BA LLB 2nd Semester Paper Code: 104
Subject: Law of Torts and Consumer Protection

Unit-I: Introduction and Principles of Liability in Tort

a. Definition of Tort

b. Development of Law of Torts

c. Distinction between Law of Tort, contract, Quasi-contract and crime

d.Constituents of Tort: Injuria sine damnum, Damnum sine injuria

e. Justification in Tort, Volenti non-fit Injuria, Necessity, Plaintiff's default, Act of God, Inevitable accidents, Private defense

Unit-II: Specific Torts-I

a. Negligence

b. Nervous Shock

c. Nuisance

d. False Imprisonment and Malicious Prosecution

e. Judicial and Quasi: Judicial Acts

f. Parental and Quasi-Parental authority

Unit-III: Specific Torts-II

a. Vicarious Liability

b. Doctrine of Sovereign Immunity

c. Strict Liability and Absolute Liability

d. Defamations

Unit-IV: The Consumer Protection Act, 1986

a. Definitions of Consumer, Goods and Service

b. Rights and Duties of Consumer

c. Authorities for Consumer Protection

d. Remedies

MEANING OF TORT

The word **Tort** is derived from a Latin word 'Tortus' which means 'twisted' or 'cooked act'. In English it means, 'wrong'. The Expression 'Tort' is of French Origin. The word **Tort** was derived from the Latin term *Tortum*.

The term '**Tort**' means a wrongful act committed by a person, causing injury or damage to another, thereby the injured institutes (files) an action in Civil Court for a remedy viz., unliquidated damages or injunction or restitution of property or other available relief. Unliquidated damages means the amount of damages to be fixed or determined by the Court.

- The person who commits or is guilty of a tort is called a "tortfeasor". (Gordon v. Lee, 133 Me. 361, 178 A. 353, 355)
- The person who suffered injury or damage by a tortfeasor is called injured or aggrieved.
- Tort is a common law term and its equivalent in Civil Law is "Delict".
- In general, the victim of a tortious act is the plaintiff in a tort case.
- As a general rule, all persons have the capacity to sue and be sued in a tort.
- Tort Law provides an avenue for an injured person of a remedy. It does not provide a guarantee of recovery.

DEFINITION OF TORTS

1 **Sir John Salmond**: "Tort as a civil wrong for which the remedy is common law action for unliquidated damages and which is not exclusively the breach of contract or the breach of trust or other merely equitable obligation."

2 **Prof. P H Winfield**: Tortious Liability arises from breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressable by an action for unliquidated damages.

1. Clark and Lindsell: "Tort is a wrong independent of contract for which the appropriate remedy is a common law action."
2. Fraser: A tort is an infringement of a legal right *in rem* of a private individual, giving a right of compensation of the suit of the injured party.
3. Section 2(m) of Limitation Act, 1963: "Tort means a civil wrong which is not exclusively a breach of contract or breach of trust."

ORIGIN OF LAW OF TORTS

The '**Law of Torts**' owes its origin to the Common Law of England. It is well developed in the UK, USA and other advanced Countries. In India, Law of Torts is non codified, like other branches of law eg: Indian

Contract Act, 1872 and Indian Penal Code, 1860. It is still in the process of development. A tort can take place either by commission of an act or by omission of an act.

Development of law of torts in India

To deal with the malicious behavior of the people tort existed in Hindu and Muslim law but it can be said that tort was formally introduced by the Crown in India. It is based on the principles of equity, justice, and good conscience. The law of torts is based on the principles of 'common law' which is mainly the English law of torts. The application of the law of tort is an applied selectively in Indian courts keeping in mind if it suits the circumstances of Indian society.

Justice Bhagwati in ***M.C Mehta v. Union of India*** observed that: *"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."*

Three Elements of Torts

For an act to be considered a Tort, there will be three essential elements:

- Tort is a civil wrong,
- Such civil wrong is other than a mere breach of trust or contract
- The remedy for such civil wrong lies in an action for unliquidated damages.

Characteristics

1. Tort, is a private wrong, which infringes the legal right of an individual or specific group of individuals.
2. The person, who commits tort is called "tort-feasor" or "Wrong doer"
3. The place of trial is Civil Court.
4. Tort litigation is compoundable i.e. the plaintiff can withdraw the suit filed by him.
5. Tort is a species of civil wrong.
6. Tort is other than a breach of contract

7. The remedy in tort is unliquidated damages or other equitable relief to the injured.

How law of torts is different from crime

S.NO	Tort	Crime
1.	The person who commits a tort is known as 'tortfeasor'.	The person who commits a crime is known as 'offender'.
2.	Proceedings take place in Civil Court.	Proceedings take place in Criminal Court.
3.	The remedy in tort is unliquidated damages.	The remedy is to punish the offender.
4.	It is not codified as it depends on judge-made laws.	Criminal law is codified as the punishments are defined.
5.	Private rights of the individuals are violated.	Public rights and duties are violated which affects the whole community.

What are the Differences Between Contract and Tort Law?

A distinct difference between contract and tort laws lies in the issue of consent. In contract law, both parties must enter an agreement knowingly and without coercion. Each party must consent to the contract and its outcomes. In tort law, the interaction between the parties is not based on consent. Usually, torts occur by the intrusion of one party to another that results in some type of harm. Courts will award damages in a contract case to restore the injured party to where they were before the breach occurred. In a tort case, a court will award damages to compensate the victim for their loss.

Another difference between the two branches of law, is that punitive damages are sometimes awarded in tort cases, whereas they are rarely awarded in breach of contract cases.

Can a Person File a Contract Claim and a Tort Claim in the Same Lawsuit?

In some cases, a tort claim and contract claim will be included within the same lawsuit. However, due to the differences between torts and contracts, these cases are not as common as those where both claims are filed separately.

If you have a case where there was a breach of duty in a contract, and a tort claim is tightly related to the subject matter of the contract, it may be possible to file the claims concurrently.

Difference between 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 TORTS

Injuria sine damno-
Let's see meaning of maxim 'injuria sine damno'

1) Injuria - injury to legal right

2) sine -without

3) damno - damages, monetary loss.

Meaning -

The meaning of this maxim is injury to legal right without any monetary loss. This is actionable, because there is violation of legal right, even though plaintiff suffer no loss in term of money and defendant is liable.

In simple words, ***Injuria sine damno*** means Injury without damage or it means infringement of an absolute private right without any actual loss or damage. whenever there is an invasion of legal right, the person in whom the right is vested is entitled to bring an action and may recover damages, although he has suffered no actual harm. In such case, the person need not prove the actual damage caused to him. Example Trespass to land or property.

Suppose 'A' enter a private compound without permission of the owner just for asking water, here the moment 'A' step in, A commit trespass and action can lie against 'A' even no actual damage is caused.

Here are some famous cases -

1) Ashby v/s White, 1703.

Fact-
Plaintiff was legal voter; his name was there in voter list defendant was a returning officer, i.e. in charge of election. Deft. Refused the plaintiff to offer or to tender his lawful vote to his candidate. Plaintiff sued Deft for compensation even though no loss is caused in term of money.

Issue -

Whether defendant is liable.

Defence of Deft-

The plaintiff suffered no loss in money. Moreover, the candidate to whom he was about to offer /tender his vote got elected. So deft not liable

Held -

Court held that Deft is liable to pay compensation because he has violated legal right of plaintiff to vote.

Even though plaintiff suffered no actual loss in term of money, or the candidate to whom plaintiff was interested got elected, defendant has committed a tort and therefore liable to pay compensation.

2) Ashrafilal v/s Municipal corporation of Agra, 9121.

Fact-

It is the similar case to Ashby v White. The name of plaintiff was deleted, dropped from voter list by the Deft corporation, so plaintiff couldn't exercise his right to vote . Plaintiff sued Deft.corporation for compensation.

Issue -

Is corporation liable?

Held -

Court accepted the principal of Ashby v/s White e.g. injuria sine damnum.

3) Marzetti v/s Williams 1830

(Bank refusing customers cheque)

Fact

Plaintiff was an account holder or customer who was having amount in his account he went to withdraw money by Self cheque. Though there was sufficient amount in his account, the Deft banker refused to pay plaintiff without any reason. So plaintiff filed a suit against Deft banker for damage.

Held -

Even though plaintiff suffered no monetary loss Deft.is liable for refusing customers cheque and therefore committed tort.

DAMNUM SINE INJURIA

Damnum means = Damage in the sense of money, Loss of comfort , service , health etc.

Sine means = Without

Injuria means = Infringement of a legal right / injury to legal right.

Damnun sine injuria means damages , monetary loss, to the plaintiff without violation of legal right, not actionable because no injury to legal right.

In Simple words, Damnum sine injuria means damage without infringement of any legal right. damage without injury is not actionable. Mere loss of money's worth does not of itself constitute legal damage. There are many acts which though harmful are not wrongful in the eyes of law, therefore do not give rise to a right of action in favour of the person who sustains the harm. No one is to be considered a wrong doer who merely avails himself of his legal rights, though his action may result in damage to another.

1) Mayor of Bradford v/s Pickles 1895

Facts -

Corporation of Bradford was supplying water from its well. Defendant was having adjacent land to the corporation land wherein there was well. Defendant was willing to sell his land. He approached the mayor of corporation. Negotiations failed. Defendant dug well in his own land .thereby cutting the underground supply of water of corporation well this has caused a loss to corporation because there was no adequate supply of water to the people of corporation. Plaintiff sued Deft for damages for malice.

Held -

Deft.is not liable, because defendant's act is not wrongful as not violated legal right or plaintiff. There is factual malice, ill will digging well in his own land does not amount to tort.

2) Gloucester Grammar school case, 1410 (setting up rival school)

Fact -

Defendant was school teacher in plaintiff's school. Because of some dispute Deft left plaintiff's school and started his own school. As defendant was very famous amongst students or his teaching, boys from plaintiffs school left and joined to Deft. School . Plaintiff sued Deft for monetary loss caused.

