BALLB (H)

LAW OF TORTS AND CONSUMER PROTECTION

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UNIT-I

INTRODUCTION

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

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

Criminal Law: Criminal laws indicate the proceedings before the criminal courts where the criminal liability of persons who have committed wrongs against the state and other prohibited acts are determined. Criminal proceedings on the other hand are those which have for their object the punishment of the wrong doer for some act of which he is accused. He who proceeds criminally is an accuser or prosecutor demanding nothing for him but merely the punishment of the accused for the offence committed by him.

DEFINITION OF TORT

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

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

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

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

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

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

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

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

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

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

GENERAL PRINCIPLES OF LIABILITY

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

Wider and narrower theory- all injuries done by one person to another are torts, unless there is some justification recognized by law.

Pigeon-hole theory- there is a definite number of torts outside which liability in tort does not exist.

The first theory was propounded by Professor Winfield. According to this, if I injure my neighbour, he can sue me in tort, whether the wrong happens to have a particular name like assault, battery, deceit or slander, and I will be liable if I cannot prove lawful justification. This leads to the wider principle that all unjustifiable harms are tortious. This enables the courts to create new torts and make defendants liable irrespective of any defect in the pleading of the plaintiff. This theory resembles the saying, my duty is to hurt nobody by word or deed. This theory is supported by Pollock and courts have repeatedly extended the domain of the law of torts. For example, negligence became a new specific tort only by the 19th century AD. Similarly the rule of strict liability for the escape of noxious things from oneôs premises was laid down in 1868 in the leading case if *Rylands v. Fletcher.*

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

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

There is, however, no recognition of either theory. It would seem more realistic fro the student to approach the tortious liability from a middle ground. In an Indian decision, Lala Punnalal v. Kasthurichand Ramaji , it was pointed out that there is nothing like an exhaustive classification of torts beyond which courts should not proceed, that new invasion of rights devised by human ingenuity might give rise to new classes of torts. On the whole if we are asked to express our preference between the two theories, in the light of recent decisions of competent courts we will have to choose the first theory of liability that the subsequent one. Thus it is a matter of interpretation of courts so as to select between the two theories. The law of torts has in the main been developed by courts proceeding from the simple problems of primitive society to those of our present complex civilization.

THE LAW OF TORTS IN INDIA

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

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

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

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

In a more recent judgement of Jay Laxmi Salt Works (p) ltd. v. State of Gujarat , Sahai, J., observed: truly speaking the entire law of torts is founded and structured on morality. Therefore, it would be primitive to close strictly or close finally the ever expanding and growing horizon of tortuous

liability. Even for social development, orderly growth of the society and cultural refineness the liberal approach to tortious liability by court would be conducive.

TORT AND CONTRACT

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

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

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

A tort is inflicted against or without consent; a contract is founded upon consent.

In tort no privity is needed, but it is necessarily implied in a contract.

A tort is a violation in rem (right vested in some person and available against the world at large.); a breach of contract is an infringement of a right in personam(right available against some determinate person or body).

Motive is often taken into consideration in tort, but it is immaterial in a breach of contract.

In tort the measure of damages is not strictly limited nor is it capable of being indicated with precision; in a breach of contract the measure of damages is generally more or less nearly determined by the stipulations of the parties.

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

The contractual duty may be owed to one person and the duty independent of that contract to another. The surgeon who is called by a father to operate his daughter owes a contractual duty to the father to take care. If he fails in that duty he is also liable for a tort against the daughter. In Austin v. G.W. Railway, a woman and her child were traveling in the defendantôs train and the child was injured by defendantôs negligence. The child was held entitled to recover damages, for it had been accepted as passenger.

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

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

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

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.

TORT AND CRIME

Historically tort had its roots in criminal procedure. Even today there is a punitive element in some aspects of the rules on damages. However tort is a species if civil injury or wrong. The distinction between civil and criminal wrongs depends on the nature of the remedy provided by law. A civil wrong is one which gives rise to civil proceedings. A civil proceeding concerns with the enforcement of some right claimed by the plaintiff as against the defendant whereas criminal proceedings have for their object the punishment of the defendant for some act of which he is accused. Sometimes the same wrong is capable of being made the subject of proceedings of both kinds. For example assault, libel, theft, malicious injury to property etc. in such cases the wrong doer may be punished criminally and also compelled in a civil action to make compensation or restitution.

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

Difference between crime and tort

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

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

In tort the wrong doer has to compensate the injured party whereas in crime, he is punished by the state in the interest of the society.

In tort the action is brought about by the injured party whereas in crime the proceedings are conducted in the name of the state.

In tort damages are paid for compensating the injured and in crime it is paid out of the fine which is paid as a part of punishment. Thus the primary purpose of awrding compensation in a criminal prosecution is punitive rather than compensatory.

The damages in tort are unliquidated and in crime they are liquidated.

Resemblance between crime and tort

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

The wrong doer may be ordered in a civil action to pay compensation and be also punished criminally by imprisonment or fine. If a person publishes a defamatory article about another in a newspaper, both a criminal prosecution for libel as well as a civil action claiming damages for the defamatory publication may be taken against him. In P.Rathinam. v. Union of India, the Supreme Court observed, In a way there is no distinction between crime and a tort, inasmuch as a tort harms an individual whereas a crime is supposed to harm a society. But then, a society is made of individuals. Harm to an individual is ultimately the harm to the society.

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

CONSTITUENTS OF TORT

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

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

There must be a wrongful act committed by a person;

The wrongful act must be of such a nature as to give rise to a legal remedy and

Such legal remedy must be in the form of an action for unliquidated damages.

I. WRONGFUL ACT

An act which prima facie looks innocent may becomes tortious, if it invades the legal right of another person. In Rogers v. Ranjendro Dutt , the court held that, the act complained of should, under the circumstances, be legally wrongful, as regards the party complaining. That is, it must prejudicially affect him in some legal right; merely that it will however directly, do him harm in his interest is not enough.

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

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

II. DAMAGE

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

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

(i) Damnum Sine Injuria (Damage Without Injury)

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

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

(ii) Injuria Sine Damno (injury without damage)

This means an infringement of a legal private right without any actual loss or damage. In such a case the person whose right has been infringed has a good cause of action. It is not necessary for him to prove any special damage because every injury imports a damage when a man in hindered of his right. Every person has an absolute right to property, to the immunity of his person, and to his liberty, and an infringement of this right is actionable per se. actual perceptible damage is not, therefore, essential as the foundation of an action. It is sufficient to show the violation of a right in which case the law will presume damage. Thus in cases of assault, battery, false imprisonment, libel, trespass on land, etc., the mere wrongful act is actionable without proof of special damage. The court is bound to award to the plaintiff at least nominal damages if no actual damage is proved. This principle was firmly established by the election case of Ashby v. White, in which the plaintiff was wrongfully

prevented from exercising his vote by the defendants, returning officers in parliamentary election. The candidate fro whom the plaintiff wanted to give his vote had come out successful in the election. Still the plaintiff brought an action claiming damages against the defendants for maliciously preventing him from exercising his statutory right of voting in that election. The plaintiff was allowed damages by Lord Holt saying that there was the infringement of a legal right vested in the plaintiff.

III. REMEDY

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

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

SOME GENERAL CONDITIONS IN TORTS

1. Act And Omission- To constitute a tort there must be a wrongful act, whether of omission or commission, but not such acts as are beyond human control and as are entertained only in thoughts. An omission is generally not actionable but it is so exceptionally. Where there is a duty to act an omission may create liability. A failure to rescue a drowning child is not actionable, but it is so where the child is oneôs own. A person who voluntarily commences rescue cannot leave it half the way. A person may be under duty to control natural happenings to his own land so as to prevent them from encroaching othersô land.

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

3. Malice- malice is not essential to the maintenance of an action for tort. It is of two kinds, óexpress maliceô (or malice in fact or actual malice) and ómalice in lawô (or implied malice). The first is what is called malice in common acceptance and means ill will against a person; the second means a wrongful act done intentionally without just cause or excuse. Where a man has a right to do an act, it is not possible to make his exercise of such right actionable by alleging or proving that his motive in the exercise was spite or malice in the popular sense. An act, not otherwise unlawful, cannot

generally be made actionable by an averment that it was done with evil motive. A malicious motive per se does not amount to injuria or legal wrong.

Wrongful acts of which malice is an essential element are:

Defamation,

Malicious prosecution,

Willful and malicious damage to property,

Maintenance, and

Slander of title.

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

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

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

is that it wholly depends upon flexible public policy, which in turn is a reflection of the compelling social needs of the time.

STRICT LIABILITY

In law, **strict liability** is a standard for liability which may exist in either a criminal or civil context. A rule specifying strict liability makes a person legally responsible for the damage and loss caused by his or her acts and omissions regardless of culpability (including fault in criminal law terms, typically the presence of mens rea). Strict liability is prominent in tort law (especially product liability), corporationôs law, and criminal law. For analysis of the pros and cons of strict liability as applied to product liability, the most important strict liability regime, see product liability.

In tort law, strict liability is the imposition of liability on a party without a finding of fault (such as negligence or tortious intent). The claimant need only prove that the tort occurred and that the defendant was responsible. The law imputes strict liability to situations it considers to be inherently dangerous. It discourages reckless behavior and needless loss by forcing potential defendants to take every possible precaution. It also has the effect of simplifying and thereby expediting court decisions in these cases.

A classic example of strict liability is the owner of a tiger rehabilitation center. No matter how strong the tiger cages are, if an animal escapes and causes damage and injury, the owner is held liable. Another example is a contractor hiring a demolition subcontractor that lacks proper insurance. If the subcontractor makes a mistake, the contractor is strictly liable for any damage that occurs.

In strict liability situations, although the plaintiff does not have to prove fault, the defendant can raise a defense of absence of fault, especially in cases of product liability, where the defense may argue that the defect was the result of the plaintiff's actions and not of the product, that is, no inference of defect should be drawn solely because an accident occurs. If the plaintiff can prove that the defendant *knew* about the defect before the damages occurred, additional punitive damages can be awarded to the victim in some jurisdictions.

The doctrine's most famous advocates were Learned Hand, Benjamin Cardozo, and Roger J. Traynor.

Under English and Welsh law, in cases where tortious liability is strict, the defendant will often be liable only for the reasonably foreseeable consequences of his or her act or omission (as in nuisance).

Strict liability is sometimes distinguished from absolute liability. In this context, an *actus reus* may be excused from strict liability if due diligence is proved. Absolute liability, however, requires only an actus reus.

Bicycle-motor vehicle accidents

A form of strict liability has been supported in law in the Netherlands since the early 1990s for bicycle-motor vehicle accidents. In a nutshell, this means that, in a collision between a car and a cyclist, the driver is deemed to be liable to pay damages and his insurer (*n.b.* motor vehicle insurance is mandatory in the Netherlands, while cyclist insurance is not) must pay the full damages, as long as 1) the collision was *unintentional* (i.e. neither party, motorist or cyclist, intentionally crashed into the other), and 2) the cyclist was not in error in some way. Even if cyclist was in error, *as long as the collision was still unintentional*, the motorist's insurance must still pay half of the damages, though this doesn't apply if the cyclist is under 14 years of age, in which case the motorist must pay full damages for unintentional accidents with minors. If it can be proved that a cyclist *intended* to collide with the car, then the cyclist must pay the damages (or his/her parents in the case of a minor.)

ABSOLUTE LIABILITY

Absolute liability is a standard of legal liability found in tort and criminal law of various legal jurisdictions.

To be convicted of an ordinary crime, in certain jurisdictions, a person must not only have committed a criminal action, but also have had a deliberate intention or guilty mind (*mens rea*). In a crime of *strict liability (criminal)* or *absolute liability*, a person could be guilty even if there was no intention to commit a crime. The difference between *strict* and *absolute* liability is whether the defence of a *mistake of fact* is available: in a crime of *absolute liability*, a mistake of fact is not a defence.

In India, absolute liability is a standard of tort liability which stipulates that

where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortious principle of strict liability under the rule in *Rylands v. Fletcher*.

In other words absolute liability is strict liability without any exception. This liability standard has been laid down by the Indian Supreme Court in *M.C. Mehta v. Union of India (Oleum Gas Leak Case)*. These exceptions include:-

- Plaintiffôs own mistake
- Plaintiffôs consent
- Natural disasters
- Third Partyôs mistake
- Part of a statutory duty

The Indian Judiciary tried to make a strong effort following the Bhopal Gas Tragedy, December, 1984 (Union Carbide Company vs. Union of India) to enforce greater amount of protection to the Public. The Doctrine of Absolute Liability was therefore evolved in Oleum Gas Leak Case and can be said to be a strong legal tool against rogue corporations that were negligent towards health risks for the public. This legal doctrine was much more powerful than the legal Doctrine of Strict Liability developed in the UK case Rylandôs Vs. Fletcher. This meant that the defaulter could be held liable for even third party errors when the public was at a realistic risk. This could ensure stricter compliance to standards that were meant to safeguard the public.

Rules of Strict and Absolute Liability are based on the concept of ôNo fault liabilityô. At times a person may be held responsible for some wrong though there was no negligence or intention on his part to do such wrong.

This rule was laid down by the House of Lords in **Rylands v Fletcher** and hence it is also commonly termed as the Rule in Rylands v Fletcher.

In the case of Rylands v Fletcher, the defendant appointed some independent contractors to construct a reservoir in order to provide water to his mill. There were some unused shafts under the site, which the contractors failed to locate. After water was filled in the reservoir, it burst through those shafts and flooded adjoining coalmines belonging to the plaintiff. Even though the defendant was not negligent and had no knowledge of the shafts, he was held liable.
In India, this rule was formulated in the case of **M.C. Mehta v Union of India (1987)**, wherein the Supreme Court termed it as óAbsolute Liabilityô. This rule was also followed in the case of **Indian Council for Enviro-Legal Action v Union of India (1996)**
Section 92A of the Motor Vehicles Act, 1938 also recognises this concept of óliability without faultô.
The ingredients of the Rule of Strict Liability are:

- Some hazardous thing must be brought by the defendant on his land.
- There must be an escape of such thing from that land.
- There must be a non-natural use of the land.

Exceptions to the Rule of Strict Liability:

- If the escape of the hazardous good was due to plaintiffôs own fault or negligence
- Vis Major or Act of God is a good defence in an action under the Rule of Strict Liability.
- In cases where the wrong done has been by someone who is a stranger and the defendant has no control over him
- Cases where the plaintiff has given his consent to accumulate the hazardous thing in the defendantôs land for the purpose of common benefit
- Any act done under the authority of a statute

VICARIOUS LIABILITY

Vicarious liability is legal responsibility imposed on an employer, who may himself be free from blame, for a tort committed by his employee in the course of his employment. In this sense it is a species of strict liability.

The traditional test for the imposition of vicarious liability was as set out by Salmond in his Law of Torts as early as 1907: "a master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master." Whilst this formulation works well as a rule of thumb, the first limb is not really an example of vicarious liability at all (it is primary liability) and the second does not deal conveniently with intentional wrongdoing. As regards the second limb, the text continues: "but a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modesð although improper modesð of doing them."

The Salmond test, whilst still a useful starting point, needs now to be considered in the light of the decision of the House of Lords in Lister v Hesley Hall Ltd , which directs us to pay particular attention to the closeness of the connection between the employee's duties and his wrongdoing.

