says, Tortuous liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages. A contract is that species of agreement whereby a legal obligation is constituted and defined between the parties to it. It is a legal relationship, the nature, content and consequence of which are determined and defined by the agreement between the parties. According to Salmond, a contract arises out of the exercise of the autonomous legislative authority entrusted by the law to private persons to declare and define the nature of mutual rights and obligations.

At the present day, tort and contract are distinguished from one another in that, the duties in the former are primarily fixed by law while in the latter they are fixed by the parties themselves. Agreement is the basis for all contractual obligations. “People cannot create tortious liability by agreement. Thus I am under a duty not to assault you, not to slander you, not to trespass upon your land because the law says

that I am under such duty and not because I have agreed with you to undertake such duty.

Some of the distinctions between tort and contract are given below:

- A tort is inflicted against or without consent; a contract is founded upon consent.
- In tort no privity is needed, but it is necessarily implied in a contract.
- A tort is a violation in rem (right vested in some person and available against the world at large); a breach of contract is an infringement of a right in personam (right available against some determinate person or body).
- Motive is often taken into consideration in tort, but it is immaterial in a breach of contract.
- In tort the measure of damages is not strictly limited nor is it capable of being indicated with precision; in a breach of contract the measure of damages is generally more or less nearly determined by the stipulations of the parties.

In certain cases the same incident may give rise to liability both in contract and in tort. For example, when a passenger whilst traveling with a ticket is injured owing to the negligence of the railway company, the company is liable for a wrong which is both a tort and a breach of a contract.

The contractual duty may be owed to one person and the duty independent of that contract to another. The surgeon who is called by a father to operate his daughter owes a contractual duty to the father to take care. If he fails in that duty he is also liable for a tort against the daughter. In Austin v. G.W. Railway, a woman and her child were traveling in the defendant's train and the child was injured by

defendant's negligence. The child was held entitled to recover damages, for it had been accepted as passenger.

There is a well-established doctrine of Privity of Contract under which no one except the parties to it can sue for a breach of it. Formerly it was thought that this principle of law of contract also prevented any action being brought under tortuous liability. But this fallacy was exploded by the House of Lords in the celebrated case of Donoghue v. Stevenson. In that case a manufacturer of ginger beer had sold to a retailer, ginger beer in a bottle of dark glass. The bottle, unknown to anyone, contained the decomposed remains of a snail which had found its way to the bottle at the factory. X purchased the bottle from the retailer and treated the plaintiff, a lady friend (the ultimate consumer), to its contents. In consequence partly of what she saw and partly of what she had drunk, she became very ill. She sued the manufacturer for negligence. This was, of course, no contractual duty on the part of the manufacturer towards her, but a majority of the House of Lords held that he owed a duty to take care that the bottle did not contain noxious matter and that he was liable if that duty was broken.

The judicial committee of the Privy Council affirmed the principle of Donoghue's case in Grant v. Australian Knitting Mills Ltd. Thus contractual liability is completely irrelevant to the existence of liability in tort. The same facts may give rise to both.

Another discrepancy between contracts and torts is seen in the nature of damages under each. In contracts the plaintiff will be claiming liquidated damages whereas in torts he will be claiming unliquidated damages. When a person has filed a suit or put a claim for the recovery of a predetermined and fixed sum of money he is said to have claimed liquidated damages. On the other hand when he has filed a suit for

the realization of such amount as the court in its discretion may award, he is deemed to have claimed unliquidated damages.

C. Tort and Quasi-Contract

Quasi contract cover those situations where a person is held liable to another without any agreement, for money or benefit received by him to which the other person is better entitled. According to the Orthodox view the judicial basis for the obligation under a quasi-contract is the existence of a hypothetical contract which is implied by law. But the Radical view is that the obligation in a quasi-contract is *sui generis* and its basis is prevention of unjust enrichment.

Quasi contract differs from tort in that:

- There is no duty owed to persons for the duty to repay money or benefit received unlike tort, where there is a duty imposed.
- In quasi contract the damages recoverable are liquidated damages, and not unliquidated damages as in tort.

Quasi contracts resembles tort and differs from contracts in one aspect. The obligation in quasi contract and in tort is imposed by law and not under any agreement. In yet another dimension quasi contract differs from both tort and contract. If, for example, A pays a sum of money by mistake to B. in Quasi contract, B is under no duty not to accept the money and there is only a secondary duty to return it. While in both tort and contract, there is a primary duty the breach of which gives rise to remedial duty to pay compensation.

Constituents of Tort

The law of torts is fashioned as an instrument for making people adhere to the standards of reasonable behaviour and respect the rights and interests of one another. This it does by protecting interests and by providing for situations when a person whose protected interest is violated can recover compensation for the loss suffered by him from the person who has violated the same. By interest here is meant a claim, want or desire of a human being or group of human beings seeks to satisfy, and of which, therefore the ordering of human relations in civilized society must take account. It is however, obvious that every want or desire of a person cannot be protected nor can a person claim that whenever he suffers loss he should be compensated by the person who is the author of the loss. The law, therefore, determines what interests need protection and it also holds the balance when there is a conflict of protected interests.

Every wrongful act is not a tort. To constitute a tort:

- There must be a wrongful act committed by a person;
- The wrongful act must be of such a nature as to give rise to a legal remedy and
- Such legal remedy must be in the form of an action for unliquidated damages.

I. Wrongful Act

An act which prima facie looks innocent may become tortious, if it invades the legal right of another person. In Rogers v. Ranjendro Dutt, the court held that, the act complained of should, under the circumstances, be legally wrongful, as regards

the party complaining. That is, it must prejudicially affect him in some legal right; merely that it will however directly, do him harm in his interest is not enough.

A legal right, as defined by Austin, is a faculty which resides in a determinate party or parties by virtue of a given law, and which avails against a party (or parties or answers to a duty lying on a party or parties) other than the party or parties in whom it resides. Rights available against the world at large are very numerous. They may be divided again into public rights and private rights. To every right, there corresponds a legal duty or obligation. This obligation consists in performing some act or refraining from performing an act.

Liability for tort arises, therefore when the wrongful act complained of amounts either to an infringement of a legal private right or a breach or violation of a legal duty.

II. Damage

In general, a tort consists of some act done by a person who causes injury to another, for which damages are claimed by the latter against the former. In this connection we must have a clear notion with regard to the words damage and damages. The word damage is used in the ordinary sense of injury or loss or deprivation of some kind, whereas damages mean the compensation claimed by the injured party and awarded by the court. Damages are claimed and awarded by the court to the parties. The word injury is strictly limited to an actionable wrong, while damage means loss or harm occurring in fact, whether actionable as an injury or not.

The real significance of a legal damage is illustrated by two maxims, namely: Damnum Sine Injuria and Injuria Sine Damno.

(i) Damnum Sine Injuria (Damage Without Injury)

There are many acts which though harmful are not wrongful and give no right of action to him who suffers from their effects. Damage so done and suffered is called Damnum Sine Injuria or damage without injury. Damage without breach of a legal right will not constitute a tort. They are instances of damage suffered from justifiable acts. An act or omission committed with lawful justification or excuse will not be a cause of action though it results in harm to another as a combination in furtherance of trade interest or lawful user of one's own premises. In Gloucester Grammar School Master Case, it had been held that the plaintiff school master had no right to complain of the opening of a new school. The damage suffered was mere damnum absque injuria or damage without injury. Acton v. Blundell, in which a mill owner drained off underground water running into the plaintiff's well, fully illustrate that no action lies for mere damage, however substantial, caused without the violation of some right.

There are moral wrongs for which the law gives no remedy, though they cause great loss or detriment. Los or detriment is not a good ground of action unless it is the result of a species of wrong of which the law takes no cognizance.

(ii) ***Injuria Sine Damno*** (injury without damage)

This means an infringement of a legal private right without any actual loss or damage. In such a case the person whose right has been infringed has a good cause of action. It is not necessary for him to prove any special damage because every injury imports a damage when a man in hindered of his right. Every person has an absolute right to property, to the immunity of his person, and to his liberty, and an infringement of this right is actionable per se. actual perceptible damage is not,

therefore, essential as the foundation of an action. It is sufficient to show the violation of a right in which case the law will presume damage. Thus in cases of assault, battery, false imprisonment, libel, trespass on land, etc., the mere wrongful act is actionable without proof of special damage. The court is bound to award to the plaintiff at least nominal damages if no actual damage is proved. This principle was firmly established by the election case of Ashby v. White, in which the plaintiff was wrongfully prevented from exercising his vote by the defendants, returning officers in parliamentary election. The candidate for whom the plaintiff wanted to give his vote had come out successful in the election. Still the plaintiff brought an action claiming damages against the defendants for maliciously preventing him from exercising his statutory right of voting in that election. The plaintiff was allowed damages by Lord Holt saying that there was the infringement of a legal right vested in the plaintiff.

III. Remedy

The law of torts is said to be a development of the maxim *ubi jus ibi remedium* or 'there is no wrong without a remedy'. If a man has a right, he must of necessity have a means to vindicate and maintain it and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without remedy; want of right and want of remedy are reciprocal.

Where there is no legal remedy there is no wrong. But even so the absence of a remedy is evidence but is not conclusive that no right exists.

Some General Conditions in Torts

1. Act and Omission- To constitute a tort there must be a wrongful act, whether of omission or commission, but not such acts as are beyond human control and as are

entertained only in thoughts. An omission is generally not actionable but it is so exceptionally. Where there is a duty to act an omission may create liability. A failure to rescue a drowning child is not actionable, but it is so where the child is one's own. A person who voluntarily commences rescue cannot leave it half the way. A person may be under duty to control natural happenings to his own land so as to prevent them from encroaching others' land.

2. Voluntary and Involuntary Acts- a voluntary act has to be distinguished from an involuntary act because the former may involve liability and the latter may not. A self-willed act like an encroachment for business is voluntary, but an encroachment for survival may be involuntary. The wrongfulness of the act and the liability for it depends upon legal appreciation of the surrounding circumstances.

3. Malice- malice is not essential to the maintenance of an action for tort. It is of two kinds, 'express malice' (or malice in fact or actual malice) and 'malice in law' (or implied malice). The first is what is called malice in common acceptance and means ill will against a person; the second means a wrongful act done intentionally without just cause or excuse. Where a man has a right to do an act, it is not possible to make his exercise of such right actionable by alleging or proving that his motive in the exercise was spite or malice in the popular sense. An act not otherwise unlawful, cannot generally be made actionable by an averment that it was done with evil motive. A malicious motive per se does not amount to injuria or legal wrong.

Wrongful acts of which malice is an essential element are:

- Defamation
- Malicious prosecution

- Willful and malicious damage to property
- Slander of title

4. Intention, motive, negligence and recklessness- The obligation to make reparation for damage caused by a wrongful act arises from the fault and not from the intention. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair it necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad or indifferent. A thing which is not a legal injury or wrong is not made actionable by being done with a bad intent. It is no defence to an action in tort for the wrong doer to plead that he did not intend to cause damage, if damage has resulted owing to an act or omission on his part which is actively or passively the effect of his volition. A want of knowledge of the illegality of his act or omission affords no excuse, except where fraud or malice is the essence of that act or omission. For every man is presumed to intend and to know the natural and ordinary consequences of his acts. This presumption is not rebutted merely by proof that he did not think of the consequences or hoped or expected that they would not follow. The defendant will be liable for the natural and necessary consequences of his act, whether he in fact contemplated them or not.

5. Malfeasance, misfeasance and nonfeasance- the term ‘malfeasance’ applies to the commission of an unlawful act. It is generally applicable to those unlawful acts, such as trespass, which are actionable per se and do not require proof of negligence or malice. The term ‘misfeasance’ is applicable to improper performance of some lawful act. The term ‘non-feasance’ applies to the failure or omission to perform some act which there is an obligation to perform.

6. Fault- liability for tort generally depends upon something done by a man which can be regarded as a fault for the reason that it violates another man's right. But liability may also arise without fault. Such liability is known as absolute or strict liability. An important example is the rule in Rylands v. Fletcher thus the two extremes of the law of torts are of non-liability even where there is fault or liability without fault. Between these two extremes is the variety of intentional and negligent wrongs to the question whether there is any consistent theory of liability, all that can be said is that it wholly depends upon flexible public policy, which in turn is a reflection of the compelling social needs of the time.

General Principles of Liability

There are two theories with regard to the basic principle of liability in the law of torts or tort. They are:

- Wider and narrower theory- all injuries done by one person to another are torts, unless there is some justification recognized by law.
- Pigeon-hole theory- there is a definite number of torts outside which liability in tort does not exist.

The first theory was propounded by Professor Winfield. According to this, if I injure my neighbour, he can sue me in tort, whether the wrong happens to have a particular name like assault, battery, deceit or slander, and I will be liable if I cannot prove lawful justification. This leads to the wider principle that all unjustifiable harms are tortious. This enables the courts to create new torts and make defendants liable irrespective of any defect in the pleading of the plaintiff. This theory resembles the saying, my duty is to hurt nobody by word or deed. This theory is supported by Pollock and courts have repeatedly extended the domain of

the law of torts. For example, negligence became a new specific tort only by the 19th century AD. Similarly the rule of strict liability for the escape of noxious things from one's premises was laid down in 1868 in the leading case if Rylands v. Fletcher.

The second theory was proposed by Salmond. It resembles the Ten Commandments given to Moses in the bible. According to this theory, I can injure my neighbour as much as I like without fear of his suing me in tort provided my conduct does not fall under the rubric of assault, deceit, slander or any other nominate tort. The law of tort consists of a neat set of pigeon holes, each containing a labeled tort. If the defendant's wrong does not fit any of these pigeon holes he has not committed any tort.

The advocates of the first theory argue that decisions such as Donoghue v. Stevenson shows that the law of tort is steadily expanding and that the idea of its being cribbed, cabined and confined in a set of pigeon holes in untenable. However salmond argues in favour of his theory that just as criminal law consists of a body of rules establishing specific offences, so the law of torts consists of a body of rules establishing specific injuries. Neither in the one case nor in the other is there any general principle of liability. Whether I am prosecuted for an alleged offence or sued for an alleged tort it is for my adversary to prove that the case falls within some specific and established rule of liability and not fro for me to defend myself by proving that it is within some specific and established rule of justification or excuse. For salmond the law must be called The Law of Torts rather that The Law of Tort.

There is, however, no recognition of either theory. It would seem more realistic for the student to approach the tortious liability from a middle ground. In an Indian

decision, Lala Punnalal v. Kasthurichand Ramaji, it was pointed out that there is nothing like an exhaustive classification of torts beyond which courts should not proceed, that new invasion of rights devised by human ingenuity might give rise to new classes of torts. On the whole if we are asked to express our preference between the two theories, in the light of recent decisions of competent courts we will have to choose the first theory of liability that the subsequent one. Thus it is a matter of interpretation of courts so as to select between the two theories. The law of torts has in the main been developed by courts proceeding from the simple problems of primitive society to those of our present complex civilization.

Thus to conclude, law of torts is a branch of law which resembles most of the other branches in certain aspects, but is essentially different from them in other respects. Although there are differences in opinion among the different jurists regarding the liability in torts, the law has been developed and has made firm roots in the legal showground. There are well defined elements and conditions of liability in tort law.

GENERAL DEFENCES

INTRODUCTION

Before we can proceed to evaluate the circumstances in which a defence can be used in any tort case it is absolutely essential to understand what the word "defence" means. The word "defence" bears several meanings in the tort context and a great deal of confusion has been spawned of a general failure by courts and commentators to make their intended meaning clear. Although conventionally the word defence is used to refer to those arguments which when used persuades the court to conclude that the defendant in a case is not guilty. So, they basically include "absent element defences" which are denials of the components of the tort that the plaintiff has allegedly committed. Now this can be done in two ways. First the defendant can deny that the tort was committed or second, the defendant can deny on the grounds of legal sufficiency in the allegations of the plaintiff, even if a tort has been committed.

Defence can also be used in a stricter sense in the case of "affirmative defences" where the result in a verdict is for the defendant even if all of the ingredients of the tort that the plaintiff contends were committed against him are present. Affirmative defences include absolute privilege, abuse of process, arrest, distress, honest opinion, immunity, limitation bars, necessity, qualified privilege, recapture of land or chattels, res judicata and self-defence. A defendant who relies on any of these rules seeks to avoid liability not by denying the plaintiff's allegations but by going around them.

Then we need to discuss the “remedy restricting rules”. The word defence when used in relation to these rules encompasses the principles that limit the relief a plaintiff is entitled to. Some remedy restricting rules cut back the plaintiff’s entitlement to damages, such as the provision for apportionment for contributory negligence and the doctrine of mitigation of damage. Others prevent the plaintiff from enjoying particular remedies completely. Examples of the latter type of remedy restricting rule include the doctrines of laches and acquiescence. The law favours those who are vigilant and not those who slumber. However it is essential to note that in this case the defendant is not absolved of liability like the previous two cases.

Another very important point to be discussed while talking about defences in any law is the concept of “onus of proof”. Historically speaking, the evolution of that particular law is very important in that aspect. When in any law the burden of proof shifts from one party to another, the use of that principle of law as a defence is affected. Suppose that X is an affirmative defence to a given tort. If the legislature enacts a provision that states that the plaintiff bears the onus of disproving X, it would be stripped of its status as a defence.

These are the four fundamental concepts of defence and the different ways in which it is to be construed. Now we shall see some of the commonly known and recognised defences to any tort. The defences discussed in detail are:

1. Consent

2. When plaintiff is the wrongdoer

3. Inevitable accident

4. Act of God

5. Act in relation to Private Defence

6. Necessity

7. Act done in respect to statutory authority

Consent

When a tort is committed, meaning that a defendant's actions interfered with the plaintiff's person or property, a plaintiff's consent will excuse the defendant of the wrongdoing. Although a defendant's conduct may be considered immoral, or harmful, if the plaintiff allows these interferences to occur, then the defendant is not considered to have committed a tort. Consent occurs when a plaintiff displays a willingness to participate in the defendant's conduct. This consent can be express or implied. One of the most widely stated examples in this sense is that of a person who is hit by the ball while watching a match in a cricket stadium. The general understanding here is that when the person bought the ticket to watch the match itself he agreed or consented to suffer any such damage or face any such risks and so the players or stadium authorities are absolved from any sort of liability arising out of such an accident.

The defendant may infer consent from the plaintiff's actions the way any reasonable man would. In some cases, silence and inaction may manifest consent when it is reasonable to assume that a person would speak or act if he objected to the defendant's actions.

Suppose there is a pile of old things that you have kept aside to dispose or give away. Now if some worker takes an old painting from the pile in your presence and you don't have any problem with that then, you cannot later claim the painting and it is reasonable to assume that the servant obtained your consent before taking it.

Also, if certain behaviour was previously consented in the past, the defendant may continue to regard this behaviour as acceptable until he is told otherwise. Suppose A owns a library and B his friend often comes and borrows books without necessarily informing A always and A too doesn't have any objections to this, then B can assume that he has A's consent always and can continue books unless expressly told not to do so by A.

Consent may not always excuse a defendant of liability. Sometimes consent is ineffective under certain conditions. If the plaintiff lacks the capacity to consent, is coerced into consenting, or consents under false pretences, the consent is not valid as a defence to the tort. Incapacity to give consent may arise due to the factors of insanity, intoxication or infancy. It may also arise due to temporary abnormalities like someone under the effect of a drug or alcohol or someone who is in a very stressful situation, or due to a permanent mental illness or disorder. This incapacity must interfere with the plaintiff's ability to weigh the benefits and consequences of the defendant's suggested conduct. A person suffering from bouts of insanity cannot be expected to be able to give proper consent and anyone who takes advantage of that fact and puts him under any risk of injury shall not have the defence of consent.