Held -

Deft not liable. Compensation is no ground of action even though monetary loss in caused if no legal right is violated of anybody.

3) Chasemore v/s Richards 1859

Fact -

Plaintiff was running a mill on his own land, and for this purpose he was using the water of the stream for a long time. The Deft dug well in his own land and thereby cut off the underground water supply of stream. Through percolation the water gathered in the well of deft. The quantity of water of stream was reduced and the mill was closed for non availability of water. Plaintiff sued deft for damage.

Held -

Deft. Not liable, because of principle of Damnum sine injuria. No violation of legal right, though actual loss in money.

2) Gloucester Grammar school case, 1410 (setting up rival school)

Fact -

Defendant was school teacher in plaintiff's school. Because of some dispute Deft left plaintiff's school and started his own school. As defendant was very famous amongst students or his teaching,boys from plaintiffs school left and joined to Deft.School . Plaintiff sued Deft.for monetary loss caused.

Held -

Deft not liable. Compensation is no ground of action even though monetary loss in caused if no legal right is violated of anybody.

3) Chasemore v/s Richards 1859

Fact -

Plaintiff was running a mill on his own land, and for this purpose he was using the water of the stream for a long time. The Deft dug well in his own land and thereby cut off the underground water supply of stream. Through percolation the water gathered in the well of deft. The quantity of water of stream was reduced and the mill was closed for non availability of water. Plaintiff sued deft for damage.

Held -

Deft. Not liable, because of principle of Damnum sine injuria. No violation of legal right, though actual

loss in money.

E. JUSTIFICATION IN TORTS , VOLENTI NON FIT INJURIA, NECESSITY,PAINTIFF'S DEFAULT, ACT OF GOD ,INEVITABLE ACCIDENTS,PRIVATE DEFENSE ,

Volenti non fit iniuria (or ***injuria***) (Latin: "to a willing person, injury is not done") is a common law doctrine which states that if someone willingly places themselves in a position where harm might result, knowing that some degree of harm might result, they are not able to bring a claim against the other party in tort or delict. *Volenti* applies only to the risk which a reasonable person would consider them as having assumed by their actions; thus a boxer consents to being hit, and to the injuries that might be expected from being hit, but does not consent to (for example) his opponent striking him with an iron bar, or punching him outside the usual terms of boxing. *Volenti* is also known as a "**voluntary assumption of risk**."

Volenti is sometimes described as the plaintiff "consenting to run a risk." In this context, *volenti* can be distinguished from legal consentin that the latter can prevent some torts arising in the first place. For example, consent to a medical procedure prevents the procedure from being a trespass to the person, or consenting to a person visiting one's land prevents them from being a trespasser.

The defence has two main elements:

- The claimant was fully aware of all the risks involved, including both the nature and the extent of the risk; and
- The claimant expressly (by statement) or implicitly (by actions) consented to waive all claims for damages. Knowledge of the risk is not sufficient: *sciens non est volens* ("knowing is not volunteering"). Consent must be free and voluntary, i.e. not brought about by duress. If the relationship between the claimant and defendant is such that there is doubt as to whether the consent was truly voluntary, such as the relationship between workers and employers, the courts are unlikely to find *volenti*.

It is not easy for a defendant to show both elements and therefore comparative negligence usually constitutes a better defence in many cases. Note however that comparative negligence is a partial defence, i.e. it usually leads to a reduction of payable damages rather than a full exclusion of liability. Also, the person consenting to an act may not always be negligent: a bungee jumper may take the greatest possible care not to be injured, and if he is, the defence available to the organiser of the event will be *volenti*, not comparative negligence.

Trespassers

The Occupiers' Liability Act 1984 requires all owners of property to take reasonable steps to make their premises safe for anyone who enters them, even those who enter as trespassers, if they are aware of a risk on the premises. However, the doctrine of *volenti* has been applied to cases where a trespasser exposed them deliberately to risk:

- *Titchener v British Railways Board* [1983] 1 WLR 1427
- *Ratcliff v McConnell* [1997] EWCA Civ 2679
- *Tomlinson v Congleton Borough Council* [2003] UKHL 47

In the first case (decided before the Occupier's Liability Act was passed), a girl who had trespassed on the railway was hit by a train. The House of Lords ruled that the fencing around the railway was adequate, and the girl had voluntarily accepted the risk by breaking through it. In the second case, a student who had broken into a closed swimming-pool and injured himself by diving into the shallow end was similarly held responsible for his own injuries. The third case involved a man who dived into a shallow lake, despite the presence of "No Swimming" signs; the signs were held to be an adequate warning.

Drunk drivers

The defence of *volenti* is now excluded by statute where a passenger was injured as a result of agreeing to take a lift from a drunken car driver. However, in a well-known case of *Morris v Murray* [1990] 3 All ER 801 (Court of Appeal), *volenti* was held to apply to a drunk passenger, who accepted a lift from a drunk pilot. The pilot died in the resulting crash and the passenger who was injured, sued his estate. Although he drove the pilot to the airfield (which was closed at the time) and helped him start the engine and tune the

radio, he argued that he did not freely and voluntarily consent to the risk involved in flying. The Court of Appeal held that there was consent: the passenger was not so drunk as to fail to realise the risks of taking a lift from a drunk pilot, and his actions leading up to the flight demonstrated that he voluntarily accepted those risks.

Rescuers

For reasons of policy, the courts are reluctant to criticise the behaviour of rescuers. A rescuer would not be considered *volens* if:

1. He was acting to rescue persons or property endangered by the defendant's negligence;
2. He was acting under a compelling legal, social or moral duty; and
3. His conduct in all circumstances was reasonable and a natural consequence of the defendant's negligence.

An example of such a case is *Haynes v. Harwood* [1935] 1 KB 146, in which a policeman was able to recover damages after being injured restraining a bolting horse: he had a legal and moral duty to protect life and property and as such was not held to have been acting as a volunteer or giving willing consent to the action - it was his contractual obligation as an employee and police officer and moral necessity as a human being to do so, and not a wish to volunteer, which caused him to act. In this case the court of appeal affirmed a judgement in favor of a policeman who had been injured in stopping some runaway horses with a van in a crowded street. The policeman who was on duty, not in the street, but in a police station, darted out and was crushed by one of the horses which fell upon him while he was stopping it. It was also held that the rescuer's act need not be instinctive in order to be reasonable, for one who deliberately encounters peril after reflection may often be acting more reasonably than one who acts upon impulse.

By contrast, in *Cutler v. United Dairies* [1933] 2 KB 297 a man who was injured trying to restrain a horse was held to be *volens* because in that case no human life was in immediate danger and he was not under any compelling duty to act.

Also, although to be a "neighbour" within Lord Atkin's dictum, a claimant must be "so closely and directly affected by one's act that one ought reasonably to have them in contemplation", rescuers are invariably

deemed to be neighbours, even if their presence would objectively seem to be somewhat unlikely - *Baker v Hopkins* [1959] 3 All ER 225 (CA).

NECESSITY

Introduction

What is the necessity defense exactly and how and under what circumstances might it work in law of tort? As in the case of *Baender v Barnett* a fire broke out in a maximum security prison, and the prisoners, threatened by death, break out of their cells. Surely they are not guilty of the crime of escape? Here's a situation where most of us would agree that necessity could be a defense and that the prisoners who broke out of their cells "out of necessity" ought not to be convicted for escape. The defense of necessity recognizes that there may be situations of such overwhelming urgency that a person must be allowed to respond by breaking the law. Necessity is based on maxim salus populi suprema lex, i.e. 'the welfare of the people is the supreme law'. Necessity typically involves a defendant arguing that he committed the crime in order to avoid a greater evil created by natural forces. Necessity as a justification (warranted or encouraged conduct where the defendant is found not culpable). Necessity is an affirmative defense that a defendant invokes the defense against the torts of trespass to chattels, trespass to land or conversion. The early trial which took place was *Regina v. Dudley and Stephens* (1884) 14 QBD 273 DC[2].

Meaning and Definition

Necessity as a defense is defined under section 81 in Indian Penal Code as:

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

Factors affecting necessity

Affirmative defense

A defendant typically invokes the defense

Against intentional torts of trespass to chattels, , trespass to land or conversion.

With the necessity defense there will always be a prima facie violation of the law.

A tort is a civil wrong for which unliquidated damages have to be compensated by the defendant even if he did in case of necessity. The defense of necessity is only applicable when the defendant is able to justify his unlawful acts. It seems to be generally assumed that, if the defense of necessity succeeds, that is the end of the matter.

To present the defense at trial, defendants must need to meet the burden of provision of the four elements:

They were forced with a choice of evils and choose the lesser evil.

They acted to prevent imminent harm

They reasonably anticipated a direct casual relationship between their conduct and the harm to be averted.

And, they had no legal alternatives to violating the law.

These elements suggests that defense to the liability for unlawful activity where the conduct cannot be avoided and one is justified in the particular conduct because it will prevent the occurrence of a harm that is more serious.

Historically the principle has been seen to be restricted to two groups of cases, which have been called cases of public necessity and cases of private necessity. The act of plaintiff distinguishes the necessity of defense

with other defenses. But the better view is that necessity should be used by defendants who rationally chose an illegal course of action that is the lesser of two evils.

Types of necessity

Public Necessity

Public necessity pertains to action taken by public authorities or private individuals to avert a public calamity. The action consists in destroying or appropriating another's property. The classic example of public necessity is the destruction of private property to prevent the spread of fire or disease and hence to avert an injury to the public at large. Public necessity is in operational where the police trespass on damage. Private property in order to apprehend a criminal suspect or gain access to the site of an emergency. The principle behind public necessity is that the law regards the welfare of the public as superior to the interest of individuals and when there is a conflict between the latter must give way. Public necessity serves as an absolute defense. The first case which was filled with reference to public necessity was ***Surocco v Geary*.**

With this illustration public necessity is being defined. "A ship which had run into difficulties found it necessary to discharge her cargo of oil, thereby polluting beaches which belong to the plaintiff. Since the discharge of the oil was necessary to save the crew, and not only the ship, it was accepted that the defense of necessity applied.