In Lister the appellants had been pupils at a boarding school, which mainly catered for children with emotional and behavioural difficulties. The school employed a warden who was responsible for the day to day running of the boarding house and for maintaining discipline. He lived there with his wife and on most days he and his wife were the only members of staff on the premises. He supervised the boys when they were not at school and the boarding house was intended to be a home for the boys, rather than simply an extension of the school environment. Unbeknown to the school, the warden systematically sexually abused the appellants at the boarding house. The sexual abuse was preceded by grooming to establish control over the appellants. It involved unwarranted gifts, undeserved leniency and so forth. What may initially have been regarded as signs of a relaxed approach to discipline gradually developed into blatant sexual abuse. Neither of the appellants made any complaint at the time. After the appellants and the warden had left the school, the warden was convicted of multiple offences involving sexual abuse. The appellants brought claims for personal injury against the employer, alleging negligence and that the employer was vicariously liable for the torts committed by the warden.

The claim in negligence failed and the trial judge was bound to dismiss the claim based on vicarious liability in accordance with the decision of the Court of Appeal in Trotman v North Yorkshire County Council , wherein Butler-Sloss LJ had said "in the field of serious sexual misconduct, I find it difficult to visualise circumstances in which an act of the teacher can be an unauthorised mode of carrying out an authorised act, although I would not wish to close the door on the possibility."

The House of Lords overruled Trotman and held the school liable for the warden's assaults. It was said not to be necessary to ask the question whether the acts of sexual abuse were modes of doing authorised acts. The correct approach is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort. It is "no answer to say that the

employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty" .

The warden's duties provided him with the opportunity to commit indecent assaults on the boys for his own sexual gratification, but that in itself was not enough to make the school liable. The same would be true of the groundsman or the school porter. Likewise the fact that his employment gave him the opportunity to establish a friendship with the boys would not constitute a sufficient connection . The important point was that the school was responsible for the care and welfare of the boys and had assumed a relationship to them which imposed specific duties in tort. It entrusted that responsibility and the performance of those duties to the warden. He was employed to discharge the school's responsibility to the boys. He did not merely take advantage of the opportunity which employment at a residential school gave him. He abused the special position in which the school had placed him to enable it to discharge its own responsibilities. There was, accordingly, a very close connection between the torts of the warden and his employment.

The position was again considered by the House of Lords in Dubai Aluminium Co Ltd v Salaam . The House again stressed the importance of considering the closeness of the connection between an employee's duties and his wrongdoing. The mere fact that he was acting dishonestly or for his own benefit is seldom likely to be sufficient to show that an employee was not acting in the course of his employment. Once a sufficient connection is established, it is immaterial whether the wrongdoing in question was unauthorised or expressly forbidden by the employer or civilly or criminally illegal. It was emphasised that an employer ought to be liable for a tort which can fairly be regarded as a reasonably incidental risk to the type of business he carries on.

Whilst Lister was a case concerning sex abuse and Dubai Aluminium concerned dishonesty, it is probably in the field of claims arising out of unlawful violence that the greatest effect has been felt. In Mattis v Pollock the defendant owned a nightclub and employed Mr Cranston as a doorman. Cranston, who was unlicensed, had a history of behaving aggressively and was employed to act on that basis towards customers. Mr Mattis went to the club one evening with friends. Cranston tried to eject one of the group from the club and a fight ensued, during which Cranston hit at least two of the group with a knuckleduster or similar. The defendant did nothing to discourage Cranston from acting in this way. The incident provoked a reaction amongst others at the club and a group turned on Cranston who fled the club to his flat. Mr Mattis, who had not been particularly involved in the incidents, was making his way home when Cranston reappeared, armed with a knife. Cranston stabbed Mr Mattis in the back, severing his spinal cord and rendering him paraplegic. Mr Mattis brought proceedings against the defendant on the basis that he was vicariously liable for the injuries inflicted on him by Cranston as well as being in breach of his own duty of care.

The claims failed at first instance. However, despite the lapse in time and the fact that Cranston's behaviour was essentially an act of personal revenge, the Court of Appeal held that, approaching the matter broadly, the assault was so closely connected with what the defendant authorised or expected of Cranston in the performance of his employment as a doorman, that it would be fair and just to hold the defendant vicariously liable for the injuries. Cranston's attack was referable to his earlier

humiliation at the club. It was observed that where an employee is expected to use violence while carrying out his duties, the likelihood of establishing that an act of violence fell within the broad scope of his employment is greater than it would be if he were not.

In Bernard v Attorney-General of Jamaica Mr Bernard had queued for some time at the Central Sorting Office in Kingston, Jamaica to make an overseas telephone call. Eventually his turn arrived, but an off duty police constable barged to the front of the queue, announced "police" and demanded the telephone. There was evidence that, in an emergency, it would be normal for a police officer to go to the head of the line and demand to use the telephone. Mr Bernard did not give up the telephone and was slapped and pushed by the constable. Mr Bernard continued to resist. The constable took two steps back, pulled out his service revolver (which he was allowed to carry when off duty) and shot Mr Bernard in the head. Mr Bernard came to in the hospital to find himself surrounded by police constables, including the one who had shot him, who arrested him for assaulting a police officer and handcuffed him to the bed. The charges against Mr Bernard were later withdrawn.

Before Lister the claim brought by Mr Bernard alleging vicarious liability could only have failed. It could not have been said that the constable's acts were a mode of carrying out his official duties. However, applying Lister, vicarious liability was made out as the connection between the tort and the nature of the constable's employment was sufficiently close. It was of prime importance that the shooting followed upon the constable's announcement that he was a policeman and Mr Bernard was shot because he did not yield to that authority. Further, Mr Bernard's subsequent arrest was retrospectant evidence which suggested that the constable had been purporting to act as a policeman. The Board also attached weight to the risk created by the fact that constables were permitted to carry loaded service revolvers while off duty, although it was stressed that the mere use of a service revolver by a policeman would not, of itself, be sufficient to make the police authority vicariously liable.

A similar situation had arisen in Weir v Chief Constable of Merseyside . An off duty policeman unlawfully borrowed a marked police van to help his girlfriend move house. While the van was being unloaded, the policeman thought that Mr Weir had been going through some of his girlfriend's belongings. The policeman identified himself as such and took Mr Weir into the van and assaulted him. The Chief Constable was vicariously liable for the assault. The policeman had been acting in his capacity as such at the time of the assault.

In Majrowski v Guy's and St Thomas's NHS Trust Mr Majrowski brought a claim against his employer for breach of statutory duty. He claimed that he had been unlawfully harassed by his departmental manager in breach of section 1 of the Protection from Harassment Act 1997 and that his employer was vicariously liable for this tort. The harassment alleged was that his manager was excessively critical of his work and time-keeping, treated him less favourably than other members of staff, was rude to him, set unrealistic targets for his performance and threatened him with disciplinary action when he failed to achieve them. The judge struck out the claim as disclosing no reasonable cause of action.

The Court of Appeal held that, subject to the terms of the statutory duty in question, an employer can be held vicariously liable for a breach of statutory duty by his employee even when such a duty is not also cast on the employer if the broad test set out in Lister is met. The House of Lords has given the employer permission to appeal and that hearing is awaited.

Accordingly, the courts no longer approach the question of vicarious liability shackled by the traditional Salmond test of "in the course of employment", but rather now apply a broader test of fairness and justice, turning on the sufficiency of the connection between the breach of duty and employment and/or whether the risk of such breach was one reasonably incidental to it. This shift undoubtedly assists claimants. Unfortunately, however, the "close connection" test is rather a broad one, the application of which may be difficult to predict with confidence in borderline cases. But as Lord Nicholls observed in the Dubai Aluminium case "imprecision is inevitable given the infinite range of circumstances where the issue arises".

THE DOCTRINE OF SOVEREIGN IMMUNITY

The doctrine of sovereign immunity is based on the Common Law principle borrowed from the British Jurisprudence that the King commits no wrong and that he cannot be guilty of personal negligence or misconduct, and as such cannot be responsible for the negligence or misconduct of his servants. Another aspect of this doctrine was that it was an attribute of sovereignty that a State cannot be sued in its own courts without its consent.

The point as to how far the State was liable in tort first directly arose in **P. & O. Steam Navigation Co. Vs. Secretary of State**. The facts of the case were that a servant of the plaintiffôs company was proceeding on a highway in Calcutta, driving a carriage which was drawn by a pair of horses belonging to the plaintiff. He met with an accident, caused by negligence of the servants of the Government. For the loss cased by the accident, the plaintiff claimed damages against the Secretary of State for India. Sir Barnes Peacock C. J. (of the Supreme Court) observed that the doctrine that the ñKing can done wrongò, had not application to the East India Company. The company would have been liable in such cases and the Secretary of State was thereafter also liable. The Court also drew the distinction between sovereign and non-sovereign functions, i.e. if a tort were committed by a public servant in the discharge of sovereign functions, no action would lie against the Government ï e.g. if the tort was committed while carrying on hostilities or seizing enemy property as prize. The liability could arise only in case of ñnon-sovereign functionsò i.e. acts done in the conduct of undertakings which might be carried on by private person-individuals without having such power.

The aforesaid judgment laid down that the East India Company had a two fold character:

(a) As a sovereign power and

(b) As a trading company.

The liability of the company could only extend to in respect of its commercial dealings and not to the acts done by it in exercise of delegated sovereign power. As the damage was done to the plaintiff in

the exercise of non-sovereign function, i.e. the maintenance of Dockyard which could be done by any private party without any delegation of sovereign power and hence the government cannot escape liability and was held liable for the torts committed by its employees.

Distinction between Sovereign and Non-sovereign functions followed in subsequent cases:

The aforesaid case was of pre-constitution era, making the distinction between sovereign and non-sovereign function of state and holding the state liable in case of non-sovereign functions was followed by the Hon'ble Apex Court in its subsequent judgments. The point as to how far the state was liable in tort first directly arose after independence before the Hon'ble Supreme Court in **State of Rajasthan v. Mst. Vidyawati, AIR 1962 SC 933.** In that case, the claim for damages was made by the dependants of a person who died in an accident caused by the negligence of the driver of a jeep maintained by the Government for official use of the Collector of Udaipur while it was being brought back from the workshop after repairs. The Rajasthan High Court took the view-that the State was liable, for the State is in no better position in so far as it supplies cars and keeps drivers for its Civil Service. In the said case the Hon'ble Supreme Court has held as under:

ñ*Act done in the course of employment but not in connection with sovereign powers of the State, State like any other employer is vicariously liable*.ò

In the aforesaid case, the Hon'ble Apex Court while approving the distinction made in Steam Navigation Co.'s case between the sovereign and non-sovereign function observed that the immunity of crown in the United Kingdom was based on the old feudalistic notions of Justice, namely, that the King was incapable of doing a wrong. The said common law immunity never operated in India.

Another case in which the principle laid down in Steam Navigation case was followed was **Kasturi Lal Ralia Ram Vs. State of UP AIR1965SC1039**. In this case partner of Kasturilal Ralia Ram Jain, a firm of jewellers of Amritsar, had gone to Meerut for selling gold and silver, but was taken into custody by the police of the suspicion of possessing stolen property. He was released the next day, but the property which was recovered from his possession could not be returned to him in its entirety inasmuch as the silver was returned but the gold could not be returned as the Head Constable in charge of the Malkhana misappropriated it and fled to Pakistan. The firm filed a suit against the State of U. P. for the return of the ornaments and in the alternative for compensation. It was held by the Apex Court that the claim against the state could not be sustained despite the fact that the negligent act was committed by the employees during the course of their employment because the employment was of a category which could claim the special characteristic of a sovereign power. The court held that the tortious act of the police officers was committed by them in discharge of sovereign powers and the state was therefore not liable for the damages caused to the appellant.

Initially aforesaid principles laid down by Apex Court were followed in MV Act cases also:

How far sovereign immunity is available in motor accident cases has however, been the subject-matter of consideration in a large number of cases of various High Courts as well as of the Supreme Court. It would be interesting to note that the aforesaid distinction of the sovereign & non-sovereign

functions of state and denying the compensation in case of sovereign functions were extended to Motor Vehicle Accident cases also. The cases were mostly those involving government vehicles, mainly Military Vehicles or paramilitary force vehicles. The trend of the judgments revealed that the court basically examined the question whether the military vehicle was engaged in the act which can alternatively be exercised by the private parties or the act is of purely sovereign nature, like act of war, movement of troops and armaments which cannot be delegated to the private parties. Let us now notice the relevant case laws on the subject:

In **Satyawati v. Union of India, (AIR1957Delhi98)** an Air Force vehicle was carrying hockey team of Indian Air Force Station to play a match. After the match was over, the driver was going to park the vehicle when he caused the fatal accident by his negligence. It was argued that it was one of the functions of the Union of lndia to keep the army in proper shape and tune and that hockey team was carried by the vehicle for the physical exercise of the Air Force personnel and therefore the Government was not liable. The Court rejected this argument and held that the carrying of hockey team to play a match could by no process of extension be termed as exercise of sovereign power and the Union of lndia was therefore liable for damages caused to the plaintiff.

In **Union of India v. Smt. Jasso, AIR 1962 Punj 315 (FB)** a military driver while transporting coal to general head-quarters in Simla in discharge of his duties committed an accident. It was held that the mere fact that the truck happened to be an army truck and the driver was a military employee cannot make any difference to the liability of the Government for damages for the tortious acts of the driver as such things could be obviously done by a private person also.

In **Union of India v. Sugrabai , (AIR 1969 Bom 13)** The Bombay High Court overruled the plea of sovereign immunity when a military driver driving a motor truck carrying a Records Sound Ranging machine from military workshop to military school of artillery killed a cyclist on the road. It was held that the driver was not acting in exercise of sovereign powers. The Bombay High Court observed in following words:

ñ*Sovereign powers are vested in the State in order that it may discharge its sovereign functions. For the discharge of that function one of the sovereign powers vested in the State is to maintain an army. Training of army personnel can be regarded as a part of the exercise of that sovereign power. The State would clearly not be liable for a tort committed by an army officer in the exercise of that sovereign power. But it cannot be said that every act which is necessary for the discharge of a sovereign function and which is undertaken by the State involves an exercise of sovereign power. Many of these acts do not require to be carried out by the State through its servants. In deciding whether a particular act was done by a Government servant in discharge of a sovereign power delegated to him, the proper test is whether it was necessary for the State for the proper discharge of its sovereign function to have the act done through its own employee rather than through a private agency*.ò

In **Baxi Amrik Singh v. Union of India, (1972 Punj LR 1)** The truck was part of an Army Division which had moved to the Front during the 1971-Indo-Pak War. It was during the movement of this Division back to its permanent location after the war, that the accident took place. The truck was at

that time carrying Jawans and rations. It was held by P&H High Court that the accident occurred during the exercise of sovereign functions of the State and consequently the Union of India could not be held liable for the tort committed by its servant-the driver of the military truck.

In **Thangarajan v. Union of India, (AIR1975Mad. 32)** an army driver was deputed for collecting CO_2 gas from the factory and to deliver it to a naval ship. As a result of rash driving he knocked down the appellant, a minor boy aged about 10 years. It was held that the accident was caused to the plaintiff while the driver was driving the lorry for the purpose of supply of CO, to the ship, I.N.S. Jamuna, which was in exercise of sovereign function of the State for maintaining military purposes. However, in view of the peculiar circumstances of the case, the Court strongly recommended to the Central Government to make an ex-gratia payment of Rs. 10,000 to the appellant. The Court said, ñIt is cruel to tell the injured boy who has suffered grievous injuries and was in hospital for over 6 months incurring considerable expenditure and has been permanently incapacitated that he is not entitled to any relief as he had the privilege of being knocked down by a lorry which was driven in exercise of sovereign functions of the stateò.