A case with relation to incapacity to give consent is that of *Gillick v West Norfolk & Wisbeck Area Health Authority*. Mrs Gillick was a mother with five daughters under the age of 16. She sought a declaration that it would be unlawful for a doctor

to prescribe contraceptives to girls under 16 without the knowledge or consent of the parent. The court refused to give such a declaration. Lord Fraser in his judgement said that:

It seems to me verging on the absurd to suggest that a girl or a boy aged 15 could not effectively consent, for example, to have a medical examination of some trivial injury to his body or even to have a broken arm set. Provided the patient, whether a boy or a girl, is capable of understanding what is proposed, and of expressing his or her own wishes, I see no good reason for holding that he or she lacks the capacity to express them validly and effectively and to authorise the medical man to make the examination or give the treatment which he advises. After all, a minor under the age of 16 can, within certain limits, enter into a contract. He or she can also sue and be sued, and can give evidence on oath. I am not disposed to hold now, for the first time, that a girl aged less than 16 lacks the power to give valid consent to contraceptive advice or treatment, merely on account of her age. Thus, we can see how the ability to give consent is determined in different cases with respect to the facts in the given situation.

Consent is usually expressed in law through the Latin phrase "*Volenti non fit injuria*". A direct translation of the phrase is, 'to one who volunteers, no harm is done'. It is often stated that the claimant consents to the risk of harm, however, the defence of *volenti* is much more limited in its application and should not be confused with the defence of consent in relation to trespass. The defence of v*olenti non fit injuria* requires a freely entered and voluntary agreement by the claimant, in full knowledge of the circumstances, to absolve the defendant of all legal consequences of their actions.

A corollary of this principle is "*Scienti non fit injuria"* which means that only knowledge of the risk is not enough to claim defence there must be acceptance to undergo the resultants of the risk undertaken. There had to be consent and mere knowledge is not sufficient.

In *Khimji* V. *Tanga Mombasa Transport Co. Ltd*. the plaintiffs were the personal representatives of a deceased who met his death while travelling as a passenger in the defendant's bus. The bus reached a place where road was flooded and it was risky to cross. The driver was reluctant to continue the journey but some of the passengers, including the deceased, insisted that the journey should be continued. The driver eventually yielded and continued with some of the passengers, including the deceased. The bus drowned with all the passengers aboard. It was held that the plaintiff's action against the defendants could not be maintained because the deceased knew the risk involved and assumed it voluntarily and so the defence of *volenti non fit injuria* rightly applied.

For the defence to be valid it is necessary that the consent was obtained voluntarily by the plaintiff and there was no undue influence, misrepresentation or fraud involved.

In the case of *R* v. *Williams* the defendant was a singing coach. He told one of his pupils that he was performing an act to open her air passages to improve her singing but he was actually having sexual intercourse with her. It was held that her consent was vitiated by fraud. This case has been used to illustrate the validity of a consent which has been obtained by unfair means.

In another case the claimant sued his employers for injuries sustained while in the course of working in their employment. He was employed to hold a drill in

position whilst two other workers took it in turns to hit the drill with a hammer. Next to where he was working another set of workers were engaged in taking out stones and putting them into a steam crane which swung over the place where the claimant was working. The claimant was injured when a stone fell out of the crane and struck him on the head. It was said that the claimant may have been aware of the danger of the job, but had not consented to the lack of care. He was therefore entitled to recover damages.

For a claim of *volenti* it is necessary that there is an agreement between the parties which may be express or implied. An implied agreement may exist where the claimant's action in the circumstances demonstrates a willingness to accept not only the physical risks but also the legal risks. In *Nettleship* v. *Weston,* Lord Denning said:

"Knowledge of the risk of injury is not enough. Nothing will suffice short of an agreement to waive any claim for negligence. The plaintiff must agree expressly or impliedly to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant: or more accurately due to the failure by the defendant to measure up to the duty of care which the law requires of him".

Also the plaintiff should have complete knowledge of the full nature and extent of risk involved before giving consent. Lord Diplock in the case *Wooldridge v. Sumner pointed out that,* "The consent that is relevant is not consent to the risk of injury but consent to the lack of reasonable care that may produce that risk… and requires on the part of the plaintiff at the time at which he gives his consent full knowledge of the nature and extent of the risk that he ran".

The conventional understanding about the plea of *volenti non fit injuria* is that it is an affirmative defence to liability arising in the tort of negligence. However, Stephen Sugarman demonstrates that pleading the volenti maxim is simply a misleading way of asserting that one of the elements of the action in negligence is absent. The decision of the English Court of Appeal in *Murray* v *Harringay Arena Ltd.* can be used to further prove this point. In the given case the plaintiff, who was six years old at the time, was injured by an errant puck while watching an ice hockey match. He failed in his bid to recover damages from the owner of the rink because he was found to have assumed the risk of injury by attending the match.The plaintiff failed not because he consented to the risk of injury (which was obviously impossible given his age) but because the rink owner was not negligent with respect to the plaintiff's safety. The facts coalesce to reveal the absence of fault on the part of the defendant which is why the defence of consent was successful here.

This principle also applies to injuries caused during contact sports. A participant in sporting events is taken to consent to the risk of injury which occurs in the course of the ordinary performance of the sport. But to use this defence it is necessary to show that the rules of the sport were followed and that the players did not cause more harm than is reasonable in a game. In *Blake* v *Galloway* the plaintiff and defendant were taking a break from music practice and became involved in "high-spirited and good natured horseplay". The plaintiff threw and struck the defendant with a piece of bark. The defendant, with no intention to cause harm, threw a piece back and struck the plaintiff in the eye, who suffered significant injury. The judges held that by participating in the game, the plaintiff must be taken to have impliedly consented to the risk of a blow on any part of his body, provided that the offending missile was thrown more or less in accordance with the tacit understanding or

conventions of the game. If there are inherent risks in an activity, and someone consents to participating in the activity, they are held to have impliedly consented to being exposed to such risks.

In the medical field the importance of consent is very high. The element of consent is one of the critical issues in medical treatment. The patient has a legal right to autonomy and self-determination enshrined within Article 21 of the Indian Constitution. He can refuse treatment except in an emergency situation where the doctor need not get consent for treatment. The consent obtained should be legally valid. A doctor who treats without valid consent will be liable under the tort and criminal laws. The law presumes the doctor to be in a dominating position, hence the consent should be obtained after providing all the necessary information. The patient may sue the medical practitioner in tort for trespass to person in case something goes amiss. Alternatively, the health professional may be sued for negligence. In certain extreme cases, there is a theoretical possibility of criminal prosecution for assault or battery.

When Plaintiff Is The Wrongdoer

The law excuses the defendant when the act done by the plaintiff itself was illegal or wrong. This defence arises from the Latin maxim "*ex turpi causa non oritur action*" which means no action arises from an immoral cause. So an unlawful act of the plaintiff itself might lead to a valid defence in torts. This maxim applies not only to tort law but also to contract, restitution, property and trusts. Where the maxim is successfully applied it acts as a complete bar on recovery. It is often referred to as the illegality defence, although it extends beyond illegal conduct to immoral conduct. This defence though taken very rarely has been in debate for a long time. The principle of "*ex turpi causa non oritur action"*, famously

enunciated by Lord Mansfield as long ago as in the case of *Holman* v. *Johnson*. In the case of *Ashton* v.*Turner* and another, the claimant was injured when the defendant crashed the car in which he was a passenger. The crash occurred after they both had committed a burglary and the defendant, who had been drinking, was driving negligently in an attempt to escape. Justice Ewbank dismissed the claim holding that as a matter of public policy the law would not recognise a duty of care owed by one participant in a crime to another. He also added that even if there was a duty of care the claimant had willingly accepted the risk and knowingly sat in the car with the defendant. In *Stone & Rolls* a fraudster used a company of which he was the sole director and shareholder to commit a letter of credit fraud. Following the company's insolvency, its liquidators, acting in the company's name, sued its auditors in negligence for having failed to detect the fraud. The House of Lords held (by 3-2) that the claim was barred on the ground *ex turpi causa*, because the state of mind of the fraudster was to be attributed to the company, which was thus treated as the perpetrator of the fraud.

The law in Australia on the illegality defence as it applies in the negligence context was, until recently, more or less identical to that in England. However, this changed when, in Miller v Miller, the High Court of Australia held that joint and unilateral illegality cases should be governed by the same rule. That rule is that no duty of care will be owed to a plaintiff who was injured while committing an offence if recognising a duty would be inconsistent with the purpose of the criminal law statute that the plaintiff infringed.

This defence of ex turpi causa can be closely related to the legal maxims "*jus ex injuria non oritur*" which means that no right can arise out of a wrong and "*Commodum Ex Injuria Sua Nemo Habere Debet*" meaning that a wrongdoer

should not be enabled by law to take any advantage from his actions. We have heard the common phrase that one who approached the courts must come with clean hands. The defence of illegality is close to this principle and works on the logic that when a person is doing a wrongful act he need not be helped by the state in getting damages as this would essentially be against public policy. In the case of*National Coal Board* v *England Lord Porter* had expressly located the ex turpi causa maxim in a public policy rationale. Thus, wrongdoing on the part of the plaintiff would not necessarily preclude him from bringing a claim where the court could be satisfied that to provide redress for the plaintiff would not offend against policy. Considering the reliance on public policy in this principle another issue which arises is the validity of *ex turpi causa* as a defence in itself. Some legal jurists are of the opinion that instead of a defence it should act as a barrier to the claim. In doing so, the public policy rationale is strengthened through a refusal to recognise the validity of the claim in the first place. This logical conclusion can be arrived from the judgement in the case of *Anderson v Cooke* as well.

An important case which raised the questions of the defence of volenti *non fit injuria* and *ex turpi causa* was *Pitts* v *Hunt.* After an evening of heavy drinking the unlicensed and uninsured owner of a motor-cycle drove the cycle on a public road in a reckless and dangerous manner which the plaintiff, as pillion passenger, was found to have actively encouraged. There was an accident in which the rider was killed and the plaintiff badly injured. In the plaintiff's action in negligence, the judge dismissed the claim against the first defendant, the personal representative of the rider, on the ground that the rider owned the plaintiff no duty of care, by reason of the maxim *ex turpi causa non oritur actio*. He held, further, that although the plaintiff had clearly accepted the risk of negligence on the rider's part, s.148(3) of the Road Traffic Act 1972 disentitled the first defendant from relying on the

defence of *volenti non fit injuria*, and that the plaintiff was 100% contributorily negligent. The plaintiff appealed.

Lord Beldam said that it followed from the public policy underlying the Road Traffic Acts that the claim must fail, as if anyone else had been killed the facts would have amounted to manslaughter, not merely by gross negligence, but by the doing of a dangerous act either with the intention of frightening other road users or knowing, but for self-induced intoxication, that it was likely to do so. The judge's decision on volenti was correct. Since s.1(1) of the Law Reform (Contributory Negligence) Act 1945 presupposed that before the section could apply there must have been fault by both parties, and liability then had to be apportioned, the judge's finding of 100% contributory negligence was wrong in principle. Justice Balcombe, concurring, said that in the circumstances the rider owed no duty of care to the plaintiff. Justice Dillon, also concurring, said that on the facts the plaintiff's action arose directly ex turpi causa; it was not a case of merely incidental unlawful conduct.

Vis Major Or Act Of God

Act of God is a defence used in cases of torts when an event over which the defendant has no control over occurs and the damage is caused by the forces of nature. In such cases the defendant will not be liable in tort law for such inadvertent damage. Act of God or Vis Major or Force Majeure may be defined as circumstances which no human foresight can provide against any of which human prudence is not bound to recognize the possibility, and which when they do occur, therefore are calamities that do not involve the obligation of paying for the consequences that result from them. *Black's Law Dictionary* defines an act of God as "An act occasioned exclusively by violence of nature without the interference of

any human agency." A natural necessity proceeding from physical causes alone without the intervention of man. It is an accident which could not have been occasioned by human agency but proceeded from physical causes alone."When a defendant pleads act of God as an answer to liability, he may deny that he was at fault. Sometimes, however, the defendant, when he relies on this plea, denies causation. He may concede that he was negligent but contend that, even if he had taken reasonable care, the damage about which the plaintiff complains would still have occurred and hence he should not be held guilty for those damages. To understand this we an illustration can be discussed. Suppose that D, an occupier, negligently omits to bring a dangerously unstable fence on his property into repair. During a ferocious storm the fence collapses onto his neighbour's (P's) house. P sues D in negligence. D relies on the defence of Act of God and brings unchallenged expert evidence to show that the storm was so fierce that even a sturdy fence would have given way. In pleading act of God, D is not denying fault. He is denying that his fault caused P's damage. This is a way in which the defence of Vis Major can be used. The essential conditions that the defendant needs to prove to be able to successfully use the defence of Act of God are as follows.

Firstly, it is important that the event that occurred was due to the forces of nature or unnatural circumstances. The event should be proved to be in excess of the normal standards. So only in cases of heavy torrential rainfall or natural disasters like earthquakes, tsunami etc. this defence can be invoked. A regularly goes to a park and gets injured one rainy day when a branch accidentally falls on him. The park authorities cannot use the defence of act of god as the rainfall was normal and they were negligent in not maintain the park during the monsoons when it is reasonably foreseeable that the trees need more maintenance during the rains to avoid such an event from occurring.

In the case of *Nichols* v. *Marshland* the defendant has a number of artificial lakes on his land. Unprecedented rain such as had never been witnessed in living memory caused the banks of the lakes to burst and the escaping water carried away four bridges belonging to the plaintiff. It was held that the plaintiff's bridges were swept by act of God and the defendant was not liable.

In another case *Ryde* vs. *Bushnell* (1967), Sir Charles Newbold observed, "Nothing can be said to be an act of God unless it is an occurrence due exclusively to natural causes of so extraordinary a nature that it could not reasonably have been foreseen and the result avoided".

It is also important to prove that the defendant had no knowledge or could not have done anything about the event to try and reduce the damages. As set out in *Tennant* v. *Earl of Glasgow* "Circumstances which no human foresight can provide against, and of which human prudence is not bound to recognize the possibility, and which when they do occur, therefore, are calamities that do not involve the obligation of paying for the consequences that may result from them" fall under the category of Act of God.

Greenock Corp. v. *Caledonian Railway Co*. contrasts with the decision in Nichols. The House of Lords criticised the application of the defence in Nichols v. Marshland. In this case, the Corporation obstructed and altered the course of a stream by constructing a padding pool for children. Due to rainfall of extraordinary violence which would normally have been carried away by the stream overflowed and caused damage to the plaintiff's property. It was held that rainfall was not an Act of God. The House of Lords followed Rylands in holding that a person making an operation for collecting and damming up the water of a stream must so work as to make proprietors or occupants on a lower level as secure

against injury as they would have been had nature not been interfered with. Nichols was further distinguished on two bases: the escape in Nichols was from a reservoir rather than a natural stream, and a jury in Nichols found the flood was due to an act of God. There had been 'no negligence in the construction or maintenance of the reservoirs," and "the flood was so great that it could not reasonably have been anticipated'.

In the case of *Blyth* v. *Birmingham Water Works Co* the defendants had constructed water pipes which were reasonably strong enough to withstand severe frost. There was an extraordinarily severe frost that year causing the pipes to burst resulting in severe damage to the plaintiff's property. It was held that though frost is a natural phenomenon, the occurrence of an unforeseen severe frost can be attributed to an act of God, hence relieving the defendants of any liability. In the Indian case of*Ramalinga Nadar* v. *Narayana Reddiar*the plaintiff had booked goods with the defendant for transportation. The goods were looted by a mob, the prevention of which was beyond control of defendant. It was held that every event beyond control of the defendant cannot be said Act of God. It was held that the destructive acts of an unruly mob cannot be considered an Act of God.

Thus we have seen how the defence of Act of God can be used. Now we shall see another defence which is very closely related to this one.

Inevitable Accident

An inevitable accident is one which could not have been possibly been avoided by the exercise of due care and caution. Charlesworth on Negligence, 4th Edn, in paragraph 1183 describes an 'inevitable accident' as follows:

"There is no inevitable accident unless the defendant can prove that something happend over which he had no control and the effect of which could not have been avoided by the exercise of care and skill.'

In *A. Krishna Patra* v. *Orissa State Electricity Board*, The Orissa High Court defined 'Inevitable accident' as an event which happens not only without the concurrence of the will of the man, but in spite of all efforts on his part to prevent it.

In the pre nineteenth century cases, the defence of inevitable accident used to be essentially relevant in actions for trespass when the old rule was that even a faultless trespass was actionable, unless the defendant could show that the accident was inevitable. This is however not relevant anymore. The emerging conception of inevitability can be seen most clearly in *Whitelock* v.*Wherwell*, the bolting horse case from 1398. The complaint in Whitelock was unusual because the plaintiff, rather than just reciting that the defendant had hit him with force and arms, also alleged that the defendant had "controlled the horse so negligently and improvidently" that it knocked him down. The defendant conceded that the horse had knocked down the plaintiff, but pleaded that the plaintiff's fall was "against the will" of the defendant. The defendant went on to explain that he had hired the horse without notice of its bad habits, that it ran away with him as soon as he mounted it, and that he "could in no way stop the horse" although he "used all his strength and power to control" it. It was a plea of inevitable accident. The collision may have been inevitable, but it had become inevitable by virtue of the defendant's negligence, and was thus not held to be an accident.

In another case, *Stanley* v. *Powell* the plaintiff was employed to carry cartridge for a shooting party when they had gone pheasant-shooting. A member of the party

fired at a distance but the bullet, after hitting a tree, rebounded into the plaintiff's eye. When the plaintiff sued it was held that the defendant was not liable in the light of the circumstance of inevitable accident.

In the case of *Fardon* v. *Harcourt-Rivington* the defendant parked his saloon motor car in a street and left his dog inside. The dog has always been quiet and docile. As the plaintiff was walking past the car, the dog started jumping about in the car, smashed a glass panel, and a splinter entered into the plaintiff's left eye which had to be removed. Sir Frederick Pollock said: "People must guard against reasonable probabilities but they are not bound to guard against fantastic possibilities" In the absence of negligence, the plaintiff could not recover damages.

The use of inevitable accident in early actions interpreted inevitability as impracticality. In the present scenario, to speak of inevitable accident as a defence, therefore, is to say that there are cases in which the defendant will escape liability if he succeeds in proving that the accident occurred despite the use of reasonable care on his part, but is also to say that there are cases in which the burden of proving this is placed upon him. In an ordinary action for negligence, for example, it is for the claimant to prove the defendant's lack of care, not for the defendant to disprove it, and the defence of inevitable accident is accordingly irrelevant and it is equally irrelevant in any other class of case in which the burden of proving the defendant's negligence is imposed upon the claimant.

There was a major shift in the use of inevitable accident as a defence after the rule of strict liability was evolved after *Rylands* v. *Fletcher*. The plea of inevitable accident lost its utility in cases involving accidents in any enterprise dealing with hazardous substances or which is inherently dangerous. As laid down in *M C*

Mehta v. *Union of India*, inevitable accident in any form is no defence to a claim based on the rule of strict liability which is not subjected to any exception.

Acts Done For Private Defence

Every individual has the right to protect his life and his property and in doing so he may use certain amount of force if necessary. This right doesn't extend to protecting just yourself and your own family members but all other people and their property in general. The law of torts recognises this right and so any act done by a person in exercise of this act will not give rise to a tortious liability.

To use this defence three conditions need to be satisfied. Firstly, there must be a real and imminent threat to the defendant. A very widely stated illustration in this reference is where a ferocious dog starts barking violently at you but doesn't bite. And then when it turns back and starts walking away if you hit it or throw a stone at it you cannot claim private defence. This is because the dog was no longer a threat to you after it turned away and started walking back and so the act committed by you is wrong and cannot be justified under the defence of private defence.