Private Necessity

Private necessity arises from self interest rather than from a community at large. It takes place when the defendant wants to protect his own interest. It does not serve as an absolute defense unlike in the case of public necessity. Private necessity can be explained with the following example. If defendant entered upon his neighbor's land without his consent, in order to prevent the spread of fire into his own land. The principle applied for private necessity is "necessitas inducit privilegium quod jura private", meaning 'Necessity induces a privilege because of a private right'. This maxim makes it clear that private defense its more kind of a privilege enjoyed by many person. The earliest case of private defense was Vincent v. Lake Erie Transp. Co.

There is, however, a third group of case, which is also properly described as founded upon the principle of necessity and which is more pertinent. 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.

These are concerned not only with the preservation of the life or health of the assisted person, but also with the preservation of his property (sometimes an animal, sometimes an ordinary chattel) and even with certain conduct on his behalf in the administration of his affairs."

Importance of Necessity

Necessity incorporates flexibility into laws that would have been lead to unjust results (that is, punishment of desirable conduct) if applied mechanically. The defence of necessity applies to situations where torture is morally justified. Like in the case of a prisoner who breaks the prison and runs away because he was mentally and physically tortured by the prison authorities. Necessity provides relief in situation pertaining to this. Necessity" defense has the effect of allowing one who acts under the circumstances of 'necessity' to escape criminal liability. Perhaps the necessity defense should be thought of as a moral provision for *mala in se* offenses. *Mala in se* offenses generally protect against harms to others, and to the extent that the necessity defense defines situations in which one may harm others. The shape of the defense should track our moral judgments about when it is morally permissible for a person to harm others.

Limiting the Necessity Defense

Necessity defense restricts the ways in which private citizens may use force that harms another's interest, the limited scope of the necessity defense is one of many tools that help sustain the state's monopoly on legitimate violence exists to empower individuals where individuals are supposed to be powerless; it cannot be used to confer powers on the state as well. Most importantly it entirely depends appropriately for a government body to examine what is allowed under the necessity defense and seek guidance as to what it is allowed to do. After all, the government's power is greater than what is allowed to private individuals under

the necessity defense, and the greater state's monopoly on violence must necessarily include the lesser individual's use of violence. The necessity defense can be asserted only when compatible with the particular federal crime at issue.

How necessity defense looked up by courts?

If a court determined that a given offense was regulatory in nature, the statute authorizes a necessity defense. If none were present, the defense would not be allowed. The necessity defense, by its nature, challenges and undermines that the given situation needed to choose from the two evils. It carries the implication that violation of a given rule is positively desirable, thus turning it in to a standard. Common law necessity requires that the harm be truly imminent. The allowing defendants to use the necessity defense in regulatory cases will tend to distract courts from the employment of other common law defenses. The cases where courts have expressly ruled on the necessity defense's availability, either on the facts or as a matter of law, can be roughly divided into three main categories: a court may (1) grant a jury instruction on necessity and allow the defendant to present evidence concerning it; (2) find the defense incompatible with the offense involved; or (3) find that the defendant failed to meet his burden of production on at least one element of the defense.

Trespass to Chattels, Land or conversion

With the necessity defense there will always be a prima facie violation of the law. The violation will consist of trespass, conversion or other kinds of infringement of property rights. Under the necessity doctrine, there is a weighing of interests: the act of invasion of another's property is justified under the necessity doctrine only if done to protect or advance some private or public interest of a value greater than, or at least equal to, that of the interest invaded. A major issue associated with both private and public necessity is whether compensation is owed to the aggrieved party whose property is damaged, appropriated or destroyed. There is a general sense in the doctrine of necessity that one has the qualified privilege to intentionally trespass onto the land of another in order to prevent serious harm to oneself, to one's own land, to one's chattels, or to the person, land, or chattels of another. However, compensation must ordinarily be paid for any harm

done in the process. The Comment to this section states that when necessary to prevent serious harm, a person is privileged "to break and enter or to destroy a fence or other enclosure and indeed a building, including a dwelling only when the defendant's action are reasonable.

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

In the discussion of each of these defences I have first given a small introduction of the defence, followed by the different aspects and conditions required to be fulfilled to successfully use the defence and then given a brief summary of some of the famous cases relating to that defence.

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* [i]. 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*.[ii] 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**[v]*, 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[xi], 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[xiii], 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*[xiv] 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*[xv] 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.**[xvi]*** 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.*[xix] 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*[xxi]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*[xxii], 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****[xxiii]***, 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**[xxiv]*** 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**[xxv]*** 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**[xxvi]***. 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**[xxvii]***, 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 recognizes this right and so any act done by a person in exercise of this act will not give rise to a tortuous 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*,[xxviii] 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****[xxix]*** , 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**[xxx]*** 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* [xxxi] 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**[xxxii]***. 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[xxxiii]*. 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**[xxxiv]***, 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* [xxxv], 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.

UNIT -2

SPECIFIC TORTS -1

A. Negligence

B. Nervous shock

C. Nuisance

D. False imprisonment and malicious Prosecution

E. Judicial and Quasi Judicial Act

F. Parental and Quasi Quasi Parental authority

A. Negligence

In order for a plaintiff to win a lawsuit for negligence, he or she must prove all of the "elements." For instance, one of the elements is "damages," meaning the plaintiff must have suffered damages (injuries, loss, etc.) in order for the defendant to be held liable. So, even if you can prove that the defendant was negligent, you may not be successful in your negligence lawsuit if that negligence caused you no harm.

When deciding on a verdict in a negligence case, juries are instructed to compare the facts, testimony, and evidence in determining whether the following elements were satisfied:

1. Duty
2. Breach of Duty
3. Cause in Fact
4. Proximate Cause
5. Damages

These five elements of a negligence case are explained in greater detail below.

1. Duty

The outcome of some negligence cases depends on whether the defendant owed a duty to the plaintiff. A duty arises when the law recognizes a relationship between the defendant and the plaintiff requiring the

defendant to act in a certain manner toward the plaintiff. A judge, rather than a jury, ordinarily determines whether a defendant owed a duty of care to a plaintiff, and will usually find that a duty exists if a reasonable person would find that a duty exists under a particular set of circumstances.

For example, if a defendant was loading bags of grain onto a truck and struck a child with one of the bags, the first question that must be resolved is whether the defendant owed a duty to the child. If the loading dock was near a public place, such a public sidewalk, and the child was merely passing by, then the court may be more likely to find that the defendant owed a duty to the child. On the other hand, if the child were trespassing on private property and the defendant didn't know that the child was present at the time of the accident, then the court would be less likely to find that the defendant owed a duty.

2. Breach of Duty

It's not enough for a plaintiff to prove that the defendant owed him or her or a duty; the plaintiff must also prove that the defendant breached his or duty to the plaintiff. A defendant breaches such a duty by failing to exercise reasonable care in fulfilling the duty. Unlike the question of whether a duty exists, the issue of whether a defendant breached a duty of care is decided by a jury as a question of fact. Thus, in the example above, a jury would decide whether the defendant exercised reasonable care in handling the bags of grain near the child.

3. Cause in Fact

Under the traditional rules in negligence cases, a plaintiff must prove that the defendant's actions were the actual cause of the plaintiff's injury. This is often referred to as "but-for" causation, meaning that, but for the defendant's actions, the plaintiff's injury would not have occurred. The child in the example above could prove this element by showing that but for the defendant's negligent act of tossing the grain, the child would not have suffered harm.

4. Proximate Cause

Proximate cause relates to the scope of a defendant's responsibility in a negligence case. A defendant in a negligence case is only responsible for those harms that the defendant could have foreseen through his or her actions. If a defendant has caused damages that are outside of the scope of the risks that the defendant could have foreseen, then the plaintiff cannot prove that the defendant's actions were the proximate cause of the plaintiff's damages.

In the example described above, the child would prove proximate cause by showing that the defendant could have foreseen the harm that would have resulted from the bag striking the child. On the contrary, if the harm is something more remote to the defendant's act, then the plaintiff will be less likely to prove this element. Assume that when the child is struck with the bag of grain, the child's bicycle on which he was riding is damaged.

Three days later, the child and his father drive to a shop to have the bicycle fixed. On their way to the shop, the father and son are struck by another car. Although the harm to the child and the damage to the bicycle may be within the scope of the harm that the defendant risked by his actions, the defendant probably could not have foreseen that the father and son would be injured on their way to having the bicycle repaired three days later. Hence, the father and son wouldn't be able to satisfy the element of proximate causation.

5. Damages

A plaintiff in a negligence case must prove a legally recognized harm, usually in the form of physical injury to a person or to property. It's not enough that the defendant failed to exercise reasonable care. The failure to exercise reasonable care must result in actual damages to a person to whom the defendant owed a duty of care.

B. Nervous Shock

- Nervous shock refers to a psychiatric illness caused by shock. Nervous shock is different from normal grief, sorrow, or anxiety. Usually, primary victims involved in an accident recover damages for shock.

- Generally, there can be no recovery for a nervous shock unaccompanied by physical injury. However, when the nervous shock follows as a result of physical injury, the nervous shock is a part of the physical injury, and a plaintiff is entitled to recovery for nervous injury.

Definition

To amount in law to "nervous shock", the psychiatric damage suffered by the claimant must extend beyond grief or emotional distress to a recognised mental illness, such as anxiety neurosis or reactive depression. Damages for bereavement suffered as a result of the wrongful death of a close one are available under the Fatal Accidents Act 1976, while courts can also award damages for "pain and suffering" as a result of physical injury.