In **Mrs. Pushpa v. State of Jammu & Kashmir, 1977 ACJ 375**, a truck under the use of the army knocked down a cyclist causing his death. At that time the truck was loaded with crushed barley for being used as a feed for the mules. It was held that the truck could not be said to be engaged in the performance of the act of sovereign function.

In **Fatima Begum v. State of Jammu & Kashmir, 1976ACJ 194**, the same High Court rejected the defence plea of sovereign immunity when a truck belonging to the Government Transport Undertaking had knocked down a cyclist while it was engaged in transporting police personnel from the place of duty to their barracks.

In **Union of India v. Miss Savita Sharma, 1979 ACJ** 1 a military truck had dashed against a tempo from behind while it was carrying Jawans from the railway station to unit headquarters. The above High Court again rejected the defence on the ground that the act of carrying Jawans could not be said to be in exercise of any sovereign function as that act could be performed by any individual.

In **Iqbal Kaur v. Chief of Army Staff, AIR 1978 Ail 417**, an accident occurred due to the negligent driving by a Sepoy of a Government truck while he was going for imparting training in motor driving to new recruits. It was held that this would not constitute an act in exercise of sovereign power, and the driver and the Union of India both were liable for damages.

In **Union of India v. Kumari Neelam, AIR 1980 NOC 60 (MP)** A military vehicle while bringing vegetables from the Supply Department for prisoners of war knocked down a girl on the road. It was held that no immunity was available for the accident as the activity was not a sovereign act.

In **Union of India v. Hardeo Dutta Tirtharam, AIR 1986 Bom 350**, A driver of a military truck while collecting tents from outdoor training place and bringing them to the regiment knocked down a Subedar. The High Court took the view that since the particular duty the driver was carrying out in

the military area could have very well been carried out by any other private truck, sovereign immunity could not be claimed.

The aforesaid judicial pronouncement clearly laid down the earlier approach of judiciary as revealed from various judicial pronouncements was to make distinction between sovereign and non-sovereign functions and exempting the government from tortuous liability in case the activity involved was a sovereign activity. Later on, there has been significant change in the judicial attitude with respect to ñSovereign and Non-Sovereign dichotomyò as revealed from various judicial pronouncements where the courts, although have maintained the distinction between sovereign and non-sovereign functions yet in practice have transformed their attitude holding most of the functions of the government as non-sovereign. Consequently, there has been an expansion in the area of governmental liability in torts. The same was true with respect to motor vehicle accident cases also.

The Doctrine of Sovereign Immunity is not applicable to MV Act-Apex Court

The Apex Court Judgment of **Pushpa Thakur v. Union, 1984 ACJ 559** has settled the dichotomy between sovereign and non-sovereign functions and settled once for all in clear terms that the doctrine of sovereign immunity has no application so far as claims for compensation under the Motor Vehicles Act are concerned. In this case the Hon'ble Apex Court reversing a decision of the Punjab & Haryana High Court (1984 ACJ 401) which in its turn placed reliance on a Full Bench decision of that very Court in **Baxi Amrik Singh v. Union of India (1973) PLR Vol. 75 p.1: 1974 ACJ 105** (already stated supra) held that where the accident was caused by negligence of the driver of military truck the principle of sovereign immunity was not available to the State.

The decision of Pushpa Thakur has been followed in subsequent cases:Â

- **Usha Aggarwal and Ors. Vs. Union of India & Ors. cited as AIR 1982 PH 279:** In this case the appellant's husband Sushil Kumar Aggarwal died as a result of the injuries he sustained when the motor-cycle, he was travelling on met with an accident with the ITBP truck which had been deputed to fetch arms from the Railway Station at Ambala and was returning with these arms when the accident occurred. The Tribunal vide its order declined compensation to the claimants on the ground that the offending Indo-Tibetan Border Police truck DHL-79 was engaged in the performance of the sovereign functions of the State when the accident occurred. The appellant appealed in the P&H High Court. The Hon'ble P& H High Court followed the decision of SC in Pushpa Thakur and rejected the contention of Mr. H. S. Brar, appearing for the Union of India in that case who attempted to press in the judgment of the Full Bench in **Bakshi Amrit Singh v. Union of India 1974 Acc CJ 105** in the following words:

ñ*This is, however, of no avail here as the judgment of this Court in Pushpa Thakur's case (supra), which the Supreme Court, upset, was based upon this very authority*.ò

The Hon'ble High Court further observed that: ñ....*it does not behave the State to seek cover under the plea of sovereign immunity merely to avoid liability for the consequences of the negligence of its*

*servants. Such a plea is wholly out of place in a welfare State, in a case like the present where instead of providing for the needy, left so by the acts of its servants in the course of their employment, the attempt is to look for immunity founded upon the dubious privilege of the injured or the deceased, as the case may be, being run over by a vehicle engaged in the discharge of the sovereign functions of the State.*ñ

In the said case, the Hon'ble High Court differed from Tribunal ruling in the following words:

ñ*The Tribunal was also in error in absolving the truck-driver from liability on the ground that he too was engaged in the performance of a sovereign function at the time of the accident. The plea of sovereign immunity, when available, cannot absolve the actual wrong-doer. It can ensure only for the benefit of the State where it is sought to be held vicariously liable for the acts of its servants, acting in the course of their employment. In other words, if an accident is caused by rash and negligent driving, the driver of the offending vehicle would undoubtedly be liable, whether or not the claim of the State, his employer, for immunity from liability on the ground that the accident had occurred in the discharge of the sovereign functions of the State, is sustained. This being the settled position in law, it was clearly incumbent upon the Tribunal to have dealt with and returned a finding on the issue of negligence*.ò

- **Gurbachan Kaur Vs. Union of India, (2002 ACJ 666)**: In this case, the Hon'ble Punjab & Haryana High Court held as under:

"The plea that the driver was on sovereign duty is not open to the Govt. vis-a-vis its citizens especially in a welfare State."

- **N. Nagendra Rao & Co. v. State of A.P. reported as AIR 1994 SC-2663**: The Hon'ble Supreme Court in this very judgment in para 13 in very positive words while noting that the field of operation of the principle of sovereign immunity has been substantially whittled down by the subsequent decisions of the apex court has taken note of the decision of Supreme Court in Pushpa Thakur case supra and observed as under:

"In Pushpa Thakur v. Union of India and Anr. (1984) ACJ SC 559, this Court while reversing a decision of the Punjab & Haryana High Court (1984 ACJ 401) which in its turn placed reliance on a Full Bench decision of that very Court in Baxi Amrik Singh v. Union of India (1973) PLR Vol. 75 p.1 : 1974 ACJ 105 held that where the accident was caused by negligence of the driver of military truck the principle of sovereign immunity was not available to the State."

- **State of Rajasthan Vs. Smt. Shekhu and ors, 2006 ACJ 1644** has categorically ruled out the application of doctrine of sovereign immunity to the Motor Vehicle Act and held as under:

".... after the amending Act 100 of 1956, by which section 110A of the Motor Vehicles Act, 1939, was inserted, the distinction of sovereign and non-sovereign acts of the State no longer existed as all owners of vehicles were brought within the scope of that section. Sec. 166 of the new Act of 1988

reproduces Sec. 110A of the old Act. Whether the State is bound by the provisions of the Motor Vehicles Act is no longer res integra."

- **Union of India Vs. Rasmuni Devi and Ors. (2008 (2) JKJ 249**: In this case decided by the Hon'ble Jammu and Kashmir High Court, the fact was that a military truck collided with BSF vehicles and caused injuries to the standing constables of the BSF who later on succumbed to the injury. The Hon'ble J&K High Court in this case did not consider the issue of sovereign immunity and awarded the compensation.

No application of Sovereign Immunity to negligence causing threat/deprivation to life under Article 21 of the Constitution:

Without prejudice to the aforesaid judicial pronouncements, even otherwise the concept of immunity in respect of sovereign functions has no application where the fundamental right to life as guaranteed by Article 21 of the Constitution of India has been transgressed as held in the judgment of the High Court of Andhra Pradesh in **Challa Ramkonda Reddy Vs. State of AP, (AIR 1989 AP 235)**, which has been subsequently approved by the Supreme Court in. **State of A.P. v. Chella Ramakrishna Reddy (AIR 2000 SC 2083).** From the said judgments, the following points emerge:

- The sovereign immunity is not applicable to the cases in public domain i.e. in cases of writ petitions under Article 32 & 226 of Constitution of India. The principle is equally applicable to private law domain, i.e. claim of damages under tort law, where the right to life as guaranteed by Article 21 Constitution of India is violated, as the said right is sacrosanct, inalienable, and indefeasible.
- Though the principle of Kasturi Lal Case (AIR1965SC1039) is not applicable where the right to life as guaranteed by Article 21 is transgressed. In such cases, damages have to be awarded for the tortuous acts of government servant depriving the person of his life and liberty except in accordance with the procedure established by law.
- The Negligent act causing the deprivation of life and property of a person is to be held as violative of Fundamental right to life as guaranteed under Article 21 of the Constitution of India.
- Last but not the least, the Hon'ble Supreme Court has also concluded in the following words.

*"..... the law has marched ahead like a Pegasus but the Government attitude continues to be conservative and it tries to defend its action or the tortious action of its officers by raising the plea of immunity for sovereign acts or acts of State, which must fail.*ò

Principle of Sovereign Immunity has been ignored in other cases:

There are catena of judicial pronouncements in which the judiciary has ignored the principle of sovereign immunity and also differed from the ruling laid down in Kasturi Ram Case (supra) and held the government liable for the tortuous acts committed by its servant. The various cases are as follows:-Â

a. **Saheli, a Women's Resources Centre v. Commissioner of Police, Delhi, AIR 1990 (SC) 513**: The state was held to be liable for the tortuous acts of its employees when a 9 year boy had died due to the beating by the police officer acting in excess of power vested in him. The court directed the Government to pay Rs. 75000/- as compensation to the mother of the child.
b. **Common Cause, A Registered Society v. Union of India and Ors. (AIR 1999 SC 2979)**: In this case the entire history relating to the institution of suits by or against the State or, to be precise, against Government of India, beginning from the time of East India Company right up to the stage of Constitution, was considered and the theory of immunity was rejected. In this process of judicial advancement, Kasturi Lalôs case (supra) has paled into insignificance and is no longer of any binding value.
c. **Shyam Sunder and Ors. v. State of Rajasthan (AIR 1974 SC 890):** Where the question of sovereign immunity was raised and reliance was placed on the ratio laid down in Kasturi Lalôs case (supra), this Court after considering the principle of sovereign immunity as understood in English and even applied in America observed that there was no ôlogical or practicalô ground for exempting the sovereign from the suit for damages.

Last but not the least it would be interesting to note that in Australia also this doctrine of sovereign immunity has been ignored as can be seen from the decision in **Parker v. The Commonwealth of Australia, 112 CLR 295 (Aus**) where two ships of the Royal Australian Navy, viz. Melbourne and Voyager, came into collision on the highseas about 20 miles off the Australian cost. Melbourne struck the Voyager and she sank along with some men therein resulting in the death of one Parker. His widow brought an action against the Commonwealth for damages on the basis that her husbandôs death was caused by the negligence of the officers and crew of the ships of the Commonwealth. The deceased Parker was a civilian employed by the Navy Department in a technical capacity. In those facts and circumstances Windeyer, J., of the High Court of Australia held that the Commonwealth was liable in tort for damages and that the widow of Parker could bring in the suit for damages for the negligent acts or omission of the members of the Royal Australian Navy

The plea of defense based on the old and archaic concept of sovereignty immunity as borrowed from British jurisprudence prevalent during colonial rule is based on old feudalistic notions of justice namely the ñKing can do no wrongò. This common law immunity do not exist in the realm of welfare state and is against the modern jurisprudence where the distinction between sovereign or non-sovereign power does not exist and the state like any ordinary citizen is liable for the acts done by its employees as has been ruled by the Honôble Apex Court and various High Courts in its various judicial pronouncements. Moreover as, the said doctrine should not be applicable to the motor accidents claim under the Motor Vehicles Act, 1988 which is a beneficial legislation. Thus, from the above aforesaid judicial pronouncements of Honôble Apex Court followed by various High Court decisions as stated supra, it is established that the sovereign immunity to claims under the Motor Vehicle Act, is no longer res integra.

Conclusion

Thus to conclude, law of torts is a branch of law which resembles most of the other branches in certain aspects, but is essentially different from them in other respects. Although there are differences

in opinion among the different jurists regarding the liability in torts, the law has been developed and has made firm roots in the legal showground. There are well defined elements and conditions of liability in tort law.

This bough of law enables the citizens of a state to claim redressal for the minor or major damage caused to them. Thus the law has gained much confidence among the laymen

UNIT-II

1. VOLENTI NON FIT INIURIA

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* only applies 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 consent in 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 your land prevents them from being a trespasser.

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 themselves 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 drunk 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 defendantôs 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 defendantôs 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.

Unsuccessful attempts to rely on *volenti*

Examples of cases where a reliance on *volenti* was unsuccessful include:

- *Nettleship v. Weston* [1971] 3 All ER 581 (Court of Appeal)
- *Baker v T E Hopkins & Son Ltd* [1959] 3 All ER 225 (Court of Appeal).

In the first case, the plaintiff was an instructor who was injured while teaching the defendant to drive. The defence of *volenti* failed: that is, because the plaintiff specifically inquired if the defendant's insurance covered him before agreeing to teach. In the second case, a doctor went in to try to rescue workmen who were caught in a well after having succumbed to noxious fumes. He did so despite being warned of the danger and told to wait until the fire brigade arrived. The doctor and the workmen all died. The court held that it would be "unseemly" to hold the doctor to have consented to the risk simply because he acted promptly and bravely in an attempt to save lives.

2. INEVITABLE ACCIDENT

An inevitable accident or ñunavoidable accidentò is that which could not be possibly prevented by the exercise of ordinary care, caution and skill. It does not apply to anything which either party might have avoided. Inevitable accident was defined by Sir Frederick Pollock as an accident

ñnot avoidable by any such precautions as a reasonable man, doing such an act then there, could be expected to take.ò

It does not mean a catastrophe which could not have been avoided by any precaution whatever, but such as could not have been avoided by a reasonable man at the moment at which it occurred, and it is common knowledge that a reasonable man is not credited by the law with perfection of judgment. As observed by Greene M.R., an accident isñone out of the ordinary course of things, something so unusual as not to be looked for by a person of ordinary prudence.ò All causes of inevitable accident may be divided into 2 classes

- Those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause
- Those which have their origin either in the whole or in part in the agency of man, whether in acts of commission or omission, nonfeasance, or in any other causes independent of the agency of natural forces. The term ñAct of Godò is applicable to the former class.