Also it needs to be shown that the force used was only for the purpose of protection or private defence and not for revenge. There should be no mala fide or bad intention involved for a successful private defence claim. Example: A and B lived in houses adjacent to each other and were not in very good terms. One day A's cow entered B's house and destroyed some of his plants. B gets angry and shoos the cow away, but later he plans to take revenge on A and shoots at it. He claims he did this in private defence but this claim shall fail because it is evident that he used more force than that was necessary and had wrong intentions while

doing the act. This brings us to the third essential component of the defence of private defence, which is, the force used by the defendant should be in proportion to the act committed and enough to ward off the imminent danger. Suppose a person installs an electric wired fence around his property to keep away trespassers without any warning signs at all. He is not only doing an act which is grossly negligent but also he doesn't have the right to claim private defence as the means used are way more dangerous than required.

In case of protection of property it is essential that the person must be in possession of the property at the time of the incident. It means that if a person is staying in a house on rental then he has the right to defend the property in which he is staying. The owner also has such right but he must be in possession of the property. A person who does not have possession of the land may use reasonable force against persons who obstruct him in carrying out his own duties. In case of trespass one must use reasonable force in the course of protecting the property.

The case of *Bird v. Holbrook*, deals with the defence of protection of property. Holbrook, the defendant set up a spring-gun trap in his garden in order to catch an intruder who had been stealing from his garden. He did not post a warning. Bird, the petitioner chased an escaped bird into the garden and set off the trap, suffering serious damage to his knee. Bird sued Holbrook for damages. It was held that while setting traps or "man traps" can be valid as a deterrent when notice is also posted, D's intent was to injure someone rather than scare them off. Hence he was held liable.

The famous case of *Morris*v. *Nugent ,* discusses the importance of the presence of a threat at the time when the act of private defence is committed. In the case as the defendant was passing by a house the defendant's dog came and bit him. When the

defendant turned around and raised his gun the dog ran away but he shot the dog anyway. It was held that the defendant's act was not justified as there was no real threat at the time the defendant shot and so he could not claim the plea of private defence.

The idea behind this principle is that it is the State that shall mete out punishment for the wrong doer and the defendant cannot use force to that effect. He only has the right to defend himself and cannot do anything further than that.

Necessity

The defence of necessity is very closely related to that of private defence. In tort common law, the defence of necessity gives the State or an individual a privilege to take or use the property of another. A defendant typically invokes the defence of necessity only against the intentional torts of trespass to chattels, trespass to land, or conversion. It is often said that necessity knows no law. This defence has been recognised on the principle of *Salus Populi Suprema Lex* i.e. the welfare of the people is the Supreme Law. Hence the act which causes certain intentional damage is excused when done for the greater good of the people or to avoid any greater harm. The Latin phrase "*necessitas inducit privilegium quod jura private*" which highlights this defence literally translates to necessity induces a privilege because of a private right.

If A sees a small fire starting on a field nearby and trespasses B's farm to reach the place and extinguish it, he can claim the defence of necessity and he shall have not committed trespass. *Surroco* v. *Geary* is a case based on very similar facts. Wildfires had swept through San Francisco around the time when this incident occurred, destroying houses and businesses. Surocco's house was directly in the

path of the fire, and he was racing to get his possessions out of the house as quickly as possible before the house was consumed. Geary, the mayor of San Francisco, ordered the fire department to demolish Surocco's house so that the fire would not spread any further into the neighbourhood. The fire department complied, using dynamite to level Surocco's house. Surocco sued Geary, claiming that had Geary not ordered the fire department to blow up his house, Surocco could have saved more of his personal possessions. The court, however, found that the public necessity defense applied because the damage to the city would have been far worse if Geary had not given the order to have Surocco's house demolished.

In the case of *Dhania Daji* vs. *Emperor* the accused was a toddy-tapper. He observed that toddy was being stolen from the trees regularly. To prevent it, he poisoned toddy in some of the trees. He sold toddy from other trees. However, by mistake, the poisoned toddy was mixed with other toddy, and some of the consumers injured and one of them died. He took the plea of necessity however it was rejected and he was prosecuted.

The limits of this defence of necessity were closely examined in the case of *Olga Tellis & Ors*v. *Bombay Municipal Corporation*. Under the Law of Torts, necessity is a plausible defence, which enables a person to escape liability on the ground that the acts complained of are necessary to prevent greater damage, inter alia, to himself". The defence is available if the act complained of was reasonably demanded by the danger or emergency. In this case the slum dwellers claim of necessity was not accepted and they had to vacate the public spaces which they had encroached upon.

Private necessity is the use of another's property for private reasons. A property owner cannot use force against an individual in a situation where the privilege of

necessity would apply. While an individual may have a private necessity to use the land or property of another, that individual must compensate the owner for any damages caused.

Vincent v. *Lake Erie Transportation Co.* is one of the most important and commonly cited American cases relating to private necessity. A steamship owned by Lake Erie Transportation Co. was moored at Vincent's dock to unload cargo. A storm arose and the vessel was held secure to the dock causing $500 in damage to the dock. Vincent sued to recover damage to the dock and the jury decided in favour of Vincent. The defendant appealed, alleging that it was not liable under the defence of private necessity. The court held that while the defendant cannot be held liable for trespass due to private necessity, he used the plaintiff's property to preserve his own and is therefore liable for resulting damages to the plaintiff. If the boat had remained secured to the dock without further action by the defendant, he would not have been liable. He was held liable because affirmative measures were taken to secure the boat.

Act Done In Respect To Statutory Authority

When the commission of what would otherwise be a tort, is authorized by a statute the injured person is remediless. This is unless legislature has thought it proper to provide compensation to him. The statutory authority extends not merely to the act authorized by the statute but to all inevitable consequences of that act. But the powers conferred by the legislature should be exercised with judgment and caution so that no unnecessary damage is done, the person must do so in good faith and must not exceed the powers granted by the statute otherwise he will be liable.

For example, if there is a railway line near your house and the noises of the train passing disturbs then you have no remedy because the construction and the use of the railway is authorized under a statute. However, this does not give the authorities the license to do what they want unnecessarily; they must act in a reasonable manner. It is for this reason that we see that there are certain guidelines that need to be followed during construction of public transport facilities.

The philosophy behind this principle is that the lesser private rights must yield to the greater public good. Hence the state and people working for the state are given certain immunity and are allowed to do acts in pursuance of the public order even if they may lead to tortious liability. The extent to which this immunity is available to a public authority depends on whether the authority is absolute or conditional.Such a condition may be express or implied. In case of absolute statutory authority the immunity is available against both the act and its natural consequences. If absolute, then the authority is not liable provided it has acted reasonably and there is no alternative course of action.

In *Kasturi Lal* v. *State of UP*, the plaintiff had been arrested by the police officers on a suspicion of possessing stolen property. On a search of his person, a large quantity of gold was found and was seized under the provisions of the Code of Criminal Procedure. Ultimately, he was released, but the gold was not returned as the Head Constable in charge of the malkhana (wherein the said gold was stored) had absconded with the gold. The plaintiff thereupon brought a suit against the State of UP for damages for the loss caused to him. It was found by the courts below, that the concerned police officers had failed to take the requisite care of the gold seized from the plaintiff, as provided by the UP Police Regulations. When the matter was taken to the Supreme Court, the court found, on an appreciation of the

relevant evidence, that the police officers were negligent in dealing with the plaintiff's property and also, that they had also not complied with the provisions of the UP Police Regulations in that behalf. In spite of the said holding, the Supreme Court rejected the plaintiff's claim, on the ground that "the act of negligence was committed by the police officers while dealing with the property of Ralia Ram, which they had seized in exercise of their statutory powers. The power to arrest a person, to search him and to seize property found with him, are powers conferred on the specified officers by statute and in the last analysis, they are powers which can be properly categorized as sovereign powers; and so, there is no difficulty in holding that the act which gave rise to the present claim for damages has been committed by the employee of the respondent during the course of its employment; but the employment in question being of the category which can claim the special characteristic of sovereign power, the claim cannot be sustained."

In *Metropolitan Asylum District Board v. Hill*, a local authority being empowered by a statute to erect a small-pox hospital was restrained from erecting it at a place where it was likely to prove injurious to the residents of the locality. The authority to construct a hospital was construed as impliedly conditional only, i.e. to erect the hospital provided that the hospital authorities selected a site where no injurious results were likely to be caused to others.

Thus we have seen how the various general defences in torts can be used. Apart from these defences there are others too which are sometimes used. Death for example is now used as a defence only in cases of defamation alone. And truth is widely used as an affirmative defence in defamation cases too. Mistake is a fault negating absent element defence to torts that require proof of certain states of mind or negligence on the part of the defendant. The defence of act of third party can

function as a causation denying absent element defence. Consider the tort of private nuisance. In order to establish liability in this tort the plaintiff must be able to show that his right to enjoy his land was unreasonably interfered with and that the defendant was responsible for the interference. The defendant can prevent the plaintiff from discharging his onus by demonstrating that the nuisance was caused by a third party. Thus, defendants have been absolved of liability in nuisance in respect of interferences on their land consisting in falling roof tiles and burning refuse on the basis that third parties were responsible for creating them.

The purpose of the paper was to highlight the importance of understanding the term defence itself as it is used in tort law and then show the various torts and the ways in which they can be applied to various civil wrongs.

THE CONCEPT OF STRICT LIABILITY

The doctrine was established into the case of Rylands v. Fletcher. In Rylands v Fletcher (1868) LR 3 HL 330, the defendants employed independent contractors to construct a reservoir on their land. The contractors found disused mines when digging but failed to seal them properly. They filled the reservoir with water. As a result, water flooded through the mineshafts into the plaintiff's mines on the adjoining property. The plaintiff secured a verdict at Liverpool Assizes. The Court of Exchequer Chamber held the defendant liable and the House of Lords affirmed their decision.

Requirements

It was decided by Blackburn J, who delivered the judgment of the Court of Exchequer Chamber, and the House of Lords, that to succeed in this tort the claimant must show:

1. That the defendant brought something onto his land;
2. That the defendant made a "non-natural use" of his land (per Lord Cairns, LC);
3. The thing was something likely to do mischief if it escaped;
4. The thing did escape and cause damage.

Foreseeability

There is now a further requirement, according to the House of Lords, that harm of the relevant type must have been foreseeable.

REQUIREMENTS

1. The defendant brought something onto his land

In law, there is a difference between things that grow or occur naturally on the land, and those that are accumulated there artificially by the defendant. For example, rocks and thistles naturally occur on land. However, the defendants in Rylands v Fletcher brought water onto the land.

2. Non-natural use of the land

In the House of Lords, Lord Cairns LC, laid down the requirement that there must be a non-natural use of the land.

3. Something likely to do mischief

The thing brought onto the land must be something likely to do mischief if it escapes. In such a situation the defendant keeps it in at his peril.

4. Escape

There must be an escape of the dangerous substance from the defendant's land.

5. Foreseeability

There was a kind of foreseeability of the damage.

REMEDIES

The owner of land close to the escape can recover damages for:

1. Physical harm to the land itself (as in Rylands v Fletcher) and to other property.

2. It is no longer clear if a claimant can recover for personal injury.

DEFENCES

A number of defences have been developed to the rule in Rylands v Fletcher.

1. Consent

The express or implied consent of the claimant to the presence of source of the danger, provided there has been no negligence by the defendant, will be a defence.

2. Common Benefit

If the source of the danger was maintained for the benefit of both the claimant and defendant, the defendant will not be liable for its escape. This defence is either related to the defence of consent or the same thing. According to Winfield & Jolowicz, p-551, "common benefit seems redundant (and indeed misleading) as an independent defence".

3. Act of a stranger

The defendant will not be liable if a stranger was responsible for the escape.

Rickards v. Lothian [1913] AC 263. The D was not liable when an unknown person blocked a basin on his property and caused a flood, which damaged a flat below.

4. Statutory authority

A statute may require a person or body to carry out a particular activity. Liability under Rylands v Fletcher may be excluded upon the interpretation of the statute.

5. Act of God

An act of God is an event which 'no human foresight can provide against, and of which human prudence is not bound to recognise the possibility' (per Lord Westbury, Tennent v Earl of Glasgow (1864) 2 M (HL) 22 at 26-27).

Nichols v. Marsland (1876) 2 ExD 1. Exceptionally heavy rain caused artificial lakes, bridges and waterways to be flooded and damage adjoining land. The D was not liable.

However, Nichols v Marsland was doubted by the House of Lords in:

Greenock Corporation v. Caledonian Railway [1917] AC 556. The corporation constructed a concrete paddling pool for children in the bed of a stream and obstructed the natural flow of the stream. Owing to a rainfall of extraordinary violence the stream overflowed at the pond and damaged the property of the plaintiffs. Held that the extraordinary rainfall did not absolve the corporation from responsibility and that they were liable in damages.

6. Default of the claimant

If the escape is the fault of the claimant there will be no liability. Alternatively, there may be contributory negligence on the part of the claimant.

THE DOCTRINE OF ABSOLUTE LIABILITY

The case of M.C. Mehta v. Union of India originated in the aftermath of oleum gas leak from Shriram Food and Fertilisers Ltd. complex at Delhi. This gas leak occurred soon after the infamous Bhopal gas leak and created a lot of panic in Delhi. One person died in the incident and few were hospitalized. The case lays down the principle of absolute liability and the concept of deep pockets.

Facts

The case came up before the five-judge bench of the Supreme Court after a three-judge bench had referred it to a higher bench because certain questions of seminal importance and high constitutional significance were raised in the course of arguments when the writ petition was originally heard.

1. The Bench of three Judges permitted Shriram Foods and Fertiliser Industries (hereinafter referred to as Shriram) to restart its power plant as also plants for manufacture of caustic chlorine including its by-products and recovery plants like soap, glycerine and technical hard oil, subject to the conditions set out in the Judgment.

2. The main issue in the original writ petition which was filed in order to obtain a direction for closure of the various units of Shriram on the ground that they were hazardous to the community.

3. But while the writ petition was pending there was escape of oleum gas from one of the units of Shriram on 4 and 6 December 1985 and applications were filed by the Delhi Legal Aid & Advice Board and the Delhi Bar Association for award of compensation to the persons who had suffered harm on account of escape of oleum gas.

4. The Court thought that these applications for compensation raised certain important issues and those issues should be addressed by a constitutional bench.

Preliminary objection of the defendants:

There was only one preliminary objection filed by the counsel for the defendant, and this was that the Court should not proceed to decide these constitutional issues since there was no claim for compensation originally made in the writ petition and these issues could not be said to arise on the writ petition. However, the Court, while rejecting this objection, said that though it is undoubtedly true that the petitioner could have applied for amendment of the writ petition so as to include a claim for compensation but merely because he did not do so, the applications for compensation cannot be thrown out. These applications for compensation are for enforcement of the fundamental right to life enshrined in Article 21 of the Constitution and while dealing with such applications we cannot adopt a hyper-technical approach which would defeat the ends of justice.

Judgment

The first question which requires to be considered is as to what is the scope and ambit of the jurisdiction of this Court under Article 32.

The Court wholly endorsed what had been stated by Bhagwati, J. in Bandhua Mukti Morcha v. Union of India and Ors. as regards the true scope and ambit of Article 32. It may now be taken as well settled that Article 32 does not merely confer power on this Court to issue a direction, order or writ for enforcement of the fundamental rights but it also lays a constitutional obligation on this Court to protect the fundamental rights of the people and for that purpose this Court has all

incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce the fundamental rights.

The next question which arises for consideration on these applications for compensation is whether Article 21 is available against Shriram which is owned by Delhi Cloth Mills Limited, a public company limited by shares and which is engaged in an industry vital to public interest and with potential to affect the life and health of the people. The issue of availability of Article 21 against a private corporation engaged in an activity which has potential to affect the life and health of the people was vehemently argued by counsel for the applicants and Shriram.

The Court traced the evolution of the Doctrine of State Action to ascertain whether the defendants in this case fall under the definition of the term state, as provided under Article 12, or not. The Court also looked into the Industrial Policy of the Government. Under the Industrial Policy Resolution 1956 industries were classified into three categories having regard to the part which the State would play in each of them. The first category was to be the exclusive responsibility of the State. The second category comprised those industries which would be progressively State owned and in which the State would therefore generally take the initiative in establishing new undertakings but in which private enterprise would also be expected to supplement the effort of the State by promoting and development undertakings either on its own or with State participation. The third category would include all the remaining industries and their future development would generally be left to the initiative and enterprise of the private sector.

If an analysis of the declarations in the Policy Resolutions and the Act is undertaken, we find that the activity of producing chemicals and fertilisers is deemed by the State to be an industry of vital public interest, whose public import

necessitates that the activity should be ultimately carried out by the State itself, in the interim period with State support and under State control, private corporations may also be permitted to supplement the State effort. The argument of the applicants on the basis of this premise was that in view of this declared industrial policy of the State, even private corporations manufacturing chemicals and fertilisers can be said to be engaged in activities which are so fundamental to the Society as to be necessarily considered government functions.

Issue of strict and absolute liability

On the question of developing a new doctrine to attach liability the court commented that;

We must also deal with one other question which was seriously debated before us and that question is as to what is the measure of liability of an enterprise which is engaged in a hazardous or inherently dangerous industry, if by reason of an accident occurring in such industry, persons die or are injured. Does the rule in Rylands v. Fletcher apply or is there any other principle on which the liability can be determined? The rule in Rylands v. Fletcher was evolved in the year 1866 and it provides that a person who for his own purposes being on to his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril and, if he fails to do so, is prima facie liable for the damage which is the natural consequence of its escape. The liability under this rule is strict and it is no defence that the thing escaped without that person's wilful act, default or neglect or even that he had no knowledge of its existence. This rule laid down a principle of liability that if a person who brings on to his land and collects and keeps there anything likely to do harm and such thing escapes and does damage to another, he is liable to compensate for the damage caused. Of course, this rule applies only to

non-natural user of the land and it does not apply to things naturally on the land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or where the thing which escapes is present by the consent of the person injured or in certain cases where there is statutory authority.

This rule evolved in the 19th Century at a time when all these developments of science and technology had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. We need not feel inhibited by this rule which was evolved in this context of a totally different kind of economy. Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country.

We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country.

We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken.

The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part.

We would therefore hold that *where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortious principle of strict liability under the rule in Rylands v. Fletcher*. We would also like to point out that the measure of compensation in the kind of cases referred to in the preceding paragraph must be co-related to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise.

Order of the court

The Supreme Court made the following observation:

Since we are not deciding the question as to whether Shriram is an authority within the meaning of Article 12 so as to be subjected to the discipline of the fundamental right under Article 21, we do not think it would be justified in setting up a special machinery for investigation of the claims for compensation made by those who allege that they have been the victims of oleum gas escape. But we would direct that Delhi Legal Aid and Advice Board to take up the cases of all those who claim to have suffered on account of oleum gas and to file actions on their behalf in the appropriate court for claiming compensation against Shriram. Such actions claiming compensation may be filed by the Delhi Legal Aid and Advice Board within two months from today and the Delhi Administration is directed to provide

the necessary funds to the Delhi Legal Aid and Advice Board for the purpose of filing and prosecuting such actions.

Thus the High Court was directed to nominate one or more Judges as may be necessary for the purpose of trying such actions so that they may be expeditiously disposed of.

THE CONCEPT OF VICARIOUS LIABILITY

Employers are vicariously liable for the torts of their employees that are committed during the course of employment.

Reasons for Vicarious Liability

According to Michael A. Jones, Textbook on Torts, 2000, p-379, several reasons have been advanced as a justification for the imposition of vicarious liability:

(1) The master has the 'deepest pockets'. The wealth of a defendant, or the fact that he has access to resources via insurance, has in some cases had an unconscious influence on the development of legal principles.

(2) Vicarious liability encourages accident prevention by giving an employer a financial interest in encouraging his employees to take care for the safety of others.
(3) As the employer makes a profit from the activities of his employees, he should also bear any losses that those activities cause.

Liability

Three questions must be asked in order to establish liability:

(1) Was a tort committed?

(2) Was the tortfeasor an employee?

(3) Was the employee acting in the course of employment when the tort was committed?

Liability for employee or independent contractor?

Employers/masters will only be liable for the torts of their employees/servants. They will not usually be liable for the torts of their independent contractors (see below). It is therefore necessary to establish the status of the tortfeasor. The intention of the parties is not necessarily conclusive.