Intentionally inflicted nervous shock

It is well established in English law that a person who has intentionally and without good reason caused another emotional distress will be liable for any psychiatric injury that follows. An example of this is a bad practical joke played on someone which triggered serious depression in that person. The joker intended to cause the other person emotional distress and will be liable for the medical consequences.

Negligently inflicted nervous shock

Before a claimant can recover damages for the nervous shock which he suffered as a result of the defendant's negligence, he must prove all of the elements of the tort of negligence:

1. The existence of a duty of care, i.e. the duty on the part of the defendant not to inflict nervous shock upon the claimant;
2. A breach of that duty, i.e. the defendant's actions or omissions in those circumstances fell below what would be expected from a reasonable person in the circumstances.
3. A causal link between the breach and the psychiatric illness, i.e. the nervous shock was the direct consequence of the defendant's breach of duty;
4. The nervous shock was not too remote a consequence of the breach.

For fear of spurious actions and unlimited liability of the defendant to all those who may suffer nervous shock in one form or other, the English courts have developed a number of "control mechanisms" or

limitations of liability for nervous shock. These control mechanisms usually aim at limiting the scope of the defendant's duty of care not to cause nervous shock, as well as at causation and remoteness.

Primary victims

A "primary victim" is a person who was *physically* injured or could foreseeably have been *physically* injured as a result of the defendants negligence. An example of this is a claimant who is involved in a car accident caused by the defendant's careless driving and gets mildly injured (or even remains unharmed) as a consequence, but the fright from the crash triggers a serious mental condition. Such a claimant can recover damages for his car, his minor injuries **and** the nervous shock he had suffered. Rescuers (such as firemen, policemen or volunteers) who put themselves in the way of danger and suffer psychiatric shock as a result used to be "primary victims", until the decision in *White v Chief Constable of the South Yorkshire Police* explained that rescuers had no special position in the law and had to prove reasonable fear as a consequence of exposure to danger.

Secondary victims

A "secondary victim" is a person who suffers nervous shock without himself being exposed to danger. An example of this is a spectator at a car race, who witnesses a terrible crash caused by negligence on the part of the car manufacturers and develops a nervous illness as a result of his experience. It is in these cases where the courts have been particularly reluctant to award damages for nervous shock. In several decisions, the courts have identified several strict requirements for the recognition of a duty of care not to cause nervous shock, as well as causation and remoteness:

- The claimant must perceive a "shocking event" with his own unaided senses, as an eye-witness to the event, or hearing the event in person, or viewing its "immediate aftermath". This requires close physical proximity to the event, and would usually exclude events witnessed by television or informed of by a third party.
- The shock must be a "sudden" and not a "gradual" assault on the claimant's nervous system. So a claimant who develops a depression from living with a relative debilitated by the accident will not be able to recover damages.

- If the nervous shock is caused by witnessing the death or injury of another person the claimant must show a "sufficiently proximate" relationship to that person, usually described as a "close tie of love and affection". Such ties are presumed to exist only between parents and children, as well as spouses and fiancés. In other relations, including siblings, ties of love and affection must be proved.
- It must be reasonably foreseeable that a person of "normal fortitude" in the claimant's position would suffer psychiatric damage. The closer the tie between the claimant and the victim, the more likely it is that he would succeed in this element. However, once it is shown that some psychiatric damage was foreseeable, it does not matter that the claimant was particularly susceptible to psychiatric illness - the defendant must "take his victim as he finds him" and pay for all the consequences of nervous shock (see "Eggshell skull" rule). A mere bystander can therefore hardly count on compensation for psychiatric shock, unless he had witnessed something so terrible that anybody could be expected to suffer psychiatric injury as a result. However, it seems that such a case is purely theoretic (see *McFarlane v. EE Caledonia Ltd*, where the plaintiff witnessed an explosion of a rig where he and his colleagues worked, but received no compensation).

C. NUISANCE

The word "nuisance" is derived from the French word "nuire", which means "to do hurt, or to else's improper use in his property results into an unlawful interference with his use or enjoyment of that property or of some right over, or in connection with it, we may say that tort of nuisance occurred annoy". One in possession of a property is entitled as per law to undisturbed enjoyment of it. If someone. In other words, Nuisance is an unlawful interference with a person's use or enjoyment of land, or of some right over, or in connection with it. Nuisance is an injury to the right of a person in possession of a property to undisturbed enjoyment of it and result from an improper use by another person in his property.

Stephen defined nuisance to be "anything done to the hurt or annoyance of the lands, tenements of another, and not amounting to a trespass**."**

According to Salmond, "the wrong of nuisance consists in causing or allowing without lawful justification the escape of any deleterious thing from his land or from elsewhere into land in possession of the plaintiff, e.g. water, smoke, fumes, gas, noise, heat, vibration, electricity, disease, germs, animals".

ESSENTIALS OF NUISANCE

In order that nuisance is actionable tort, it is essential that there should exist· wrongful acts; damage or loss

or inconvenience or annoyance caused to another. Inconvenience or discomfort to be considered must be more than mere delicacy or fastidious and more than producing sensitive personal discomfort or annoyance. Such annoyance or discomfort or inconvenience must be such which the law considers as substantial or material.

In Ushaben v. Bhagyalaxmi Chitra Mandir, AIR 1978 Guj 13, the plaintiffs'-appellants sued the defendants-respondents for a permanent injunction to restrain them from exhibiting the film "Jai Santoshi Maa". It was contended that exhibition of the film was a nuisance because the plaintiff's religious feelings were hurt as Goddesses Saraswati, Laxmi and Parvati were defined as jealous and were ridiculed. It was held that hurt to religious feelings was not an actionable wrong. Moreover the plaintiff's were free not to see the movie again**.**

In Halsey v. Esso Petroleum Co. Ltd. (1961) 2 All ER 145:,the defendant's depot dealt with fuel oil in its light from the chimneys projected from the boiler house, acid smuts containing sulphate were emitted and were visible falling outside the plaintiff's house. There was proof that the smuts had damaged clothes hung out to dry in the garden of the plaintiff's house and also paint work of the plaintiff's car which he kept on the highway outside the door of his house. The depot emanated a pungent and nauseating smell of oil which went beyond a background smell and was more than would affect a sensitive person but the plaintiff had not suffered any injury in health from the smell. During the night there was noise from the boilers which at its peak caused window and doors in the plaintiff's house to vibrate and prevented the plaintiff's sleeping. An action was brought by the plaintiff for nuisance by acid smuts**,** smell and noise. The defendants were held liable to the plaintiff in respect of emission of acid smuts, noise or smell.

KINDS OF NUISANCE

Nuisance is of two kinds:

Public Nuisance

Under Section 3 (48) of the General Clauses Act, 1897, the words mean a public nuisance defined by the Indian Penal Code.

Section 268 of the Indian Penal Code, defines it as "an act or illegal omission which causes any common injury, danger or annoyance, to the people in general who dwell, or occupy property, in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right."

Simply speaking, public nuisance is an act affecting the public at large, or some considerable portion of it; and it must interfere with rights which members of the community might otherwise enjoy.

Thus acts which seriously interfere with the health, safety, comfort or convenience of the public generally or which tend to degrade public morals have always been considered public nuisance.Public nuisance can only be subject of one action, otherwise a party might be ruined by a million suits. Further, it would give rise to multiplicity of litigation resulting in burdening the judicial system. Generally speaking, Public Nuisance is not a tort and thus does not give rise to civil action.

In the following circumstances, an individual may have a private right of action in respect a public nuisance.

1. He must show a particular injury to himself beyond that which is suffered by the rest of public i.e. he must show that he has suffered some damage more than what the general body of the public had to suffer. **2.** Such injury must be direct, not a mere consequential injury; as, where one is obstructed, but another is left open.

4. The injury must be shown to be of a substantial character, not fleeting or evanescent.

In Solatu v. De Held (1851) 2 Sim NS 133, the plaintiff resided in a house next to a Roman Catholic Chapel of which the defendant was the priest and the chapel bell was rung at all hours of the day and night. It was held that the ringing was a public nuisance and the plaintiff was held entitled to an injunction.

In Leanse v. Egerton, (1943) 1 KB 323, The plaintiff, while walking on the highway was injured on a Tuesday by glass falling from a window in an unoccupied house belonging to the defendant, the window having been broken in an air raid during the previous Friday night. Owing to the fact that the offices of the defendant's agents were shut on the Saturday and the Sunday and to the difficulty of getting labour during the week end, no steps to remedy the risk to passers by had been taken until the Monday. The owner had no actual knowledge of the state of the premises. It was held that the defendant must be presumed to have knowledge of the existence of the nuisance, that he had failed to take reasonable steps to bring it to an end although he had ample time to do so, and that, therefore, he had "continued" it and was liable to the plaintiff.

In Attorney General v. P.Y.A. Quarries, (1957)1 All ER 894:, In an action at the instance of the Attorney General, it was held that the nuisance form vibration causing personal discomfort was sufficiently widespread to amount to a public nuisance and that injunction was rightly granted against the quarry owners restraining them from carrying on their operations.

Without Proving Special Damage

In India under Section 91 of the Civil Procedure Code, allows civil action without the proof of special damage. It reads as follows:

"S. 91.(1) In the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted- by the Advocate General, or with the leave of the court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions." Thus a suit in respect of a public nuisance may be instituted by any one of the followings By the Advocate-General acting ex officio; or By him at the instance of two or more persons or by two or more persons with the leave of the Court.

Private Nuisance

Private nuisance is the using or authorizing the use of one's property, or of anything under one's control, so as to injuriously affect an owner or occupier of property by physically injuring his property or affecting its enjoyment by interfering materially with his health, comfort or convenience.

In contrast to public nuisance, private nuisance is an act affecting some particular individual or individuals as distinguished from the public at large. The remedy in an action for private nuisance is a civil action for damages or an injunction or both and not an indictment.