An accident is said to be óinevitableô not merely when caused by Vis major or the act of God but also when all precautions reasonably to be required have been taken, and the accident has occurred notwithstanding. That there is no liability in such a case seems only one aspect of the proposition that

liability must be based on fault. 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. Vis Major includes those consequences which are occasioned by elementary force of nature unconnected with the agency of man. Common examples are falling of a tree, a flash of lightening, a tornado or a flood. The essential conditions of this defence are:

- The event causing damage was the result of natural forces without any intervention from human agency.
- The event was such that the possibility of such an event could not be recognized by using reasonable care and foresight[3].

The American Jurisprudence defines act of God as:

An event may be considered an act of God when it is occasioned exclusively by the violence of nature. While courts have articulated varying definitions of an act of God, the crux of the definition typically is an act of nature that is the sole proximate cause of the event for which liability is sought to be disclaimed[4].

Act of God as a defence arises only where escape is caused through natural causes without human intervention, in circumstances which no human foresight can provide against and of which human prudence is not bound to recognize the possibility[5].

Origin and Historical Evolution of the Defences

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 trespassery contact was actionable, unless the defendant could show that the accident was inevitable. It was for long thought that the burden of proof in trespass upon the person rested with the defendant and that trespass, therefore, offered scope to the defence of inevitable accident, but it has now been held that here too the burden is with the claimant In trespass as well as in negligence, therefore, inevitable accident has no place. In these cases inevitable accident is irrelevant because the burden is on the claimant to establish the defendantôs negligence, but it does not follow that that it is any more relevant if the claimant has no such burden. The emerging conception of inevitability can be seen most clearly in Whitelock v. Wherwell ,the bolting horse case from 1398. The complaint in Whitelock was unusual because the plaintiff, rather than just reciting that the defendant had hit him with force and arms, also alleged that the defendant had ñcontrolled the horse so negligently and improvidentlyò that it knocked him down. The defendant conceded that the horse had knocked down the plaintiff, but pleaded that the plaintiffôs fall was ñagainst the willò 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 ñcould in no way stop the horseò although he ñused all his strength and power to controlò it. It was a plea of inevitable accident in a case of latent defect (the horse is a ñbolterò). The collision may have

been inevitable, but it had become inevitable by virtue of the defendantôs negligence, and was thus not held to be an accident.

The first explicit statement that a defendant can escape liability in trespass if the accident was inevitable occurs in Weaver v. Ward decided in 1616. The category ñinevitable accidentò was understood, in its inception as distinguished from the defence of ñaccident,ò or ñmischance,ò which was available in felony but not in trespass, and which was a true no-negligence defence. The defendant in Weaver inadvertently shot the plaintiff when his musket discharged while their company of soldiers was skirmishing with another band. The defendant pleaded that he ñaccidentally and by misfortune and against his will, in discharging his musket, injured and wounded the plaintiff; which wounding is the same trespass of which the plaintiff complains.ò Substantively, this was a plea of accident. The plaintiff demurred, and the court held the defendantôs plea bad. In trespass, the plaintiff needed only to allege that the defendant had done harm with force and arms, rather than done harm negligently. In actions on the case, however, allegations of negligence seem always to have been necessary

In property damage cases involving heavy weather, where there was typically a presumption of fault against the moving vessel, and the vessel ownerôs efforts to rebut liability take the inevitable accident form. The inevitable accident defence was typically invoked when a vessel, caught in the full force of a storm, has been driven against another vessel or vessels, or against a fixed structure. Property damage cases also involved destruction by fire. In Tucker v. Smith (1359), the defendant said simply that his house ñcaught fire by mischance and was burned down so that the fire there from being blown by the wind to [plaintiff's] houseò burned it ñby mischance.ò It can be quite as impractical to stop an ordinary wind from spreading fire as a tempest. The plaintiff therefore elected to join issue on how the fire started rather than how it spread. His special traverse claimed that the defendants burned the house ñof their own wrong and by their faultò and denied that it ñwas burned down by mischance.ò

In *Ellis v. Angwyn* (1390), the defendant pleaded that unknown to him and ñagainst his will, a fire suddenly arose by mischanceò in his house, and was spread by ña great gust of windò to the plaintiffôs houses. The plea says nothing about what the defendant did to prevent the fire from arising or spreading. The act of God was thus incorporated (though not by that name) in a plea of accident to show that the harm was inevitable.The last pre-nineteenth century case that directly deals with how inevitable accident should be pleaded is Gibbons v. Pepper[13]. The defendant pleaded that his horse became frightened and ñran away with him so that he could not stop the horse,ò that the plaintiff ignored his warning ñto take care,ò and that the horse thus ran over the plaintiff ñagainst the will of the defendant.ò In substance, this was a plea of inevitable accident. Gibbons thus holds that inevitable accident should be raised by pleading the general issue when the substantive nature of the plea amounts to a complete denial of causal responsibility. The Gibbons court put the ñrunaway horseò on a par with the hypothetical case of A using Bôs hand to strike C, and treated both as denials.

In *Mitchell v. Allestry* (1676), the plaintiff was run over by two untamed horses the defendants were breaking in a public square. The plaintiff initially brought an action claiming that the defendants ñdid negligently permitò the horses to run over her. But at the first trial ñthe evidence as to the negligenceò

went against the plaintiff, and she was non-suited. She then brought a second suit, in which, as counsel for the defendant said, her ñown declaration excusedò the defendants of that ñnegligence,ò because it said ñthat on account of their ferocity they could not govern them, but that they did run upon her.ò The first suit failed because the evidence-given that the plaintiff did not challenge the defendantsô antecedent decision to break horses in a public square-showed that the harm was both accidental and inevitable. The court (Hale, C.B.) pointed out, however, that the plaintiff could sue again on a different theory. This accordingly illustrates the way in which some decisions about precautions were governed only by accident, while others were also governed by inevitability. In the Nitro Glycerine[15] case, the defendants, a firm of carriers, received a wooden case to be carried to its destination and its contents were not communicated. It was found that the contents were leaking. The case was taken to the defendantsô office, which they had rented from the plaintiff and the defendants proceeded to open the case for examination but the nitro glycerine which was present had already exploded. All present were killed and the building was badly damaged. The defendants were held not liable ñin the absence of reasonable ground of suspicion, the contents of the package offered them for carriageò and that, they were ñwithout such knowledge in fact and without negligence.ò

In the case of *Holmes v. Matherthe* defendantôs horses while being driven by his servant on a public highway ran away from a barking dog and became unmanageable that the servant could not stop them, but could, to some extent guide them. While trying to turn a corner safely, they knocked down and injured the plaintiff on the highway. It was held that the action was not maintainable since the servant had done his best under the circumstances. In the case of Fardon v. Harcourt-Rivington the defendant parked his saloon motor car in a street and left his dog inside. The dog has always been quiet and docile. As the plaintiff was walking past the car, the dog started jumping about in the car, smashed a glass panel, and a splinter entered into the plaintiffôs left eye which had to be removed. Sir Frederick Pollock said: ñPeople must guard against reasonable probabilities but they are not bound to guard against fantastic possibilitiesò In the absence of negligence, the plaintiff could not recover damages. In the case of *Brown v. Kendal* the plaintiffôs and defendants dogs were fighting. The defendant was hitting the dogs to stop them from fighting while the plaintiff was standing at a distance watching them. Accidentally, the stick hit and hurt the plaintiffôs eye. In an action for damages it was held that the defendant would not be liable since the damage was the result of a pure accident and not the negligence of the defendant.

3. PRIVATE DEFENSE

Harm inflicted in defense of oneôs person, property is justified if it is reasonably necessary. It includes defense of oneôs own property, life, but also people close to you like oneôs family. Force used must be reasonable and proportionate to the force applied. Moreover force used for prevention of injury and not reprisal. Apprehension is good enough for private defense. Every man has the right to defend himself when it is urgent. The person may not have to wait till he gets a blow from someone else. He may strike before that. But one is not justified in using sword to repel a blow. But if the person is attacked with a deadly weapon, he can defend himself with any weapon. ñWhen a man strikes at another within a distance capable of the latter being struck to resist it, and he is justified in

using such a degree of force as will prevent a repetitionò. But in case of verbal provocation blow is not justified. The person on the defensive can use as much force as is reasonably necessary.

In case of private defense *necessity* has to be proved. In case of defense of property the property has to be possessed by the person. 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. One must not use deadly dogs, spring guns to protect his property. If such measures are used then the plaintiff or the injured may get compensations. The principal of private defense extends to killing of other animal if it is reasonably necessary in order to save his property, life and his animals. Killing is justified if the defendant proves that the animal (as well as humans) was attacking, damaging his property, imminent risk of such attack or damage & there was no means other than shooting, or stopping the injury from being committed. In case of injury to third party private defense may apply if the defendant can prove that he acted under that he did not mean to harm, was not negligent and he acted merely under self defense. He may also rely on defense of necessity. Sec *96 IPC* says ñ*Nothing is an offence which is done in exercise of the right of private defense*ò. Private defense may be regarded as a species of self help or self-redress. When a person trespasses into ones house and use derogatory methods then one can repeal the attack by using reasonable force against him to preserve oneself but later one may also go after him and retake from him the goods stolen. The former is private defense and the later is self help. The person are allowed to repel force by force, not for the redress of injuries but for their prevention, not in order to undo a wrong done or to get compensation for it but to cut wrong short before it is done; & the right goes only to the extent necessary for this purpose.

CASE STUDIES

Holmes v Bagge.

The claimant and the defendant were both members of a cricket club. During the match defendant asked the claimant a spectator to act as a substitute for one of the players. But during the match the defendant rudely asked the claimant to remove his coat which he refused. The claimants neither removed his coat nor leave the field. The defendant forcefully removed the claimant. The defendant when sued for assault pleaded possession of ground but the plea was rejected as the possession of land was in the committee of the club.

Scott v Shepherd. (1773) 2 W & B L 892.

A threw a lighted squib into a crowded market. It fell upon a stall of B. C a bystander to prevent injury to himself takes and throws it away. It fell in Dôs
Stall who inturn threw it away which exploded on the face of E and blinded his one eye. In such case the intermediate involuntary agents who acted under right of private defense are not liable. The

judges decided that even if action has been bought against them they would not have been liable for they acted ñunder a compulsive necessity for their own safety and self-preservationò

Cook v Beal. (1697) Lord Raym 176.

In this case A strikes B, B draws his sword and cuts the head of A. This will not come under private defense as B used unreasonable force.

Bird v Holbrook. (1821) 4 Bing 628.

Defendant set some spring guns on his garden because his flowers were stolen from his garden. The plaintiff a boy did not knew the existence of spring guns entered the garden in search of his fowl got injured. The defendant was held liable as he used unreasonable methods to protect his land.

4. NECESSITY

In tort common law, the defense of **necessity** gives the State or an individual a privilege to take or use the property of another. A defendant typically invokes the defense of necessity only against the intentional torts of trespass to chattels, trespass to land, or conversion. The Latin phrase from common law is *necessitas inducit privilegium quod jura privata*, "Necessity induces a privilege because of a private right." A court will grant this privilege to a trespasser when the risk of harm to an individual or society is apparently and reasonably greater than the harm to the property. Unlike the privilege of self-defense, those who are harmed by individuals invoking the necessity privilege are usually free from any wrongdoing. Generally, an individual invoking this privilege is obligated to pay any actual damages caused in the use of the property but not punitive or nominal damages.

Private necessity is the use of another's property for private reasons. Well established doctrines in common law prevent a property owner from using 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. For example:

A strong wind blows a parachuting skydiver off course from his intended landing zone. He must land in a nearby farmer's field. The skydiver tramples on the farmer's prized roses, and the farmer hits the skydiver on the head with a pitchfork. The skydiver can invoke the privilege of private necessity for trespassing in the farmer's fields but will have to pay for the damage caused to the roses. The farmer will be liable for battery because the use of force in defense of property is not privileged against an individual who successfully claims private necessity.

In American law, the case most often cited to explain the privilege of private necessity is *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 124 N.W. 221 (1910).

Vincent v. Lake Erie Transportation Co.

- **Facts**

  Defendant Lake Erie was at the dock of plaintiff Vincent to unload cargo from *Reynolds*, the steamship owned by the defendant. An unusually violent storm developed. Lake Erie was unable to leave the dock safely and deckhands for the steamship instead tied the *Reynolds* to the dock, continually changing ropes as they began to wear and break. A sudden fierce wind threw the ship against the dock significantly damaging the dock.

- **Issue**

  Is compensation required when there is damage to another's property due to a private necessity?

- **Decision**

  (Judge O'Brien) Yes. A private necessity may require one to take or damage another's property, but compensation is required. If the *Reynolds* had entered the harbor at the time the storm began, and the wind knocked her against the dock, this force of nature would not have allowed Vincent to recover. The defendant, Lake Erie, deliberately kept the *Reynolds* tied to the dock. If they had not done so, the ship could have been lost creating a far greater damage than what was caused to the dock. Although this was a prudent thing to do, Lake Erie is still liable to Vincent for the damage caused.

- **Dissent**

  (Judge Lewis) One who constructs a dock and conducts business assumes a risk of damage that may occur from storms. For this reason, Judge Lewis did not agree with the majority and believed that Vincent had assumed the risk of damage caused by Lake Erie.

To invoke the private necessity privilege, the defendant must have been actually threatened or have reasonably thought that a significant harm were about to occur. The ruling in *Vincent v. Lake Erie* assures private citizens from a public policy stand point that they will be compensated for their loss. Vincent will be compensated for repairs and Lake Erie can rest assured that their ship will not sink.

Public necessity is the use of private property by a public official for a public reason. The potential harm to society necessitates the destruction or use of private property for the greater good. The injured, private individual does not always recover for the damage caused by the necessity. In American law, two conflicting cases illustrate this point: *Surocco v. Geary*, 3 Cal. 69 (1853) and *Wegner v. Milwaukee Mutual Ins. Co.* 479 N.W.2d 38 (Minn 1991).

Surocco v. Geary

- **Facts**

  San Francisco was hit by a major fire. The plaintiff, Surocco, was attempting to remove goods from his home while the fire raged nearby. The defendant and mayor of San Francisco, Geary, authorized that the plaintiff's home be demolished to stop the progress of the fire and to prevent its spread to nearby buildings. Surocco sued the mayor claiming he could have recovered more of his possessions had his house not been blown up.

- **Issue**

  Is a person liable for the private property of another if destroying that property would prevent an imminent public disaster?

- **Decision**

  No. The right of necessity falls under natural law and exists independent of society and government. Individual rights must give way to the higher law of impending necessity. A house on fire or about to catch on fire is a public nuisance which is lawful to abate. Otherwise one stubborn person could destroy an entire city. If property is destroyed without an apparent necessity, the destroying person would be liable to the property owner for trespass. Here, blowing up Surocco's house was necessary to stop the fire. Any delay in blowing up the house to allow him to remove more of his possessions would have made blowing up the house too late.

The decision in *Surocco v. Geary* differs from the private necessity doctrine that a trespasser must compensate a property owner for any damage she may cause. The next case coincides with the private necessity doctrine and shows that American courts are conflicted on the issue of compensation for damage.

Wegner v. Milwaukee Mutual Ins. Co

- **Facts**

  A suspected felon barricaded himself inside of plaintiff, Wegner's house. The Minneapolis police department fired tear gas canisters and concussion grenades into the house causing extensive damage. Wegner sued the defendant, the City of Minneapolis for trespass. Wegner claimed that the City's actions constituted a "taking" of his property under principles similar to those outlined in the Fifth Amendment to the US Constitution: this was a taking of his private property for public use and so the City was required to compensate him for it. The City

claimed there was no taking because the police's actions were a legitimate exercise of police power. Lower courts ruled that the City was justified under the doctrine of public necessity and that the City was not required to compensate Wegner. Wegner appealed to the State Supreme Court in its claim against the City's insurance company.