(a) The control test

This was the traditional test. In Collins v. Hertfordshire, Hilbery J said: "The distinction between a contract for services and a contract of service can be summarised in this way: In one case the master can order or require what is to be done, while in the other case he can not only order or require what is to be done, but how it shall be done."

But in Cassidy v. Ministry of Health, Somervell LJ pointed out that this test is not universally correct. There are many contracts of service where the master cannot control the manner in which the work is to be done, as in the case of a captain of a ship. He went on to say: "One perhaps cannot get much beyond this 'Was the contract a contract of service within the meaning which an ordinary person would give under the words?'"

(b) The nature of the employment test

One accepted view is that people who have a 'contract of service' (an employment contract) are employees, but people who have a 'contract for services' (a service contract) are independent contractors.

(c) The 'integral part of the business' test

This test was proposed by Lord Denning in Stevenson, Jordan and Harrison Ltd v McDonald and Evans [1952] 1 TLR 101: 'It is often easy to recognise a contract of

service when you see it, but difficult to say wherein the difference lies. A ship's master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi-man, and a newspaper contributor are employed under a contract for services. One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.'

Lord Wright suggested a complex test involving (i) control; (ii) ownership of the tools; (iii) chance of profit; (iv) risk of loss (Montreal v Montreal Locomotive Works [1947] 1 DLR 161). In a later case, Cooke J referred to these factors and said that the fundamental test was: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer is yes, it is a contract for services; if no, it is a contract of service. There is no exhaustive list of considerations relevant to determining this question, and no strict rules about the relative weight the various considerations should carry in a particular case. Factors which could be of importance were: (i) whether the person hires his own helpers; and (ii) what degree of responsibility for investment and management he has master-servant relationship.

Lending an employee

If an employer lends an employee to another employer on a temporary basis, as a general rule it will be difficult for the first employer to shift responsibility to the temporary employer.

An employer will only be liable for torts which the employee commits in the course of employment. There is no single test for this, although Parke B famously

stated in Joel v Morison (1834) 6 C&P 501 at 503, that the servant must be engaged on his master's business, not 'on a frolic of his own'.

An employer will usually be liable for (a) wrongful acts which are actually authorised by him, and for (b) acts which are wrongful ways of doing something authorised by the employer, even if the acts themselves were expressly forbidden by the employer (Salmond & Heuston on the Law of Torts, 1996, p-443). Liability for criminal acts will also be considered.

Authorised acts

If an employer expressly authorises an unlawful act he or she will be primarily liable. The master will not be liable if there is express prohibition from his side and the servant acts against that prohibition. Prithi Singh v. Bhinda Ram (P & H High Court)

Wrongful modes of doing authorised acts

In the following cases it was held that the employer was vicariously liable for torts of the employee:

Limpus v London General Omnibus Co (1862) 1 H&C 526 - bus drivers racing, despite a prohibition, caused a collision.

Bayley v Manchester, Sheffield and Lincolnshire Railway Co (1873) LR 8 CP 148 - a porter, believing a passenger was on the wrong train, violently pulled him off, causing injury.

In the following cases it was held that the employer was not vicariously liable:

Beard v London General Omnibus Co [1900] 2 QB 530 - a bus conductor drove a bus injuring a pedestrian.

Criminal acts

An employer will not usually be liable for the criminal acts of employees. For example:

ST v N. Yorkshire CC [1999] IRLR 98 - a deputy headmaster of a special school, responsible for caring for a handicapped teenager on a foreign holiday, sexually assaulted him. Butler-Sloss LJ said that this was not an unauthorised mode of carrying out a teacher's duties on behalf of his employer. Rather it was a negation of the duty of the council to look after children for whom it was responsible.

However, if the employee performs their duties in a criminal manner, an employer may be liable. See:

Nahhas v Pier House Management (1984) 270 EG 328 - a porter entrusted with keys by a tenant, entered her flat and stole jewellery. The employers were liable for negligently employing a 'professional thief' and breaching a duty to protect the plaintiff's flat.

Vasey v. Surrey Free Inns [1996] PIQR P373 - the plaintiff was attacked by two doormen and a manager employed by the defendant after he had kicked a door, breaking glass. The CA held the defendants vicariously liable because the attack was a reaction to the damage to the door for the protection of the employer's property and was not a private quarrel unrelated to the employer's duties.

The Indemnity Principle

There is a term implied at common law into contracts of employment that an employee will exercise all reasonable care and skill during the course of employment. An employee who is negligent is in breach of such a term and the

employer who has been held vicariously liable for the tort may seek an indemnity from the employee to make good the loss.

Liability for independent contractors

In Alcock v Wraith [1991] 59 BLR 16, Neill LJ stated: "where someone employs an independent contractor to do work on his behalf he is not in the ordinary way responsible for any tort committed by the contractor in the course of the execution of the work.

The main exceptions to the principle fall into the following categories:

- Cases where the employer is under some statutory duty which he cannot delegate
- Cases involving the withdrawal of support from neighbouring land
- Cases involving the escape of fire
- Cases involving the escape of substances, such as explosives, which have been brought on to the land and which are likely to do damage if they escape; liability will attach under the rule in Rylands v Fletcher (1868) LR 3 HL 330
- Cases involving operations on the highway which may cause danger to persons using the highway
- Cases involving non-delegable duties of an employer for the safety of his employees
- Cases involving extra-hazardous acts

TRESPASS TO THE PERSON

Trespass to person is studied into following heads:

1. ASSAULT

An assault is an act which intentionally causes another person to apprehend the infliction of immediate, unlawful, force on his person.

It was said in R v Meade and Belt (1823) 1 Lew CC 184, that 'no words or singing are equivalent to an assault'. However, the House of Lords have stated that an assault can be committed by the Court of Appeal in R v Constanza [1997] Crim LR 576.

It is much more authoritative that words will not constitute an assault if they are phrased in such a way that negatives any threat that the defendant is making. See:

Tuberville v. Savage (1669) 86 ER 684

Stephens v. Myers (1830) 172 ER 735

The claimant must have reasonably expected an immediate battery. Thus in Stephens v. Myers (1830) 172 ER 735, the defendant made a violent gesture at the plaintiff by waiving a clenched fist, but was prevented from reaching him by the intervention of third parties. The defendant was liable for assault.

Also see: Bavisetti Venkata Surya Rao v. Nandipati Muthayya

2. BATTERY

A battery is the actual intentional infliction of unlawful force on another person. It was stated in Cole v. Turner (1704): 'The least touching of another in anger is a

battery'. However, such a widely drawn principle must inevitably be subject to exceptions:

Collins v. Wilcock [1984] 1 WLR 1172

Controversially, the Court of Appeal said that there must be a 'hostile touching':

Is 'hostility' a necessary element of battery? In Re F [1990] 2 AC 1 (at p 73), Lord Goff said that he doubted whether it is correct to say that the touching must be hostile, and further: 'the suggested qualification is difficult to reconcile with the principle that any touching of another's body is, in the absence of lawful excuse, capable of amounting to a battery and a trespass.'

If a person intentionally applies force directly to another, the claimant has a cause of action in trespass. However, if a person does not inflict injury intentionally, but only unintentionally, the claimant only has a claim in negligence.

The defendant's act must cause direct damage, but see:

Scott v. Shepherd (1773) 2 B1 R892

Unintentional and accidental harm is not actionable-Stanley v. Powell. Also see Charubin Gregory v. State of Bihar

3. FALSE IMPRISONMENT

False imprisonment is the unlawful imposition of constraint upon another's freedom of movement from a particular place.

Requirements of False Imprisonment:

I. Total restraint upon the liberty of a person
II. Without any lawful justification

This tort protects a person from restraint and does not give a person absolute freedom of movement. Thus, if there is a reasonable escape route there will be no false imprisonment. See:

Bird v Jones (1845) 7 QB 742
Robinson v Balmain New Ferry [1910] AC 295

Can a person be falsely imprisoned without his knowledge? Yes, according to the Court of Appeal and the House of Lords in, respectively:

Meering v Graham-White Aviation Co Ltd (1920) 122 LT 44

However, Lord Griffiths did state in the latter case: 'If a person is unaware that he has been falsely imprisoned and has suffered no harm, he can normally expect to recover no more than nominal damages ...'.

In Rudal Shah v. State of Bihar, unlawful detention into the prison for a longer time was held false imprisonment. See also: Bhim Singh v. State of Jammu and Kashmir.

Can an omission to release a person constitute false imprisonment? Not according to the House of Lords, at least where a person has consented to some degree of constraint on their movement. See:

Heard v Weardale Steel, Coal & Coke Co [1915] AC 67

The Rule In Wilkinson V Downton

The rule in Wilkinson v Downton relates to the intentional infliction of harm. This is not actually a trespass to the person but a separate analogous tort. See:

Wilkinson v Downton [1897] 2 QB 57

The Court of Appeal upheld this rule in Janvier v Sweeney [1919] 2 KB 316.

DEFENCES

Consent

Consent may be given expressly by words or be implied from conduct.

A person is deemed to consent to a reasonable degree of physical contact as a result of social interaction (see Collins v Wilcock, above).

Those who take part in sports also consent to a reasonable degree of physical contact during the course of play, i.e. within the rules, even to the risk of being unintentionally injured. However, there can be no consent to deliberate acts of violence (R v Billinghurst [1978] Crim LR 553).

What is meant by 'informed consent' and does English law recognise such a doctrine? Informed consent is the notion that consent is not valid unless all the risks of a surgical procedure have been explained. A person may not bring an action, in trespass or negligence, on the ground that they had not been informed of the potential consequences.

The issue in trespass is whether the patient consented to what was being done, and the issue in negligence is whether the patient should have been informed of the risks.

Every adult has the right to refuse medical treatment even if it will result in permanent injury or even death. However, a person may be deprived of his capacity to decide either by long term mental incapacity or temporary factors such as unconsciousness or confusion or the effects of fatigue, shock, pain or drugs. In such a case, it is the duty of the doctors to treat him in whatever way they consider, in the exercise of their clinical judgment, to be in his best interests.

Lawful arrest

The powers of arrest, exercisable by a constable or a private citizen, are contained in the Police and Evidence Act. An arrested person must be told, as soon as is practicable, that he is under arrest; and the grounds for the arrest. Private citizens making an arrest must, as soon as is reasonable, hand the arrested person over to the police. Only reasonable force may be used to effect an arrest.

The police must not act unlawfully. See:

Collins v Wilcock [1984] 1 WLR 1172

Self defence

It has long been an established rule of the common law that a person may use reasonable force to defend himself, another person, or his property from attack. What is reasonable force is a question of fact in each case.

A person may make a mistake as to their right to self defence. In such a situation, the criminal law allows a defendant to be judged on the facts as he honestly believed them to be: R v Williams (Gladstone) (1984) Cr App R 276 and Beckford v R [1988] AC 130.

Necessity

In Re F (above), a case concerning when medical treatment can be justified when given without consent, Lord Goff having explained public necessity and private necessity stated:

"There is, however, a third group of cases, which is also properly described as founded upon the principle of necessity and which is more pertinent to the resolution of the problem in the present case. These cases are concerned with action taken as a matter of necessity to assist another person without his consent.

To give a simple example, a man who seizes another and forcibly drags him from the path of an oncoming vehicle, thereby saving him from injury or even death, commits no wrong. But there are many emanations of this principle, to be found scattered through the books".

Lord Goff went on to say that the present case was concerned with action taken to preserve the life, health or well-being of another who is unable to consent to it. The basic requirements, applicable in these cases of necessity, were "not only (1) must there be a necessity to act when it is not practicable to communicate with the assisted person, but also (2) the action taken must be such as a reasonable person would in all circumstances take, acting in the best interests of the assisted person".

Remedies Available

- Action for damages: it is the most common remedy available to the detainee. Compensation may be claimed not only for the injury to the liberty but also for disgrace and humiliation which may be caused thereby.
- Self Help
- Habeas Corpus-Sunil Batra v. Delhi Administration

MALICIOUS PROSECUTION

Malicious prosecution is the malicious institution of unsuccessful criminal or bankruptcy or liquidation proceedings against another without reasonable or probable cause. This tort balances competing principles, namely freedom that every person should have in bringing criminals to justice and the need for restraining false accusations against innocent persons. Malicious prosecution is an abuse of the process of the court by wrongfully setting the law in motion on a criminal charge. The foundation lies in the triangular abuse of the court process of the court by wrongfully setting the law in motion and it is designed to encourage the perversion of the machinery of justice for a proper cause the tort of malicious position provides redress for those who are prosecuted without cause and with malice. In order to succeed the plaintiff must prove that there was a prosecution without reasonable and just cause, initiated by malice and the case was resolved in the plaintiff's favor. It is necessary to prove that damage was suffered as a result of the prosecution.

In an action of malicious prosecution the plaintiff must prove:

1) That he was prosecuted by the defendant.

2) That the proceeding complained was terminated in favour of the present plaintiff

3) That the prosecution was instituted against without any just or reasonable cause.

4) That the prosecution was instituted with a malicious intention, that is, not with the mere intention of getting the law into effect, but with an intention, which was wrongful in fact.

5) That he suffered damage to his reputation or to the safety of person, or to security of his property.

When does Prosecution commence?

The Prosecution is not deemed to have commenced before a person is summoned to answer a complaint. In Khagendra Nath v. Jacob Chandra, there was mere lodging of ejahar alleging that the plaintiff wrongfully took away the bullock cart belonging to the defendant and requested that something should be done. The plaintiff was neither arrested nor prosecuted. It was held that merely bringing the matter before the executive authority did not amount to prosecution and therefore the action for malicious prosecution could not be maintained. There is no commencement of the prosecution when a magistrate issues only a notice and not summons to the accused on receiving a complaint of defamation and subsequently dismissed it after hearing both the parties.

Elements:

1. **Institution or continuation of Legal proceedings:**

There must have been a prosecution initiated by the defendant. The word 'prosecution' means a proceeding in a court of law charging a person with a crime. To prosecute is to set the law in motion and the law is set in motion only by an appeal to some person clothed. The person to be sued is the person who was 'actively instrumental in putting the law in force. There was a conflict on the question whether there is prosecution of a person before process is issued calling upon him to defend himself. One view was that a prosecution began only when process was issued and there could be no action when a magistrate dismissed a complaint under section 203 of the code of criminal procedure. The other view was that a prosecution commenced as soon as a charge was made before the court and before process was issued to the accused.

The proper test was indicated by the Privy Council in the Mohammad Amin v. Jogendra Kumar Bannerjee. The defendant had filed a complaint before the magistrate charging the plaintiff with cheating. The magistrate thereupon examined the complainant an oath and made an inquiry under s. 202 of the code of criminal procedure. Notice of the inquiry had been issued to the plaintiff who attended it with his counsel and incurred costs doing so. The magistrate finally dismissed the complaint under section 203 of the code. In these circumstances the Privy Council held that there was a prosecution .The test is not whether the criminal proceedings have reached a stage at which they may be described as a prosecution, the test is whether such proceedings have reached a stage at which damage to the plaintiff results. A mere presentation of complaint to a magistrate who dismissed it on the ground that is disclosed no offence may not be sufficient ground for presuming that damage was a necessary consequence. It will be for the plaintiff to prove that damage actually resulted.

In the Gaya Prasad v Bhagat Singh[3] the privy council pointed out that the conduct of the complainant before and after the complaint has to be seen to decide whether he was the real prosecutor or not. If the complainant knowing that the charge is false tries to mislead the police by procuring false evidence for the conviction of the accused, he would be considered to be the prosecutor.

2. **Termination of the prosecution in the plaintiff's favour**

The plaintiff must prove that the prosecution ended in his favour. He has no right to sue before it is terminated and while it is pending. The termination may be by an acquittal on the merits and a finding of his innocence or by a dismissal of the complaint for technical defects or for non-prosecution. If however his is convicted he has no right to sue and will not be allowed to show that he was innocent and wrongly convicted. His only remedy in that case is to appeal against the

conviction. If the appeal results in his favour then he can sue for malicious prosecution. It is unnecessary for the plaintiff to prove his innocence as a separate issue.

3. **Absence of reasonable and probable cause**

'Reasonable and probable cause' is an honest belief in the guilt of the accused based on a full conviction founded upon reasonable grounds, of the existence of a circumstances, which assuming them to be true, would reasonably lead any ordinary prudent man and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed. As aid down in Hicks v. Faulkner there must be

i. an honest belief of the accuser in the guilt of the accused

ii. such belief must be based on an honest conviction of the existence of circumstances which led the accuser

iii. such secondly mentioned belief as to the existence of the circumstances must be based upon reasonable grounds that is such grounds , as would lead any fairly cautious man in the defendant's situation to believe so

iv. The circumstances so believed and relied on by the accuser must be such as amount to a reasonable ground for belief in the guilt of the accused. It is the responsibility of the plaintiff to show that there was no reasonable and probable cause for the prosecution of the case. If the defendant can be shown to have initiated the prosecution without himself holding an honest belief in the truth of the charge, it cannot be said that he acted upon reasonable and probable cause. The fact that the plaintiff has been acquitted is not prima facie evidence that the charge was unreasonable and false. Lack of reasonable and probable cause is to be understood

objectively, it does not connote the subjective attitude of the accuser. The fact that the accuser himself thinks that it is reasonable to prosecute does not per se lead to the conclusion that he had a reasonable and probable cause.

4. Malice

Malice for the purposes of malicious prosecution means having any other motive apart from that of bringing an offender to justice. Spite and ill-will are sufficient but not necessary conditions of malice. Malice means the presence of some other and improper motive that is to say the legal process in question for some other than its legally appointed and appropriate purpose. Anger and revenge may be proper motives if channeled into the criminal justice system. The lack of objective and reasonable cause is not an evidence of malice but lack of honest belief is an evidence of malice. In Allen v. Flood a general rule was propounded that an act lawful in itself does not merely become unlawful because of the bad motives of the actor and some of their lordships in the House of Lords suggested that malicious prosecution was not really an exception to this rule. The settled rule is that malice is the gist of the action for malicious prosecution and must be proved by the plaintiff in the first instance. It is for the plaintiff to prove that there was an existence of malice i.e. the Burden of Proof lies upon the plaintiff.

Evidence of Malice

Malice may be proved by previously strained relations, unreasonable or improper conduct like advertising of the charge or getting up false evidence. Though mere carelessness is not per se proof of malice unreasonable conduct like haste, recklessness or failure to prove enquiries would be some evidence. When there is absence of some reasonable cause owing to defendant’s want of belief in the truth

of his charge is the conclusive evidence of malice. However the converse proposition is not true because a person may be inspired by malice and also has a reasonable belief in the truth of his case. There may be malice either in commencing a prosecution or continuing one, honestly began. The mere fact that criminal prosecution resulted in acquittal or discharge of the accused will not establish that the defendant had acted with malice.

5. Damages

It has to be proved that the plaintiff has suffered damages as a result of the prosecution complaint of. Even though the proceedings terminate in favour of the plaintiff, he may suffer damage as a result of the prosecution. The damages may not necessarily be pecuniary. According to HOLT C.J., 'classic analysis in Savile v. Robert, there could be three sort of damages any one of which could be sufficient to support any action of malicious prosecution.

1) The damage to a man's fame as where the matter whereof he is accused is scandalous.
2) The damage done to a person as where man is put to a danger of losing his life, limb or liberty

3) The damage to a man's property as where is forced to expend money in necessary charges, to acquit himself of the crime of which he is accused.

The damage must also be the reasonable and probable results of malicious prosecution and not too remote. In assessing damage the court to some extent would have to consider

1) The nature of the offence the plaintiff was charged of

2) The inconvenience to which the plaintiff was charged to

3) Monetary loss and

4) The status and prosecution of the person prosecuted

Malicious Civil Proceeding

An action will not lie for maliciously and without reasonable and probable cause instituting suit the reason stated to be is that "such a case does not necessarily and naturally involve damage to the party sued. The civil action which is false will be dismissed at the hearing. The defendant's reputation will be cleared against all imputations made against him and he will be awarded costs against the opponent. The law does not award damage for mental anxiety, or extra costs incurred beyond those imposed on unsuccessful parties.

