LAW OF TORTS

Brief Notes

by Manoj Kr. Binwal

DEFINITION AND MEANING OF TORTIOUS LIABILITY

- GENERAL:
  - Derived from word **“tortum”** meaning **“to twist”**.
  - What is twisted >>> conduct of wrong doer.
  - What results from such twist >>> Legal Injury(civil wrong)
  - What is remedy >>> a suit for unliquidated damages.
- WINFIELD:
  - **"Tortious liability arises from a breach of duty fixed by law. This duty is towards persons generally and its breach is redressible by an action for unliquidated damages" (Winfield).**
- SALMOND:
  - **It is a civil wrong remedy for which is a common law action for unliquidated damages and which is not exclusively a breach of contract or a breach of trust or other mere equitable obligation.**

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- Limitation Act: sec 2(m)
  - Tort is a civil wrong which is not exclusively a breach of contract or a breach of trust.
- FRASER:
  - Tort is a infringement of right in rem of a private individual, giving a right of compensation at the suit of Injured party.
- Lord Denning:
  - The province of tort is to allocate responsibility for injurious conduct.
- C J Pratt:
  - Torts are indefinitely various and not limited or confined.
- Professor William L Prosser
  - Propounded the theory of Social Engineering as purpose of Law of torts.
- Salmond
  - law of torts consist of body of rules establishing special injuries.
- Justinian:
  - Every action contrary to law is an injury.
- Henry Maine:
  - the penal law of ancient communities is not the law of crime. It is the law of wrongs or to use the English technical word Torts.

- In a civil wrong liability is measure by the wrongful act.
- Tort is violation of Right in Rem, i.e. right available against the world at large.
- Liability in tort depends upon the infringement of legal rights and not on the quantum of damage suffered.
- Tort is governed by common law.
- In tort privity of contract is not applicable. [Donoghue v. Stevenson]
- Mistake of law and mistake of facts are no defence in tort.
- Law of torts has developed mainly through judicial decisions.

“Torts are civil wrong, But all civil wrongs are not Torts”

❖ESSENTIALS OF TORTS

1. **Breach of duty** primarily fixed by Law
2. **The legal duty is towards persons** generally
3. **Unliquidated Damages**

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TORT V. BREACH OF CONTRACT

GROUND	TORT	BREACH OF CONTRACT
Nature of right infringed	It is violation of right in rem of a person i.e. a right exercisable against the whole world.	A breach of contract is an infringement of right in personam i.e. a right exercisable against a definite person or persons
DUTY	Duty is imposed by law and owed to society generally.	Duty is imposed by will and consent of parties and is owed to definite person or persons.
CONSENT	In a tort the obligation arises independently of any consent i.e. a tort is inflicted against consent or without it.	Consent is basic essential of all contractual obligations.
PRIVITY	No privity between parties.(Donoghue v stevenson) & (grant v australian knitting mills ltd.	There is privity of contract between parties
DAMAGES	Always unliquidated.	Damages are always liquidated.

Law of Tort v. Law of Crime

- **SC in P Rathinam v UOI AIR 1994 SC 1844**
  - In a way there is no distinction between crime and tort, in as much tort harms individual whereas a crime is supposed to harm a society. But then society is composed of individuals. Harm to an individual is ultimately harm to society

DIFFERENCE BETWEEN LAW OF TORT AND LAW OF CRIME

GROUNDS	CRIME	TORT
Nature of wrong	Crime is a wrong against the whole Society. i.e public wrong	tort is a wrong only against an individual. i.e. private wrong
COURT	Crime proceedings are held in criminal Courts.	Tort proceedings are held in civil courts.
PROSECUTION	In Crime state prosecutes regardless of the wishes of a person who has been wronged.	In tort suit is brought the person wronged.
MENS REA	In crime guilty mind is must.	In tort guilty mind is not must. However it is important in some torts.
PROCEDURE	In crime code of criminal procedure is followed	In tort code of civil procedure is followed.
COMPROMISE	Only allowed in compoundable offences	It is always allowed in tort.
LIMITATION	There is no bar of limitation for prosecution of crime	There is bar of limitation in law of tort.
EFFECT OF DEATH	Death of accused results in abatement of suit.	On death of tort-feasor, his LRs are sued.
CODIFICATION	Law of crime is based on codified laws	There is no or very less codification in law of torts.
NATURE OF REMEDY	Remedy in crime is retributive or punitive in nature	Remedy in tort is restitutive in nature

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TEST OF REASONABLE FORESIGHT & TEST OF DIRECTNESS (RE POLEMIS RULE)

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The test of directness

- The test of reasonable foresight was rejected and the test of directness was considered to be more appropriate by the Court of Appeal in Re Polemis and Furness, Wilthy & Co. Ltd 1921.
- According to the test of directness, a person is liable for all the direct consequences of this wrongful act, whether he could have foreseen them or not; because consequences which directly follow a wrongful act are not too remote.
- The only question which has to be seen in such a case is whether the defendant's act is wrongful or not, i.e., could he foresee some damage?
- If the answer to this question is in the affirmative, i.e., if he could foresee any damage to the plaintiff, then he is liable not merely for those consequences which he could have foreseen but for all the direct consequences of his wrongful act.

- The first authority for the view advocating the directness test is the case of Smith v London & South Wetern Railway Company
  - **FACTS:** the railway company was negligent in allowing a heap of trimmings of hedges and grass near a railway line during dry weather. Spark from the railway engine set fire to the material. Due to the high wind, the fire was carried to the plaintiff‟s cottage which was burnt.
  - **HELD:** The defendants were held liable even though they could not have foreseen the loss to the cottage.
- This rule was disapproved by the house of lords in the famous Wagon Mound case and therefore has not been in application under common law .
- However there is still an exception, and the rule is still applied in a class of cases known as eggshell skull cases.
- Eggshell skull cases are those where the plaintiff already suffering from some fatalities was injured by the defendant’s negligence and the resultant injury was greater than what would normally take place if the plaintiff was not suffering from any such fatalities.
- E.g. where the plaintiff having a weak heart was so terrified by the trespass caused by defendant that he suffered a heart attack. The defendant would be liable for the whole of injury and cannot take defence of plaintiff’s fatalities.

Test of reasonable Foresight(remoteness of Damage)

- According to this test, if the consequences of a wrongful act could have been foreseen by a reasonable man, they are not too remote. If, on the other hand, a reasonable man would not have foreseen the consequences, they are too remote.
- According to the opinion of **Pollock C.B**. in Rigby v Hewit 1850, and Greenland v Chaplin 1850,
  - the liability of the defendant is only for those consequences which could have been foreseen by a reasonable man placed in the circumstances of the wrongdoer. According to this test, if I commit a wrong, I will be liable only for those consequences which I could foresee, for whatever could not have been foreseen is too remote a consequence of my wrongful act

- In Fardon v. Harcourt Rivington 1932
  - the defendant parked his saloon motor car in a street and left his dog inside. The dog has always been quiet and docile. As the plaintiff was walking past the car, the dog started jumping about in the car, smashed a glass panel, and a splinter entered into the plaintiff's left eye which had to be removed.
  - Lord Dunedin held that "people must guard against reasonable probabilities but they are not bound to guard against fantastic possibilities."
- In Bolton v. Stone 1951:
  - it was expressly approved by their Lordships. In this case a cricket ball was driven out of the playground into an unfrequented public road.
  - The event was plainly foreseeable though the chance of its happening was infinitesimal.
  - It was held that a reasonable man would have been justified in disregarding such a risk. In fact, the foreseeable consequences for which a person could be held liable were meant to be probable ones rather than merely possible.36

- Wagon mound case. (Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd) 1961
  - Privy Council in this case heard an appeal from the SC of New south Wales which applied the Polemis Rule and held that defendant was liable.
  - Privy Council held that Re Polemis was no more good law and reversed the decision.
  - It was held that since a reasonable man could not foresee the injury, the defendant was not liable, even though the defendant's servant's negligence was the direct cause of damage.