- **Issue**

  Must a city compensate a homeowner whose property was damaged in the apprehension by police of a suspect?

- **Decision**

  (Judge Tomljanovich) Yes. Under Minnesota's constitution, the government must compensate a landowner for any damage it causes when it takes private land for public use. Whether the police acted reasonably is not relevant. The constitutional provision is not limited to an improvement of property for public use. The doctrine of public necessity does not change our holding. Once a taking has been found to exist, compensation is required. If the public necessity doctrine were to apply to a situation like this, no taking would ever be found. Fairness and justice require this result. It would not be fair for Wegner to suffer the burden of his loss for the public good. Therefore, the City must bear his loss. In addition, the individual police officers are not personally liable; the public must bear the loss.

It is an issue of public policy to determine if either private individuals or the public at large through taxes should bear the loss for damages caused through public necessity. *Wegner v. Milwaukee* allocates the loss that benefits the public to the public rather than to Wegner, the innocent citizen. Cases with similar facts to *Wegner* have used the public necessity doctrine under *Surocco*, and the individual must bear the cost of the greater public good. Courts determine this issue as a matter of public policy.

Necessity and private defense, are they interrelated?

This defense (necessity) may be presented by a defendant in cases where action has been undertaken out of necessity for public or private good, such as to save a life. Such actions often involve trespass on another's property, or even damage to their goods, but under the circumstances, were necessary.
E.g. A car accident late at night causes several serious injuries requiring immediate ambulance assistance. One of the victims breaks the window of a nearby gas station to use their phone to call 111.

Necessity is such a defense that it is widely applicable under different heads, e.g., executive and military authority and in case of private defense.

The defense is available if the act complained of was reasonably demanded by the danger or emergency. (Pollock, torts 15th ed p 122)

In this case there is an immediate threat of danger and itôs reasonable to defend oneself. Every man has the right to defend himself when it is urgent. Acts of defense of oneself or another in a sense falls under necessity. The common link between necessity and private defense is ñdefendants conduct has to be reasonable in the circumstancesò. The plea of necessity will succeed if the defendant can show that his that his act is reasonably necessary to prevent harm to a third party like say for e.g. family or strangers which comes under private defense. In case of third party the case *Scott v Shepherd. (1773) 2 W & B L 892* clearly explains it. Necessity is a defense when it comes to trespass. This is also applicable when it comes to trespass of fierce animal, robbers, thiefôs etc. A person who does not have possession of the land or who has may use reasonable force against persons who obstruct him in carrying out his own statutory rights. In case of trespass one must use reasonable force. The test is same for actions in defense of persons and property, if it is reasonably necessary in the circumstances but application is different in two cases. Devlin. J said ñThe safety of human lives belong to different scale of values from the safety of property. The two are beyond comparison and the necessity of saving life has at all times been considered a proper ground for inflicting such damage as may be necessary upon anotherôs propertyò in case of private defense attack, apprehension, threat are important. In case of necessity attack, apprehensions, threats are not the conditions.

Act of defense itself falls under private defense. Private defense presupposes some kind of attack or threat against the person acting in defense, while necessity does not; and in case of self defense it would usually be the case that the plaintiff is in wrong himself. Acts of private defense is itself a *necessity* when it comes to trespass. Private defense is available against one self but *necessity* is available against the public at large. Acting in the public interest can itself be a necessity but such rights are not available when it comes to private defense. *Necessity is the macro aspect of private defense and private defense is a micro aspect*. In case of private defense *necessity* has to be proved.

5. ACT OF GOD

Act of God is a legal term for events outside human control, such as sudden floods or other natural disasters, for which no one can be held responsible.

When something occurs over which you have no control and it is effected of accentuated by the forces of nature then you are not liable in tort law for such inadvertent damage that may arise out of such. However if you were well aware of the risks and could have possibly taken steps to stop the wrongful act or damaging act or have in anyway mitigated it then you cannot duck responsibility under this defence. Constituents of this defence:

ÅDue to forces of nature or unnatural circumstances.

ÅYou had no control over it and it happened suddenly.

ÅYou had no knowledge or could not do anything to mitigate the damage.

6. STATUTORY AUTHORITY

Act in respect to Statutory Authority_Any damage arising out of an act that the law prescribes or the statute authorises will never become actionable even though in absence of such statutory authority it is an offence in tort.

Some other defenses

Mistake (which is of two types):

a) Mistake of Law.

Mistake of law is no defense and ignorance of law, no excuse.

b) Mistake of Fact.

Mistake of facts is a defense in crime but inn torts, nistake of facts is not a defense every time.

This would make you clear that when is mistake of fact a defense. Mistake can be pleaded as a defense in the following cases:

1. Malicious prosecution of an innocent

Where motive or intention is essential, mistake is a defense. (e.g. in case of malicious prosecution). Malice takes away the defense of mistake. If there is a malice on the part of police officials in prosecuting an innocent person, then it is a tort for which mistake is no defense.

2. Mistaken Arrest of an innocent person

Mistaken arrest of an innocent person can be pleaded as a defense. However, a reasonable and well-founded suspicion, even if proven false at a later stage, is not a tort, provided, of course, that it is free from any vengeance and negligence.

- **Right to private defense:-** This right entitles a person to go to any extent to protect oneôs life, property, or any third person. Provided, of course, that such a force used in private defense must be **reasonable** force to repel the attack and it should always be in **defensive and not offensive.**
Also, the danger must be imminent. If there is malice and one is not naturally reacting to the attack on oneself but such a reaction is pre-planned then such a force is deemed to be unreasonable and the defense is not available.

The following case should make the application of the defense clearer. Please note that you are under ***no compulsion to memorise these facts. These are only for your convenience.*** In this case , a dog belonging to Tewari, began chasing the Chauhanôs servant Raju and bit him. Then Tewari turned around and raised his gun. The dog on seeing an imminent threat to his life, ran away, however, he shot the running dog.

Here the private defense is not available as the act of shooting the dog was an offence and not a defense (as Tewari shot a dog that was already leaving the site and there was no imminent threat to him in that situation).

UNIT-III

SPECIFIC TORTS

1. DEFAMATION

There is always a delicate balance between one person's right to freedom of speech and another's right to protect their good name. It is often difficult to know which personal remarks are proper and which run afoul of defamation law.

The term "defamation" is an all-encompassing term that covers any statement that hurts someone's reputation. If the statement is made in writing and published, the defamation is called "libel." If the hurtful statement is spoken, the statement is "slander." The government can't imprison someone for making a defamatory statement since it is not a crime. Instead, defamation is considered to be a civil wrong, or a tort. A person that has suffered a defamatory statement may sue the person that made the statement under defamation law.

Defamation law, for as long as it has been in existence in the United States, has had to walk a fine line between the right to freedom of speech and the right of a person to avoid defamation. On one hand, people should be free to talk about their experiences in a truthful manner without fear of a lawsuit if they say something mean, but true, about someone else. On the other hand, people have a right to not have false statements made that will damage their reputation. Discourse is essential to a free society, and the more open and honest the discourse, the better for society.

Elements of a Defamation Lawsuit

Defamation law changes as you cross state borders, but there are normally some accepted standards that make laws similar no matter where you are. If you think that you have been the victim of some

defamatory statement, whether slander or libel, then you will need to file a lawsuit in order to recover. Generally speaking, in order to win your lawsuit, you must show that:

1. Someone made a statement;
2. that statement was published;
3. the statement caused you injury;
4. the statement was false; and
5. the statement did not fall into a privileged category.

To get a better grasp of what you will need to do to win your defamation lawsuit, let's look at each element more closely.

The Statement -- A "statement" needs to be spoken, written, or otherwise expressed in some manner. Because the spoken word often fades more quickly from memory, slander is often considered less harmful than libel.

Publication -- For a statement to be published, a third party must have seen, heard or read the defamatory statement. A third party is someone apart from the person making the statement and the subject of the statement. Unlike the traditional meaning of the word "published," a defamatory statement does not need to be printed in a book. Rather, if the statement is heard over the television or seen scrawled on someone's door, it is considered to be published.

Injury -- To succeed in a defamation lawsuit, the statement must be shown to have caused injury to the subject of the statement. This means that the statement must have hurt the reputation of the subject of the statement. As an example, a statement has caused injury if the subject of the statement lost work as a result of the statement.

Falsity -- Defamation law will only consider statements defamatory if they are, in fact, false. A true statement, no matter how harmful, is not considered defamation. In addition, because of their nature, statements of opinion are not considered false because they are subjective to the speaker.

Unprivileged -- Lastly, in order for a statement to be defamatory, it must be unprivileged. Lawmakers have decided that you cannot sue for defamation in certain instances when a statement is considered privileged. For example, when a witness testifies at trial and makes a statement that is both false and injurious, the witness will be immune to a lawsuit for defamation because the act of testifying at trial is privileged.

Whether a statement is privileged or unprivileged is a policy decision that rests on the shoulders of lawmakers. The lawmakers must weigh the need to avoid defamation against the importance that the person making the statement have the free ability to say what they want.

Witnesses on the stand at trial are a prime example. When a witness is giving his testimony, we, as a society, want to ensure that the witness gives a full account of everything without holding back for

fear of saying something defamatory. Likewise, lawmakers themselves are immune from defamation suits resulting from statements made in legislative chamber or in official materials.

Social Media and Defamation

With the rise of social media, itôs now easier than ever to make a defamatory statement. Thatôs because social media services like Twitter and Facebook allow you to instantly ñpublishò a statement that can reach thousands of people. Whether itôs a disparaging blog post, Facebook status update, or YouTube video, online defamation is treated the same way as more traditional forms. That means you can be sued for any defamatory statements you post online.

Higher Burdens for Defamation -- Public Officials and Figures

Our government places a high priority on the public being allowed to speak their mind about elected officials as well as other public figures. People in the public eye get less protection from defamatory statements and face a higher burden when attempting to win a defamation lawsuit.

When an official is criticized in a false and injurious way for something that relates to their behavior in office, the official must prove all of the above elements associated with normal defamation, and must also show that the statement was made with "actual malice."

"Actual malice" was defined in a Supreme Court case decided in 1964, *Hustler v. Falwell*. In that case, the court held that certain statements that would otherwise be defamatory were protected by the First Amendment of the United States Constitution. The court reasoned that the United States society had a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."

This meant, according to the Court, that public officials could only win a defamation suit when the statement that was made was not an honest mistake and was in fact published with the actual intent to harm the public figure. According to the Court, actual malice only occurs when the person making the statement knew the statement was not true at the time he made it, or had reckless disregard for whether it was true or not.

For other people that are in the public eye, but not public officials, the defamation laws are also different. These people, such as celebrities and movie stars, must also prove, in most situations, that the defamatory statements were made with actual malice.

Freedom of speech is less meaningful when a statement is made about a private individual because the statement is probably not about a matter of public importance. As noted above, a private person has no need to show that the statement maker acted with actual malice in order to be victorious in their defamation lawsuit

2. NEGLIGENCE

Negligence (Lat. *negligentia*, from *neglegere*, to neglect, literally "not to pick up something") is a failure to exercise the care that a reasonably prudent person would exercise in like circumstances. The area of tort law known as *negligence* involves harm caused by *carelessness*, not intentional harm.

According to Jay M. Feinman of the Rutgers University School of Law;

> "The core idea of negligence is that people should exercise reasonable care when they act by taking account of the potential harm that they might foreseeably cause harm to other people."

Through civil litigation, if an injured person proves that another person acted negligently to cause their injury, they can recover damages to compensate for their harm. Proving a case for negligence can potentially entitle the injured plaintiff to compensation for harm to their body, property, mental well-being, financial status, or intimate relationships. However, because negligence cases are very fact-specific, this general definition does not fully explain the concept of when the law will require one person to compensate another for losses caused by accidental injury. Further, the law of negligence at common law is only one aspect of the law of liability. Although resulting damages must be proven in order to recover compensation in a negligence action, the nature and extent of those damages are not the primary focus of negligence cases.

Elements of negligence claims

Negligence suits have historically been analyzed in stages, called elements, similar to the analysis of crimes (see Element (criminal law)). An important concept related to elements is that if a plaintiff fails to prove any one element of his claim, he loses on the entire tort claim. For example, assume that a particular tort has five elements. Each element must be proven. If the plaintiff proves only four of the five elements, the plaintiff has not succeeded in making out his claim.

Common law jurisdictions may differ slightly in the exact classification of the elements of negligence, but the elements that must be established in every negligence case are: duty, breach, causation, and damages. Each is defined and explained in greater detail in the paragraphs below. Negligence can be conceived of as having just three elements - conduct, causation and damages. More often, it is said to have four (duty, breach, causation and pecuniary damages) or five (duty, breach, actual cause, proximate cause, and damages). Each would be correct, depending on how much specificity someone is seeking. "The broad agreement on the conceptual model", writes Professor Robertson of the University of Texas, "entails recognition that the five elements are best defined with care and kept separate. But in practice", he goes on to warn, "several varieties of confusion or conceptual mistakes have sometimes occurred."

Duty of care

Main article: Duty of care

A decomposed snail in Scotland was the humble beginning of the modern English law of negligence

The case of *Donoghue v. Stevenson* [1932] illustrates the law of negligence, laying the foundations of the fault principle around the Commonwealth. The Pursuer, May Donoghue, drank ginger beer given to her by a friend, who bought it from a shop. The beer was supplied by a manufacturer, a certain David Stevenson in Scotland. While drinking the drink, Donoghue discovered the remains of an allegedly decomposed slug. She then sued Stevenson, though there was no relationship of contract, as the friend had made the payment. As there was no contract the doctrine of privity prevented a direct action against Stevenson.

In his ruling, justice Lord MacMillan defined a new category of delict (the Scots law nearest equivalent of tort), (which is really not based on negligence but on what is now known as the "implied warranty of fitness of a product" in a completely different category of tort--"products liability") because it was analogous to previous cases about people hurting each other. Lord Atkin interpreted the biblical passages to 'love thy neighbour,' as the legal requirement to 'not harm thy neighbour.' He then went on to define neighbour as "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question." Reasonably foreseeable harm must be compensated. This is the first principle of negligence.

In England the more recent case of *Caparo v. Dickman* [1990] introduced a 'threefold test' for a duty of care. Harm must be (1) reasonably foreseeable (2) there must be a relationship of proximity between the plaintiff and defendant and (3) it must be 'fair, just and reasonable' to impose liability. However, these act as guidelines for the courts in establishing a duty of care; much of the principle is still at the discretion of judges.

Breach of duty

See also: Breach of duty in English law

In *Bolton v. Stone* the English court was sympathetic to cricket players

Once it is established that the defendant owed a duty to the plaintiff/claimant, the matter of whether or not that duty was breached must be settled. The test is both subjective and objective. The defendant who knowingly (subjective) exposes the plaintiff/claimant to a substantial risk of loss, breaches that duty. The defendant who fails to realize the substantial risk of loss to the plaintiff/claimant, which any reasonable person [objective] in the same situation would clearly have realized, also breaches that duty.