Cases Of Malicious Prosecution

In the Kanta Prasad v National Buildings Constructions Corporation Pvt. Ltd., The officer of the respondent corporation found certain articles missing while preparing inventory and checking up with the stock register. The plaintiff was prosecuted under sec. 403 of the I.P.C. but was given the benefit of doubt and hence acquitted. The plaintiff brought an action for malicious prosecution. The plaintiff could not prove that he had been harassed by the officers. There was held to be reasonable and probable case for prosecution of the plaintiff and then fact that plaintiff was not harassed indicated that there was no malice and hence the charge was not held.

In Girija Prasad v Uma Shankar Pathak, the plaintiff was a practicing advocate at Panna in M.P. he was also a Jan Sangh leader and had started an agitation on the question of food scarcity in the city and one Jan Sangh worker had gone to a hunger strike. On Jan 2 1965 Girija Singh a sub inspector was deputed outside the collectorate to control the crowd that had collected there to support the agitation. Then there were some bullet shots made from the revolver of the sub inspector. He

stated that while he was grappling with some person who was assaulting him the revolver got fired mistakenly. On that date Girija Singh had lodged an FIR stating that he was assaulted by some person. His watch snatched and also the plaintiff Uma Shankar Pathak was present at the scene and was instigating the crowd against him. The case was investigated and the plaintiff was arrested on 15th January and released on bail on 18th January he was finally acquitted on June 30th 1965. The plaintiff then sued 4 persons for malicious prosecution, the sub inspector Girija Prasad who lodged the F.I.R., the S.H.O. of that area who entertained the report and two other persons involved with the case.

It was found by the M.P. High court that the report prepared by Girija Prasad was false and at that relevant time the plaintiff was not present there but was appearing infront of a civil judge Justice Verma. Eventually Girija Prasad was held for malicious prosecution and others acquitted of the charge and not held liable for malicious prosecution.

Recent Case

Vishweshwar Shankarrao Deshmukh and Anr v. Narayan Vithoba Patil

Facts of the case

The plaintiff was the sarpanch of the village Shirputi in the year 1980 and the defendant no. 1 was in the service as a Gram sewak under the Zila Parishad and the defendant no.2 was a teacher in a school run by the Zila Parishad. The plaintiff contended that he made several reports against the defendants for their misconduct. The report was made against defendant no.1 for his misbehavior, defalcation and forgery of accounts and also against defendant no.2 for his absence from duties and other irregularities. It is contended that both the defendants then hatched a conspiracy to involve the plaintiff in a criminal conspiracy and such that the

defendant no.1 had lodged an F.I.R. with the police that was assaulted by the plaintiff while he was discharging his duties. On the basis of the F.I.R and investigation done by the police, criminal proceedings were launched against the plaintiff. The plaintiff was acquitted of the charges against him. It is contended that on the basis of the F.I.R. lodged by the defendant no. 1, plaintiff was arrested but the police and the criminal proceeding against him was with malicious intention on the part of the defendants. The prosecution was launched without any reasonable cause and due to the false prosecution, there was a loss to his prestige and reputation and his status was lowered down in the society being a sarpanch and a politician.

Decision

The court decided that the plaintiff was maliciously prosecuted by the defendants without any reasonable and probable cause, and therefore they are liable to pay damages worth Rs. 12,500.00 to the plaintiff.

Conclusion

Malicious prosecution is an abuse of the process of the court by wrongfully setting the law in motion on a criminal charge. In order to succeed the plaintiff must prove that there was a prosecution without any just and reasonable cause, initiated by malice and the case was decided in the plaintiff's favour. It is necessary to prove that damages were incurred by the plaintiff as a result of the prosecution. The burden of proof rests on him. He has to prove the existence of malice.

Malice may be proved by previously stained relations, unreasonable and improper conduct like advertising the charge or getting up false evidence. Though mere carelessness is not the per se proof of malice, unreasonable conduct like haste, recklessness or failure to make enquiries would be some evidence.

Malicious prosecution is the malicious institution of unsuccessful criminal or bankruptcy or liquidation proceedings against another without reasonable or probable cause. This tort balances competing principles, namely freedom that every person should have in bringing criminals to justice and the need for restraining false accusations against innocent persons. Malicious prosecution is an abuse of the process of the court by wrongfully setting the law in motion on a criminal charge. It is an effort to disturb the proper functioning of the judicial machinery.

DEFAMATION

Definition

A defamatory statement is one which injures the reputation of another by exposing him to hatred, contempt, or ridicule, or which tends to lower him in the esteem of right-thinking members of society.

What has to be proved?

Subject to the differences between the two types of defamation, libel and slander (explained below), the claimant must prove:

(1) that the statement was defamatory,

(2) that it referred to him, and

(3) that it was published, i.e. communicated, to a third party.

The onus will then shift to the defendant to prove any of the following three defences:

(1) truth (or justification),

(2) fair comment on a matter of public interest, or

(3) that it was made on a privileged occasion.

In addition, some writers put forward the following as defences in their own right:

(4) unintentional defamation, and

(5) consent.

DISTINCTION BETWEEN LIBEL AND SLANDER

The basic differences between the torts of libel and slander are as follows:

(1) Libel is a defamatory statement in permanent form, for example

writing, films, public performances of plays etc.

Slander is a defamatory statement in a transient form.

(2) Libel is actionable per se whereas damage must be proved for slander, except in four instances:

Where there is an allegation that the claimant has committed an imprisonsable offence;Where there is an imputation that the claimant is suffering from a contagious disease, such as venereal disease, leprosy, plague and, arguably, HIV/AIDS;Where there is an imputation that a woman has committed adultery or otherwise behaved in an 'unchaste' fashion; orWhere there is an imputation that the claimant is unfit to carry on his trade, profession or calling.

(3) In England, Libel may be prosecuted as a crime as well as a tort, whereas slander is only a tort. But in India, both libel and slander are criminal offences under Section-499 IPC.

ESSENTIALS OF DEFAMATION

(1) Words Must Be Defamatory

The statement must be defamatory. According to Lord Atkin, the statement must tend to lower the claimant in the estimation of right-thinking members of society generally, and in particular cause him to be regarded with feelings of hatred, contempt, ridicule, fear and disesteem.

See S.N.M. Abdi v. Prafulla Kumar Mohanta and D.P. Chaudhary v. Manjulata.

Mere abuse

Vulgar abuse is not defamatory. Mansfield CJ stated "For mere general abuse spoken no action lies" (Thorley v Kerry (1812) 4 Taunt 355 at 365, and also Pollock CB and Wilde B in Parkins v Scott (1862) 1 H&C 153 at 158, 159).

Winfield & Jolowicz (p-406) states that spoken words which are prima facie defamatory are not actionable if it is clear that they were uttered merely as general vituperation and were so understood by those who heard them. Further, the same applies to words spoken in jest (Donoghue v Hayes (1831) Hayes R 265).

Innuendo

Sometimes a statement may not be defamatory on the face of it but contain an innuendo, which has a defamatory meaning. Such a statement may be actionable. The hidden meaning must be one that could be understood from the words themselves by people who knew the claimant (Lewis v Daily Telegraph [1964] AC 234) and must be specifically pleaded by the claimant.

(2) Reference To The Claimant

The statement must refer to the claimant, i.e., identify him or her, either directly or indirectly.

Defamation of a class

If a class of people is defamed, there will only be an action available to individual members of that class if they are identifiable as individuals. "If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there was something to point to the particular individual" (per Willes J in Eastwood v Holmes (1858) 1 F&F 347 at 349). Same was held into Dhirendra Nath Sen v. Rajat Kanti Bhadra.

If the defendant made a reference to a limited group of people, eg the tenants of a particular building, all will generally be able to sue (Browne v DC Thomson (1912) SC 359.

This issue was considered by the House of Lords in Knupffer v London Express Newspaper Ltd [1944] AC 116.

Unintentional defamation

At common law it was irrelevant that the defendant did not intend to refer to the claimant. Section 4 of the Defamation Act 1952 provided a special statutory defence in cases of 'unintentional defamation', by allowing the defamer to make an 'offer of amends' by way of a suitable correction and apology and may include an agreement to pay compensation and costs. The defence is now contained in ss2-4 of the Defamation Act 1996, which was an attempt to modernise the law. The person accepting the offer may not bring or continue defamation proceedings. If the offer to make amends fails, the fact that the offer was made is a defence and may also be relied on in mitigation of damages.

A publication made 'maliciously' (spitefully, or with ill-will or recklessness as to whether it was true or false) will destroy the defence of unintentional defamation.

(3) Publication

The statement must be published, i.e. communicated, to a person other than the claimant.

For example, dictating a defamatory letter to a typist is probably slander (Salmond and Heuston on the Law of Torts, 1996, p154), but when the letter is published to a third party it is libel. However, in Bryanston Finance v De Vries [1975] QB 703 it was held that where a letter was written to protect the interests of the business there

was a common interest between the employer and employee, and so a letter dictated to a secretary in the normal course of business was protected by qualified privilege. See also Mahendra Ram v. Harnandan Prasad.

Communication between husband and wife

A statement made to one's own spouse will not be 'published' for the purposes of defamation (Wennhak v Morgan (1888) 20 QBD 635 at 639). Communication between husband and wife is protected as any other rule "might lead to disastrous results to social life".

Distributors

The defence sometimes known as 'innocent dissemination' is designed to protect booksellers and distributors of materials which may contain libelous statements.

A person has a defence if he shows that he was not the author, editor or commercial publisher of the statement; he took reasonable care in relation to its publication; and he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement. A person shall not be considered the author, editor or publisher of a statement if he is only the printer, producer, distributor, or seller of printed material containing the statement, or the broadcaster of a live programme.

An internet service provider was held not to be the publisher, within the meaning of s1, of defamatory statements posted on a newsgroup. However, on the facts the claimant had notified the defendants that the posting was defamatory and requested that they remove it, but they had refused to do so.

Consent

Consent of the claimant to the publication of a statement, by showing other people defamatory material which the defendant meant for the claimant only, will create a situation in which technically there has been no publication (Hinderer v Cole (1977) (unreported) - defamatory letter sent by the defendant to the claimant was shown by the claimant himself to third parties).

For further information see: Chapman v. Lord Ellesmere [1932] 2 KB 431; Tadd v. Eastwood [1985] ICR 132 and Gurbachan Singh v. Babu RamAIR 1969 Pb. 201.

DEFENCES

(1) Truth (Or Justification)

Only false statements are actionable, so if the statement made about the claimant is true, there can be no action for defamation. The burden of proof is on the defendant to prove that the statement made is true, rather than on the claimant to prove that it was false.

If a number of imputations are made by the defendant but only one action is brought by the claimant in respect of them, then, by virtue of s5 of the Defamation Act 1952 (In England), a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the claimant's reputation, having regard to the truth of the remaining charges. See also: Radheyshyam Tiwari v. Eknath AIR 1985 Bom. 285.

The Rehabilitation of Offenders Act 1974 (England) provides that certain criminal convictions, depending upon their seriousness, are to become 'spent' after certain periods of time have elapsed, and treated as if they had never happened. Section 8 provides that in defamation actions which are based on allegations that the

claimant has committed offences which would otherwise be 'spent', justification can be used as a defence except where the publication was made with malice (i.e., spitefully, or with ill-will or recklessness as to whether it was true or false).

(2) Fair Comment On A Matter Of Public Interest

The defence of fair comment is frequently relied upon by the press, as it is designed to protect statements of opinion on matters of public concern. Lord Esher, in Merivale v Carson (1887) 20 QBD 275, stated that the test was:

"Would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work which is criticised?"

The defence only applies to comments made on matters of public interest, e.g. comments on works of literature, music, art, plays, radio and television; and also the activities of public figures.

A publication made 'maliciously' (spitefully, or with ill-will or recklessness as to whether it was true or false) will destroy the defence of fair comment.

Where there are imputations partly based on fact and partly expressions of opinion, the defence of fair comment will not fail merely because the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved (s. 6 of the Defamation Act 1952).

(3) PRIVILEGE

(a) Absolute

There are certain occasions on which the law regards freedom of speech as essential, and provides a defence of absolute privilege which can never be defeated, no matter how false or malicious the statements may be. The following communications are 'absolutely privileged' and protected from defamation proceedings:

Statements made in either House of Parliament.

Parliamentary papers of an official nature, i.e., papers, reports and proceedings which Parliament orders to be published. Extracts from parliamentary papers are covered by qualified privilege.

Statements made in the course of judicial proceedings or quasi-judicial proceedings.

Fair, accurate and contemporaneous reports of public judicial proceedings before any court in the UK (s. 3 of the Law of Libel Amendment Act 1888). The same privilege was extended to radio and television broadcasts of judicial proceedings in similar circumstances by s. 9(2) of the Defamation Act 1952.

Communications between lawyers and their clients.

Statements made by officers of state to one another in the course of their official duty (Chatterton v Secretary of State for India [1895] 2 QB 189).

(b) Qualified

Qualified privilege operates only to protect statements which are made without malice (i.e., spitefully, or with ill-will or recklessness as to whether it was true or false).

The judge must decide whether the situation is covered by qualified privilege. If so the jury must then decide whether the defendant acted in good faith or whether there was malice.

The following communications will be protected by 'qualified privilege':

Statements made in pursuance of a legal, moral or social duty, but only if the party making the statement had an interest in communicating it and the recipient had an interest in receiving it.

Statements made in protection of an interest, eg public interests or the defendant's own interests in property, business or reputation.

Fair and accurate reports of parliamentary proceedings.

Fair and accurate reports of public judicial proceedings, e.g., when the report is not published contemporaneously with the proceedings.

This defence was tested in:

Loutchansky v. Times Newspapers (QBD, 27 April 2001).

TRESPASS TO GOODS

Introduction

The action for trespass to goods, trespass de bonis asportatis, affords a remedy where there has been a direct interference with goods in the claimant's possession at the time of the trespass, whether that be by taking the goods from him or damaging the goods without removing them.

The oldest of the chattel torts, the writ of detinue, developed to provide a remedy for wrongful detention of goods. Detinue was abolished by the Torts (Interference with Goods) Act 1977 (English). The one clear instance of detinue (loss or destruction of goods in breach of duty by a bailee) which did not constitute conversion at common law is 'converted' into a statutory conversion by s. 2(2) of that Act.

The action for conversion (originally called trover) developed upon a legal fiction. The original form of the pleadings alleged that the defendant had found the claimant's chattels (hence the name 'trover') and had wrongfully converted them to his own use. The allegation of finding (trover) could not be contested and the essence of the tort became the wrongful conversion of the goods to the use of the defendant. But merely moving or damaging goods without converting them to the defendant's own use remains remediable in trespass alone.

Trespass and conversion deal with intentional interference with goods. Where goods are lost or damaged as a result of the defendant's breach of a duty of care, an action may lie in negligence.

The Torts (Interference with Goods) Act 1977 introduces a collective description 'wrongful interference with goods' to cover conversion, trespass to goods, negligence resulting in damage to goods or to an interest in goods and any other tort in so far as it results in damage to goods or an interest in goods. This is done to facilitate common treatment of all chattle torts in respect to remedies and procedure. The Act neither redefines nor replaces the existing substantive rules on trespass, conversion, or the residual chattle torts. The substantive impact of the Act is extremely limited. Detinue is abolished and the one clear instance of detinue which did not constitute conversion at, common law (wrongful loss or destruction of goods by a bailee) is declared to be conversion by s. 2(2). New provision is made for bailees to dispose of uncollected goods. The main impact of the 1977 Act is, as we shall see, to simplify and rationalise the remedies and procedures relating to chattle torts.

1. Conversion

Conversion may be defined as an intentional dealing with goods which is seriously inconsistent with the possession or right to immediate possession of another person.

This tort protects the claimant's interest in the dominion and control of his goods; it does not protect his interest in its physical condition.

In M.S. Chokkalingam v. State of Karnataka, the respondent i.e. the Forest Department of the State Govt. purchased 206 rosewood logs from the petitioner and refused to pay even after the repeated demands for 9 years. It was held to amount to conversion and ordered to pay the amount with interest @ 6% from the date of delivery of logs until the payment of value and costs of Rs. 2,000.

(A) Interest Of The Claimant

The claimant must have either possession or the right to immediate possession. For example if a landlord has rented out furnished accommodation for a fixed term and a third party commits an act of conversion in respect of some of the furniture, the landlord has no right to sue in conversion, although the tenant may.

(1) Bailment

Where goods have been entrusted to another so as to create a bailment, the bailee can sue third parties in conversion. If the bailment is at will, then the bailor may also sue because he is then deemed to have an immediate right to possession. Manders v Williams (1849) 4 Exch 339 is illustrative:

The plaintiff brewer supplied porter (stout) in casks to a publican on condition that he was to return empty casks within six months; it was held that the plaintiff could sue a sheriff who seized (within six months of their being supplied) some empty casks in execution for a debt of the publican, because, once the casks were empty, the effect of the contract was to make the publican a bailee at will, whereupon the plaintiff was entitled to immediate possession.

However, where bailor and bailee enjoy concurrent rights to sue in conversion they cannot both exercise those rights and so effect double recovery against the defendant. Either party may sue but the successful claimant must then account to the other.

Sale of the goods by the bailee will ordinarily terminate the bailment and the bailor can then sue either the bailee or the third party. Destruction of the goods or dealing with them in a manner wholly inconsistent with the terms of the bailment will have the same result.

(2) Lien And Pledge

In certain limited cases where goods are entrusted to another to carry out certain services (e.g. repairs), the person in possession of those goods acquires a lien over the goods, that is to say a right to retain the goods until he is paid for his services.

(3) Sale

It is often difficult to discover which of the parties to a contract for the sale of goods has an interest sufficient to support an action in conversion. The crucial question is whether at the date of the alleged conversion the buyer has a sufficient right to immediate possession of the goods.

(4) Licensee

Sometimes a licensee may be able to sue in conversion. In Northam v Bowden (1855) 11 Ex 70, the plaintiff had a licence to prospect certain land for tin, and the defendant, without permission, carted away some of the soil on this land. The plaintiff was entitled to maintain an action for its conversion.

(5) Finder

The popular maxim 'finders-keepers' has some considerable substance to it. The rule that possession is sufficient to ground a claim in conversion means that in certain circumstances someone who finds a chattle can keep it and protect his right to do so against third parties.

The defendant in an action of conversion or other wrongful interference is now entitled to prove that a third party has a better right than the claimant with respect to all or any part of the interest claimed by the claimant.

These rules abolish the former principle that a possessor of goods could recover for the full amount of their value although he was not the owner.

(B) The Subject Matter

Any goods can be the subject matter of conversion.Although cheques are of value only as choses in action, the courts have satisfied the demands of commercial convenience by allowing the full value represented by them to be recovered in actions for conversion (Lloyd's Bank v Chartered Bank [1929] 1 KB 40).

(C) Human Body Parts

Advances in medical science pose some fascinating conundrums concerning property rights in human body products. It is well established that there is no property in a dead body. Only where some significant process has been undertaken to alter that body, or preserve it for scientific or exhibition purposes, can any title to the body be claimed.

(D) State Of Mind Of The Defendant

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.

If the defendant intends that dealing with the goods which, in fact, interferes with the control of the claimant, that act will be conversion: "though the doer may not know of or intend to challenge the property or possession of the true owner."

Mistake and good faith are irrelevant: "the liability ... is founded upon what has been regarded as a salutary rule for the protection of property, namely that persons deal with the property in chattels or exercise acts of ownership over them at their

peril" (per Cleasby B, Fowler v Hollins (1872) LR 7 QB 616, 639; aff'd (1875) LR 7 HL 757. Same was held into the case of Roop Lal v. Union of India.