- Their Lordships divided the cases of possible consequences into two categories.
    1. Those in which before the event the risk of its happening would have been regarded as unreal because the happening of the event would have been so fantastic that no reasonable man would pay any attention to it —a mere possibility, which would never occur to the mind of a reasonable man; and
    2. Those cases in which there is a real or substantial risk.
- Cases like Fardon v. Harcourt-Rivington **would fall into the first category**. In such cases the question of taking precautions or of liability, does not arise. On the other hand both Bolton v. Stone and Wagon Mound, **would fall into the second category.**
- It is in the second type of cases that their Lordships demarcated a new field of liability. In such cases a person would be justified in disregarding the risk if he has some valid reasons for not taking care, e.g., if it would involve considerable expense to eliminate the risk. The existence or otherwise of such a justification in a particular case would depend upon weighing a risk against the difficulty of eliminating it. In the absence of such a justification he will be liable.

What is the test?

1. Is the damage of a kind which a reasonable person could foresee as a possible consequence — not necessarily probable — of his conduct?
2. If the answer is no, further enquiries are unnecessary. If yes, the next question is, is there any justification for not taking precautions?

MERITS

- That the rule is rational and simple to apply as it avoids the use of different criteria for culpability and compensation and is free from subtleties of intervening causes.
- That the rule is consonant with the duty concept in Tort of negligence which depends upon foreseeability by a reasonable man and is necessary for being logical and consistent. The direct consequence test leads to unjust and illogical conclusion.
- That it is in consonance with the current ideas of justice and morality.

DEMERITS

- It requires a lot of clear imagination to decide what is reasonably foreseeable and what is not.
- Who is a reasonable man changes with the circumstances.
- The rule is hard to apply in eggshell skull cases and rescue cases.

- Doughty v. Turner Manufacturing Co. Ltd. 1964
  - The court of appeal has expressly held that Wagon Mound and not Re Polemis is the governing authority.
- SCM (UK) Ltd. V. W.J. Whittall & Sons. 1971
  - There was damage caused to electric wires on the road by defendant's servant which resulted in 7 hours power cut to plaintiff's factory. Defendant knew the wire supply current to the defendant's factory and therefore was held liable to pay damages.
- Meah v McCreamer No 1 [1985] 1 All ER 367
  - **Facts:** The claimant was a passenger in a defendant's car. The defendant had been drinking and caused an accident, injuring the claimant's head.
  - The claimant had a personality change, and started attacking and raping women. He had previously been a petty criminal. He was sent to prison for life, and sued the defendant in negligence, stating that he would not have done these things if it hadn't been for the head injuries
  - **HELD:** Awarded £60k compensation, taking into account free board and lodgings in prison

- Meah v McCreamer (No. 2) [1986] 1 All ER 943
  - **FACTS: The** women he attacked then sued him and got compensation. He then tried to recover this from the defendants.
  - **HELD: The** damages awarded to the victims were too remote to be recoverable and that such an award would be contrary to public policy as it would effectively relieve the Claimant from the consequences of his crime.

REASONABLE MAN

- The reasonable man has a reference to **the "Standard of care" fixed by law** in negligence or in other tortious obligations.
- Reasonable man exhibits>>> reasonable conduct>>> which is >>>**behavior of ordinary prudent man**>>> in a given set circumstances.
- He shows a degree of >>> **SKILL, ABILITY or COMPETENCE** >>>which is >>> **general in discharge** of that function.
- Winfield:
  - He is not a perfect citizen nor a “paragon of circumspection”.
  - Reasonable man’s standard is guidance to how person regulates his conduct.

❖Therefore, reasonable man is a>>> judicial standard or yardstick>>> which>> **attempts to reach exactness**>>. This is because complete exactness cannot be reached.

❖**Reasonableness can be best explained in cases of negligence**.

- Negligence is in fact the omission to do something which an ordinary prudent man would not do in the circumstances. Hence, reasonable man is a man who uses ordinary care and skill.

❖ **Daly V. Liverpool Corporation**

- **ISSUE:** Whether a 70 year old woman was negligent in crossing a road?
- **TEST:** The standard was that of an ordinary prudent women of her age in the circumstances, and not a hypothetical pedestrian.

❖ **Wagon Mound Case**

- Test of reasonable foresight was applied and defendant was held not liable.

Motive and Malice

❖General rule: **motive is irrelevant in tort**.

- Motive denotes>>> reason for good conduct of an individual.

❖ **Mayor of BroadFord Corporation V. Pickles**

- **ISSUE**: Here, the corporation refused to purchase the land which belonged to Pickles, for the purpose of the water supply scheme**. In revenge, he sank a shaft on his land.** In consequence, the water of the corporation became got diverted into shaft. The corporation sued pickles.
- **HELD:** Held, the motive of D may be bad but not unlawful and hence not liable. This shows that if the act is lawful, mere bad motive will not make the act tortious.

❖ Allen v Flood.

- **ISSUE:** In this case, P was appointed by A to make repairs to the ship and this was terminable at will. D, belonging to an union objected to the appointment and threatened to go on strike if P was not removed. A dismissed P.
- **HELD**: the motive of D may be bad but not unlawful and hence not liable. This shows that if the act is lawful, mere bad motive will not make the act tortious.

Malice in Tort

- Malice denotes>>> spite or ill will
- **General rule**: Malice is irrelevant in Tort.
- **Exceptions to the GR:**
  - Malicious prosecution
  - Nuisance
  - Conspiracy
- Bromage v Prosser
  - Malice in law means the doing of a wrongful act intentionally without just cause or excuse.
- Chasemore V Richards.
  - The interception of underground water is not actionable wrong even though done intentionally.

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Difference between Malice-in-fact and Malice-in-law

GROUNDS	MALICE IN FACT	MALICE IN LAW
MEANING	When an act is done with ill-will or motive towards an individual then it is called malice-in-fact.	Act is done wrongfully and without reasonable and probable cause, it is called malice-in-law or implied malice.
STATE OF MIND	There must be ill-will or any vindictive motive of defendant against plaintiff.	Ill-will or vindictive movie is not essential. There must be concurrence of mind with the wrongful act done by the defendant without just cause or excuse.
BASIS	Motive is main ingredient upon which Malice-in-fact is based.	On the other hand, knowledge is main ingredient upon which malice in law is based
RELEVANCY	Malice in fact is not relevant in tort subject to certain exceptions.	Malice in law is always relevant in tort.

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UBI JUS IBI REMEDIUM

- "**Where there is a right, there is a remedy".**
- According to some jurists law of Torts have developed from this maxim.
- JUS = "legal right"
- REMEDIUM = "right to take action"(i.e. remedy according to law)
- Has it's origin in the case of Ashby v White.
- Applicability:
  - Law of Torts
  - Trust act
  - Sec 9 of cpc
  - Specific relief act

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MARZETTI V. WILLIAMS 1930

- The plaintiff had sufficient fund in his account in the defendant's bank. In spite of this, the banker had refused to honor his cheque. It was held that the bank was liable to pay damages to the plaintiff, as his legal right is being violated.

Injuria sine Damnum

➢ **Definition**:
- Damnum = 'damage' involving economics loss or loss of comfort, services, health or the like.
- Injuria = legal injury
- Sine = without
- Therefore injuria sine damnum = **'legal injury without damage'**

- **Cause of Action u/s 42 of Specific Relief Act.**

➢ Ashby V. White:
- **ISSUE:** The defendant, a returning officer, without proper reason refused to register P's vote duly tendered. P's preffered candidate won the election.
- **HELD**: that the plaintiff had a legal right to vote and that there was a legal injury to him. Defendant was held liable. The Court observed **"every injury imports a damage, though it may not cost a farthing to the party".**

➢ Merzetti V. william (Bank Case):
- **ISSUE:** In this case without any excuse the Banker refused to honour the cheque presented by a customer.
- **HELD**: That the Banker was liable to the drawer. Compensation was paid by the Bank

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Damnum sine Injuria

❑**Definition:**

- **<u>Actual and substantial damage without infringement of any legal right</u>**.
- And no legal injury means no compensation.

❑**Chasemore V. Richards:**

- ISSUE: The defendant D dug a well on his own soil. In consequence, the adjoining owner P's stream of water dried up and his mill was closed down. P sustained heavy economic loss.
- HELD: No compensation. There was no legal injury to P but only economic loss.