Breach of duty is not limited to professionals or persons under written or oral contract; all members of society have a duty to exercise reasonable care toward others and their property. A person who engages in activities that pose an unreasonable risk toward others and their property that actually results in harm, breaches their duty of reasonable care. An example is shown in the facts of *Bolton v. Stone*, a 1951 legal case decided by the House of Lords which established that a defendant is not

negligent if the damage to the plaintiff was not a reasonably foreseeable consequence of his conduct. In the case, a Miss Stone was struck on the head by a cricket ball while standing outside her house. Cricket balls were not normally hit a far enough distance to pose a danger to people standing as far away as was Miss Stone. Although she was injured, the court held that she did not have a legitimate claim because the danger was not sufficiently foreseeable. As stated in the opinion, 'Reasonable risk' cannot be judged with the benefit of hindsight. As Lord Denning said in *Roe v. Minister of Health*, the past should not be viewed through rose coloured spectacles. Therefore, there was no negligence on the part of the medical professionals in a case faulting them for using contaminated medical jars because the scientific standards of the time indicated a low possibility of medical jar contamination. Even if some were harmed, the professionals took reasonable care for risk to their patients.

- *United States v. Carroll Towing Co.* 159 F.2d 169 (2d. Cir. 1947)

Factual causation (Direct Cause)

For a defendant to be held liable, it must be shown that the particular acts or omissions were the cause of the loss or damage sustained. Although the notion sounds simple, the causation between one's breach of duty and the harm that results to another can at times be very complicated. The basic test is to ask whether the injury would have occurred but for, or without, the accused party's breach of the duty owed to the injured party. Even more precisely, if a breaching party materially increases the risk of harm to another, then the breaching party can be sued to the value of harm that he caused.

Asbestos litigations which have been ongoing for decades revolve around the issue of causation. Interwoven with the simple idea of a party causing harm to another are issues on insurance bills and compensations, which sometimes drove compensating companies out of business.

Legal causation or remoteness

Negligence can lead to this sort of collision - a train wreck at Gare Montparnasse in 1895.

Sometimes factual causation is distinguished from 'legal causation' to avert the danger of defendants being exposed to, in the words of Cardozo, J., "liability in an indeterminate amount for an indeterminate time to an indeterminate class." It is said a new question arises of how remote a consequence a person's harm is from another's negligence. We say that one's negligence is 'too remote' (in England) or not a 'proximate cause' (in the U.S.) of another's harm if one would 'never' reasonably foresee it happening. Note that a 'proximate cause' in U.S. terminology (to do with the chain of events between the action and the injury) should not be confused with the 'proximity test' under the English duty of care (to do with closeness of relationship). The idea of legal causation is that if no one can foresee something bad happening, and therefore take care to avoid it, how could anyone be responsible? For instance, in *Palsgraf v. Long Island Rail Road Co.* the judge decided that the defendant, a railway, was not liable for an injury suffered by a distant bystander. The plaintiff, Palsgraf, was hit by scales that fell on her as she waited on a train platform. The scales fell because of a far-away commotion. A train conductor had run to help a man into a departing train. The man was carrying a package as he jogged to jump in the train door. The package had fireworks in it. The

conductor mishandled the passenger or his package, causing the package to fall. The fireworks slipped and exploded on the ground causing shockwaves to travel through the platform. As a consequence, the scales fell. Because Palsgraf was hurt by the falling scales, she sued the train company who employed the conductor for negligence.

The defendant train company argued it should not be liable as a matter of law, because despite the fact that they employed the employee, who was negligent, his negligence was too remote from the plaintiff's injury. On appeal, the majority of the court agreed, with four judges adopting the reasons, written by Judge Cardozo, that the defendant owed no duty of care to the plaintiff, because a duty was owed only to foreseeable plaintiffs. Three judges dissented, arguing, as written by Judge Andrews, that the defendant owed a duty to the plaintiff, regardless of foreseeability, because all men owe one another a duty not to act negligently.

Such disparity of views on the element of remoteness continues to trouble the judiciary. Courts that follow Cardozo's view have greater control in negligence cases. If the court can find that, as a matter of law, the defendant owed no duty of care to the plaintiff, the plaintiff will lose his case for negligence before having a chance to present to the jury. Cardozo's view is the majority view. However, some courts follow the position put forth by Judge Andrews. In jurisdictions following the minority rule, defendants must phrase their remoteness arguments in terms of proximate cause if they wish the court to take the case away from the jury.

Remoteness takes another form, seen in *The Wagon Mound (No. 1)*.[11] The Wagon Mound was a ship in Sydney harbour. The ship leaked oil creating a slick in part of the harbour. The wharf owner asked the ship owner about the danger and was told he could continue his work because the slick would not burn. The wharf owner allowed work to continue on the wharf, which sent sparks onto a rag in the water which ignited and created a fire which burnt down the wharf.

The UK House of Lords determined that the wharf owner 'intervened' in the causal chain, creating a responsibility for the fire which canceled out the liability of the ship owner.

In Australia, the concept of remoteness, or proximity, was tested with the case of *Jaensch v. Coffey*. The wife of a policeman, Mrs Coffey suffered a nervous shock injury from the aftermath of a motor vehicle collision although she was not actually at the scene at the time of the collision. The court upheld in addition to it being reasonably foreseeable that his wife might suffer such an injury, it also required that there be sufficient proximity between the plaintiff and the defendant who caused the collision. Here there was sufficient causal proximity. Also see the case of *Kavanagh v Akhtar*

Harm

Even though there is breach of duty, and the cause of some injury to the defendant, a plaintiff may not recover unless he can prove that the defendant's breach caused a pecuniary injury. This should not be mistaken with the requirements that a plaintiff prove harm to recover. As a general rule, a plaintiff can only rely on a legal remedy to the point that he proves that he suffered a loss. It means something more than pecuniary loss is a necessary element of the plaintiff's case in negligence. When damages

are not a necessary element, a plaintiff can win his case without showing that he suffered any loss; he would be entitled to nominal damages and any other damages according to proof. Negligence is different in that the plaintiff must prove his loss, and a particular kind of loss, to recover. In some cases, a defendant may not dispute the loss, but the requirement is significant in cases where a defendant cannot deny his negligence, but the plaintiff suffered no loss as a result. If the plaintiff can prove pecuniary loss, then he can also obtain damages for non-pecuniary injuries, such as emotional distress.

The requirement of pecuniary loss can be shown in a number of ways. A plaintiff who is physically injured by allegedly negligent conduct may show that he had to pay a medical bill. If his property is damaged, he could show the income lost because he could not use it, the cost to repair it, although he could only recover for one of these things.

The damage may be physical, purely economic, both physical and economic (loss of earnings following a personal injury), or reputational (in a defamation case).

In English law, the right to claim for purely economic loss is limited to a number of 'special' and clearly defined circumstances, often related to the nature of the duty to the plaintiff as between clients and lawyers, financial advisers, and other professions where money is central to the consultative services.

Emotional distress has been recognized as an actionable tort. Generally, emotional distress damages had to be parasitic. That is, the plaintiff could recover for emotional distress caused by injury, but only if it accompanied a physical or pecuniary injury.

A claimant who suffered only emotional distress and no pecuniary loss would not recover for negligence. However, courts have recently allowed recovery for a plaintiff to recover for purely emotional distress under certain circumstances. The state courts of California allowed recovery for emotional distress alone ï even in the absence of any physical injury, when the defendant physically injures a relative of the plaintiff, and the plaintiff witnesses it.

Damages

Damages place a monetary value on the harm done, following the principle of restitutio in integrum (Latin for "restoration to the original condition"). Thus, for most purposes connected with the quantification of damages, the degree of culpability in the breach of the duty of care is irrelevant. Once the breach of the duty is established, the only requirement is to compensate the victim.

One of the main tests that is posed when deliberating whether a claimant is entitled to compensation for a tort, is the "reasonable person". The test is self-explanatory: would a reasonable person (as determined by a judge or jury) be damaged by the breach of duty. Simple as the "reasonable person" test sounds, it is very complicated. It is a risky test because it involves the opinion of either the judge or the jury that can be based on limited facts. However, as vague as the "reasonable person" test

seems, it is extremely important in deciding whether or not a plaintiff is entitled to compensation for a negligence tort.

Damages are compensatory in nature. Compensatory damages addresses a plaintiff/claimant's losses (in cases involving physical or mental injury the amount awarded also compensates for pain and suffering). The award should make the plaintiff whole, sufficient to put the plaintiff back in the position he or she was before Defendant's negligent act. Anything more would unlawfully permit a plaintiff to profit from the tort.

Types of damage

- Special damages - quantifiable dollar losses suffered from the date of defendant's negligent act (the tort) up to a specified time (proven at trial). Special damage examples include lost wages, medical bills, and damage to property such as one's car.
- General damages - these are damages that are not quantified in monetary terms (e.g., there's no invoice or receipt as there would be to prove special damages). A general damage example is an amount for the pain and suffering one experiences from a car collision. Lastly, where the plaintiff proves only minimal loss or damage, or the court or jury is unable to quantify the losses, the court or jury may award nominal damages.
- Punitive damages - Punitive damages are to punish a defendant, rather than to compensate plaintiffs, in negligence cases. In most jurisdictions punitive damages are recoverable in a negligence action, but only if the plaintiff shows that the defendantôs conduct was more than ordinary negligence (i.e., wanton and willful or reckless).

Procedure in the United States

The plaintiff must prove each element to win his case. Therefore, if it is highly unlikely that the plaintiff can prove one of the elements, the defendant may request judicial resolution early on, to prevent the case from going to a jury. This can be by way of a demurrer, motion to dismiss, or motion for summary judgment. The ability to resolve a negligence case without trial is very important to defendants. Without the specific limits provided by the four elements, any plaintiff could claim any defendant was responsible for any loss, and subject him to a costly trial.[15]

The elements allow a defendant to test a plaintiff's accusations before trial, as well as providing a guide to the "finder of fact" (jury) to decide whether the defendant is or is not liable, after the trial. Whether the case is resolved with or without trial again depends heavily on the particular facts of the case, and the ability of the parties to frame the issues to the court. The duty and causation elements in particular give the court the greatest opportunity to take the case from the jury, because they directly involve questions of policy. The court can find that regardless of the disputed facts, if any, the case can be resolved as a matter of law from undisputed facts, because two people in the position of the plaintiff and defendant simply cannot be legally responsible to one another for negligent injury.

On appeal, the court reviewing a decision in a negligence case will analyze in terms of at least one of these elements, depending on the disposition of the case and the question on appeal. For example, if it

is an appeal from a final judgment after a jury verdict, the reviewing court will look to see that the jury was properly instructed on each contested element, and that the record shows sufficient evidence for the jury's findings. On an appeal from a dismissal or judgment against the plaintiff without trial, the court will review *de novo* whether the court below properly found that the plaintiff could not prove any or all of his case.

3. NUISANCE

Nuisance (from archaic *nocence*, through Fr. *noisance*, *nuisance*, from Lat. *nocere*, "to hurt") is a common law tort. It means that which causes offence, annoyance, trouble or injury. A nuisance can be either public (also "common") or private. A public nuisance was defined by English scholar Sir J. F. Stephen as,

"an act not warranted by law, or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects".

Private nuisance is the interference with the right of specific people. Nuisance is one of the oldest causes of action known to the common law, with cases framed in nuisance going back almost to the beginning of recorded case law. Nuisance signifies that the "right of quiet enjoyment" is being disrupted to such a degree that a tort is being committed.

Under the common law, persons in possession of real property (land owners, lease holders etc.) are entitled to the **quiet enjoyment** of their lands. However this doesn't include visitors or those who aren't considered to have an interest in the land. If a neighbour interferes with that quiet enjoyment, either by creating smells, sounds, pollution or any other hazard that extends past the boundaries of the property, the affected party may make a claim in nuisance.

Legally, the term *nuisance* is traditionally used in three ways:

1. to describe an activity or condition that is harmful or annoying to others (e.g., indecent conduct, a rubbish heap or a smoking chimney)
2. to describe the harm caused by the before-mentioned activity or condition (e.g., loud noises or objectionable odors)
3. to describe a legal liability that arises from the combination of the two. However, the "interference" was not the result of a neighbor stealing land or trespassing on the land. Instead, it arose from activities taking place on another person's land that affected the enjoyment of that land.

The law of nuisance was created to stop such bothersome activities or conduct when they unreasonably interfered either with the rights of other private landowners (i.e., private nuisance) or with the rights of the general public (i.e., public nuisance)

A public nuisance is an unreasonable interference with the public's right to property. It includes conduct that interferes with public health, safety, peace or convenience. The unreasonableness may be evidenced by statute, or by the nature of the act, including how long, and how bad, the effects of the activity may be.

A private nuisance is simply a violation of one's use of quiet enjoyment of land. It doesn't include trespass.

To be a nuisance, the level of interference must rise above the merely aesthetic. For example: if your neighbour paints their house purple, it may offend you; however, it doesn't rise to the level of nuisance. In most cases, normal uses of a property that can constitute quiet enjoyment cannot be restrained in nuisance either. For example, the sound of a crying baby may be annoying, but it is an expected part of quiet enjoyment of property and does not constitute a nuisance.

Any affected property owner has standing to sue for a private nuisance. If a nuisance is widespread enough, but yet has a public purpose, it is often treated at law as a public nuisance. Owners of interests in real property (whether owners, lessors, or holders of an easement or other interest) have standing only to bring private nuisance suits.

History and legal development of nuisance

In the late 19th and early 20th centuries, the law of nuisance became difficult to administer, as competing property uses often posed a nuisance to each other, and the cost of litigation to settle the issue grew prohibitive. As such, most jurisdictions now have a system of land use planning (e.g. zoning) that describes what activities are acceptable in a given location. Zoning generally overrules nuisance. For example: if a factory is operating in an industrial zone, neighbours in the neighbouring residential zone can't make a claim in nuisance. Jurisdictions without zoning laws essentially leave land use to be determined by the laws concerning nuisance.

Similarly, modern environmental laws are an adaptation of the doctrine of nuisance to modern complex societies, in that a person's use of his property may harmfully affect another's property, or person, far from the nuisance activity, and from causes not easily integrated into historic understandings of nuisance law.

Remedies

Under the common law, the only remedy for a nuisance was the payment of damages. However, with the development of the courts of equity, the remedy of an injunction became available to prevent a defendant from repeating the activity that caused the nuisance, and specifying punishment for contempt if the defendant is in breach of such an injunction.

The law and economics movement has been involved in analyzing the most efficient choice of remedies given the circumstances of the nuisance. In *Boomer v. Atlantic Cement Co.* a cement plant interfered with a number of neighbors, yet the cost of complying with a full injunction would have

been far more than a fair value of the cost to the plaintiffs of continuation. The New York court allowed the cement plant owner to 'purchase' the injunction for a specified amountð the permanent damages. In theory, the permanent damage amount should be the net present value of all future damages suffered by the plaintiff.

Inspector of Nuisances

An Inspector of Nuisances was the title of an office in several English-speaking jurisdictions. In many jurisdictions this term is now archaic, the position and/or term having been replaced by others. In the United Kingdom from the mid 19th century this office was generally associated with public health and sanitation.