(E) Acts Of Conversion

In the some of the acts of conversion now to be enumerated, especially those involving the sale of the goods, it is unchallengeably clear that the act is sufficiently inconsistent with the rights of the true owner to be a conversion. In many of the other ways of committing conversion, the courts have discretion whether they will treat the act as sufficiently inconsistent with the right of the true owner to be a conversion - this is especially true in the case of physical damage to the goods and breach of bailment.

(1) Taking Goods Or Dispossessing

To take goods out of the possession of another may be to convert them. To steal, or seize under legal process without justification, is a conversion. Merely to remove goods from one place to another is not conversion. A deprivation of the goods which is more than a mere moving of the goods, but in reality deprives the claimant of the use of the goods for however short a time, will generally constitute conversion. To make the claimant hand over goods under duress is conversion.

(2) Destroying Or Altering

To destroy goods is to convert them, if done intentionally. The quantum of harm constituting destruction for this purpose is clearly a question of degree, but damage as such is not a conversion.

(3) Using

'If a man takes my horse and rides it and redelivers it to me nevertheless I may have an action against him, for this is a conversion ...' (Rolle, Abridgement). To use goods as your own is ordinarily to convert them; it was thus conversion for a person, to whom carbolic acid drums were delivered by mistake, to deal with them as his own by pouring the contents into his tank: Lancashire and Yorkshire Railway v MacNicoll (1918) 88 LJKB 601. A mere misuse by a bailee, unaccompanied by any denial of title, is not a conversion although it might be some other tort: Donald v Suckling (1866) LR 1 QB 585.

(4) Receiving

Voluntarily to receive goods in consummation of a transaction which is intended by the parties to give to the recipient some proprietary rights in the goods may be a conversion actionable by the owner.

(5) Disposition Without Delivery

A person who agrees to sell goods to which he has no title and who does not transfer possession of them does not thereby ordinarily commit conversion, for the bargain and sale is void if the seller has no rights in the goods.

(6) Disposition And Delivery

Ordinarily a person who without lawful authority disposes of goods with the intention of transferring the title or some other right in the goods, and who delivers the goods, thereby commits a conversion.

(7) Misdelivery By Carrier

A carrier or warehouseman, who by mistake delivers goods to the wrong person, commits a conversion whether or not his mistake was innocent. But failure to deliver because the goods have been lost or destroyed by accident or carelessness is not conversion. Nor is it conversion for a bailee or pledgee without notice of the claim of the true owner to return goods to the person from whom he received them.

(8) Refusal To Surrender On Demand

A refusal to surrender goods upon lawful and reasonable demands is a conversion.

(9) Goods Lost Or Destroyed

At common law there could be no conversion where there was no voluntary act. Bailees are required to take reasonable care of goods in their keeping and will be liable for the loss or destruction of such goods unless they can disprove fault, but they are not insurers of the goods: Sutcliffe v CC of West Yorkshire [1996] RTR 86 - no action for conversion where an arson attack destroyed the plaintiff's car, seized and kept in the police station yard.

(10) Residual Acts Amounting To A Coversion

It must be emphasised again that the above are not exhaustive categories of acts of conversion. There are other acts which are not capable of being readily classified and which may yet fall within the definition of conversion. In these residual cases the judicial discretion whether to treat the act as sufficiently inconsistent with the true owner's rights for a conversion is especially important.

(F) Conversion As Between Co-Owners

Co-ownership does not afford a defence to certain proceedings in conversion. Section 10(1)(a) of the 1977 Act (English) provides that co-ownership is no defence to an action founded on conversion where the defendant, without the authority of the other co-owner, destroys the goods, or dispose of them in a way giving a good title to the entire property in the goods, or otherwise does anything equivalent to the destruction of the other interest in the goods. This principle was well established at common law, and s.10(1)(a) is declared to be by way of restatement of existing law (s10(3)).

The 1977 Act, however, does alter the common law by further providing in s10(1)(b) that it is also no defence to an action founded on conversion where the defendant, without the authority of the other co-owner, purports to dispose of the goods in such a way as would give a good title to the entire property in the goods if he were acting with the authority of all co-owners of the goods. At common law, a sale and delivery by a co-owner which did not pass title was not a conversion because it was not akin to destruction of the claimant's property.

(G) Remedies: Damages

The major effect of the 1977 Act is to rationalise the remedies available to claimants suing in conversion both in relation to the damages which may be awarded and in making provision for specific return of the goods by way of orders for delivery.

(1) At common law a claimant with a limited interest in the goods could normally recover their full value from a third party. The claimant now has to identify any other person whom he knows to have an interest in the goods and any such

interested party may be joined, whereupon the damages may be apportioned amongst the interested parties in proportion to their respective interests.

(2) The claimant in conversion is entitled to be compensated to the extent of the value to him of the goods of which he has been deprived. This will often appropriately be the market value of the goods. Where goods are of a kind which can be readily bought in the market the actual market value will be the appropriate measure; otherwise the replacement value in a comparable state or the original cost minus depreciation will be the standard. Where the actual value of the claimant's interest in the goods is less than the market value he may be awarded the value of that interest and not the higher market value.

(3) 'The general rule is that a plaintiff whose property is irreversibly converted has vested in him a right to damages for conversion measured by the value of the property at the date of conversion'.

However, the market value (even where ascertainable) at conversion will not necessarily mark the top limit of damages recoverable in conversion in the following instances:

(i) Evidence comes in later to show what was the value at conversion (Caxton Publishing v Sutherland Publishing [1939] AC 178, 203, per Lord Porter).

(ii) The market value of the goods rises between the date of the cause of action and trial (Greening v Wilkinson (1825) 1 C&P 625).

(iii) If the defendant converts the claimant's goods and he then increases their value the claimant cannot ordinarily recover that increased value. If the defendant has improved the goods in the mistaken but honest belief that he had a good title to them an allowance is made for the extent to which at the time at which the goods

fall to be valued in assessing damages, the value of the goods is attributable to the improvement. A similar allowance is enjoyed by purported purchasers of goods improved by another, provided again that the purchaser acted in good faith. Subsequent purchasers enjoy the same protection.

(iv) If the claimant incurs pecuniary loss as a direct consequence of the conversion he may recover this as special damage in addition to the market value of the goods. A workman deprived of his tools recovered loss of wages in Bodley v Reynolds (1846) 8 QB 779.

2. 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 the recovery of goods unlawfully detained by the defendant. If the original possession is lawful but subsequently the goods are wrongfully detained, an action for detinue can be made.

Position in England

The tort of detinue was abolished by the passing of 'Torts (Interference with Goods) Act, 1977. However the tort of conversion has been extended to include the situations which were covered by detinue earlier.

Position in India

In India, the tort of 'Detinue' as such is not mentioned as a wrong anywhere. But the similar action may be made by way of taking help of the Specific Relief Act, 1963. The courts have used the name 'detinue' in some of the cases. Section 7 and Section 8 of the said Act deal with the recovery of specific movable property.

3. TRESPASS TO GOODS

An intentional or negligent interference with goods in the possession of the claimant is a trespass provided that the interference is direct.

This tort protects several interests. First, it protects the claimant's interest in the retention of possession of his goods (though the tort of conversion also protects this interest and is more often relied on for this purpose than is trespass). Secondly, trespass protects his interest in the physical condition of his goods and, thirdly, his interest in the inviolability of his goods, i.e. protection against intermeddling.

(A) Forms Of Trespass

It follows that trespass to goods assumes various forms. Taking goods out of the possession of another, moving them from one place to another, or even bringing one's person into contact with them, or directing a missile at them have all been held to be trespass.

(B) Character Of The Act Of The Defendant

There cannot be a trespass if the interference is indirect. In order to decide whether a mere touching of goods is a trespass one must ask whether trespass to goods is actionable per se:

A dictum of Lord Blanesburgh in William Leitch v Leydon [1931] AC 90, 106 is often cited to support the view that it is always actionable per se.Some, on the other hand, state that there is clear authority for the proposition that trespass is actionable per se, but only where there is a dispossession of the claimant. Yet in Kirk v. Gregory (1876) 1 Ex D 55, a woman, who moved rings belonging to a man who had just died from one room in his house to another was held liable in

nominal damages for this asportation, ie for carrying away of the goods from one place to another.

(C) State Of Mind Of The Defendant

The wrong may be committed intentionally or negligently (Covell v. Laming, 1808 1 Camp. 487). A person driving away the car, believing that to be his own, will be liable in trespass to the person in possession even though the latter does not have a good title to the same.

(D) The Interest Of The Claimant

The claimant must be in possession of the goods at the time of the interference. Possession connotes both the power (factum) of exercising physical control and the intention (animus) to exercise such control on his own behalf. Whether the claimant is owner is immaterial. Lord Esher has said: 'The plaintiff in an action of trespass must at the time of the trespass have the present possession of the goods, either actual or constructive, or a legal right to the immediate possession' (Johnson v Diprose [1893] 1 QB 512, 515).

There are three apparent exceptions to the rule that possession is essential:

(1) In White v Morris (1852) 11 CB 1015, it was held that, where goods were assigned as security for a loan upon trust to permit the assignor to remain in possession until default in repayment, the assignee could sue in trespass while the goods were still in the assignor's possession.

(2) The title of executors or administrators relates back to the death of deceased, and this entitles them to sue for a trespass committed between the date of the death and that of the grant (Tharpe v Stallwood (1843) 5 Man & G 760).

(3) The owner of a franchise in wrecks has been deemed to have constructive possession of a wreck so as to enable him to sue in trespass a person who seized a cask of whisky before he could do so (Dunwich Corp v Sterry (1831) 1 B & Ad 831).

'Trespass to goods' is expressly included within the definition of a 'wrongful interference with goods' in the Torts (Interference with Goods) Act 1977 (English). Therefore the defence of jus tertii is no longer available, and the statutory rules regarding co-ownership also apply, as in an appropriate case are all forms of relief provided for by that Act.

(E) Damages

(1) Measure

Where the claimant has been deprived of the goods, he is entitled to their value by way of damages.

A claimant may recover general damages for loss of use of goods (as distinct from special damages for loss of profits from the goods) although he would not have been using them during the period within which he has been deprived of their use (The Mediana [1900] AC 113, 117-8 per Earl of Halsbury LC).

(2) Trespass Ab Initio

Where any person having by authority of law entered on land or seized goods, or arrested a person, subsequently commits a trespass his original act will in certain circumstances be deemed itself to be a trespass.

This doctrine has little practical relevance today, but damages may be assessed on the basis that the entire conduct of the defendant and not merely his subsequent wrongful act is tortuous (Shorland v Govett (1826) 5 B&C 485, obiter).

LIABILITY FOR GOODS

The Narrow Rule In Donoghue V Stevenson

Contractual remedy

The purchaser of goods, which turn out to be defective, will sue in contract for breach of the terms implied by the Sale of Goods Act 1979, or the Supply of Goods and Services Act 1982, which cannot be excluded against a consumer (Unfair Contract Terms Act 1977). However, the doctrine of privity of contract usually prevents third parties from suing on contracts to which they are not privy.

Manufacturers' duty

In Donoghue v Stevenson Lord Atkin stated that a manufacturer of products owes a duty to the ultimate consumer to take reasonable care in the preparation of the product. See:

M'Alister (or Donoghue) v Stevenson [1932] AC 562

Intermediate inspection

Lord Atkin also stated that this duty applies to products which reach the ultimate consumer in the form in which they left the manufacturer, with no reasonable possibility of intermediate examination. See further:

Grant v Australian Knitting Mills [1936] AC 85

There may be a reasonable contemplation of intermediate examination by a third party or the consumer, for example, a hairdresser or consumer warned to test a hair product before use.

Warning

An 'adequate' warning may discharge the manufacturers' duty of care. See in:

Haseldine v CA Daw & Son Ltd [1941] 2 KB 343 (per Goddard LJ at 380) Hurley v Dyke and others [1979] RTR 265, cf. Andrews v Hopkinson [1957] 1 QB 229

Continuing duty

The manufacturer owes a continuing duty in respect of prloducts already in circulation when a defect is discovered. See, for example:

Hobbs (Farms) Ltd v Baxenden Chemical Co [1992] 1 Llloyd's Rep 54, 65 Carroll v Fearon, Bent and Dunlop Ltd [1998] PIQR P146

Type of loss

Applying the usual rules of tort, the claimant can recover only for:

Personal injury;physical damage to property other than the uproduct itself; and economic loss consequential to the physical damage.Pure ecofnomic loss cannot be recovered.

TRESPASS TO IMMOVABLE PROPERTY

DEFINITION

Trespass to land or movable property occurs where a person directly enters upon another's land without permission, or remains upon the land, or places or projects any object upon the land.

This tort is actionable per se without the need to prove damage. By contrast, nuisance is an indirect interference with another's use and enjoyment of land, and normally requires proof of damage to be actionable.

THE WAYS IN WHICH TRESPASS MAY OCCUR

1. Entering upon land

Walking onto land without permission, or refusing to leave when permission has been withdrawn, or throwing objects onto land are all example of trespass to land. For example, see Basely v Clarkson (1681) 3 Lev 37, below.

2. Trespass to the airspace

Trespass to airspace above the land can be committed. In Kelsen v Imperial Tobacco Co [1957] 2 QB 334, D committed trespass by allowing an advertising board to project eight inches into P's property at ground level and another above ground level.

3. Trespass to the ground beneath the surface

In Bulli Coal Mining Co v Osborne [1899] AC 351, the Ds mined from their land through to the P's land. This was held to be trespass to the subsoil.

POSSESSION OF LAND

This tort developed to protect a person's possession of land, and so only a person who has exclusive possession of land may sue. Thus, a landlord of leased premises does not have exclusive possession, nor does a lodger or a licensee. However, a tenant or subtenant does.

Where there is justification to enter it will not be treated as trespass-Madhav Vithal Kudwa v. Madhavdas Vallabhdas.

CONTINUING TRESPASS

A continuing trespass is a failure to remove an object (or the defendant in person) unlawfully placed on land. It will lead to a new cause of action each day for as long as it lasts (Holmes v Wilson and others (1839) 10 A&E 503; Konskier v Goodman Ltd [1928] 1 KB 421).

For example, in Holmes v Wilson and others (1839) the Ds built supports for a road on P's land. The Ds paid damages for the trespass, but were held liable again in a further action for failing to remove the buttresses.

MISTAKEN OR NEGLIGENT ENTRY

Trespass to land is an intentional tort. However, intention for the act is required, not an intention to trespass. Consequently, deliberate entry is required and lack of knowledge as to trespass will not be a defence (Conway v George Wimpey & Co [1951] 2 KB 266, 273).

Mistaken entry (Basely v Clarkson (1681) 3 Lev 37)

In Basely v Clarkson (1681) 3 Lev 37, the D owned land adjoining P's, and in mowing his own land he involuntarily and by mistake mowed down some grass on the land of P. P had judgment for 2s.

Involuntary entry (Smith v Stone (1647) Sty 65)

An involuntary trespass is not actionable: Smith v Stone (1647) Sty 65, where D was carried onto the land of P by force and violence of others; there was trespass by the people who carried D onto the land, and not by D.

Negligent entry (League Against Cruel Sports v Scott.)

A negligent entry is possible and was considered in League Against Cruel Sports v Scott. The Ps owned 23 unfenced areas of land. Staghounds used to enter the land in pursuit of deer. The Ps sued the joint Masters of the Hounds for damages and sought an injunction against further trespasses. Park J issued an injunction in respect of one area restraining the defendants themselves, their servants or agents, or mounted followers, from causing or permitting hounds to enter or cross the property. Damages for six trespasses were awarded. The judge said:

"Where a master of staghounds takes out a pack of hounds and deliberately sets them in pursuit of a stag or hind knowing that there is a real risk that in the pursuit hounds may enter or cross prohibited land, the master will be liable for trespass if he intended to cause the hounds to enter such land or if by his failure to exercise proper control over them he causes them to enter such land."

DEFENCES

Licence

A licence is a permission to enter land and may be express, implied or contractual. A dictionary definition is as follows:

"In land law, a licence is given by X to Y when X, the occupier of land, gives Y permission to perform an act which, in other circumstances, would be considered a trespass, e.g., where X allows Y to reside in X's house as a lodger. A bare licence

is merely gratuitous permission. A licence may be coupled with an interest, as where X sells standing timber to Y on condition that Y is to sever the timber; in this case the sale implies the grant of a licence to Y to enter X's land. For contractual licence see Horrocks v Forray [1976] 1 WLR 230. See Street v Mountford [1985] AC 809." (LB Curzon, Dictionary of Law, Fourth Edition).

If a licensee exceeds their licence, or remains on the land after it has expired or been revoked, the licensee becomes a trespasser (Wood v Leadbitter (1845) 13 M&W 838; Hillen v ICI (Alkali) Ltd [1936] AC 65). Such a person is allowed a reasonable time in which to leave (Robson v Hallett [1967] 2 QB 939; Minister of Health v Bellotti [1944] KB 298).

There is also the defence of estoppel by acquiescence, that is, consent which is expressed or implied from conduct, e.g. inactivity or silence (Jones v Stones [1999] 1 WLR 1739 - mere delay in complaining is not acquiescence).

Rights of entry

A person may exercise a lawful right of entry onto land, for example:

A private right of way granted to the defendant;

A public right of way;

A right given by the common law, such as the right to abate a nuisance; and

REMEDIES

Remedies include:

- Damages (which will be nominal if there is only slight harm to land).
- An injunction to prevent further acts of trespass (at the discretion of the court).
- Action for mesne profit.

- Distress damage pheasant-right to seize the trespassing cattle or other chattels and detaining them until the compensation is paid to the rightful possessor.
- An action for the recovery of land if a person has been deprived of lawful possession of the land (formerly known as ejectment).

Note 1: an action cannot be brought to recover land after the expiration of twelve years from the date on which the right of action accrued (Limitation Act).

Note 2: the procedure for the removal of squatters is given under Civil Procedure Code.

A relevant case:

Countryside Residential Ltd v Tugwell (2000)

- An action for mesne profits, to recover damages for loss during a period of dispossession.
- Right of entry, i.e. the right of resuming possession of land by entering.

Note 1: A lease may give the lessor the right to re-enter on a breach of covenant by the lessee but the right is not enforceable unless and until notice is served on the lessee.

Note 2: It is unlawful to enforce a right of re-entry, except through court proceedings, while the occupier is lawfully residing in the premises.

NUISANCE

DEFINITION

Private nuisance is a continuous, unlawful and indirect interference with the use or enjoyment of land, or of some right over or in connection with it.

REQUIREMENTS

1. Continuous Interference

There must be a continuous interference over a period of time with the claimant's use or enjoyment of land. In Radhey Shyam v. Gur Prasad, the Court held that the noise created by a flour mill amounts to nuisance though it was a noisy locality because there was continuous interference.

De Keyser's Royal Hotel v. Spicer Bros Ltd (1914) 30 TLR 257. Noisy pile driving at night during temporary building works was held to be a private nuisance.

There are only rare examples where a single act has been held to amount to a private nuisance:

Crown River Cruises v. Kimbolton Fireworks [1996] 2 Lloyd's Rep 533. It was held that a firework display constituted a nuisance when it was inevitable that for 15-20 minutes debris of a flammable nature would fall upon nearby property, thereby damaging the property in the ensuing fire.

2. Unlawful Interference/Unreasonableness

The claimant must prove that the defendant's conduct was unreasonable, thereby making it unlawful. The rule is sic utere tuo ut alienum non laedas (So use your own property as not to injure your neighbour's).

As to impairment of the enjoyment of land, the governing principle is that of reasonable user - the principle of give and take as between neighbouring occupiers of land.

The court will take the following factors into account in assessing the reasonableness or otherwise of the defendant's use of land:

The locality

It was stated in Sturges v Bridgman (1879) 11 Ch D 852 that: "What would be a nuisance in Belgravia Square would not necessarily be so in Bermondsey."

Sensitivity of the claimant

The standard of tolerance is that of the 'normal' neighbour. Therefore, abnormally sensitive plaintiffs are unlikely to succeed in their claims for private nuisance. Contrast:

Robinson v. Kilvert (1889) 41 Ch D 88. The P's claim was for damage to abnormally sensitive paper stored in a cellar which was affected by heat from adjoining premises. The claim failed because ordinary paper would not have been affected by the temperature.