❑**Gloucester Grammar School:**

- ISSUE:A teacher who was illegally terminated by Gloucestor school opened a school opposite to it. The pupils, who loved the teacher joined his school in large numbers. Thereupon the Gloucestor school was closed.
- HELD:No compensation. Reason: Business competition, and teacher has not infringed any legal right of the Gloucestor School.

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MALFEASANCE

- The term Malfeasance applies to the commission of an unlawful act in official capacity.
- It is generally applicable to those unlawful acts, such as trespass, which are actionable per se and do not require proof of intention or motive.
- Malfeasance is often used in reference to people in public office. In many cases, proving malfeasance on the part of an official is grounds to remove that person from his or her post

MISFEASANCE

- The term ‘misfeasance’ is applicable to improper performance of some lawful act for example where there is negligence.
- Generally, a civil defendant will be liable for misfeasance if the defendant owed a duty of care toward the plaintiff, the defendant breached that duty of care by improperly performing a legal act, and the improper performance resulted in harm to the plaintiff.
- For example, assume that a janitor is cleaning a restroom in a restaurant. If he leaves the floor wet, he or his employer could be liable for any injuries resulting from the wet floor. This is because the janitor owed a duty of care toward users of the restroom, and he breached that duty by leaving the floor wet.

Nonfeasance

- Nonfeasance is a term used in Tort Law to describe inaction that allows or results in harm to a person or to property.
- An act of nonfeasance can result in liability if
  a) the actor owed a duty of care toward the injured person,
  b) the actor failed to act on that duty, and
  c) the failure to act resulted in injury.
- if the victim is drowning in a public pool and the bystander is a lifeguard employed by the city, and if the lifeguard does not act to help, she may be held liable for the drowning because the lifeguard's employment places her in a relationship with swimmers in the pool. Because of this relationship, the lifeguard owes a duty to take affirmative steps to prevent harm to the swimmers.

Leading case

- Lucknow development Authority v M K gupta.
  - The court held that misfeasance in public office is also part of law of torts.
- Common cause v UOI 1996
  - **The SC held that –** if a public servant abuses his office by an act of omission or commission, and the consequence of that is injury to an individual or loss to public property, an action may be maintained against such public servant. No public servant can say “you may set aside an order on ground of mala fide but you cannot hold me personally liable”. No public servant can arrogate to himself the power to act in a manner which is arbitrary.

Wednesbury Principle

- (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223*).... LJ Green MR:
  - A reasoning or decision is Wednesbury unreasonable (or irrational) if it is so unreasonable that no reasonable person acting reasonably could have made it.

STRICT LIABILITY

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STRICT LIABILITY

- MEANING:
  - A situation where a person is held liable >>> FOR SOME HARM >>> even though he is >>> not NEGLIGENT and had no INTENTION to cause the same.
  - i.e. sometimes law recognizes **“ NO FAULT LIABILITY”.**
- ORIGIN:
  - Had its origin in the nuisance.
  - Liability is strict in the sense that it relieves claimant of the burden of showing fault.
  - The principle of strict liability has its origin in the leading case **Ryland V. Fletcher 1868**.

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- **Ryland V. Fletcher 1868:**
  - **FACTS:**
    - In this case B, a mill owner>>> employed independent contractors who were competent, to construct a water reservoir for the purpose of his mill. >>>In the course of construction the contractors came across some old shafts and passages on B's land. They did not block them up, but completed the construction.>>> When the reservoir was filled with water, water gushed through the shaft and flooded the mines of A.>>> A sued B.
  - **HELD:**
    - The court held that B was liable on the ground of "Strict liability".
    - **BLACKBURN J:**
      - "We think that the rule of law is, that the person who for his own purposes brings on his lands and keeps there anything likely to do mischief if it escapes,
      - must keep it in at his peril,
      - and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.
      - He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the consequence was of vis major, or the act of god; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient."

- **ESSENTIALS:**
  - There must be **non natural use** of defendant's land.
  - The defendants must have **artificially accumulated a thing likely do mischief** if it escapes from his land.
  - There must **be escape from defendants land** of the thing likely to do the mischief.
  - **Damage must result** from the escape as the tort is not actionable perse.
- **Non Natural use of Land:**
  - Non natural use may suppose to mean:
    - **Artificial use of Land**. or
    - **Distinct from traditional use of land.**
  - In deciding whether a particular use of land is not natural, the courts will look not only at the thing or activity in isolation but also the place and manner in which it is maintain and its relation to the surroundings.

- **ACCUMULATION:**
  - Things artificially accumulated.
  - WILSON V. WADDELL:
    - it was held that the defendant will not be liable under the rule, if the water is naturally on the defendant's land and he has done nothing to accumulate it.
- **ESCAPE:**
  - means escape from a place where the defendant has occupation or control over land to a place which is outside his occupation or control.
  - LORD SIMON IN READ V. LYONS
    - In that case the plaintiff an Ammunition Inspector while carrying out her duties inside the defendant's factory was injured by an explosion which occurred within the factory premises. It was held that there is no escape and that accordingly the defendant cannot be held liable.
- **DAMAGE:**
  - Injury under the rule not actionable per se.

- **EXCEPTION TO THE RULE:**

1. DEFAULT OF CLAIMANT
2. ACT OF GOD
3. STATUTORY AUTHORITY
4. ACT OF THE THIRD PARTY
5. COMMON BENEFIT
6. CONSENT OF CLAIMANT

- **DEFAULT OF THE CLAIMANT:**
  - Damage **solely by the act or default of claimant** himself.
  - In Rylands v Fletcher itself, this was noticed as a defence.
  - Ponting v Noakes (1849) 2 QB 283,
    - the claimant's horse reached over the defendant's boundary, nibbled some poisonous tree there and died accordingly and it was held that the claimant could recover nothing, for the damage was due to the horse's own intrusion and alternatively there had been no escape of vegetation.

- **ACT OF GOD:**
  - Act caused directly by **natural cause without human intervention** >>> under circumstances that **no human foresight can provide** >>> and **which no human prudence can recognize** the possibility of.
  - Recognised itself in case of Rylands v. Flethcher.
  - **Nichols v Marsland (1876) 2 Ex D1.**
    - In this case the defendant for many years had been in possession of some artificial ornamental lakes formed up by damming up a natural stream. **An extraordinary rainfall, "greater and more violent than any within the memory of the witnesses"** broke down the artificial embankments and the rush of escaping water carried away four bridges in respect of which damage the claimant sued. Judgment was given for the defendant; the jury had found that she was not negligent and the court held that she ought not to be liable for an extraordinary act of nature which she could not foresee or reasonably anticipate.

- **STATUTORY AUTHORITY:**
  - Green v Chelsea Waterworks Co(1894) 70 LT 547
    - for instance a main belonging to a water-works company, which was authorized by Parliament to lay the main, burst without any negligence on the part of the company and the claimant's premises were flooded; the company was held not liable.
- **CONSENT OF THE CLAIMANT:**
  - Expressly or impliedly >>> consented to presence >>> of source of danger >>> no negligence on the part of the defendant.
  - Illustrates application of the maxim **volenti non fit injuria .**
- **ACT OF THIRD PARTY:**
  - If the harm has been caused due to the act of a stranger, who is neither the defendant's servant nor the defendant has any control over him.
  - Where the risk undertaken by the defendant is very high, the duty of care is also very high and the defendant cannot take the benefit of this defence.

Madhya Pradesh Electricity Board vs Shail Kumari And Ors. (2002) 2 SCC 162

- Facts:
  - Plaintiff's husband got electrocuted by the live wire which fell onto the ground on a rainy day while riding his bicycle. The defendant took the defence that act of third party who for siphoning the electricity took the wire and the board had no notice of it. The wire got unfastened by the wind and fell onto the ground.
- Held:
  - In the present case, the Board made an endeavour to rely on the exception to the rule of strict liability (Rylands v. Fletcher) being "an act of stranger".
  - The said exception is not available to the Board as the act attributed to the third respondent should reasonably have been anticipated or at any rate its consequences should have been prevented by the appellant-Board.
- Box v Jubb LR 4 Ex Div 76.
  - The overflow from the defendant's reservoir was caused by the blocking of a drain by strangers, the defendant was held not liable for that

- **COMMON BENEFIT:**
  - If the source of danger was maintained for the benefit of both the claimant and the defendant, then the defendant will not be held liable for the consequences of its escape.
  - This defence is somewhat related to the defence of consent, as it can be construed as an implied consent.
  - According to Winfield, common benefit seems redundant as an independent defence.