The first Inspector of Nuisances appointed by a UK local authority Health Committee was Thomas Fresh in Liverpool in 1844. Both the 1855 Nuisances Removal and Diseases Prevention Act and the Metropolis Management Act 1855 defined such an office but with the title of 'Sanitary Inspector'. In local authorities that had established a Board of Health, the title was 'Inspector of Nuisances'. Eventually the title was standardized across all UK local authorities as 'Sanitary Inspector'. An Act of Parliament later changed the title to 'Public Health Inspector'. Similar offices were established across the British Empire.

The nearest modern equivalent of this position in the UK is the Environmental Health Officer. This title being adopted by local authorities on the recommendation of Central Government after the Local Government Act 1972. Today, Registered UK Environmental Health Officers working in non-enforcement roles (eg in the private sector) may prefer to use the generic term 'Environmental Health Practitioner'.

In the United States, a modern example of an officer with the title 'Inspector of Nuisances' but not the public health role is found in Section 3767[7] of the Ohio Revised Code which defines such a position to investigate nuisances, where this term broadly covers establishments in which lewdness and alcohol are found. Whereas in the United States the environmental health officer role is undertaken by local authority officers with the titles 'Registered Environmental Health Specialist' or 'Registered Sanitarian' depending on the jurisdiction.

Law related to nuisance, by country

United Kingdom

The boundaries of the tort are potentially unclear, due to the public/private nuisance divide, and existence of the rule in Rylands v Fletcher. Writers such as John Murphy of the University of Manchester have popularised the idea that *Rylands* forms a separate, though related, tort. This is still an issue for debate, and is rejected by others (the primary distinction in *Rylands* concerns 'escapes onto land', and so it may be argued that the only difference is the nature of the *nuisance*, not the nature of the civil *wrong*.)

Under English law, unlike US law, it is no defence that the claimant "came to the nuisance": the 1879 case of Sturges v Bridgman is still good law, and a new owner can bring a claim in nuisance for the existing activities of a neighbour.

Environmental nuisance

In the field of environmental science, there are a number of phenomena which are considered nuisances under the law, including most notably noise and light pollution. Moreover there are some issues that are not necessarily legal matters that are termed environmental nuisance; for example, an excess population of insects or other vectors may be termed a "nuisance population" in an ecological sense.

From Britannica 1911

A common nuisance is punishable as a misdemeanour at common law, where no special provision is made by statute. In modern times, many of the old common law nuisances have been the subject of legislation. It's no defence for a master or employer that a nuisance is caused by the acts of his servants, if such acts are within the scope of their employment, even though such acts are done without his knowledge, and contrary to his orders. Nor is it a defence that the nuisance has been in existence for a great length of time, for no lapse of time will legitimate a public nuisance.

A private nuisance is an act, or omission, which causes inconvenience or damage to a private person, and is left to be redressed by action. There must be some sensible diminution of these rights affecting the value or convenience of the property. "The real question in all the cases is the question of fact, whether the annoyance is such as materially to interfere with the ordinary comfort of human existence" (Lord Romilly in *Crump v. Lambert* (1867) L.R. 3 Eq. 409). A private nuisance, differing in this respect from a public nuisance, may be legalized by uninterrupted use for twenty years. It used to be thought that, if a man knew there was a nuisance and went and lived near it, he couldn't recover, because, it was said, it is he that goes to the nuisance, and not the nuisance to him. But this has long ceased to be law, as regards both the remedy by damages, and the remedy by injunction.

The remedy for a public nuisance is by information, indictment, summary procedure or abatement. An information lies in cases of great public importance, such as the obstruction of a navigable river by piers. In some matters, the law allows the party to take the remedy into his own hands, and to "abate" the nuisance. Thus; if a gate be placed across a highway, any person lawfully using the highway may remove the obstruction, provided that no breach of the peace is caused thereby. The remedy for a private nuisance is by injunction, action for damages or abatement. An action lies in every case for a private nuisance; it also lies where the nuisance is public, provided that the plaintiff can prove that he has sustained some special injury. In such a case, the civil is in addition to the criminal remedy. In abating a private nuisance, care must be taken not to do more damage than is necessary for the removal of the nuisance.

In Scotland, there's no recognized distinction between public and private nuisances. The law as to what constitutes a nuisance is substantially the same as in England. A list of statutory nuisances will

be found in the Public Health (Scotland) Act 1867, and amending acts. The remedy for nuisance is by interdict, or action

4. BATTERY/MAYHEM

Battery is the intentional and direct application of any physical force to the person of another. It is the actual striking of another person, or touching him in a rude, angry, revengeful , or insolent manner. Battery includes an assault which briefly stated in an act evidencing an immediate intention to commit a battery. It is mainly distinguishable from an assault in the fact that physical contact is necessary to accomplish it. It does not matter whether the force is applied directly to the human body itself or to anything coming in contact with it.

e.g.

(i) to throw water at a person is assault; if any drop fall upon him it is a battery.
(ii) Riding a horse towards a person is assault; riding it against him is a battery.

5. ASSAULT

An assault is an attempt or a threat to do a corporeal hurt to another, coupled with an apparent present ability and intention to do the act. Actual contact is not necessary in an assault. Any gesture calculated to excite in the party threatened a reasonable apprehension that the party threatening intends immediately to offer violence, or, in the language of the Indian Penal Code, is 'about to use criminal force' to the person threatened , constitutes assault. It coupled with a present to ability to carry such intention in execution is an assault in law.

Essentials
(a) The defendant by his act creates an apprehension in the mind of the plaintiff.
(b) It consists of an attempt, more than the harm.e.g.
(i) A friendly pat on the shoulder or back doesn't constitute assault.
(ii) A advance towards B with clenched fists, but is stopped by C. An assault has been committed

6. FALSE IMPRISONMENT

False imprisonment involves intentional interference with a personôs freedom of movement. Many people regard liberty or freedom of the individual as a fundamental political right. Hence the policy of the law is that imposing restraints or restrictions on that freedom is wrong. It is a legally actionable wrong and thus a tort. However, there are some exceptions, as you will see.

In this unit we will also look at other torts which are often grouped with false imprisonment, because all in some sense involve abuse of legal process. These other torts are *malicious prosecution*, *maintenance* and *champerty***.**

Learning objectives

When you have completed this unit, you should be able to:

- identify the key elements in the tort of false imprisonment;
- apply relevant principles of law to factual situations in relation to false imprisonment;
- list possible defences to false imprisonment; and
- analyse torts concerned with abuse of legal process, such as malicious prosecution, maintenance and champerty.

Principle of False Imprisonment

We now introduce you to the principles of ***false imprisonment**** through examples and relevant cases.

Total restriction on freedom of movement

In order for an act to amount to the tort of false imprisonment, the restriction on a personôs freedom of movement must be total or comprehensive. If there is some reasonable opportunity available for escape, then the courts will hold that a person has not been falsely imprisoned.

The first two examples provide a contrast in terms of how much a personôs freedom of movement is restricted.

Example 4.1: Detention in a speeding car

Suppose a driver stops to pick up a hitch-hiker. The hitch-hiker gets in the car and the driver drives on. After some talk in the car, the hitch-hiker decides that the driver is a strange person. She says, "I want to get out of the car now". The driver says nothing, but speeds up the car. The hitch-hiker again demands to be allowed out of the car. The driver speeds up even more. After more protests by the hitch-hiker, the driver says, "I am in a hurry. I cannot stop now to waste time on you. If you want to get out, then jump out the door." The car is by now doing 120 kilometres per hour.

"Opportunity to escape" as a defence

Has the driver falsely imprisoned the hitch-hiker? In his defence, the driver will say that he allowed the hitch-hiker the opportunity to escape. He knew that she did not want to remain in the car any longer but, in his view, he had his own convenience to consider first. He was in a hurry. He told her how she could get out of the car. How could he have wrongfully detained her, if he allowed her to jump out at any time?

That is not a reasonable argument. From the time when the hitch-hiker said she wanted to get out, the driver had the power to stop the car and let her out. It was his car and he was in control. Matters of inconvenience that the driver raised are not serious enough to outweigh a personôs right to liberty and freedom of movement. The hitch-hiker was being detained in a particular place against her will. That is false imprisonment.

Was detention total?

But was the ***detention**** in that place (i.e. the car) total? Can we accept the driverôs argument that there was an opportunity to escape? In one sense there was, but it was an opportunity which the hitch-hiker could only take at the risk of death or serious injury. The opportunity provided must be reasonable, such that it allows the person to take an action which:

- a reasonable person would or could do in the circumstances; and
- the person could do without serious risk of injury or damage.

Contrast the first example with the following situation.

Example 4.2: Prevention from walking along a public road

You are walking along a road with the intention of going for a hike through a nearby parkland. You come to an intersection in the road. You want to go straight ahead because that is the shortest way to get to the parkland. However, much to your alarm, you find that a number of bulldozers and men have blocked off the roadway. One of the men says to you that you cannot go any further along that road, as they are about to start work nearby and they donôt want anybody interfering with their preparations. You say, "You are not council employees or police officers. You cannot stop me. I have the right to go along this public road. I want to get to the parkland. This is the shortest route. Let me through, you fools!"

One of the men replies, "You are not coming through here. If you try, we will put you underneath one of these bulldozers. You can take the alternative road to the left here. It will only take you a couple of hours of extra walking. It should improve your fitness. Anyway you look as if you need a bit of exercise. Get lost. You are not getting in here."

You say, "You donôt scare me one bit, but I will go the other way anyway in protest. You have interfered with my freedom of movement and you will hear from my lawyers tomorrow (Monday)." You then leave by the other route to go off to the parkland.

What are you rights in tort?

Now, what rights if any do you have in tort? You might think about assault, but if you understood *unit 3* thoroughly, you should know that it is unlikely that the workers will be liable for assault. They made a conditional threatð "If you do this, then we will do so and so!" Your response was "You

don't scare me!" Where is your apprehension of injury? Thus you would have some problems in bringing an assault case.

However, if you understood *unit 1* thoroughly, you might be wondering about the tort of public nuisance in this case. If you are thinking that it was probably a public nuisance to obstruct a person's public right of access on a public highway, then you are correct. But we are not concerned with this tort at this stage.

Confinement in a particular place

Is it false imprisonment? Your lawyer tells you yes. There is nothing worse than a bad lawyer! She is wrong. It is not false imprisonment at all. Why? Because false imprisonment is not concerned with blocking a person's access to somewhere he or she wants to go. It is about confining or detaining a person in a particular place against his or her will.

Certainly, in this instance, people prevented you from gaining a particular means of public access. They stopped you from going somewhere. They inconvenienced you considerably. They denied you the opportunity to go specifically where you wanted to go and as a result you had to make other choices about where you went.

But none of that amounts to false imprisonment. You cannot say that you were detained or confined in a particular place against your will. We can describe this situation by saying:

- the workers did not *confine* you *in a particular place* at all; or
- the workers presented you with several alternatives for escapeð "Go left, go right, go backwards". It might have been inconvenient but causing inconvenience is not enough to establish false imprisonment.

7. MALICIOUS PROSECUTION

Malicious prosecution* is a tort which is sometimes grouped together with others as torts involving an abuse of legal process. It is similar to false imprisonment in the sense that false imprisonment, and other trespasses, can involve a breach of legal process in some sense. For example, if police officers abuse their powers of arrest and detain a suspect without proper legal authority to do so, they have abused proper legal process in a way.

But there are also notable differences between malicious prosecution and false imprisonment, especially in terms of the traditional approach to them. Malicious prosecution, traditionally, was an indirect tort that arose from an action on the case. In contrast, false imprisonment was traditionally a direct form of wrongdoing and therefore a trespass. No doubt this difference has become somewhat confused with the more recent shift from direct versus indirect to intentional versus unintentional torts.

Elements of malicious prosecution

So what are the elements of the tort of malicious prosecution? A person causes a prosecution to be brought against a particular individual by providing information. Prosecution here means the launch of official criminal proceedings. It does not include civil proceedings (such as in tort, contract etc.). There is authority that it might include bankruptcy proceedings or proceedings to wind up a company.

In order for a person to be successful in an action for malicious prosecution (where he or she was the defendant), the plaintiff in this action must show that:

- there was *no reasonable or probable cause* for the plaintiff in the malicious prosecution (i.e. the defendant or accused in the action for prosecution) to instigate the proceedings in question;
- the plaintiff in the malicious prosecution acted with an element of ***malice****. Malice means the absence of any proper motive to instigate the action. Hatred, ill-will and the desire to cause harm to the defendant are some types of malice. Negligence is not malice;
- the proceedings failedð i.e. the malicious prosecution was unsuccessful; and
- the defendant in the malicious prosecution suffered loss. This element demonstrates some connection to historical actions on the case rather than trespass.

The actions for malicious prosecution are comparatively rare.

Note:

You will need to get used to the way that we constantly make a distinction between things which are legal and things which are not.

Reading

Turn to your *Reader* for the following cases on the general nature of the tort of malicious prosecution:

Glinski v McIver [1962] AC 762

Roy v Prior [1970] 2 All ER 729

Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc. [1990] 1QB 391

Offei also discusses some South Pacific cases at pp. 77ï 86. Take note of *Manorama Raju v Gurnam Singh and Another* [1975] 21 Fiji 22 and *Attorney-General v Wilson Wong* (1994) Appeal No. 4 Solomon Islands.

8. NERVOUS SHOCK

Generally: recoverable in exceptional circumstances only, though courts are slow to accept it as head of damage for which tort of negligence could scope of recovery severely restricted Psychiatric Injury a)◊compensate Excluded: grief or sorrow (except for claim for bereavement in damages) b) symptoms: preoccupation w/event,◊Included:post traumatic stress disorder intrusive memories, increased arousal, sleeping difficulties, irritability, outburst of anger, overreaction to reminders of event, personality change etc. Victims (1) Primary - suffers psychiatric injury after being directly involved in accident or being within the zone of danger and is either: a. Persons to whom physical injury is a foreseeable consequence of D's negligence o Page v Smith-collision b/w cars, no physical injury to C but within hours of coming home felt obviously exhausted, claimed accident caused the return of Chronic Fatigue Syndrome from which he suffered in mild form for past 20 years. Unlikely he'd beable to ever work again. Lord Lloyd for majority in HL held that: a) where physical injury to C was a foreseeable consequence of D's negligence, C is also a primary V for purposes for the law on psychiatric injury b) b/c in cases of physical injury to primary Vs, D is under duty not to cause him foreseeable physical injury, same applies to psychiatric injury

- to be treated as one so in psychiatric injury cases◊type of damage for purposes of foreseeability primary V placed in foreseeable physical danger won't have to prove psychiatric injury was also foreseeable +
decision to conflate 2 types of injury potentially reduced impact of Wagon Mound foreseeability in PI cases.

 Bailey & Nolan: both principles should be discarded & replaced w/clearer, more rational ones. In the mean time courts should continue to distinguish Page where circs are sufficiently different & its application would cause injustice. a) C's presence in area of foreseeable physical risk shouldn't ensure her classification as primary V for purposes of liability for psychiatric injury. Instead primary Vs should be defined as all those who suffer psychiatric injury as a result of death, injury, imperilment of another. Would ensure criteria for secondary Vs laid down in Alcock would apply in all cases where rationale for those criteria is satisfied so that attempts to limit primary V category to those in the area of foreseeable physical risk would be doomed to fail. b) Psychiatric & physical injury should be regarded as different types of damage so that in all primary Vs cases it would be required for psychiatric injury to be foreseeable in a person of ordinary fortitude, unless D knew or should have known of C's particular suspectibility (apparently correct app of thin skull rule!) NB: there are many signs in both judiciary & Law Commission that Page v Smith won't last, though Lords in Rothwell preferred to "leave it for another day". b. put in fear.