Elements of Private Nuisance

Private nuisance is an unlawful interference and/or annoyance which cause damages to an occupier or owner of land in respect of his enjoyment of the land**.**

Thus the elements of private nuisance are:

1. unreasonable or unlawful interference;

2. Such interference is with the use or enjoyment of land, or some right over, or in connection with the land; and

3. Damage**.**

Nuisance may be with respect to property or personal physical discomfort.

1. Injury to property

In the case of damage to property any sensible injury will be sufficient to support an action.

In St. Helen Smelting Co. v. Tipping, (1865) 77 HCL 642:, the fumes from the defendant's manufacturing work damaged plaintiff's trees and shrubs. The Court held that such damages being an injury to property gave rise to a cause of action.

In Ram Raj Singh v. Babulal, AIR 1982 All. 285:, the plaintiff, a doctor, complained that sufficient quantity of dust created by the defendant's brick powdering mill, enters the consultation room and causes discomfort and inconvenience to the plaintiff and his patients.

The Court held that when it is established that sufficient quantity of dust from brick powdering mill set up near a doctor's consulting room entered that room and a visible thin red coating on clothes resulted and also that the dust is a public hazard bound to injure the health of persons, it is clear the doctor has proved damage particular to himself. That means he proved special damage.

In Hollywood Silver Fox Farm Ltd v Emmett, (1936) 2 KB 468:, A carried on the business of breeding silver foxes on his land. During the breeding season the vixens are very nervous and liable if disturbed, either to refuse to breed, or to miscarry or to kill their young. B, an adjoining landowner, maliciously caused his son to discharge guns on his own land as near as possible to the breeding pens for the purpose of disturbing A's vixens.

A filed a suit for injunction against B and was successful.

In Dilaware Ltd. v. Westminister City Council, (2001) 4 All ER 737 (HL):, the respondent was owner of a tree growing in the footpath of a highway. The roots of the tree caused cracks in the neighbouring building. The transferee of the building of the building, after the cracks were detected, was held entitled to recover reasonable remedial expenditure in respect of the entire damage from the continuing nuisance caused by the trees.

2. Physical discomfort

In case of physical discomfort there are two essential conditions to be fulfilled:

a. In excess of the natural and ordinary course of enjoyment of the property –

In order to be able to bring an action for nuisance to property the person injured must have either a proprietary or possessory interest in the premises affected by the nuisance.

b. Materially interfering with the ordinary comfort of human existence
The discomfort should be such as an ordinary or average person in the locality and environment would not put up with or tolerate**.**

Following factors are material in deciding whether the discomfort is substantial:
its degree or intensity;
its duration;
its locality;
the mode of user of the property.

In Broadbent v. Imperial Gas Co. (1856) 7 De GM & G 436:, an injunction was granted to prevent a gas company from manufacturing gas in such a close proximity to the premises of the plaintiff, a market gardener, and in such a manner as to injure his garden produce by the escape of noxious matter.

In Shots Iron Co. v. Inglis, (1882) 7 App Cas 518: An injunction was granted to prevent a company from carrying on calcining operations in any manner whereby noxious vapours would be discharged, on the pursuer's land, so as to do damage to his plantations or estate.

In Sanders Clark v. Grosvenor mansions Co. (1900) 16 TLR 428: An injunction was granted to prevent a person from turning a floor underneath a residential flat into a restaurant and thereby causing a nuisance by heat and smell to the occupier of the flat.

In Datta Mal Chiranji Lal v. Lodh Prasad, AIR 1960 All 632: The defendant established an electric flour mill adjacent to the plaintiff's house in a bazaar locality and the running of the mill produced such noise and vibrations that the plaintiff and his family, did not get peace and freedom from noise to follow their normal avocations during the day. They did not have a quiet rest at night also.
It was held that the running of the mill amounted to a private nuisance which should not be permitted**.**

In Palmar v. Loder, (1962) CLY 2233: In this case, perpetual injunction was granted to restrain defendant from interfering with plaintiff's enjoyment of her flat by shouting, banging, laughing, ringing doorbells or otherwise behaving so as to cause a nuisance by noise to her.

In Radhey Shiam v. Gur Prasad Sharma, AIR 1978 All 86: It was held by the Allahabad High Court held that a permanent injunction may be issued against the defendant if in a noisy locality there is substantial addition to the noise by introducing flour mill materially affecting the physical comfort of the plaintiff.

In Sturges v. Bridgman (1879) 11 Ch D 852, end of his garden, and then the noise and vibration, owing to the increased proximity, became A confectioner had for upwards of twenty years used, for the purpose of his business, a pestle and mortar in his back premises, which abutted on the garden of a physician, and the noise and vibration were not felt to be a nuisance or complained of until 1873, when the physician erected a consulting room at the a nuisance to him. The question for the consideration of the Court was whether the confectioner had obtained a prescriptive right to make the noise in question.
It was held that he had not, inasmuch as the user was not physically capable of prevention by the owner of the servient tenement, and was not actionable until the date when it became by reason of the increased proximity a nuisance in law, and under these conditions, as the latter had no power of prevention, there was no prescription by the consent or acquiescence of the owner of the servient tenement**.**

DEFENCES TO NUISANCE
Following are the valid defences to an action for nuisance
It is a valid defence to an action for nuisance that the said nuisance is under the terms of a grant.

. Prescription
A title acquired by use and time, and allowed by Law; as when a man claims any thing, because he, his ancestors, or they whose estate he hath, have had possession for the period prescribed by law. This is there in Section 26, Limitation Act & Section 15 Easements Act.

Three things are necessary to establish a right by prescription:
1. Use and occupation or enjoyment;
2. The identity of the thing enjoyed;
3. That it should be adverse to the rights of some other person.

A special defence available in the case of nuisance is prescription if it has been peaceable and openly enjoyed as an easement and as of right without interruption and for twenty years. After a nuisance has been continuously in existence for twenty years prescriptive right to continue it is acquired as an easement appurtenant to the land on which it exists. On the expiration of this period the nuisance

becomes legalised ab initio, as if it had been authorised in its commencement by a grant from the owner of servient land. The time runs, not from the day when the cause of the nuisance began but from the day when the nuisance began**.**

The easement can be acquired only against specific property, not against the entire world.

In Elliotson v. Feetham (1835) 2 Bing NC 134, by showing twenty years' user by the defendant. it was held that a prescriptive right to the exercise of a noisome trade on a particular spot may be established

In Goldsmid v. Turubridge Wells Improvement Commissioners (1865) LR 1 Eq 161, it was held that no prescriptive right could be obtained to discharge sewage into a stream passing through plaintiff's land and feeding a lake therein perceptibly increasing quantity.

In Mohini Mohan v. Kashinath Roy, (1909) 13 CWN 1002, it was held that no right to hold kirtan upon another's land can be acquired as an easement. Such a right may be acquired by custom.

In Sturges v. Bridgman (1879) 11 Ch.D. 852 A had used a certain heavy machinery for his business, for more than 20 years. B, a physician neighbour, constructed a consulting room adjoining A's house only shortly before the present action and then found himself seriously inconvenienced by the noise of A's machinery.

B brought an action against A for abatement of the nuisance. It was held that B must succeed. A cannot plead prescription since time runs not from the date when the cause of the nuisance began but from the day when the nuisance began.

· **Statutory Authority**

Where a statute has authorised the doing of a particular act or the use of land in a particular way, all remedies whether by way of indictment or action, are taken away; provided that every reasonable precaution consistent with the exercise of the statutory powers has been taken. Statutory authority may be either absolute or conditional.

In case of absolute authority, the statute allows the act notwithstanding the fact that it must necessarily cause a nuisance or any other form of injury.
In case of conditional authority the State allows the act to be done only if it can be without causing nuisance or any other form of injury, and thus it calls for the exercise of due care and caution and due regard for private rights.

In a suit for nuisance it is no defence:

1. Plaintiff came to the nuisance: E.g. if a man knowingly purchases an estate in close proximity to a smelting works his remedy, for a nuisance created by fumes issuing therefrom is not affected. It is not valid defence to say that the plaintiff came to the nuisance.

2. In the case of continuing nuisance, it is no defence that all possible care and skill are being used to prevent the operation complained of from amounting to a nuisance. In an action for nuisance it is no answer to say that the defendant has done everything in his power to prevent its existence.

3. It is no defence that the defendant's operations would not alone **a**mount to nuisance. E.g. the other factories contribute to the smoke complained of.

4. It is no defence that the defendant is merely making a reasonable use of his own property. No use of property is reasonable which causes substantial discomfort to other persons.

5. That the nuisance complained of although causes damages to the plaintiff as an individual, confers a benefit on the public at large. A nuisance may be the inevitable result of some or other operation that is of undoubted public benefit, but it is an actionable nuisance nonetheless. No consideration of public utility should deprive an individual of his legal rights without compensation.

6. That the place from which the nuisance proceeds is the only place suitable for carrying on the operation complained of. If no place can be found where such a business will not cause a nuisance, then it cannot be carried out at all, except with the consent or acquiescence of adjoining proprietors or under statutory sanction**.**

REMEDIES FOR NUISANCE

The remedies available for nuisance are as follows:

· **Injunction**- It maybe a temporary injunction which is granted on an interim basis and that maybe reversed or confirmed. If it's confirmed, it takes the form of a permanent injunction. However the granting of an injunction is again the discretion of the Court

· **Damages-** The damages offered to the aggrieved party could be nominal damages i.e. damages just to recognize that technically some harm has been caused to plaintiff or statutory damages i.e. where the amount of damages is as decided by the statute and not dependent on the harm suffered by the plaintiff or exemplary damages i.e. where the purpose of paying the damages is not compensating

the plaintiff, but to deter the wrongdoer from repeating the wrong committed by him.