- **APPLICATION OF THE DOCTRINE(liability without fault) IN INDIA:**
  - Applicable in India with some deviations in both the extension or scope of the doctrine and its limitations.
  - Recognized in the case of motor vehicle accidents.
  - The motor vehicles act 1938 recognizes the doctrine to limited extent.
    - S.140 fixed sum of 50k for death and 22k for permanent disability can be claimed without establishing any fault on the part of owner of the vehicle.
  - **Madras railway company v zamindar**
    - ISSUE: due to bursting of two ancient tanks water flowed into applicants land and damaged three bridges.
    - Held: due to peculiar condition of India, the escape of water kept for agriculture cannot be subjected to rule of strict liability unless there has been negligence on the part of owner/defendant.

One Bite Rule – liability for damage done by dog

- Prior to the twentieth century, a dog owner was only held liable for his dog's biting someone if the owner had reason to know the dog might bite. This was called the “one bite” rule because it generally meant that a dog was allowed “one free bite” before it would get its owner in legal trouble.
- In modern times, the one bite rule does not necessarily allow a dog one free bite. If an owner knows the particular breed is dangerous, or if the particular dog might be prone to biting because of its general character or recent events, he could be liable for the dog’s first bite.

ABSOLUTE LIABILITY

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RULE OF ABSOLUTE LIABILITY

- WHAT IS IT:
  - it is the application of Strict Liability but without the exceptions.
- ORIGIN:
  - Laid down in M.C. Mehta v UOI 1987 and Bhopal gas Leak case 1989.
  - SC maximized the limits of rule of Ryland v. Fletcher
- Why modified the rule:
  - The rule of strict liability was subject to many exceptions and therefore was not capable of making individual strictly liable.
  - Apex court in M.C. Mehta v UOI stated:
    - The principle of strict liability cannot be used in modern world. The principle evolved in the period when the industrial revolution had just begun and therefore this two centuries old principle of liability cannot be taken as it is in the modern world without modifications.

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- M.C. Mehta case:
  - FACTS: on 6th December 1985 leakage of oleum gas from one of the units f Sri Ram Foods and Fertilizers Industries in Delhi, belonging to Delhi cloth Mill Ltd. >>> resulted in death of one practicing advocate and several others were affected.
  - HELD: The S.C took a hard view and held that it was not bound to follow the 19th century rule of English Law and it could evolve a rule suitable to prevail in Indian conditions of present day.
  - So the supreme court evolved a new rule creating absolute liability for harm caused by dangerous things.

- **In words of J. P N Bhagwati**
  - "We are of the view that **an enterprise which is engaged in a hazardous or inherently dangerous industry which poses potential threat to the health and safety of the persons** working in the factory and residing in surrounding areas,
  - owes an **absolute and non-delegable duty to the community** to **ensure no harm results** to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken.
  - The **enterprise must be held to be under obligation to provide that its activities be conducted with the highest standards of safety** and if any harm results on account of such activity, the **enterprise must be absolutely liable** to compensate for such harm
  - and it should be **no answer to the enterprise to say that it had taken all reasonable care** and that the harm occurred without any negligence on its part"

- **JUSTIFICATION FOR RULE :**
  - An industry carrying on such hazardous and inherently dangerous activity for private profit has an obligation to those who are suffering therefrom.
  - Only the industry has **resources to discover and guard** against such hazards and dangers.
- The rule laid down in M.C Mehta case was also approved by the apex court in Charan Lal Sahu v. UOI (BHOPAL GAS LEAK DISASTER CASE).

BHOPAL GAS LEAK DISASTER CASE

- FACTS:
  - On 2-3 December 1984, mass disaster was caused by the leakge of methyl isocynate and other toxic gases from Union Carbide India Ltd. (UCIL). Which was a subsidiary company of Union Carbide Corporation(UCC) , a MNC registered in U.S.
  - About 4000 died in consequence and lacs of people were affected.
  - Representative suits were filed in the U.S for compensation however Justice Keenan dismissed all the suits on the ground of inconvenience of Forum and held that Indian judiciary must have the "opportunity to stand tall before the world and pass judgment on behalf of its own people."
  - Afterwards the GOI filed a suit in District court of Bhopal which passed an interim compensation of RS 350 crore.
  - The compensation was then reduced to Rs 250 crore by M.P High Court.
  - Meanwhile the corporation propose a settlement of $350 million which was later increased to $450 million.
  - The appeal was preffered to Supreme Court. The matter was settled by the apex court by two judgements dated 14th and 15th Feb 1989.

- **HELD:**
  - **14th Feb:** the S.C recorded the settlement of claims reached between the parties in the suit for 470 million USD and as consequence all civil and criminal proceedings against UCC & UCIL and their officers were terminated.
  - **15th Feb:** terms of settlement were signed by learned attorney general for UOI and the Counsel for the UCC.
- The settlement of claims recorded by the SC was criticized mainly on the two grounds:
  - The criminal cases were not compoundable.(court
  - The compensation was very low.
- UCC v UOI 1992
  - The court held that principle laid down in M.C Mehta case that in Toxic tort action the damage to be awarded should be proportional to the economic superiority of the offender cannot be applied to the settlement arrived in the present case.

- INDIAN COUNCIL FOR ENVIRO-LEGAL ACTION V UOI
  - THE SUPREME COURT of India imposed the principles of absolute liability and held that "once the activity carried on is hazardous and inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity is by far the more appropriate and binding."

Merits absolute liability

- Wider Application.
- Application to motor vehicle accident cases.
- No exceptions
- Damages proportionate to economic capacity of offender.

DEMERITS

- Does not even takes into account Act of God.
- Limited to hazardous and inherently dangerous activities.
- Gives much emphasis on enterprise liability.

DIFFERENCE – ABSOLUTE V STRICT LIABILITY

GROUND	STRICT LIABILITY	ABSOLUTE LIABILITY
SOURCE OF LIABILITY	NON-NATURAL USE OF LAND	HAZARDOUS ACTIVITY
DEFENCE	SOME DEFENCES	NO DEFENCES
DAMAGES	SUBSTANTIAL DAMAGES ARE AWARDED	ALONG WITH SUBSTANTIAL DAMAGES, EXEMPLARY DAMAGES ARE ALSO AWARDED.

by Manoj Kr. Binwal

VICARIOUS LIABILITY

by Manoj Kr. Binwal

VICARIOUS LIABILITY

- **DEFINITION:**
  - This concept makes one man liable for the acts of another because of certain relationships like Master and Servant, Parent and Children etc.
  - Vicarious is derived form Latin term 'vice' i.e., in the place of. By this phrase we mean the liability of a person for the tort of another in which he had no part. It may arise under the common law or under statute.
  - Vicarious liability in the law of tort may be defined as a liability imposed by the law upon a person as a result of
    - (1) a tortious act or omission by another,
    - (2) some relation between the actual tortfeasor and the defendant whom it is sought to make liable, and
    - (3) some connection between the tortious act or omission and that relationship.

by Manoj Kr. Binwal

- **PRINCIPLES:**
  - Qui Facit Per Alium Facit Per Se :
    - The concept had its origin in the Latin maxim "Qui Facit Per Alienum Facit Per Se" i.e. **He who does an act through the instrumentality of another does it himself.**
  - Respondeat Superior: -
    - **the superior must be responsible; or let the principal be liable; or let the master answer**.
    - All the acts done by the servant has been done by master's express or implied authority, are acts of master and he would be held liable for them.
    - eg., **Sita Ram Moti Lal Kalal v. Santanu Prasad Bhatt, (AIR 1966 SC 1697),**
      - owner entrusted his car to his driver M for driving it as taxi.
      - M training C, cleaner of taxi, to drive and take him to the office of R.T.O. for test driving.
      - C committed accident while driving negligently
      - SC held that there is no proof that the driver was authorized to coach the cleaner so that the cleaner might become a driver and drive the taxi .At the time of accident, the car was not used as taxi for owner's business .
      - The act of driver and cleaner was held to be outside the scope of their employment .
      - The owner was therefore not responsible
      - However, driver and cleaner were held personally responsible.