UNIT-IV

CONSUMER PROTECTION

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 ócónsumerô and conferred express additional rights on him. It is interesting to note that the Act doesnôt 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 ócónsumerôgiven 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 whoð

(*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;

THE CONSUMER PROTECTION ACT

The Consumer Protection Act seeks to provide better protection of the interests of consumers. It aims to provide a speedy and simple redressal to consumer grievances. The Consumer Protection Act offers for the setting up of three-tier quasi-judicial machinery. This machinery has been empowered to give relief of a specific nature and to award compensation to consumers. The Consumer Protection Act applies both to goods and services. It protects not only buyer but user in the case of goods and any beneficiary in case of services.

Several laws had been passed to protect consumers. The Contract Act, 1872, The Sale of Goods Act, 1930, The Agricultural Produce/Trading and Marking Act, 1937, The Drugs and Cosmetics Act, 1940, The Essential Commodities Act, 1955, The Preventions of Food Adulteration Act, 1954, The Monopolies and Restrictive Trade Practices Act, 1969, The Standards of Weights and Measures Act, 1976, etc., are examples of these laws.

It was; however, felt that there was need for a specific law for consumer protection. Therefore, The Consumer Protection Act, 1986 was passed.

OBJECTS

The Consumer Protection Act seeks to provide better protection of the interests of consumers. It aims to provide a speedy and simple redressal to consumer grievances. The Consumer Protection Act offers for the setting up of three-tier quasi-judicial machinery. This machinery has been empowered to give relief of a specific nature and to award compensation to consumers. The Consumer Protection Act applies both to goods and services. It protects not only buyer but user in the case of goods and any beneficiary in case of services.

SALIENT FEATURES OF THE CONSUMER PROTECTION ACT, 1986

1. **Social Welfare Law** : It is a highly progressive piece of social welfare legislation. It is acclaimed as the Magna Carta of Indian consumers. This is a unique law which directly pertains to consumers in the market place and seeks to redress complaints arising there from.

2. **Comprehensive Provisions and Effective Safeguards**: Its provisions are very comprehensive. It provides effective safeguards to the consumers against various types of exploitation and unfair trade practices. In fact, it provides more effective protection to consumers than any other law in India.

3. **Special Consumer Courts**: The Consumer Protection Act has created special consumer courts for enforcement of the rights of consumers.

4. **Three-Tier Grievance Redressal Machinery:** The Consumer Protection Act provides for a three-tier consumer grievance redressal machinery ð District Forums at the base, the State Commission at the middle level and the National Commission at the apex level. The redressal machinery is quasi-judicial in

nature.

5. **Simple and Inexpensive** : There are no complicated or elaborate procedures or other technicalities. The redressal machinery is merely to observe the principles of natural justice. No court fee any other charge is to be paid by the complainant. It is not mandatory to employ any advocate. The complainant can write his grievance- on a simple paper along with the name and address of the opposite party against whom the complaint is made.

Thus, the consumer protection Act provides a simple, convenient and inexpensive redressal of consumer grievances.

6. **Covers Goods and Services** : The Consumer Protection Act covers both goods and services rendered for consideration by any person or organization including public sector undertakings and Government agencies. However, services rendered free of charge or under any contract of personal service are excluded. All suppliers of goods and services in private, public and cooperative sectors are covered under the Act.

7. **Time Frame** : The Consumer Protection Act lays down time limits for the disposal of cases so as to provide speedy redressal of grievances.

8. **Class Action** : The Consumer Protection Act allows filing of class action complaints on behalf of groups of consumers having common interest.

9. **Check on Unfair Trade Practices** : The Consumer Protection Act also covers complaints relating to unfair trade practices. Thus, a consumer can protect against food adulteration, short weighting and overcharging, directly to the District Forums. The consumer can pick up a food sample from a shop, get it analyzed by a chemist and file a complaint on that basis.

10. **Check on Overcharging** : The Consumer Protection Act also provides for complaints against charging in excess of the price of a product fixed by a law or rule and/or displayed on the packaged commodities.

THE BASIC FEATURES OF THE CONSUMER PROTECTION ACT, 1986

The Constitution of India, which is divided into different parts, has two very important parts . Part III Fundamental Rights and Part IV Directive Principles of State Policy. These two parts denote two important features of our constitution. The former denotes the existing and enforceable legal rights and the latter denotes the targeted social and economic goals which our founding fathers desired, our successive governments to achieve.

That in pursuance of achieving one such goal, Consumer Protection Act came into force in the year 1986. That as per the preamble of the Act it was brought to provide for the better protection of the interests of consumers and for settlement of consumersô disputes. Although there were remedies in other laws like Contract Act, Sales of Goods Act, Torts, IPC and procedure prescribed in C.P.C. and Cr.P.C., the purpose o f enactment of Consumer Protection Act, 1986 was to provide specialized redressal to the consumer grievances.

That the Act provides for the Central Consumer Protection Council, State Consumer Protection Council and three tiers of the Consumer Redressal Authorities i.e. District Consumer Forum, State Consumer Commission and the National Consumer Commission. The Councils were assigned with the job to promote and protect interest of the consumers at the Central and State levels and the redressal authorities were established to provide speedy and simple remedy to consumer disputes through a quasi-judicial machinery.

That the proceedings before the District Consumer Forum, State Consumer Commission or the National Consumer Commission are deemed to be judicial proceedings. Further the District Consumer Forum is deemed to be a Civil Court headed by a person qualified to be a District Judge. The territorial jurisdiction of the District Forum is the entire district and the current enhanced monetary jurisdiction is the dispute up to Rupees twenty lakhs.

That the State Consumer Commission has two jurisdictions i.e. original which is the territory of the entire state beyond Rupees twenty lakhs up to Rupees one crore and the Appellate Jurisdiction i.e. to hear the appeals against the judgments and orders of the District forums.

That the National Consumer Commission has two jurisdictions i.e. original which is the territory of the whole of India beyond Rupees one crore up to infinity and the Appellate Jurisdiction i.e. to hear the appeals against the judgments and orders of the State Consumer Commission.

That by the establishment of the specialized mechanism by the Act it was ensured that the ócomerô can file a ócomplaintô in case of any unfair trade practice, defect in goods, deficiency in services or excess-pricing. Thus making it necessary to first understand the connotations of these words and/or phrases in the context of the Act. Firstly, the consumer is defined by the Act as a person who buys or uses any goods or hires any services for money paid or promised. Secondly, the complaint means any allegation in writing made by the consumer against any unfair trade practice, defect in goods, deficiency in services or excess pricing.

One more thing note worthy is that the complaint can be lodged by consumer, registered consumer association, Central Government or State Government. Therefore the complaint can be lodged by not only the consumer himself but also by others, in representative capacity.

It is pertinent to note that consumer means any person who consumes the goods or services. Therefore making all human beings as consumers as long as they live. It is the consumer who is the center of the entire business and industry. He needs to be protected from malpractices and exploitative deeds of market operators like the producer, supplier, whole-seller, dealer and retailer.

Interestingly, even the producer, supplier, whole-seller, dealer and retailer are somewhere also consumers when they are in their own personal life consuming the goods or services.

Another important aspect to be noted is that the Act came into force with the objective to protect and promote the interest of the consumers in addition to the existing provisions for the same objective in other laws and statutes not in abrogation of the same. That means that even after the promulgation of the Act other laws and statutes continue to be in force for the protection of the consumersô interest.

That since inception in the year 1986 till now there has been a lot of changes and development in the law as well as the redressed system. The legal concepts have been enlarged and elaborated by wonderful judicial precedents. Amendments have been brought to make it more effective. Though a lot is yet to be achieved, at least the steps in right direction had been taken has come a long way and is growing fast.

AUTHORITIES FOR CONSUMER PROTECTION

Consumer Protection Council

Consumer Protection Councils are established at the national, state and district level to increase consumer awareness.

Central Consumer Protection Council

It is established by the Central Government which consists of the following members:

- The Minister of Consumer Affairs, ï Chairman, and
- Such number of other official or non-official members representing such interests as may be prescribed.

State Consumer Protection Council

It is established by the State Government which consists of the following members:

- The Minister in charge of consumer affairs in the State Government ï Chairman.
- Such number of other official or non-official members representing such interests as may be prescribed by the State Government.
- such number of other official or non-official members, not exceeding ten, as may be nominated by the Central Government.

The State Council is required to meet as and when necessary but not less than two meetings every year.

Consumer Disputes Redressal Agencies

Main article: Consumer Court

- District Consumer Disputes Redressal Forum (DCDRF): Also known as the "District Forum" established by the State Government in each district of the State. The State Government may establish more than one District Forum in a district. It is a district level court that deals with cases valuing up to ₹2 million (US$31,000).

- State Consumer Disputes Redressal Commission (SCDRC): Also known as the "State Commission" established by the State Government in the State. It is a state level court that takes up cases valuing less than ₹10 million (US$150,000)

- National Consumer Disputes Redressal Commission (NCDRC): Established by the Central Government. It is a national level court that works for the whole country and deals with amount more than ₹10 million (US$150,000).

Objectives of Central Council

The objectives of the Central Council is to promote and protect the rights of the consumers such as:-
a) ï the right to be protected against the marketing of goods and services which are hazardous to life and property.
b) ï the right to be informed about the quality, quantity, potency, purity, standard and price of goods or services, as the case may be so as to protect the consumer against unfair trade practices.
c) ï the right to be assured, wherever possible, access to a variety of goods and services at competitive prices.
d) ï the right to be heard and to be assured that consumer's interests will receive due consideration at appropriate forums.
e) ï the right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers; and
f) ï the right to consumer education. g) - the right against consumer exploitation.

Objectives of State Council

The objects of every State Council shall be to promote and protect within the State the rights of the consumers laid down in clauses (a) to (f) in central council objectives.

Jurisdiction of District Forum

1) ï Subject to the other provisions of this Act, the District Forum shall have jurisdiction to entertain complaints where the value of the goods or services and the compensation, if any, claimed

does not exceed rupees twenty lakhs.

2) ï A complaint shall be instituted in a District Forum within the local limits of whose jurisdiction:-

a) ï the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides or carries on business or has a branch office or personally works for gain, or

b) ï any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office, or personally works for gain, provided that in such case either the permission of the District Forum is given, or the opposite parties who do not reside, or carry on business or have a branch office, or personally work for gain, as the case may be, acquiesce in such institution; or

c) ï the cause of action, wholly or in part, arises.

Jurisdiction of state council

1) Subject to the other provisions of this Act, the State Commission shall have jurisdiction:-

a) ï to entertain

i) ï complaints where the value of the goods or services and compensation, if any, claimed exceeds rupees twenty lakhs but does not exceed rupees onecrore; and

ii) ï appeals against the orders of any District Forum within the State; and

b) ï to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Forum within the State, where it appears to the State Commission that such District Forum has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested or has acted in exercise of its jurisdiction illegally or with material irregularity.

Jurisdiction of National Council

a) - Subject to the other provisions of this Act, the National Commission shall have jurisdictionð

i) complaints where the value of the goods or services and compensation, if any, claimed exceeds rupees one crore; and

ii) appeals against the orders of any State Commission

b) ï to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any State Commission where it appears to the National Commission

that such State Commission has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity.

1) ï The District Forum, the State Commission or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen.
2) ï Notwithstanding anything contained in sub-section (1), a complaint may be entertained after the period specified in sub-section (1), if the complainant satisfies the District Forum, the State Commission or the National Commission, as the case may be, that he had sufficient cause for not filing the complaint within such period: Provided that no such complaint shall be entertained unless the National Commission, the State Commission or the District Forum, as the case may be, records its reasons for condoning such delay.

REMEDIES

Grievance redressal procedure

Every insurer shall have in place proper procedures and effective mechanism to address complaints and grievances of policyholders efficiently and with speed and the same alongwith the information in respect of Insurance Ombudsman shall be communicated to the policyholder along-with the policy document and as may be found necessary.

4.2.4 Claims procedure in respect of a life insurance policy

A life insurance policy shall state the primary documents which are normally required to be submitted by a claimant in support of a claim.

A life insurance company, upon receiving a claim, shall process the claim without delay. Any queries or requirement of additional documents, to the extent possible, shall be raised all at once and not in a piece-meal manner, within a period of 15 days of the receipt of the claim.

A claim under a life policy shall be paid or be disputed giving all the relevant reasons, within 30 days from the date of receipt of all relevant papers and clarifications required. However, where the circumstances of a claim warrant an investigation in the opinion of the insurance company, it shall initiate and complete such investigation at the earliest. Where in the opinion of the insurance company the circumstances of a claim warrant an investigation, it shall initiate and complete such investigation at the earliest, in any case not later than 6 months from the time of lodging the claim.

If a claim is ready for payment but the payment cannot be made due to any reasons of a proper identification of the payee, the life insurer shall hold the amount for the benefit of the payee and such

an amount shall earn interest at the rate applicable to a savings bank account with a scheduled bank (effective from 30 days following the submission of all papers and information).

Where there is a delay on the part of the insurer in processing a claim for a reason other than the above, the life insurance company shall pay interest on the claim amount at a rate which is 2% above the bank rate prevalent at the beginning of the financial year in which the claim is reviewed by it.

Claim procedure in respect of a general insurance policy

An insured or the claimant shall give notice to the insurer of any loss arising under contract of insurance at the earliest or within such extended time as may be allowed by the insurer.

On receipt of such a communication, a general insurer shall respond immediately and give clear indication to the insured on the procedures that he should follow. In cases where a surveyor has to be appointed for assessing a loss claim, it shall be so done within 72 hours of the receipt of intimation from the insured.

Where the insured is unable to furnish all the particulars required by the surveyor or where the surveyor does not receive the full cooperation of the insured, the insurer or the surveyor as the case may be, shall inform in writing the insured about the delay that may result in the assessment of the claim. The surveyor shall be subjected to the code of conduct laid down by the Authority while assessing the loss, and shall communicate his findings to the insurer within 30 days of his appointment with a copy of the report being furnished to the insured, if he so desires. Where, in special circumstances of the case, either due to its special and complicated nature, the surveyor shall under intimation to the insured, seek an extension from the insurer for submission of his report. In no case shall a surveyor take more than six months from the date of his appointment to furnish his report.

If an insurer, on the receipt of a survey report, finds that it is incomplete in any respect, he shall require the surveyor under intimation to the insured, to furnish an additional report on certain specific issues as may be required by the insurer. Such a request may be made by the insurer within 15 days of the receipt of the original survey report.

The surveyor on receipt of this communication shall furnish an additional report within three weeks of the date of receipt of communication from the insurer.

On receipt of the survey report or the additional survey report, as the case may be, an insurer shall within a period of 30 days offer a settlement of the claim to the insured. If the insurer, for any reasons to be recorded in writing and communicated to the insured, decides to reject a claim under the policy, it shall do so within a period of 30 days from the receipt of the survey report or the additional survey report, as the case may be. Upon acceptance of an offer of settlement by the insured, the payment of the amount due shall be made within 7 days from the date of acceptance of the offer by the insured. In the cases of delay in the payment, the insurer shall be liable to pay interest at a rate which is 2%

above the bank rate prevalent at the beginning of the financial year in which the claim is received by it.

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