McKinnon Industries v. Walker [1951] 3 DLR 577. Fumes from the D's factory damaged delicate orchids. As the fumes would have damaged flowers of ordinary sensitivity there was a nuisance.

The utility of the defendant's conduct

It will be unlikely for an activity to amount to a nuisance if it is useful for the community as a whole taking into account all the surrounding circumstances, such as locality and the duration of the activities. Contrast:

Harrison v Southwark Water Co [1891] 2 Ch D 409 - building work carried out at reasonable times of the day did not amount to a nuisance. Adams v Ursell [1913] 1 Ch D 269 - a fried-fish shop was a nuisance in the residential part of a street. An injunction would not cause hardship to the D and to the poor people who were his customers.

Malice

It is not necessary to establish malicious behaviour on the part of the defendant but it may be regarded as evidence of unreasonableness. Contrast:

Christie v. Davey [1893] 1 Ch D 316. The P had been giving music lessons in his semi-detached house for several years. The D, irritated by the noise, banged on the walls, shouted, blew whistles and beat tin trays with the malicious intention of annoying his neighbour and spoiling the music lessons. An injunction was granted to restrain the D's behaviour.

Bradford Corporation v Pickles [1895] AC 587. The P deliberately diverted water flowing through his land, away from his neighbour's property. The P intended to force them to buy his land at an inflated price. It was held that he was committing no legal wrong because no-one has a right to uninterrupted supplies of water which percolates through from adjoining property.

Hollywood Silver Fox Farm v. Emmett [1936] 2 KB 468. The D, motivated by pure spite, deliberately fired guns near the boundary of P's land in order to scare the P's silver foxes during breeding-time. Held to be a nuisance following Christie v Davey.

The state of the defendant's land

An occupier must take such steps as are reasonable to prevent or minimise dangers to adjoining land from natural hazards on his land.

Leakey v National Trust [1980] QB 485. The NT owned land upon which there was a large mound of earth which was being gradually eroded by natural processes, and was sliding onto the P's property. It was held that an occupier must take such steps as are reasonable to prevent or minimise dangers to adjoining land from natural hazards on his land.

3. Interference With The Use Or Enjoyment Of Land Or Some Right Over Or In Connection With It

The claimant must usually prove damage, i.e. physical damage to the land itself or property; or injury to health, such as headaches caused by noise, which prevents a person enjoying the use of their land. Case examples include:

Bliss v Hall (1838) 4 Bing NC 183 - smells and fumes from candle making invading adjoining land.Solloway v Hampshire County Council (1981) 79 LGR 449 - allowing tree roots to suck moisture from adjoining soil, thereby causing subsidence.

However, note the decision and points made by the House of Lords:

Interference with TV reception by a tall building could not amount to an actionable public or private nuisance, on the basis that this was not an interference with use or enjoyment of land.

"The general principle is that at common law anyone may build whatever he likes upon his land. If the effect is to interfere with the light, air or view of his

neighbour, that is his misfortune. The owner's right to build can be restrained only by covenant or the acquisition (by grant or prescription) of an easement of light or air for the benefit of windows or apertures on adjoining land." (per Lord Hoffman at p17; see also Lord Goff at p2 and Lord Hope at p27.)

WHO MAY SUE

Only a person who has a proprietary interest in the land affected by the nuisance will succeed in a claim, e.g. as owner or reversioner, or be in exclusive possession or occupation of it as tenant or under a licence to occupy (but there may be anomalous exceptions, per Lord Hope, Hunter v Canary Wharf).

Malone v. Laskey [1907] 2 KB 141. The P was using a toilet. The lavatory cistern fell on her head because of vibrations from machinery on adjoining property. Her claim failed as she was merely the wife of a mere licensee, and had no proprietary interest herself in the land. However, today she would be able to claim in negligence (per Lords Goff and Hoffman in Hunter v Canary Wharf).

This rule was upheld by the House of Lords in Hunter v Canary Wharf over-ruling the Court of Appeal decision in Khorasandjian v Bush. However, the wife of a homeowner would be able to sue as she has a beneficial interest in the matrimonial home, per Lord Hoffman, Hunter v Canary Wharf.

Note that jus tertii (right of a third person) is not a defence to an action of nuisance. A person who is in exclusive possession of land may sue even though he cannot prove title to it (Foster v Warblington UDC [1906] 1 KB 648, discussed by Lord Goff in Hunter v Canary Wharf).

WHO MAY BE SUED

Creator of the nuisance Any person who creates the nuisance can be sued, whether or not that person is the occupier of the land at the time of the action.

Occupiers Who adopt and continue to allow nuisances on their land may also be liable, even if such nuisances were created by predecessors in title, trespassers or third parties.

Landlord A landlord may be liable for nuisances emanating from land, e.g. if the landlord had knowledge of the nuisance before letting, or where the landlord reserved the right to enter and repair the premises.

DEFENCES

Prescription If the nuisance has been continued for 20 years without interruption the defendant will not liable if s/he pleads a prescriptive right to the nuisance. See Sturges v Bridgman (1879) 11 Ch D 852 - Doctor built consulting room next to a confectioner's workshop which had been operating for over 20 years; court held that the prescriptive right began on the use of the room.

Statutory authority There will be a defence to private nuisance if it can be shown that the activities complained of by the claimant were authorised (expressly or impliedly) by a statute (Lord Dunedin in Manchester Corporation v Farnworth [1930] AC 171).

Coming to the nuisance no defence It is no defence to prove that the claimant came to the nuisance: Bliss v Hall (1838) 4 Bing NC 183, where P moved next to a candle-making factory which had been operating for three years; followed by the Court of Appeal in the cricket ball case.

Public good is not also a valid defence.

Reasonable careto prevent nuisance is generally no defence.

Plaintiff coming to nuisanceis also not a defence.

REMEDIES

Injunction An injunction will only be granted at the discretion of the court.

Damages In cases of nuisance by encroachment or damage to land, the measure of damages will be the diminution in the value of land; in cases of interference with enjoyment the measure will be the reduction in amenity value (per Lord Lloyd in Hunter v Canary Wharf). The cost of repairs or other remedial works is also recoverable (per Lord Hope). For the date of assessment see Alcoa Minerals v Broderick [2000] 3 WLR 23.

Abatement This is the remedy of self-help, e.g. removing over-hanging tree branches, which are a nuisance. For further details, see Michael A. Jones, Textbook on Torts, p339

PUBLIC NUISANCE

OUTLINE

Public nuisance is an offence under Indian Penal Code. It is only actionable as a tort if the claimant has suffered damage over and above other members of the public. In other words the plaintiff has to prove the special injury to him because of that particular instance of public nuisance.

Defences include statutory authority and act of a stranger, but not prescription.

Remedies include damages and an injunction to restrain further repetition of acts of public nuisance.

NEGLIGENCE

Breach Of Duty - Reasonable Man Test

The Reasonable Man

A potential defendant will be negligent by falling below the standards of the ordinary reasonable person in his/her situation, i.e. by doing something which the reasonable man would not do or failing to do something which the reasonable man would do. See the statement of Alderson B in:

Blyth v Birmingham Waterworks Co (1856) 11 Exch 781.

The most popular definition of the reasonable man is that he is the ordinary man, the average man, or the man on the Clapham omnibus (Hall v Brooklands Auto Racing Club [1933] 1 KB 205).

The Objective Standard

The court will decide if the defendant fell below the standard of the reasonable man. The standard of care expected from this hypothetical character is objective; not taking into account the characteristics or weaknesses of the defendant in the instant case. For example, the standard of care to be expected from a leaner-driver is the same as that required by a qualified driver.

Likewise, a householder doing DIY work must not fall below the standard to be expected of a reasonably competent carpenter in doing the work.

Unforeseeable Harm

If the reasonable person would not foresee a harmful consequence of an action, then a defendant will not be negligent in failing to take precautions. See:

Hall v Brooklands [1933] 1 KB 205

FACTORS TO BE WEIGHED IN ESTABLISHING BREACH

Magnitute Of Harm

The court will consider the likelihood of harm occurring. The greater the risk of harm, the greater the precautions that will need to be taken.

Consider the following question: 'What is the possibility of harm being caused by road works to a blind pedestrian?'

Sometimes, the risk of harm may be low but this will be counter-balanced by the gravity of harm to a particularly vulnerable claimant.

Defendant's Purpose

If the defendant's actions served a socially useful purpose then he may have been justified in taking greater risks

Practicability Of Precautions

The courts expect people to take only reasonable precautions in guarding against harm to others.

General Practice

If the defendant acted in accordance with the common practice of others this will be strong evidence that he has not been negligent. For example, see:

Gray v Stead [1999] 2 Lloyd's Rep 559.

However, this will not prevent the courts from declaring a common practice to be negligent in itself.

Special Standards Appropriate To Professionals

Professionals will be judged by the standard of the ordinary skilled man exercising and professing to have that special skill. This is the basis of the 'Bolam test'.

People holding themselves out as having a specialist skill will be judged by the standards of a reasonably competent man exercising that skill.

Standard Applied In Sporting Situations

Spectators at a sporting event take the risk of any injury from competitors acting in the course of play, unless the competitor's actions show a reckless disregard for the spectator's safety.

A referee who oversees a match may also owe a duty of care to see that players are not injured:

Smoldon v. Whitworth [1997] PIQR P133.

Standard Applied To Children

Children cannot plead infancy as a defence to a tort. However, children and young people will usually be judge by the objective standard of the ordinarily prudent and reasonable child of the same age.

If a young person deliberately commits an action with an obvious risk of harm, they may be judged by the standards of an adult. See:

Williams v. Humphrey.

Alternatively, school authorities or parents, may be liable in negligence for failing to adequately supervise a child who causes harm to another.

PROOF OF NEGLIGENCE

Importance Of Evidence In Establishing Proof Of Breach

The claimant bears the burden of proving, on the balance of probabilities, that the defendant was negligent. However, in some situations a claimant may be able to rely on the maxim res ipsa loquitur, i.e. the thing speaks for itself. By this rule of evidence, the mere fact of an accident occurring raises the inference of the defendant's negligence, so that a prima facie case exists. "You may presume negligence from the mere fact that it happens" (Ballard v North British Railway (1923) SC 43).

When The Maxim 'Res Ipsa Loquitur' Applies

There are three conditions that must be fulfilled before res ipsa loquitur applies.

(a) The defendant must have control over the thing that caused the damage.

(b) The accident must be such as would not normally happen without carelessness. See:

Scott v London and St Katherine Docks (1865) 3 H & C 596

(c) The cause of the accident must be unknown.

Its Effect

There are two opinions as to the effect of res ipsa loquitur.

(a) It raises a prima facie inference of negligence, which requires the defendant to provide a reasonable explanation of how the accident could have occurred without negligence on his part. If the defendant provides an explanation, the inference is rebutted and the claimant must prove the defendant's negligence.

(b) It reverses the burden of proof requiring the defendant to show that the damage was not caused by his failure to take reasonable care.

The opinion of the Privy Council is that burden of proof does not shift to the defendant because the burden of proving negligence rests throughout the case on the claimant. See:

Ng Chun Pui v Lee Chuen Tat [1988] RTR 298.

NEGLIGENCE - CAUSATION AND REMOTENESS

‘But For’ Test

The claimant must prove that harm would not have occurred 'but for' the negligence of the defendant.

It is possible to apply the 'but for' test where there is speculation as to how the claimant would have behaved in a given situation. The question of causation may also arise where there is a dispute about what the defendant would have done in a given situation. Sometimes, it may be clear that the defendant's breach of a duty did not actually cause the harm suffered by the claimant.

Proof Of Causation

The claimant must prove, on the balance of probabilities, that the defendant's breach of duty caused the harm. The defendant does not have to provide an explanation for the cause of harm but a failure to do so may be a factor in deciding whether the claimant's explanation of the cause should be accepted.

Multiple Causes

However, the claimant does not have to prove that the defendant's breach of duty was the main cause of the damage provided that it materially contributed to the

damage. It may be sufficient for the claimant to show that the defendant's breach of duty made the risk of injury more probable. Where there are a number of possible causes, the claimant must still prove the defendant's breach of duty caused the harm or was a material contribution.

Where the claimant's case is based on proving a material contribution to the damage, the defendant is responsible only for that part of the damage to which his negligence has contributed. The case of McGhee has also been applied to a case where there were three possible causes of injury.

Loss Of Chance

A claimant may lose because of a solicitor's negligence an opportunity to bring legal proceedings, or because of a doctor's negligence a good chance of recovery. Loss of chance is actionable in contract (Chaplin v Hicks [1911] 2 KB 786) but its extent in tort is unclear.

The House of Lords have held that questions of loss of chance do not arise where there are positive findings of fact on the issue of causation. Such a case may be an 'all or nothing' case.

Where the claimant's loss resulting from the defendant's negligence depended on the hypothetical action of a third party, either in addition to action by the claimant or independently of it, see the decision of the Court of Appeal.

The Court of Appeal has followed the approach adopted in Allied Maples in two later cases: First Interstate Bank v Cohen Arnold & Co [1996] 1 PNLR 17, and Stovold v Barlows [1996] 1 PNLR 91

Inadequacy Of The ‘But For’ Test

The ‘but-for’ test will be inadequate in a number of cases, for example, where the breach of duty consists of an omission to act, where the claimant's damage is the result of more than one cause and where the claimant's loss is economic.

CAUSATION IN LAW

Note

causa causans = immediate or effective causecausa sine qua none = ineffective causenova causa interveniens = new intervening causenovus actus interveniens = new act intervening

MULTIPLE CAUSES

Successive Causes

Where there are two successive causes of harm, the court may regard the first event as the cause of the harm. However, it is possible for a second supervening event to reduce the effect of a tort. Where a tort is submerged in a greater injury caused by (a) another tort or

(b) a supervening illness or non-tortious event.

Acts Of Third Parties

The defendant may be responsible for harm caused by a third party as a direct result of his negligence, provided it was a highly likely consequence.

Acts Of The Claimant

If the claimant suffers further injury as a result of his own actions, there will be a break in the chain of causation only if the claimant acted unreasonably.

A defendant may be responsible where the claimant commits suicide following the defendants' negligence. However, damages will now be apportioned under the Law Reform (Contributory Negligence) Act 1943 (England). The doctrine of contributory negligence is applicable in India also.

Public policy will prevent a claimant relying on his own criminal acts from seeking compensation from the defendant.

REMOTENESS OF DAMAGE

The Contrasting Approach Of The Appellate Courts

The opinion of the Court of Appeal was that a defendant was liable for all the direct consequences of his negligence, no matter how unusual or unexpected:

Re Polemis [1921] 3 KB 560

The opinion of the Privy Council was that a person is responsible only for consequences that could reasonably have been anticipated.

Manner Of Occurrence

If harm is foreseeable but occurs in an unforeseeable way there may still be liability.

However, there are two cases which go against this decision:

Type Of Harm

The damage must be of the same type or kind as the harm that could have been foreseen.

Note that only personal injury of some kind needs to be reasonably foreseeable where a primary victim suffers psychiatric harm.

Extent Of Harm

The defendant will still be liable, provided the type of harm and its manner was reasonably foreseeable, if the extent of the harm was not foreseeable.

Eggshell Skulls

It is well-established that 'The tortfeasor must take his victim as he finds him'. The defendant will be responsible for the harm caused to a claimant with a weakness or predisposition to a particular injury or illness.

Claimant's Impecuniosity

The claimant's impecuniosity (lack of funds) is no excuse for a failure to mitigate damages. See the decision of the House of Lords in:

Liesbosch Dredger v SS Edison [1933] AC 449

However, this authority has been distinguished by the Court of Appeal, QBD and the Privy Council:

Alcoa Minerals v Broderick [2000] 3 WLR 23

NEGLIGENCE - DUTY OF CARE

Existence Of A Duty

Before 1932 there was no generalised duty of care in negligence. The tort did exist and was applied in particular situations where the courts had decided that a duty should be owed, eg, road accidents, bailments or dangerous goods. In Donoghue v Stevenson [1932] AC 562, Lord Atkin attempted to lay down a general principle which would cover all the circumstances where the courts had already held that there could be liability for negligence. He said:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

This test has been criticised as being too wide but it made it easier for lawyers to argue that there should be liability for negligently causing harm in new situations, not previously covered by case law. In 1970, Lord Reid said that Lord Atkin's dictum ought to apply unless there was some justification or valid explanation for its exclusion (Home Office v Dorset Yacht Co [1970] AC 1004).

Foreseeability and proximity

'Foreseeability' means whether a hypothetical 'reasonable person' would have foreseen damage in the circumstances.

'Proximity' is shorthand for Lord Atkin's neighbour principle. It means that there must be legal proximity, i.e. a legal relationship between the parties from which the law will attribute a duty of care.

Note that a duty of care may not be owed to a particular claimant, if the claimant was unforeseeable.

The role of policy

Policy is shorthand for 'public policy considerations'. Policy considerations were recognised in the Wilberforce test and the test in Caparo v Dickman.

Arguments that an extension of liability for negligence would lead to a flood of litigation or to fraudulent claims were once granted greater credence than they are today. But other arguments, such as the possible commercial or financial consequences, the prospect of indeterminate liability, the possibility of risk-spreading (e.g., through insurance) and potential conflicts with rights in property or other social or moral values, are given due consideration. In recent years the courts have identified a wide range of factors that may be relevant to the denial of a duty of care. For example, a duty of care may not exist where:

(a) The claimant is the author of his own misfortune (Philcox v Civil Aviation Authority)

(b) A duty of care would lead to unduly defensive practices by defendants seeking to avoid claims for negligence with detrimental effects on their performance of some public duty.

(c) Awards of damages against a public authority exercising a public function would have an impact upon the resources available to the authority to perform its duties, both in terms of the damages and costs, and in terms of the resources required to investigate and defend spurious claims.

(d) A duty of care would cut across a complex statutory framework established by Parliament for regulating particular circumstances, such as the regulation of financial markets.

(e) There is an alternative remedy available to an aggrieved claimant, such as a statutory right of appeal from the decision of a government officer or department, or judicial review, or another source of compensation, such as the criminal Injuries Compensation Scheme, or another cause of action, such as a claim for breach of contract, even where the action would be against a different defendant.

(f) Where a duty of care would tend to undermine the requirements of other causes of action, particularly in the case of complex commercial contracts where the parties have had the opportunity to negotiate a detailed structure of contractual negotiations.

In Rural Transport Service v. Bezlum Bibi, the conductor of an overloaded bus invited passengers to travel on the roof of the bus. One of them was hit by the overhanging branch of a tree. It was held that there was negligence on the part of the driver and conductor of the bus and the defendant was held liable. There was negligence regarding the lack of duty of care on the part of defendant.

Acts And Omissions

There are two types of omissions. Firstly, a person may fail to take appropriate precautions, which would be regarded as a negligent act. Secondly, it may refer to passive inaction where a person does not take any action. The general rule is that there is no duty on a person to take action in order to prevent harm befalling others.

Lord Goff analysed the mere-omissions rule and then considered the exceptions to the rule. There are some circumstances where the courts have established duties of affirmative action. These may arise where:

(a) there is an undertaking by the defendant; (b) there is a special relationship between claimant and defendant; (c) the defendant has control over a third party who causes damage to the claimant; or (d) the defendant has control over land or something likely to be dangerous if interfered with.

Undertaking

A person who undertakes to perform a task, even gratuitously, assumes a duty to act carefully in carrying it out.

Relationship between claimant and defendant

There are a number of relationships that give rise to an affirmative duty to prevent harm. These include employer and employee, parent and child, captain (or carrier) and passenger, referee and player in a colts rugby match (Smoldon v Whitworth [1997] PIQR P133, hotelier and patron, the organiser of a dangerous competition and a visibly drunken participant, and occupier and visitor.