MODES OF VICARIOUS LIABILITY

- Vicarious liability for another's wrongful act or omission arises in three ways: -
  a) By ratification of a particular act;
  b) By special relationship; and
  c) By abetting the tortuous act committed by others

BY RATIFICATION

- The person may be held liable for the torts committed by others on the ground of ratification: -
  a) The act of ratification must take place at a time, and under circumstances when the ratifying party might himself have lawfully done the act, which he ratifies.
  b) The act, which has been done on behalf of the principal, can bind the principal
  c) The person ratifying the act must have full knowledge of its tortuous character.
  d) An illegal or void act cannot be ratified.

BY SPECIAL RELATIONSHIP

- Vicarious Liability arises where the doer of the act and the person sought to be held liable are related to each other as:
  i. **Master and servant;**
  ii. **Owner and independent contractor;**
  iii. **Principal and agent;**
  iv. **Company & its director;**
  v. **Firm and its partners**
  vi. **Guardian/parents and child;**
  vii. **Husband and wife**

Master-Servant Liability

- **Master-Servant Liability:**
  - Master is liable for the wrongful acts of his servant when the following conditions are fulfilled:
    A. **Tort is committed by the servant, and**
    B. **The servant committed the tort while acting 'during the course of employment' or 'during the scope of his employment.**
- A master can be made liable as much for unauthorized acts as for the acts he has authorized if the act is within the course of employment.

- **WHO IS A ‘SERVANT’?**

Lord Thankerton has said that there must be contract of service between the master and servant has laid down the following four ingredients.

1. **the master's power of selection of his servant,**
2. **the payment of wages or other remuneration**
3. **the master's right to control the method of doing the work, and**
4. **the master's right of suspension or dismissal**

COURSE OF EMPLOYMENT

- A servant is said to be acting in the course of employment if:
  1. **the wrongful act has been authorised by the master, or**
  2. **the mode in which the authorised act has been done is wrongful or unauthorised** .
- An employee in case of necessity is also considered as acting in the course of employment, if he is performing his employer's business.
- but if the torts are committed in any manner beyond the scope of employment the master is liable only if he was expressly authorised or subsequently ratified them.

six principal ways in which a master becomes liable for the wrong:

1. ***The wrong committed by the servant may be the natural consequence of something done by him with ordinary care in execution of his master 's specific orders.***

In Indian Insurance Corporation, Association Pool, Bombay Verses Radhabai, 1989

- the driver of a motor vehicle belonging to the Primary Health Centre of the State was required to bring the ailing children by bus to the Primary Health Centre. **The driver in the course of driving gave the control of the steering wheel to an unauthorised person**. It was an unauthorised mode of doing the act authorised by the master.
- It was held that in such circumstances, the Government, *viz.,* the owner of the vehicle is vicariously liable for the negligence of the driver in permitting unauthorised person to drive the vehicle.

- Gregory v. Piper(1829) 9 B & C 591,
  - the defendant and plaintiff had some disputes between them and the defendant, therefore, ordered his servant to place rubbish across a pathway to prevent the plaintiff from proceeding on that way and the servant took all care to ensure that no part of it was touching the part of the plaintiff's property but with the passage of some time. The rubbish slid down and touched the walls of the plaintiff and thus he sued for trespass. **The defendant was held liable despite his servant taking all due care**.

2. Master will be liable for the negligence of his servant

- In Baldeo Raj Verses Deowati, 1985
  - The **driver of a Truck sat by the side of the conductor and allowed the conductor to drive.** The conductor caused an accident with a rickshaw as a result of which a rickshaw passenger died.
  - It was held that the act of the driver in permitting the conductor to drive the vehicle at the relevant time was a breach of duty by the driver, and that was the direct cause of the accident. For such negligence of the driver his master was held vicariously liable.
- In Pushpabai Purshottam Udeshi & Ors. v. Ranjit Ginning & Pressing Co. (P), 1977
  - **Deceased was travelling in a car driven by the manager of the respondent company** and it met with an accident as a result of which he died.
  - SC held that from the facts of the case it was clear that the accident had occurred due to the negligence of the manager who was driving the vehicle in the course of his employment and therefore, the respondent company was liable for his negligent act.

3. Servant's wrong may consist in excess of mistaken execution of lawful authority.

- **Here two things have to be established:**
  a) In the first place, it must be shown that the servant intended to do on behalf of his master something which he was, in fact, authorised to do.
  b) Secondly, it has to be proved that the act if done in a proper manner, would have been lawful.

- Bayley v Manchester S&L Railway (1873) LR 8 CP 148,
  - **a porter of a railway company while working mistakenly believed that the plaintiff was in the wrong carriage even though he was in the right one**. The porter thus pulled the plaintiff as a result of which the plaintiff sustained injuries.
  - Here, the Court held the railway company vicariously liable for the act of the porter because it was done in the course of his employment and this act would have been proper if the plaintiff was indeed in the wrong carriage

❑Anita Bhandari & Ors. v. Union of India,

- The husband of the petitioner went to a bank and while entering inside it, the cash box of the bank was also being carried inside and as a result, the security guard in a haste shot him and caused his death. The petitioner had claimed that the bank was vicariously liable in the case because the security guard had done such act in the course of employment but the bank had contended that it had not authorized the guard to shoot.
- The Court held the bank liable as the act of giving him gun amounted to authorize him to shoot when he deemed it necessary and while the guard had acted overzealously in his duties but it was still done in the course of employment.

4. Wrong' may be a wilful wrong but doing on the master's behalf and with the intention of serving his purpose.

- If a servant performs some act which indicates recklessness in his conduct but which is within the course of his employment and calculated to serve the interest of the master, then the latter will be saddled with the responsibility for it.

❑Limpus v. London General Omnibus Co. (1862) EngR 839,

- the driver of the defendant company, willfully and against the express orders not to get involved in racing or to obstruct other omnibuses, had driven to obstruct the omnibus of the plaintiff. In the case, the Court held that the defendant company was liable for the act of driver because the driver's act of driving the omnibus was within the scope of the course of employment.

❑ Peterson v. Royal Oak Hotel Ltd. (1948) N.Z.I.R. 136,

- The plaintiff was a customer who on being intoxicated was refused further drinks by the barman, who was employed under the respondent and thus the plaintiff threw a glass at him. The barman took a piece of the glass and threw it at him which hit his eye.
- The respondent hotel was held liable due to the act of the barman who had a master-servant relation with them.

5. Wrong may be due to the servant's fraudulent act

- A master is liable also for the wrongful acts of his servants done fraudulently. It is immaterial that the servant's fraud was for his own benefit.
- The master is liable if the servant was having the authority to do the act, that is, the act must be comprehended within his ostensible authority.
- The underlying principle is that on account of the fraudulent act of the servant, the master is deemed to extend a tacit invitation to others to enter into dealings or transactions with him.
- Therefore, the master's liability for the fraudulent acts of his servants is limited to cases where the plaintiff has been invited by the defendant to enter into some sort of relationship with a wrong doer. Consequently, where there is no invitation, express or implied, the acts will be treated as the independent acts of his servant himself, and outside the scope of his employment.

- Lloyd v. Grace Smith & Co. (1912) A.C. 716,
  - the plaintiff was a widow who owned 1000 pounds as dues on a mortgage and a cottage. She went to the manager of the defendant, which was a firm of solicitors, and she asked for his advice to get richer. The manager told her to sell her cottage and to call up the amount of mortgage. She authorized the manager to sell the property and to collect her money but he absconded with the money. Thus, she sued the defendant company. It was held that the defendant was liable for the fraudulent act of the manager because even a fraudulent act is not authorized, the manager was authorized to take her signature and thus it was within the course of employment.

6. Wrong may be due to the Servant's Criminal Act.

- Though there is no such thing as vicarious liability in criminal proceedings, yet in a *civil* action, a master is liable in respect of the *criminal* acts of a servant, provided they are committed in the course of his employment.

❖M. S. Grewal v. Deep Chand Sood, (2001 (8) SCC 151)

➢FACTS:

- Dalhousie Public School organized a picnic on the bank of a river. Two teachers were deputed to take care of students
- The children were allowed to play in the danger zone of water without any caution or warning being sounded. 14 students drowned and died because of rash and negligent act of teachers.