· **Abatement-** It means the summary remedy or removal of a nuisance by the party injured without having recourse to legal proceedings. It is not a remedy which the law favors and is not usually advisable. E.g. - The plaintiff himself cuts off the branch of tree of the defendant which hangs over his premises and causes nuisance to him**.**

False Imprisonment and Malicious Prosecution

An unjustified criminal charge can be devastating to an innocent person. Even when criminal proceedings absolve a guiltless person, the stigma attached with detention and accusations of criminal activity can lead to significant economic and non economic losses. Job opportunities are foreclosed. Anxiety, depression and humiliation often follow. This blog explores two of the tort remedies available to the falsely accused in the civil justice system.

The elements of malicious prosecution are:

(1) A criminal case was brought against the plaintiff

(2) The criminal case was brought as a result of oral or written statements made by the defendant;

(3) The criminal case ended in the favor of the plaintiff;

(4) The defendant's statements against the plaintiff were made without probable cause; and

(5) The defendant's statements were motivated by malice toward the plaintiff. CJI 4th, Civil, 17:1**.**

The elements of malicious prosecution pose a significant burden to the Plaintiff. As the elements note, the criminal case must be resolved in the favor of the Plaintiff. This means that the case must be dismissed or the plaintiff must be acquitted. Even if the plaintiff is actually innocent, the claim will not succeed if the plaintiff is found guilty at trial. Additionally, the claim must be made without probable cause. Probable cause means that the reporter of the crime must have a good faith and reasonable belief that the Plaintiff was guilty of the offense. It is not enough that the plaintiff is. It must be apparent to a reasonable person that the plaintiff is not guilty of the offense. Finally innocent, it should be noted that prosecuting attorneys generally cannot be held liable for malicious prosecution.

False imprisonment is a tort separate from malicious prosecution. The elements of false imprisonment are:

(1) The defendant intended to restrict the plaintiff's freedom of movement;

2) The defendant, directly or indirectly, restricted the plaintiff's freedom of movement; and

(3) The plaintiff was aware that his or her movement was restricted. False imprisonment is viable tort in a number of circumstances. One such circumstance is when an individual levels a false allegation against another leading to an arrest and detention. The defendant must directly or indirectly restrict **of** movement**.**

There are several notable affirmative defenses to false imprisonment. Most of the affirmative defenses revolve around the rights of police officers and business owners to arrest or detain individuals suspected of committing a crime. Generally, police officers and shopkeepers have the right to detain individuals that they reasonably believe have committed a crime. Note that a plaintiff can sue the police for false imprisonment. However, the police have a privilege to arrest individuals without a warrant. If the police officer believed and had probable cause to believe that the accused had committed a criminal offense, that officer cannot be held liable for false arrest.

e. Judicial and Quasi: Judicial Acts

The rule is that "no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice". And the exemption is not confined to judges of superior courts. It is founded on the necessity of judges being independent in the exercise of their office, a reason which applies equally to all judicial proceedings. But in order to establish the exemption as regards proceedings in an inferior court, the judge must show that at the time of the alleged wrong-doing some matter was before him in which he had jurisdiction (whereas in the case of a superior court it is for the plaintiff to prove want of jurisdiction); and the act complained of must be of a kind which he had power to do as judge in that matter.

Thus a revising barrister has power by statute "to order any person to be removed from his court who shall interrupt the business of the court, or refuse to obey his [105] lawful orders in respect of the same": but it is an actionable trespass if under color of this power he causes a person to be removed from the court, not because that person is then and there making a disturbance, but because in the revising barrister's opinion he improperly suppressed facts within his knowledge at the holding of a former court. The like law holds if a county court judge commits a party without jurisdiction, and being informed of the facts which show that he has no jurisdiction; though an inferior judge is not liable for an act which on the facts apparent to him at the time was within his jurisdiction, but by reason of facts not then shown was in truth outside it.

A judge is not liable in trespass for want of jurisdiction, unless he knew or ought to have known of the defect; and it lies on the plaintiff, in every such case, to prove that fact. And the conclusion formed by a judge, acting judicially and in good faith, on a matter of fact which it is within his jurisdiction to determine, cannot be disputed in an action against him for anything judicially done by him in the same cause upon the footing of that conclusion.

Allegations that the act complained of was done "maliciously and corruptly," that words were spoken "falsely and maliciously," or the like, will not serve to make an action of this kind maintainable against a judge either of a superior or of an inferior court.

There are two cases in which by statute an action does or did lie against a judge for misconduct in his office, namely, if he refuses to grant a writ of habeas corpus in vacation time, and if he refused to seal a bill of exceptions.

The rule of immunity for judicial acts is applied not only to judges of the ordinary civil tribunals, but to members of naval and military courts-martial or courts of inquiry constituted in accordance with military law and usage. It is also applied to a limited extent to arbitrators, and to any person who is in a position like an arbitrator's, as having been chosen by the agreement of parties to decide a matter that is or may be in difference between them. Such a person, if he acts honestly, is not liable for errors in judgment. He would be liable for a corrupt or partisan exercise of his office; but if he really does use a judicial discretion, the rightness or competence of his judgment cannot be brought into question for the purpose of making him personally liable.

QUASI-JUDICIAL ACTS

These quasi-judicial functions are in many cases created or confirmed by Parliament. Such are the powers of the universities over their officers and graduates, and of colleges in the universities over their fellows and scholars, and of the General Council of Medical Education over registered medical practitioners. Often the authority of the quasi-judicial body depends on an instrument of foundation, the provisions of which are binding on all persons who accept benefits under it. Such are the cases of endowed schools and religious congregations. And the same principle appears in the constitution of modern incorporated companies, and even of private partnerships. Further, a quasi-judicial authority may exist by the mere convention of a number of persons who have associated themselves for any lawful purpose, and have entrusted powers of management and discipline to select members. The committees of most clubs have by the rules of the club some such authority, or at any rate an initiative in presenting matters of discipline before the whole body. The Inns of Court exhibit a curious and unique example of great power and authority exercised by voluntary unincorporated societies in a legally anomalous manner. Their powers are for some purposes quasi-judicial, and yet they are not subject to any ordinary jurisdiction.

The general rule as to quasi-judicial powers of this class is that persons exercising them are protected from civil liability if they observe the rules of natural justice, and also the particular statutory or conventional rules, if any, which may prescribe their course of action. The rules of natural justice appear to mean, for this purpose, that a man is not to be removed from office or membership, or otherwise dealt with to his disadvantage, without having fair and sufficient notice of what is alleged

against him, and an opportunity of making his defence; and that the decision, whatever it is, must be arrived at in good faith with a view to the common interest of the society or institution concerned. If these conditions be satisfied, a court of justice will not interfere, not even if it thinks the decision was in fact wrong. If not, the act complained of will be declared void, and the person affected by it maintained in his rights until the matter has been properly and regularly dealt with. These principles apply to the expulsion of a partner from a private firm where a power of expulsion is conferred by the partnership contract.

It may be, however, that by the authority of Parliament (or, it would seem, by the previous agreement of the party to be affected) a governing or administrative body, or the majority of an association, has power to remove a man from office or the like without anything in the nature of judicial proceedings, and without showing any cause at all. Whether a particular authority is judicial or absolute must be determined by the terms of the particular instrument creating it.

On the other hand, there may be question whether the duties of a particular office be quasi-judicial, or merely ministerial, or judicial for some purposes and ministerial for others. It seems that at common law the returning or presiding officer at a parliamentary or other election has a judicial discretion, and does not commit a wrong if by an honest error of judgment, he refuses to receive a vote: but now in most cases it will be found that such officers are under absolute statutory duties, which they must perform at their peril.

Parental and Quasi-Parental authority

There are also several kinds of authority in the way of summary force or restraint which the necessities of society require to be exercised by private persons. And such persons are protected in exercise thereof, if they act with good faith and in a reasonable and moderate manner. Parental authority (whether in the hands of a father or guardian, or of a person to whom it is delegated, such as a schoolmaster) is the most obvious and universal instance. It is needless to say more of this here, except that modern civilization has considerably diminished the latitude of what judges or juries are likely to think reasonable and moderate correction.Persons having the lawful custody of a lunatic, and those acting by their direction, are justified in using such reasonable and moderate restraint as is necessary to prevent the lunatic from doing mischief to himself or others, or required, according to competent opinion, as part of his treatment. This may be regarded as a quasi-paternal power; but I conceive the person entrusted with it is bound to use more diligence in informing himself what treatment is proper than a parent is bound (I mean, can be held bound in a court of law) to use in studying the best method of education. The standard must be more strict as medical science improves. A century ago lunatics were beaten, confined in dark rooms, and the like. Such treatment could not be justified now, though then it would have been unjust to hold the keeper criminally or

civilly liable for not having more than the current wisdom of experts. In the case of a drunken man, or one deprived of self-control by a fit or other accident, the use of moderate restraint, as well for his own benefit as to prevent him from doing mischief to others, may in the same way be justified.

Unit-III: Specific Torts-II

a. Vicarious Liability

Vicarious liability means the liability of one person for the torts committed by another person. The general rule is that every person is liable for his own wrongful act. However, in certain cases a person may be made liable for wrongful acts committed by another person. For example: An employer may be held liable for the tort of his employees. Similarly, a master is liable for any tort, which the servant commits in the course of his employment. The reason for this rule of common law is that:

- As the master has the benefit of his servant's service he should also accept liabilities.

- The master should be held liable as he creates circumstances that give rise to liability.

- The servant was at mere control and discretion of the master.

- Since the master engages the servant, he ought to be held liable when gagging a wrong person.

- The master is financially better placed than the servant.

It must be proved that a person was acting as a servant and that the said tort was committed in the course of his employment before a master can be sued for a tort committed by his servant.