Control over third parties

In some circumstances, a person may be in such a relationship with a third party as to have a duty to control the third party's conduct in order to prevent harm to the claimant. These include employer and employee, parent and child, jailor and prisoner, mental hospital and patient and even car owner and an incompetent or drunken driver.

Control of land or dangerous things

An occupier's control of land may give rise to an affirmative duty in relation to the behaviour of visitors or even acts of nature. Where the defendant has control over some object which is likely to be particularly dangerous if interfered with by a third party he may be under a duty to prevent such an interference (Dominion Natural Gas v Collins and Perkins [1909] AC 640). This has been applied to the theft of a poisonous chemical by young children (Holian v United Grain Growers (1980) 112 DLR (3d) 611). Lord Goff cited the case of Haynes v Harwood [1935] 1 KB 146 (see below).

Types Of Claimant

At common law the dependants of a deceased person had no claim in respect of the death, but this problem was dealt with long ago by the Fatal Accidents Acts.

Trespassers are owed a common duty of care by the occupiers of premises, now by virtue of the Occupiers' Liability Act 1984.

In some circumstances a participant in a crime may not be owed a duty of care by a fellow participant in the same crime. This is related to the illegality of the claimant's conduct, but it is submitted that this issue is probably better left to the defence of ex turpi causa non oritur actio (a right of action will not arise from a base cause).

Duty in a profession (e.g. medical etc.): a person engaged in some particular profession is supposed to have the requisite knowledge and skill needed for that purpose and he has a duty to exercise reasonable degree of care in the conduct of his duties. The main cases related to the medical profession are: Shishir Rajan Saha v. State of Tripura, Lakshman Balkrishana Joshi v. Trimbak Bapu Godbole, Jasbir Kaur v. State of Punjab, State of Haryana v. Smt. Santra and Philips India Ltd. V. Kunju Punnu.

The final category of claimant is the injured rescuer. A duty of care is owed to a rescuer. "Danger invites rescue. The cry of distress is the summons to relief ... The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer" (Wagner v International Railway (1921) 133 NE 437, per Cardozo J). Relevant cases include:

Haynes v Harwood [1935] 1 KB 146

ECONOMIC LOSS

Careless Acts

Until the 1970s the rules on liability for economic loss as a result of negligent acts were simple to state: there was generally no liability in respect of 'pure' economic

loss. There are two broad categories of case in which the claimant sustains economic loss as a result of a negligent act:

(a) As a consequence of physical damage to a third party's property

Firstly, the damage may interrupt the claimant's ability to carry on his business, as in:

Cattle v Stockton Waterworks (1875) LR 10 QB 453 Weller v Foot and Mouth Disease Research Institute [1966] 1 QB 569

The courts in this country have consistently refused to allow recovery for economic loss in these circumstances.

Secondly, the claimant may have a contractual right to use the property for the purposes of his business, but no proprietary interest in it. Damage to the property may put him to the expense of repairing it (depending on the terms of the contract) and will interfere with his ability to use the property for profitable purposes.

Thirdly, the claimant may suffer loss as a result of damage to property belonging to a third party where the claimant is 'at risk' as to the loss at the time of the damage under a contract with the third party. Such financial loss cannot be recovered:

(b) As a consequence of acquiring a defective item of property

In this category the claimant owns the property, but it is discovered after he has acquired it that the property has a defect and the claimant has to expand money in repairing or replacing it. It is this category of cases which has produced the most marked shifts of judicial attitudes in relation to claims for economic loss, first in favour of allowing claimants to recover for such losses where the property consisted of a dangerously defective building, then allowing claimants to succeed

for the loss where the defect could not be categorised as dangerous, and finally returning to a more orthodox approach in 1990, when the House of Lords held that the damage in both cases was purely economic and therefore irrecoverable. See:

Dutton v Bognor Regis UDC [1972] 1 QB 373

The House of Lords attempted to establish a general duty of care in respect of pure economic loss resulting from a negligent act, based on the closeness of the relationship between the parties and reliance by the claimants on the defendants' skill and experience.

The courts began to retreat from the implications of Junior Books almost immediately. It has repeatedly been described as limited to its own facts. In D & F Estates v Church Commissioner , the House of Lords said that Junior Books was so far dependent on the 'unique' relationship between the claimant and the defendant that it cannot be regarded as laying down any general principle in the law of tort.

Nervous Shock

The term 'nervous shock' is used by lawyers to signify a medically recognised psychiatric illness or disorder. 'Psychiatric damage' encompasses all relevant forms of mental illness, neurosis and personality change. This is distinguished from emotional distress or grief which normal individuals may suffer when someone else is injured or killed, though the distinction may sometimes be difficult to draw. There can be no claim for emotional distress, anguish or grief unless this leads to a positive psychiatric illness, such as an anxiety neurosis or reactive depression, or physical illness, such as a heart attack. Bourhill v. Young is one of the main authority on the cases of nervous shock.

(**a) Primary victims**

The House of Lords held that in the case of a 'primary victim' (i.e., where the claimant was involved either mediately or immediately as a participant in the events) if personal injury of some kind to the claimant was foreseeable the defendant would be liable for psychiatric injury sustained as a result of the defendant's negligence, irrespective of whether psychiatric injury was foreseeable.

The courts have been extremely cautious about admitting claims for psychiatric harm which were not the result of physical injury to the claimant. The first response was to deny any action for psychiatric harm which was not the product of some form of physical impact with the claimant. Then claims succeeded in:

Dulieu v White [1901] 2 KB 669 Hambrook v Stokes Bros [1925] 1 KB 141

However, the several limiting factors have emerged: (a) The psychiatric injury must have been the product of what the claimant perceived with his or her own unaided senses. (b) The nature of the relationship between the accident victim and the person who suffered the psychiatric injury is important. (c) The test of liability for shock is foreseeability of injury by shock, thus separating psychiatric damage from other forms of personal injury. (d) When applying the test of foreseeability of injury by shock it has to be demonstrated that the claimant is a person of reasonable fortitude and is not unduly susceptible to some form of psychiatric reaction.

(b) Secondary victims

A person may be a 'secondary victim' (a person who suffers psychiatric damage as a result of harm done to another).

In such cases, there must be: (a) reasonable foreseeability of psychiatric illness arising from the close relationship of love and affection between the claimant and the primary victim of the defendant's negligence; (b) proximity in terms of physical and temporal connection between the claimant and the accident caused by the defendant; (c) the psychiatric harm must come through the claimant's own sight or hearing of the event or its immediate aftermath. See:

Greatorex v Greatorex and Others [2000] Times Law Report May 5 and Bourhill v. Young (1943) A.C. 92.

(c) Employees

Employers may be responsible for psychiatric injury caused to employees. Relevant cases include:

Dooley v Cammell Laird [1951] 1 Lloyd's Rep 271 Young v Charles Church Ltd [1997]

Contributory Negligence

When a person by his own want of care contributes to the damage caused by the negligence or the wrongful conduct of the defendant, he is considered to be guilty of Contributory Negligence. “Contributory Negligence” it does not mean breach of any duty. It only means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an “author of his own wrong”. It is not a complete defence, where the plaintiff’s own fault has contributed to the damages he suffered and the plaintiff will have his/her damages reduced in proportion to his/her fault.

Contributory negligence is a defense to a claim based on negligence. It is applied in cases where the plaintiff by his own negligence or fault has contributed to the

harm suffered due to the negligence or wrongful conduct of the defendant. For example, a pedestrian who tries to cross the road all of a sudden and is hit by a moving vehicle, is guilty of contributory negligence. Similarly, if A, going on the wrong side of the road,is hit by a vehicle coming from the opposite direction and driven rashly by B , A can be met with the defence of contributory negligence.

Contributory negligence defers from contribution, which is a claim bought by one tortfeaser against another to recover some or all of the money damages awarded to the plaintiff.

To be guilty of contributory negligence, the plaintiff should not have acted like a prudent man. If he has taken as much care as a prudent man would have taken in a similar situation, there is no contributory negligence.

When the plaintiff is negligent, but his negligence hasn't contributed to the harm suffered by him, the defence of contributory negligence cannot be pleaded.

Rules To Determine Contributory Negligence

The Contributory Negligence Act, 1945 prescribes the rule when there is contributory negligence on the part of the plaintiff. There are 2 rules to determine whether there is contributory negligence or not:-

• 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. Here the plaintiff need not necessarily owe a duty of care to the other party. What has to be proved is that the plaintiff did not take due care of his own safety and thus contributed to his own damage.

• 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

damage. If the defendant's negligence would have caused the same damage even if the plaintiff had been careful and the plaintiff's negligence is not the operative cause of accident, the defence of contributory negligence can't be pleaded. For example, the plaintiff is negligent in driving the motor cycle on the road without proper brakes and the defendant aiming at a bird negligently shoots and injures the plaintiff, the plaintiff's negligence here can't be considered as contributory negligence for this injury by the defendant.

Burden Of Proving Contributory Negligence

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

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

LAST OPPORTUNITY RULE

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."The rule of law is that if there is blame causing the accident on both sides, however small that blame may be on one side, the loss lies where it falls".

This rule worked a great hardship particularly for the plaintiff's 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 therefore modified the law relating to contributory negligence by introducing the 'LAST OPPORTUNITY RULE'. 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 negligent act of the defendant does not observe any ordinary care; he cannot make the defendant liable for that. Similarly, if the last opportunity to avoid the accident was with the defendant, he will be liable for the whole of the loss to the plaintiff. The case of Davies v. Mann explains the rule. In that case, the plaintiff fettered the fore-feet of his donkey and left it in a narrow highway. The defendant was driving his wagon driven by the horses too fast that it negligently ran over and killed the donkey. In spite of his own fault, the plaintiff was held entitled to recover because the defendant had 'last opportunity' to avoid the accident.

The application of the 'last opportunity' rule was further defined in the case of British Colombia Electric Co.v. Loach and the party, who could have the last opportunity to avert the accident, if he had not been negligent, was considered to be responsible for the accident. In other words, the rule was extended to cases of 'CONSTRUCTIVE LAST OPPORTUNITY'. In that case, the driver of a wagon, in which the deceased was seated, negligently brought the wagon on the level crossing of the defendant's tramline without trying to see whether any tram was coming on the line. A tram, which was being driven too fast, caused the collision. It was found that the tram which caused the accident was allowed to go on the line with defective brakes and if the brakes were in order then, in spite of the

negligence on part of the wagon's driver, the tram could have been stopped and accident averted. The legal representatives of the deceased brought an action against the tramway company. The defendants pleaded the defence of contributory negligence .It was held that they could not take the defence of contributory negligence because they had the last opportunity to avoid the accident. The defendants were therefore held liable.

Contributory Negligence Of Children

What amounts to contributory negligence in the case of a mature person may not be the case of a child because a child cannot be expected to be as careful as a grown up person. Age of a person, therefore, has to be taken into account to ascertain whether a person is guilty of contributory negligence or not. In R.Srinivasa v. K.M.Parasivamurthy, a child of about 6 years was hit by a lorry while standing just near the footpath. It was held that a child of that age doesn't have the road sense like his elders and, therefore, the plaintiff, cannot be blamed for contributory negligence.

Doctrine Of Apportionment Of Damages In India

Law Reform (Contributory Negligence) Act,1945

Section1 (1) of the Act provides as follows:

"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person(s), a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

Thus, if in an accident the plaintiff is as much at fault as the defendant, the compensation to which he would otherwise be entitled will be reduced by 50%.

In India, there is no central legislation corresponding to the Law Reform (contributory negligence) Act,1945 of England. The Kerala legislation has taken a lead by passing The Kerala Torts (Miscellaneous provisions) Act, 1976 Sec.8 of the Act makes provision for apportionment of liability in case of contributory negligence.

The Doctrine Of Alternative Danger

Although, the plaintiff is supposed to be careful in spite of the negligence of the defendant, the plaintiff might become perplexed or nervous by a dangerous situation created by the defendant and to save his person or property, he may take an alternative risk. The law therefore allows the plaintiff to encounter an alternative danger to save himself from the 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. The judgement of the plaintiff should not, however, be rash. In Shyam Sunder v. State of Rajasthan, due to the negligence of the defendants, the State of Rajasthan, a truck belonging to them caught fire hardly after it had covered a distance of only 4 miles on a particular day. One of the occupants, Navneetlal, jumped out to save himself from the fire, he struck against a stone lying by the roadside and died instantaneously .The defendants were held liable.

"**Contributory Negligence" And "Volenti Non Fit Injuria" Distinguished**

1. CONTRIBUTORY NEGLIGENCE is based on the proportion of his fault in the matter. The damages which the plaintiff will be reduced to the extent the claimant himself was to blame for the loss. VOLENTI NON FIT INJURIA is a complete

defence in a case of negligence which totally makes the defendant free from the liability.

2. In the defence of CONTRIBUTORY NEGLIGENCE, both plaintiff as well as defendant is negligent. In VOLENTI NON FIT INJURIA, the plaintiff may be volens but at the same time exercising due care for his own safety. Moreover, defendant's negligence may rule out the application of the defence.

Conclusion

Contributory Negligence is a type of defence for the defendant with which he can show some negligence on the part of the plaintiff so that the amount to be paid as compensation is reduced to the extent of the plaintiff's own negligence. Thus, Contributory Negligence is a good defence for the defendants to use against the plaintiffs in cases related to some specific torts.

Since this defence favoured the defendants in most of the cases, the last opportunity rule was brought in wherein whoever among the defendant and plaintiff had the last opportunity to prevent the accident was held liable.

Motor Vehicle Act, 1988

INTRODUCTION

The number of people who get killed or maimed in motor vehicle accidents is growing day by day. The main source of succour to such hapless people and their dependants is the compensation that they are entitled to receive under law. But right from 1956, motor accident compensation law has been in a state of flux. It was in that year that the legislature amended the Motor Vehicles Act, 1939 by inserting several new sections. Over the years, many more amendments followed and in 1988, a new Motor Vehicles Act replaced the old one. Over the years, the judiciary has not only been called upon from time to time to interpret these statutory provisions and apply them to different facts and situations, but also to lay down the legal principles for assessing compensation. The Motor Vehicles Act, 1988 does not provide any guidelines for the identification of the items of loss to be compensated; nor does it lay down any criteria for the computation of the quantum of compensation for each item of loss.

The first enactment relating to motor vehicles in India was the Indian Motor Vehicles Act, 1914, which was subsequently replaced by the Motor Vehicle Act, 1939. The Act of 1939 had been amended several times. In spite of several amendments it was felt necessary to bring out a comprehensive legislation keeping in view the changes in the transport technology, pattern of passenger and freight movements, development of the road network in the country and particularly the improved techniques in the motor vehicles management. Various Committees as well as the Law Commission had gone into different aspects of road transport. Several Members of Parliament had also urged for comprehensive review of the Motor Vehicles Act, 1939. A working group was, therefore, constituted in January,

1984 to review all the provisions of the Act of 1939. This Working Group took into account the suggestions and recommendations. On the recommendations of the Working Group and comments received from the State Governments were discussed at a special meeting of Transport Ministers of all State and Union Territories. Based on the conclusions reached in the meeting of Transport Ministers and suggestions made by the Supreme Court in a case the Motor Vehicles Bill was introduced in the Parliament.

The Motor Vehicles Act, 1988 has so far been amended three times in the years 1994, 2000 and 2001:-

- Amendment in the year 1994. This included:

- Rationalization of the definition of the various categories of motor vehicles;

- Mandating of a minimum one year experience of driving a light motor vehicle before a person can be granted a licence for transport vehicle tightening of norms for drivers transporting dangerous or hazardous goods;

- Encouraging use of battery, CNG and solar energy as an auto fuel by exempting vehicles using such fuel from the requirement of permit or fixation of fare by the State Government;

- Empowering Central Government to make rule for standardizing components in Motor Vehicles;

- Increasing the amount of compensation in the event of death from Rs. 25,000/- to Rs. 50,000/- in respect of no fault liability etc.

- Amendment in the year 2000. This Included:

- Authorized use of LPG as an auto fuel.

- Buses used by educational institutions brought under the purview of permit regime.

- Alterations made in transport vehicle without prior approval of the Registering Authority were barred.

- Amendment in the year 2001 was necessitated by:

- Need to bring the buses plying on CNG within the purview of State Transport Authority in respect of fixation of fares and route permits.

LIABILITY WITHOUT FAULT IN CERTAIN CASES

The Motor Vehicles Act provides the concept of no-fault liability for the noble purpose of social welfare. Following are the main provisions in this regard:

140. Liability to pay compensation in certain cases on the principle of no fault.- (1) Where death or permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle or motor vehicles, the owner of the vehicle shall, or, as the case may be, the owners of the vehicles shall, jointly and severally, be liable to pay compensation in respect of such death or disablement in accordance with the provisions of this section.

(2) The amount of compensation which shall be payable under sub-section (1) in respect of the death of any person shall be a fixed sum of [85] [fifty thousand rupees] and the amount of compensation payable under that sub-section in respect of the permanent disablement of any person shall be a fixed sum of [86] [twenty-five thousand rupees].

(3) In any claim for compensation under sub-section (1), the claimant shall not be required to plead and establish that the death or permanent disablement in respect

of which the claim has been made was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person.

(4) A claim for compensation under sub-section (1) shall not be defeated by reason of any wrongful act, neglect or default of the person in respect of whose death or permanent disablement the claim has been made nor shall the quantum of compensation recoverable in respect of such death or permanent disablement be reduced on the basis of the share of such person in the responsibility for such death or permanent disablement.

(5) Notwithstanding anything contained in sub-section (2) regarding death or bodily injury to any person, for which the owner of the vehicle is liable to give compensation for relief, he is also liable to pay compensation under any other law for the time being in force:Provided that the amount of such compensation to be given under any other law shall be reduced from the amount of compensation payable under this section or under Section 163A.]

141. Provisions as to other right to claim compensation for death or permanent disablement.- (1) The right to claim compensation under Section 140 in respect of death or permanent disablement of any person shall be in addition to [any other right, except the right to claim under the scheme referred to in Section 163A (such other right hereafter] in this section referred to as the right on the principle of fault) to claim compensation in respect thereof under any other provision of this Act or of any other law for the time being in force].

(2) A claim for compensation under Section 140 in respect of death or permanent disablement of any person shall be disposed of as expeditiously as possible and where compensation is claimed in respect of such death or permanent disablement under Section 140 and also in pursuance of any right on the principle of fault, the

claim for compensation under Section 140 shall be disposed of as aforesaid in the first place.

(3) Notwithstanding anything contained in sub-section (1), where in respect of the death or permanent disablement of any person, the person liable to pay compensation under Section 140 is also liable to pay compensation in accordance with the right on the principle of fault, the person so liable shall pay the first-mentioned compensation and—

(a)If the amount of the first-mentioned compensation is less than the amount of the second-mentioned compensation, he shall be liable to pay (in addition to the first-mentioned compensation) only so much of the second-mentioned compensation as is equal to the amount by which it exceeds the first mentioned compensation;

(b)If the amount of the first-mentioned compensation is equal to or more than the amount of the second-mentioned compensation, he shall not be liable to pay the second-mentioned compensation.

142. Permanent disablement.- For the purposes of this Chapter, permanent disablement of a person shall be deemed to have resulted from an accident of the nature referred to in sub-section (1) of Section 140 if such person has suffered by reason of the accident, any injury or injuries involving:—

(a)permanent privation of the sight of either eye or the hearing of either ear, orprivation of any member or joint; or

(b)destruction or permanent impairing of the powers of any member or joint; or

(c)permanent disfiguration of the head or face.

143. Applicability of Chapter to certain claims under Act 8 of 1923.- The provisions of this Chapter shall also apply in relation to any claim for compensation in respect of death or permanent disablement of any person under the Workmen's Compensation Act, 1923 resulting from an accident of the nature referred to in sub-section (1) of Section 140 and for this purpose, the said provisions shall, with necessary modifications, be deemed to form part of that Act.

144. Overriding effect.- The provisions of this Chapter shall have effect notwithstanding anything contained in any other provision of this Act or of any other law for the time being in force.