➢HELD:

- SC held that the teachers were utterly negligent and they failed to take due care, resulting in sad tragedy, and the school authorities were vicariously liable in as much as the teachers were working within the course of employment.

❖In Lloyd's Case,

- D was a firm of solicitors. It had employed a clerk to do its work. P a widow was the owner of some cottages. She went for professional advice and the clerk asked her to execute documents, which she did. Here he had conveyed cottages to himself. The court held that D the master was liable for the wilful wrong doing of the servant clerk

Doctrine of Common Employment

- The doctrine of common employment, it is a well known principle in England established by lord Abinger in the year of 1837 in the case of priestly v fowler.
- The doctrine was **later developed in the case of** Hutchinson v York Newcastle Railway corp.
- The doctrine simply based on the **liability towards the master to the injury caused by a servant to another servant of the same master on the course of employment, the master would not be liable and hence the injured party could not sue or bring an action against the master.** There for protecting the master from liabilities that arises of it.
- The doctrine was abolished U.K. by sec 1 of Law Reform (Personal Injuries) Act 1948

by Manoj Kr. Binwal

Owner & Independent Contractor

- If an independent contractor is employed to do a lawful act and in the course of the work, he or his servant commits some wrong or negligence, then the employer is not answerable
- Exceptions when the employer is vicariously liable for the wrongful acts committed by the contractor: -
  a) **Employer retaining control**
  b) **Unlawful Act**: - the thing contracted to be done is itself unlawful, e.g., a gas company was held liable for the negligence of his contractor employed to lay down pipes in the streets, because the gas company was not authorized to interfere with streets, was itself an unlawful act.
  c) **Legal Duty**: - If a legal or statutory duty imposed upon the employer, he is liable for any injury done in consequence of its having been negligently performed by the contractor, eg., gas pipeline

d) **Damage to Another: -** Where the work entrusted to the contractor is from its nature likely to cause danger to others and if the contractor does not take these precautions, the employer will be liable.

e) **Implied Warranty**: - Employer is liable where there is an implied warranty given by the employer. He is liable for the negligent act of an independent contractor, eg., child left with play school

f) **Incompetent contractor employed:** - employer gives the work to an independent contractor known to be incompetent or fails to give proper instructions, he cannot escape liability for the negligent act of contractor In such cases, the liability of employer is more for his own negligence rather than for the negligence of the contractor.

g) **Rule in Rylands v. Fletcher: -** Employer is responsible for the act of independent contractor.

Leading cases

- Mersey Dock case:
  - The power of control is presumed to be in the general employer and the burden of proving that the power of control is in the hirer rests on general employer.

TEST OF LIABILITY

❖**TRADITIONAL VIEW : TEST OF CONTROL**

➢Short V.J. & W. Henderson Ltd. LORD THANKERTON pointed out four indicia of a contract of service:

(1) Master's power of selection of his servant;
(2) Payment of wages or other remunerations;
(3) Master's right to control the method of doing the work, and
(4) Master's right of suspension or dismissal.

❖Modern View: Control Test Not Exclusive

- The test of control as traditionally formulated was based upon the social conditions of an earlier age and "was well suited to govern relationship like those between a farmer and an agricultural labourer (prior to agriculture mechanisation), a craftsman and a journeyman, a householder and a domestic servant and even a factory owner and an unskilled hand". The control test bricks down when applied to skill and particularly professional work and, therefore, in recent years it has not been treated as an exclusive test.

- The Supreme Court in Dharangadhara Chemical Works Ltd. v State of Saurashtra
  - that the test of control is not of universal application and that there are many contracts in which the master could not control the manner in which work was done. The English Courts have also recognised that the control test is no longer decisive.

VICARIOUS LIABILITY OF THE STATE

- Background:
  - Based on Article 300(1): action by or against government of india.
  - Liability to same extent as it stood prior to the enactment of the constitution.
  - Prior: GOI Act 1935 >>> S.176(1) refers to >>> s.65 of the GOI Act 1858 >>> Implies that liability of GOI would be same as East India Company.
  - the above provisions do not provide any substantive guidance as to the scope of liability, reference must be made to certain relevant judgments, which have specifically considered the scope of state liability in relation to the tortious acts of public servants.

by Manoj Kr. Binwal

SOVEREIGN FUNCTION

- Those functions for which the state is not answerable in any court of law.
- Based on maxim “King can do no Wrong”.
- **The following are the instances of "sovereign" functions:**
    1. Maintenance of defence force that is construction of a military road, distribution of meals to the army personnel on duty, checking army personnel on duty.
        - In *Baxi Amrik Singh Verses Union of India*,
            - held that the checking of army personnel on duty was a function intimately connected with the army discipline and it could only be performed by a member of the Armed Forces and that too by such a member who is detailed on such duty and is empowered to discharge that function.

2. Maintenance of law and order that is if plaintiff is injured while police personnel are dispersing unlawful crowd *(State of Orissa v. Padmalochan*), or plaintiff's loudspeaker set is damaged when the police makes a lathi charge to quell a riot *(State of M.P. Verses Chironji Lal*).

- **The following are the instances of "non-sovereign" functions**:
  1. Maintenance of dockyard (*P. & O. Steam Navigation Co.* case).
  2. A truck belonging to the public works department carrying material for the construction of a road bridge *(Rap Raw Verses The Punjab State*),
  3. Famine relief work *(Shyam Sunder Verses State of Rqjasthan*).
  4. A Government jeep car being taken from the workshop to the Collector's bungalow for the Collector's use *(State of Rajasthan Verses Vidjawati*)
  5. Taking ailing children to Primary Health Centre in a Government carrier *(Indian Insurance Co. Assn. Pool Verses Radbabai*).

6. Carrying military *jawans* from Railway Station to the Unit Headquarters *(LJnion of India Verses Savita Sharma*). Similarly, carrying ration and *sepoys* within the country during peace time in the course of movement of troops after the hostilities were over *[Pushpa Thakur Verses UOI*].
7. Carrying Air Force officers from one place to another in Delhi for playing hockey and basket ball *(Satya Wati Devi Verses UOI*), or bringing back military officers from the place of exercise to the college of combat *(Nandram Heeralal Verses*).
8. Taking a truck for imparting training to new M.T. Recruits *(Iqbal Kaur Verses Chief of Army Staff*).
9. Transporting of a machine and other equipment to a military training school *(Union of India Verses Sugrabai*).
10. Where some military *jawans* found some firewood lying by river side and carried the same away for purposes of camp fire and fuel *(Roop Lal Verses UOI*).
11. A 'service' (facility) provided to a 'consumer' within the meaning of the Consumer Protection Act, 1986 is not a 'sovereign' function *(Lucknow Development Authority Verses M.K. Gupta*)

- Buron V. Denman ((1848), 2 Ex. 167).
  - If a servant of the Crown commits a wrongful act against an alien, and the Crown authorised such act, or subsequently ratifies it, it is an act of State and no action will lie in respect of it against such servant
  - The defendant, a British naval commander, in execution of a treaty concluded with the King of the Gallinas, fired the premises of the plaintiff, a Spaniard, and liberated his slaves. The English Government adopted and ratified the act. Held, the defendant was not liable

PRE-CONSTITUTION JUDEGMENTS (India)

- P & O Steam Navigation Co. v Secretary of State 1861. (N.L)
  - This case involved a claim for damages for injury caused to the appellant's horse due to the negligence of workers in a government dockyard. The issue was whether the Secretary of State would be liable for the negligence of the workers.
  - Peacock C.J. held that the Secretary of State would be liable for negligence.
  - **Peacock C.J: . reasoned that state liability for tortious acts of public servants would arise in those cases where the tortious act would have made an ordinary employer liable**
  - Peacock C.J. **recognised a crucial distinction between sovereign and non-sovereign functions - thus, if a tort was committed by a public servant in the exercise of sovereign functions, no state liability would arise**.
- Nobin Chunder Dey v Secretary of State 1876 (NL)
  - In this case, a claim for damages was brought in connection with the issuance of a government licence. The claim was ultimately rejected by the court as it related to the exercise of a sovereign function.