MASTER AND SERVANT

A servant means a person employed under a contract of service and acts on the orders of his master. The master therefore controls the manner in which his work is done. The concept of vicarious liability is based on the principle of equity that employee is normally people of meager resources and it is therefore only fair that the injured person is allowed to recover damages from the employers. Therefore a master is liable for the torts committed by his servant. To prove liability under master-servant relationship the servant must have acted in the course of his employment A master is liable whether the act in a question was approved by him or not. It is immaterial that the alleged act was not done for the benefit of the master. But the master is not liable for torts committed beyond the scope of employment. A servant is a person who works under the control of and is subject to the directions of another e.g. house-help, home servant, chauffeurs etc. Such

persons are employed under a contract of service. The servant would also hold his master liable for torts committed in the course of duty for action done on ostensible authority. For vicarious liability to arise, it must be proved that:

1. There was a lawful relationship between the parties.

2. There must have been a contract of service between the parties.

3. The servant is under the control and discretion of the master. This control and discretion is determined by the master‟s freedom:

- To hire or fire the servant.

- To determine the tasks to be discharged.

- To provide implements.

- To determine how the tasks would be discharged.

- To determine the servants remuneration**.**

- That the tort was committed by the servant in the course of his employment. This is irrespective of whether the servant was acting negligently, criminally, deliberately or wantonly for his own benefit**.**

An employer is however responsible for the torts committed by an independent contractor where the contract, if properly carried out, would involve commission of a tort and also in cases where the law entrusts a high duty of care upon the employer.

INDEPENDENT CONTRACTOR

An independent contract means a person who undertakes to produce a given result without being controlled on how he achieves that result. These are called contract for service. Because the employer has no direct control of him, he (the employer) is not liable for his wrongful acts. However, there are certain cases (exception) under which the employer may still be liable. These are: - a). Where the employer retains his control over the contractor and personally interferes and makes himself a party to the act, which causes the damage. b). Where the thing contracted is in itself a tort. c). Where the thing contracted to be done is likely

to do damage to other people's property or cause nuisance. d). Where there is strict liability without proof of negligence e.g. the rule in Ryland vs. Fletcher.

STRICT LIABILITY

Strict liability means liability without proof of any fault on the part of the wrongdoer. Once the plaintiff is proved to have suffered damage from the defendant's wrongful conduct, the defendant is liable whether there was fault on his part or not. Strict liability must be distinguished from absolute liability. Where there is absolute liability, the wrong is actionable without proof of fault on the part of the wrong-doer and in addition, there is no defense whatsoever to the action. Where there is strict liability, the wrong is actionable without proof of fault but some defenses may also be available.

Strict liability may be considered in the following case namely:

i. The rule in Ryland Vs. Fletcher (1866)

ii. Liability for fire and;

iii. Liability for animals.

1. The rule in RYLAND VS FLETCHER (1866) The rule is base on the judgment contained in the above case. It states that; "The person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril and, is prima facie answerable for all the damage which is the natural consequence of its escape". The above rule is commonly called the rule in Ryland vs. Fletcher. It was formulated on the basis of the case of Ryland vs. Fletcher (1866). In this case Ryland had employed independent contractors to construct a reservoir on his land adjoining that of Fletcher. Due to the contractor's negligence, old mine shafts, leading from Ryland‟s land to Fletcher's were not blocked. When the reservoir was filled, the water escaped through the shafts and flooded the plaintiffs mine and caused great damage. The court held that Ryland was liable and it was immaterial that there was no fault on their part.

Limits of the rule.

For this rule to apply the following conditions must be applied:

i. Non-natural user: The defendant must have used his land in a way, which is not ordinarily natural.

ii. Bringing into, or keeping or accumulating things on land for personal use.

iii. That the things brought were capable of causing mischief if they escaped. These things need not be dangerous always.

iv. Need for escape: There must be actual escape of the thing from the defendants land and not a place outside it.

v. That the plaintiff suffered loss or damage for such escape.

Defenses in rule in Ryland vs. Fletcher.

i. Acts of God: Act of God is a good defense to an action brought under the rule**.**

ii. Plaintiffs' Fault: If the escape of the thing is due to the fault of the plaintiff, the defendant is not liable. This is because the plaintiff has himself brought about his own suffering.

iii. Plaintiff‟s consent or benefit: That the accumulation or bringing of the thing was by consent of the plaintiff.

iv. Statutory authority: That the thing was brought into the land by requirement of an Act of parliament.

v. Contributory negligence: if the plaintiff was also to blame for the escape.

vi. Wrongful act of third party: the defendant may take the defence of the wrongful acts of a third party though he may still be held liable in negligence if he failed to foresee and guard against the consequences to his works of that third party‟s act.

2. Liability for Fire: The liability for fire due to negligence is actionable in tort. It is also a case of strict liability. Therefore, if a fire starts without negligence but it spreads due -to negligence of a person, then that person will be liable for damages caused by the spread of the fire.

3. Liability for Animals: This may arise in cases of negligence. An occupier of land is liable for damage done by his cattle if they trespass onto the land of his neighbors thus causing damage. In the same way, person who keeps dangerous animals like leopards, dogs, lions, etc is liable strictly for any injury by such animals. He cannot claim that he was careful in keeping them. He remains liable even in the absence of negligence.

DEFAMATION

Defamation means the publication of a false statement regarding another person without lawful justification, which tends to lower his reputation in the estimation of right thinking members of society or which causes him to be shunned or avoided or has a tendency to injure him in his office, professions or trade. It has also been defined as the publication of a statement that tends to injure the reputation of another by exposing him to hatred, contempt or ridicule. In the case of Dixon Vs Holden (1869) the right of reputation is recognized as an inherent right of every person, which can be exercised against the entire world. A man‟s reputation is therefore considered his property.

Following are the essential elements of defamation: -

i. False statement: The defendant must have made a false statement. If the statement is true, it's not defamation.

ii. Defamatory statement: The statement must be defamatory. A statement is said to be defamatory when it expose the plaintiff to hatred, contempt, ridicule or shunning or injures him in his profession or trade among the people known to him.

iii. Statement refers the plaintiff: The defamatory statement must refer to the plaintiff. But the plaintiff need not have been specifically named. It is sufficient if right thinking members of the society understand the statement to refer to the plaintiff.

iv. Statement must be Published: Publication of the statement consists in making known of the defamatory matter to someone else (third parties) other than the plaintiff.

TYPES OF DEFAMATION

1. Slander: Slander takes place where the defamatory statement are made in non-permanent form e.g. by word of mouth, gestures, etc. Slander is actionable only on proof of damage. However, in exceptional cases, a slanderous statement is actionable without proof of damage. This is so in cases: a) Where the statement inputs a criminal offence punished by imprisonment. b) Where the statement inputs a contagious disease on the plaintiff. c) Where the statement inputs unchastely on a woman. d) Where the statement imputes incompetence on the plaintiff in his trade, occupation or profession.

2. Libel: Libel takes place where the defamatory permanent form e.g. in writing, printing, television broadcasting, effigy, etc. Where a defamatory matter is dictated to a secretary and she subsequently transcribes it, the act of dictation constitutes a slander while the transcript is a libel.

An action for libel has the following essential requirements:

i) it must be proved that the statement is false,

ii) in writing,

iii) is defamatory, and

iv) has been published.

Distinctions between slander and libel Libel can be a criminal offence as well as a civil wrong while slander amounts to a mere civil wrong only.

1. Libel is in a permanent form while slander is in a non-permanent form.

2. Under libel, the wrong is actionable per se whereas in slander the plaintiff must prove actual damage except when it conveys certain imputations.

3. Libel can be a criminal offence and may as well give rise to civil liability while slander is essentially a civil wrong.

Defenses against defamation

i. Truth or justification: Truth is a complete defense to an action on libel or slander. The defendant must be sure of proving the truth of the statement otherwise more serious and aggravated damage may be awarded against him.

ii. Fair comment: Fair comment on a matter of Public interest is a defense against defamation. The word "fair" means honesty relevant and free from malice and improper motive.

iii. Absolute Privilege: Certain matters are not actionable at all in defamation. They are absolutely privileged. A matter is said to be privileged when the person who makes the communication has a moral duty to make it to the person to whom he does make it, and the person who received it has an interest in hearing it. They include statements made by the judges or magistrates in the course of judicial proceedings, statements made in Parliament by Legislators and communication between spouses, etc.

iv. Qualified Privilege: In this case a person is entitled to communicate a defamatory statement so long as no malice is proved on his part. They include statements made by a defendant while defending his reputation, communications made to a person in public position for public good, etc.

v. Apology or offer of Amends: The defendant is at liberty to offer to make a suitable correction of the offending statement coupled with an apology. Such offers maybe relied upon as a defense.

vi. Consent: In case whereby the plaintiff impliedly consents to the publication complained of, such consent is a defence in defamation**.**

Remedies for defamation Damages: The plaintiff can recover damages for injury to his reputation as well as his feelings. Apology: An apology is another remedy available to the plaintiff. This is because it has the effect of correcting the impression previously made by the offending statement about the plaintiff.
Injunctions: The Court may grant injunction restraining the publication of a libel. But the plaintiff must first prove that the defamatory statement is untrue and its publication will cause irreparable damage to him.