POST-CONTITUTION JUDGEMENTS

- State of Rajasthan v Vidhyawati 1962 (L)
  - In this case, a government servant negligently drove a government vehicle and injured a pedestrian, who later succumbed to injuries.
  - The Supreme Court followed the decision of Peacock C.J. in P & O Steam Navigation Co. to hold that the Government of Rajasthan would be liable for the tortious acts of its servants like any other private employer.
  - The Supreme Court also observed that **"there is no justification, in principle, or in public interest, that the State should not be held liable vicariously for tortious acts of its servant."**

- Kasturilal Ralia Ram Jain v State of Uttar Pradesh 1965 (NL)
  - In this case, a quantity of gold seized from the plaintiff by the police and kept in police custody was misappropriated by a police constable. The plaintiff raised a claim against the Government of Uttar Pradesh and argued that the loss was caused due to the negligence of police officers.
  - The Supreme Court rejected the claim raised by the plaintiff and affirmed a more expansive view of sovereign immunity.
  - The Supreme Court did not follow the decision in Vidhyawati as it distinguished this decision on the basis of the facts involved. It noted that the tortious act in Vidhyawati (driving a government vehicle from the workshop to the Collector's residence) could not be considered as an exercise of sovereign functions, unlike the tortious act in Kasturilal (seizure of property by police).
  - **The Supreme Court specifically held that the state was not vicariously liable as**
    a) **the power to arrest and search a person and seize his property were statutory powers conferred on the police officers; and**
    b) **such powers could be characterized as sovereign powers (para 31)**

- Shyam Sunder v State of Rajasthan 1974 (L)
  - the Government of Rajasthan was held vicariously liable for the death of a person sent on famine relief work.
- It was **held that famine relief work could not be considered as a sovereign function** as it could be carried out by private individuals also.
- Rudal shah v state of Bihar 1983 SC 1086 (L)
  - Compensation can be awarded to a person who suffered personal injuries at the hands of Govt. officers which amounted to tortuous acts.
- People's union of Democratic Rights v State of Bihar AIR 1987 SC 355 (L)
  - Compensation was directed to be paid to those who suffered injuries on account of police firing.
- Manju Bhatia v N D M C AIR 1988 SC 223 (L)
  - Damages were awarded for breach of statutory duty.
- Lucknow development authority v M.K. Gupta 1993 (L)
  - It was also held that public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behavior before authorities created under the statute like commission or the court entrusted with maintaining the rule of law.
  - Misfeasance in public office is also part of law of torts.

- N. Nagendra Rao v. State of A.P 1994 (L)
  - All the earlier Indian decisions on the subject were referred to. The court enunciated the following legal principles, in its judgment:
    - **In the modern sense, the distinction between sovereign or non-sovereign power thus does not exist.**
    - **It all depends on the nature of the power and manner of its exercise.**
    - **State cannot claim sovereign immunity if its officers are negligent in exercise of their powers.**
- Chairman, Railway Board v Chandrima Das 2000 (L)
  - the **establishment of guest houses at railway stations was not considered as a sovereign function**.
  - This case was brought under Article 226 of the constitution of India.
- Gurbachan Kaur Vs. UOI. 2002 (L)
  - In this case the Punjab and Haryana high court held **"the plea that the driver was on sovereign duty is not open to government vis-à-vis its citizen especially in modern welfare state."**

- State of Rajasthan Vs. Smt. Shekhu and ors, 2006 ACJ 1644
  - H.C 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."

Sovereign immunity vs Fundamental Rights

- No application of Sovereign Immunity to negligence causing threat/deprivation to life under Article 21 of the Constitution
- 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:
  - Sovereign immunity is not applicable to the writ petitions under Article 32 and 226.
  - Damages to be awarded where procedure established by law is not followed.
- Also in Nilabati Behra v State of Orissa 1993

conclusion

- Plea is based on old and archaic notion of justice namely “ king can do no wrong “
- This common law immunity no longer exist in the modern welfare state and is against modern jurisprudence where the distinction between the sovereign and non sovereign function has ceased to exist.
- The state like an ordinary citizen is liable for the acts done by it.
- Sovereign immunity is not applicable in cases of Article 21 and writs U/A 32 and 226.

DEFAMATION

by Manoj Kr. Binwal

DEFAMATION

- **MEANING:**
- The word defamation is driven from Latin word ‘Diffamare’. Semantics or Etymology of the Latin word ‘Diffamare’ provides that it means 'Spreading evil report about someone'.
- **WINFIELD:**
  - Defamation is the publication of a statement which tends to lower a person in the estimation of right-thinking members of society generally or which tends to make them shun or avoid that person. It is liabel if the statement is in permanent form and slander if it consists of significant words or gestures.

by Manoj Kr. Binwal

- Defamation is defined by Parke B. in Parmiter v. Coupland 1840 as **'A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule'**
- it is libel if the statement be made in permanent form and
- it is slander if it consists in significant words or gestures.
- Libel and slander are offences under S. 499 of IPC 1860

❖ESSETIALS:

- STATEMENT MUST BE DEFAMATORY
- THE STATEMENT MUST REFER TO PLAINTIFF
- THE STATEMENT MUST BE PUBLISHED

STATEMENT MUST BE DEFAMATORY

- Statement **must injure the reputation** of the plaintiff and lower him in esteem in the eyes of the society.
- Means may be by : humiliation, ridicule, contempt, making false allegations etc.
- Mode: oral, writing, printed, exhibition of a picture, statue or effigy or by some other conduct.
- Defamatory statement according to salmond:
  - Has **tendency to injure reputation** of person whom it refers.
  - Tends to **lower his esteem** in the thinking society.
  - Cause him to be regarded with the feeling **of contempt, hatred, ridicule, dislike or disesteem.**

- Deepak Kumar Biswas V. National Insurance Company Ltd. 2006
  - **FACTS**: Appellant was engaged as council by the national insurance company in arbitration matter.
  - The award so passed became a rule of the court.
  - But the appellant did not make any communication to the company that award became rule of the court.
  - As a result delay was caused by the company in filing the appeal.
  - In codonation petition another council appointed by the company stated that " the delay was caused by the laches on the part of lawyer who was conducting arbitration before the arbitrator"
  - **HELD:** The insurance **company had no motive or ill will to defame the defendant**. The statement so made was held to be not defamatory.

- # RAM JETHMALANI V SUBMANIYAM SWAMY 2006
  - FACTS:
    - Inquiry on assassination of late shri Rajeev Gandhi was going on.
    - Defendant at a press conference made a statement **that C.M. Of T.N has the prior information that LTTE cadre will make an assassination bid** on the life of shri Rajeev Gandhi.
    - Defendant during the proceeding for defamation, **in written conclusive submission, alleged** that the plaintiff have been receiving money from LTTE, a banned terrorist organization.
    - The **statement made by the defendant was held to ex-facie defamatory**.
    - It was held to be a case of exceeding the privilege and that itself was sufficient proof of malice

INNUENDO

- Statement prima facie non defamatory but becomes **defamatory** when **understood** **in secondary sense**.
- The plaintiff has to **prove the secondary or latent meaning**.
- E.g. x say y about z, that z is saint. The statement is prima facie not defamatory, however it will be defamatory if there is a gang by the name “the saints”.

- J Anson v Stuart 1787:
  - A newspaper stated – ‘This diabolic character, like Ployphemus the man eater, has but one eye and is well known to all persons acquainted with the name of a certain noble circumnavigator.’
  - The plaintiff proving that he has one eye and he bore a name similar to Anson, the famous admiral.
  - It was held that it is innuendo and the plaintiff was the person referred.
- Other leading cases:
  - Capital and countries bank V Henry and Sons 1882
- Mrs. Cassidy V. Daily Mirror 1929.
  - The facts were that the defendant published in his newspaper that 'Mr. Cassidy and Miss. K are engaged', In fact Mr. Cassidy had married Mrs. Cassidy. The wife Mrs. C sued the publishers. Her contention was that on seeing the news item, her friends in the women’s club and elsewhere shunned her company and looked down upon her.
  - The court therefore looked into the inner meaning of the publication. In effect, it meant that Mrs. C was not a legally wedded wife of Mr. C i.e. she was a kept mistress of Mr. C. The court awarded compensation.