Unit-IV: The Consumer Protection Act, 1986

a. Definitions of Consumer, Goods and Service

Introduction 1.1

The moment a person comes into this would, he starts consuming. He needs clothes, milk, oil, soap, water, and many more things and these needs keep taking one form or the other all along his life. Thus we all are consumers in the literal sense of the term. When we approach the market as a consumer, we expect value for money, i.e., right quality, right quantity, right prices, information about the mode of use, etc. But there may be instances where a consumer is harassed or cheated. The Government understood the need to protect consumers from unscrupulous suppliers, and several laws have been made for this purpose. We have the Indian Contract Act, the Sale of Goods Act, the Dangerous Drugs Act, the Agricultural Produce (Grading

and Marketing) Act, the Indian Standards Institution (Certification Marks) Act, the Prevention of Food Adulteration Act, the Standards of Weights and Measures Act, etc. which to some extent protect consumer interests. However, these laws require the consumer to initiate action by way of a civil suit involving lengthy legal process which is very expensive and time consuming. The Consumer Protection Act, 1986 was enacted to provide a simpler and quicker access to redressal of consumer grievances. The Act for the first time introduced the concept of 'consumer' and conferred express additional rights on him. It is interesting to note that the Act doesn't seek to protect every consumer within the literal meaning of the term. The protection is meant for the person who fits in the definition of 'consumer' given by the Act. Now we understand that the Consumer Protection Act provides means to protect consumers from getting cheated or harassed by suppliers. The question arises how a consumer will seek protection? The answer is the Act has provided a machinery whereby consumers can file their complaints which will be entertained by the Consumer Forums with special powers so that action can be taken against erring suppliers and the possible compensation may be awarded to consumer for the hardships he has undergone. No court fee is required to be paid to these forums and there is no need to engage a lawyer to present the case. Following chapter entails a discussion on who is a consumer under the Act, what are the things which can be complained against, when and by whom a complaint can be made and what are the relief available to consumers.

Who is a consumer 1.2 Section 2(d) of the Consumer Protection Act says that consumer means any person who— (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment, and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or (ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment, and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person; Explanation.—For the purposes of the sub-clause (i), "commercial purpose" does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his

livelihood, by means of self-employment. 1.2-1 Consumer of goods - The provision reveals that a person claiming himself as a consumer of goods should satisfy that— 1-2-1a THE GOODS ARE BOUGHT FOR CONSIDERATION - There must be a sale transaction between a seller and a buyer; the sale must be of goods; the buying of goods must be for consideration. The terms sale, goods, and consideration have not been defined in the Consumer Protection Act. The meaning of the terms 'sale', and 'goods' is to be construed according to the Sale of Goods Act, and the meaning of the term 'consideration' is to be construed according to the Indian Contract Act. 1-2-1b ANY PERSON WHO USE THE GOODS WITH THE APPROVAL OF THE BUYER IS A CONSUMER - When a person buys goods, they may be used by his family members, relatives and friends. Any person who is making actual use of the goods may come across the defects in goods. Thus the law construe users of the goods as consumers although they may not be buyers at the same time. The words "....with the approval of the buyer" in the definition denotes that the user of the goods should be a rightful user. Example : A purchased a scooter which was in B's possession from the date of purchase. B was using it and taking it to the seller for repairs and service from time to time. Later on B had a complaint regarding the scooter. He sued the seller. The seller pleaded that since B did not buy the scooter, he was not a consumer under the Act. The Delhi State Commission held that B, the complainant was using it with the approval of A, the buyer, and therefore he was consumer under the Act. [Dinesh Bhagat v. Bajaj Auto Ltd. (1992) III CPJ 272]

ANY PERSON WHO OBTAINS THE GOODS FOR 'RESALE' OR COMMERCIAL PURPOSES' IS NOT A CONSUMER -

b. Rights and Duties of Consumer

Rights of consumers in India

1. Right to Safety: The right to be protected against goods which are hazardous to life and property.

Right to Information: The right to be informed about the quality, quantity, purity, price and standards of goods.

Right to Choose: The right to be assured access to a variety of products at competitive prices, without any pressure to impose a sale, i.e., freedom of choice.

Right to be Heard: The right to be heard and assured that consumer interests will receive due consideration at appropriate forums.

Right to Seek Redressal: The right to get relief against unfair trade practice or exploitation.

Right to Education: The right to be educated about rights of a consumer.

Duties of consumer

Illiteracy and Ignorance: Consumers in India are mostly illiterate and ignorant. They do not understand their rights. So its our duty to know about our rights and to use it in the right place.

Unorganized Consumers: In India consumers are widely dispersed and are not united. They are at the mercy of businessmen. On the other hand, producers and traders are organized and powerful**.**

Spurious Goods: There is increasing supply of duplicate products. It is very difficult for an ordinary consumer to distinguish between a genuine product and its imitation. It is necessary to protect consumers from such exploitation by ensuring compliance with prescribed norms of quality and safety. Always check the norms of the product.

False Advertising: Some businessmen give misleading information about quality, safety and utility of products. Consumers are misled by false advertisement. To stop this, we the consumer have to know about the product.

Malpractices of Businessmen: Only consumer can avoid and stop the mal practises of the businessmen by opposing them. So this is one of the duty of consume

The composition of the District Forum and the State Commission has been detailed out by the Consumer Protection Act, 1986. As for the National Commission, the Consumer Protection Rules, 1987, elaborates upon its composition.

District Forum [Section 10]

COMPOSITION - District Forum consist of one president and two other members (one of whom is to be a woman). The president of the Forum is a person who is, or has been qualified to be a District Judge, and other members are persons of ability, integrity and standing, and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration.

3.2-1b APPOINTING AUTHORITY - Every appointment of the president and members of the District Forum is made by the State Government on the recommendation of a selection committee consisting of the following, namely— (i) the President of the State Commission — Chairman. (ii) Secretary, Law Department of the State — Member. (iii) Secretary incharge of the Department dealing with consumer affairs in the State — Member.

TERM OF OFFICE [SECTION 10(2)] - Every member of the District Forum is to hold office for a term of five years or up to the age of 65 years, whichever is earlier. However, he/she shall not be eligible for re-appointment.

VACANCY - A vacancy in the office of president or a member may occur after the expiry of his term, or by his death, resignation, or removal. The Consumer Protection Act does not have any specific provision for removal of the president and members of the District Forum. But the consumer protection rules made by various States provide for such removal. Accordingly, a president or member of a District Forum may be removed by the State Government, who— (a) has been adjudged an insolvent, or (b) has been convicted of an offence involving moral turpitude, or (c) has become physically or mentally incapable of performing his duties, or

(d) has acquired such financial interest in the matter as would prejudicially affect his functions as president or member, or (e) has abused his position so as to render his continuance to office prejudicial to public interest.

3.2-1e TERMS AND CONDITIONS OF SERVICE [SECTION 10(3)] - The salary or honorarium and other allowances payable to, and the other terms and conditions of service of the members of the District Forum shall be such as may be prescribed by the State Government. Different States have made different rules in this regard.

3.2-2 State Commission [Section 16] - After the District Forum, State Commission is next in the hierarchy of Consumer Rederessal Forums under the Act.

3.2-2a COMPOSITION - State Commission consists of a president and two members one of whom is to be a woman. President is a person who is or has been a Judge of a High Court, and the members, are persons

of ability, integrity and standing and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration.

(d) has acquired such financial interest in the matter as would prejudicially affect his functions as president or member, or (e) has abused his position so as to render his continuance to office prejudicial to public interest.

3.2-1e TERMS AND CONDITIONS OF SERVICE [SECTION 10(3)] - The salary or honorarium and other allowances payable to, and the other terms and conditions of service of the members of the District Forum shall be such as may be prescribed by the State Government. Different States have made different rules in this regard.

3.2-2 State Commission [Section 16] - After the District Forum, State Commission is next in the hierarchy of Consumer Rederessal Forums under the Act.

3.2-2a COMPOSITION - State Commission consists of a president and two members one of whom is to be a woman. President is a person who is or has been a Judge of a High Court, and the members, are persons of ability, integrity and standing and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration.

d. remedies

Under this Act, the remedies available to consumers are as follows:

(a) Removal of Defects:

If after proper testing the product proves to be defective, then the 'remove its defects' order can be passed by the authority concerned.

(b) Replacement of Goods:

Orders can be passed to replace the defective product by a new non-defective product of the same type.

(c) Refund of Price:

Orders can be passed to refund the price paid by the complainant for the product.

(d) Award of Compensation:

If because of the negligence of the seller a consumer suffers physical or any other loss, then compensation for that loss can be demanded for.

(e) Removal of Deficiency in Service:

If there is any deficiency in delivery of service, then orders can be passed to remove that deficiency. For instance, if an insurance company makes unnecessary delay in giving final touch to the claim, then under this Act orders can be passed to immediately finalise the claim.

(f) Discontinuance of Unfair/Restrictive Trade Practice:

If a complaint is filed against unfair/restrictive trade practice, then under the Act that practice can be banned with immediate effect. For instance, if a gas company makes it compulsory for a consumer to buy gas stove with the gas connection, then this type of restrictive trade practice can be checked with immediate effect.

(g) Stopping the Sale of Hazardous Goods:

Products which can prove hazardous for life, their sale can be stopped.

If there is any deficiency in delivery of service, then orders can be passed to remove that deficiency. For instance, if an insurance company makes unnecessary delay in giving final touch to the claim, then under this Act orders can be passed to immediately finalise the claim.

(f) Discontinuance of Unfair/Restrictive Trade Practice:

If a complaint is filed against unfair/restrictive trade practice, then under the Act that practice can be banned with immediate effect. For instance, if a gas company makes it compulsory for a consumer to buy gas stove with the gas connection, then this type of restrictive trade practice can be checked with immediate effect.

(g) Stopping the Sale of Hazardous Goods:

Products which can prove hazardous for life, their sale can be stopped.

BOOKS RECOMMENDED

1. W.V.H. Rogers, Winfield and Jolowicz on Tort, Sweet & Maxwell, 2010 (18th Edn)

2. Ratanlal & Dhirajlal, The Law of Torts, Lexis Nexis, 2013 (26th Edn)

References:

1. B.M. Gandhi, Law of Torts with Law of Statutory Compensation and Consumer Protection, Eastern

Book Company, 2011 (4th Edn)

2. R.K. Bangia, Law of Torts including Compensation under the Motor Vehicles Act and Consumer

Protection Laws, Allahabad Law Agency, 2013

3. Ramaswamy Iyer's , The Law of Torts, Lexis Nexis, 2007 (10th Edn)