The statement must refer to the plaintiff

- Necessary to prove that the statement was referred to him.
- Immaterial if he intended to defame plaintiff or not. i.e. even if resemblance was coincidental, proceeding will lie.
- **TEST:** The person to whom it was published can reasonably infer, that the statement referred to plaintiff.
- Newstead v., London Express Newspapers Ltd 1939
  - The defendants published an article stating that 'Harold Newstead, a Camberwell man' had been convicted of bigamy. **The story was true of Harold Newstead, a Camberwell barman. The action for defamation was brought by another Harold Newstead, the barber**. As the words were considered to be understood as referring to the plaintiff, the defendants were liable.

- Harsh Mendiratta v. Maharaj Singh 2002
  - Delhi HC said that an action for defamation was maintainable only by the person who was defamed and not by his friends or relatives.
- Youssoupoff v. MGM Pictures Ltd 1934
  - **Facts:** The plaintiff (herself a Princess) complained that she could be identified with the character Princess Natasha in the film 'Rasputin, the Mad Monk'. On the basis that the film suggested that, by reason of her identification with 'Princess Natasha', she had been seduced by Rasputin. The defendant contended that if the film indicated any relations between Rasputin and 'Natasha' it indicated a rape of Natasha and not a seduction.
  - **Held:** In a cinema film, not only the photographic part of it is considered to be libel but also the speech which synchronizes with it also. Slesser J. said that defamation could include words which cause a person to be shunned or avoided: 'not only is the matter defamatory if it brings the plaintiff into hatred, ridicule, or contempt by reason of some moral discredit on [the plaintiff's] part, but also if it tends to make the plaintiff be shunned and avoided and that without any moral discredit on [the plaintiff's] part. Thus she was awarded with damages.

DEFAMATION MUST BE PUBLISHED

- Publication means making the defamatory matter known to some person other than the person defamed and unless that is done, no civil action for defamation lies.
- Mahender Ram v. Harnandan Prasad 1958
  - It was said when a defamatory letter is written in urdu to the plaintiff and he doesn't know urdu, he asks a third person to read it **, it is not defamation unless it was proved that at the time of writing letter defendant knew that urdu was not known to the plaintiff.**
- Arumuga Mudaliar V. Annamalai Mudaliar 1996
  - **Madras HC held that when two persons write a letter containing defamation material jointly and send it to plaintiff, they can't be held liable for defamation for publication against one another.**

Defamation – intention and malice; how far considerable

- **Malice is essential** for criminal defamation.
- Malice is present if the acts were done in the knowledge that the statement is invalid and with knowledge that it would cause or be likely to cause injury.
- Malice would also exist if the acts were done with reckless indifference or deliberate blindness to that invalidity and that likely injury.
- Malice is presumed to exist, in law, when there is intention to bring disrepute or knowledge that the matter in question could bring disrepute to a person.

by Manoj Kr. Binwal

DEFENCES AGAINST DEFAMATION

DEFENCES

1. JUSTIFICATION/ TRUTH
2. FAIR COMMENT
3. PRIVILLEGES
4. CONSENT
5. APOLOGY

Exceptions:

1. IMPUTATION OF TRUTH WHICH PUBLIC GOOD REQUIRES TO BE MADE
2. PUBLIC CONDUCT OF PUBLIC SERVANTS
3. CONDUCT OF PERSON TOUCHING ANY PUBLIC QUESTION
4. PUBLICATION OF REPORTS OF PROCEEDINGS OF COURTS
5. MERITS OF CASE DECIDED IN COURT OR CONDUCT OF WITNESSES AND OTHERS CONCERNED
6. MERITS OF PUBLIC PERFORMANCE
7. CENSURE PASSED IN GOOD FAITH BY PERSON HAVING LAWFUL AUTHORITY OVER ANOTHER
8. ACCUSATION PREFERRED IN GOOD FAITH TO AUTHORISED PERSON
9. IMPUTATION MADE IN GOOD FAITH BY PERSON FOR PROTECTION OF HIS OR OTHER'S INTERESTS
10. CAUTION INTENDED FOR GOOD OF PERSON TO WHOM CONVEYED OR FOR PUBLIC GOOD

by Manoj Kr. Binwal

JUSTIFICATION/ TRUTH

- Complete defence.
- The substance of the statement must be true, not merely a part of it.
- (Bishop V. Lautiar)
  - "How, a lawyer treats his clients" was an article which dealt with how a particular lawyer was treating his client.
  - Held the article was in-sufficient to justify the heading.

FAIR COMMENT

- The comment must be on a matter of **public interest.**
- It **must be a comment** i.e. a statement of **opinion** rather than assertion of facts
- Comment must not be on the personal character of the writer.
- The comment **must be fair** : Mere violence in criticism by itself will not make the statements unfair.
- Honest criticism is essential for the efficient working of democratic public institutions.
- The Government and its institutions may be criticized.
- Comment must be malicious. Even fictitious name may be used. That by itself will not render the statement unfair.

PRIVILEGES

- They are occasions on which there ought to be no liability for defamation. This is because the public interest outweighs the plaintiff's right to his reputation.
- Salmond:
  - Statement made in such a circumstances as to exempt from the rule that a man attacks the reputation of another at his own risk.
- Privileges are of two Kinds :
  - Absolute
  - qualified.
- Privileges are absolute when the communication is of paramount importance. Such occasions are protected, however malicious or outrageous they may be. The defendant may make statements even if they are false.

- Examples for absolute privileges:
  1. Statements made in Parliament or Legislature.
  2. Reports, papers, etc., of either House of Legislature.
  3. Judicial proceedings.
  4. Communications between solicitor (advocate) and his client.
  5. Communication between one officer and a foreign officer
- Statements are qualified when the person makes the statement honestly even though they are false.

Absolute privilege in judicial proceedings

- Judicial proceeding have been defined in the code of civil procedure as – judicial proceeding may include any proceeding in course of which evidence is or maybe taken on oath."
- Absolute privilege has been granted to:
  - Judge – while acting in judicial capacity
  - Advocate – in course of administration of justice
  - Witness – in character of witness.
  - Parties to suit – similar privilege as witness
- LEADING CASES:
  - Ram Nayar v. Subramanya:
    - No action lie against judge for words used by him whilst trying a case in the court even though such words are alleged to be false, malicious and without reasonable cause.
    - Sumant Prasad v. Sheo Dutt Sharma 1946 – a counsel acting professionally in a cause.

by Manoj Kr. Binwal

Public conduct of public servants

- it is not defamation to express in a good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct.
- In the case of Kartar Singh v. State 1956 it was observed that public men should not be thin skinned with respect to comments made against them in discharge of their official functions. So, this exception is always raised in such kind of cases

Conduct of any person touching any public question

- It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.
- Example: Where the death of a married woman gave rise to much suspicion and rumours and the public was keen to know as to whether her husband and some others including some family members were involved in it or not, and a news item to this effect was published in the newspaper of the accused which brought the appellant within the area of suspicion, it was held that the whole matter having become a public question in the town, the accused was entitled to the benefit of the third exception.

Publication of reports of proceedings of Courts

- It is not defamation to publish substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.
- A correspondent of a newspaper made available material for publication to the editor of a newspaper, including a complaint made by a complainant against a person, the complainant in the aforesaid case, under sections 500 and 504 of the Code along with the allegations contained therein. These were published in the newspaper. On a complaint made by the complainant in the present case, it was held that there was no liability for defamation since exception is available to the accused persons.

Merits of case decided in Court or conduct of witnesses and others concerned

- It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a partly, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

Merits of public performance

- It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.

Censure passed in good faith by person having lawful authority over another

- It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.
- Example: Any confidential report about a public servant by his superior is protected by exceptions 2 and 7 of section 499. So an adverse entry with respect to the ability, integrity and suitability of an officer by his superior can be made without fear. If the subordinate officer has any grievance about the same, he is always entitled get the same cancelled or get adverse remarks expunged from his confidential report

Accusation preferred in good faith to authorised person

- It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

Imputation made in good faith by person for protection of his or other's interests

- It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good.
- It has been held that the person alleging in good faith must establish the fact that before making any allegations he had made an inquiry and necessary reasons and facts given by him must indicate that he had acted with due care and attention and that he was satisfied about the truth of the allegation.

LIBEL V SLANDER

GROUND	LIBEL	SLANDER
FORM	**WRITTEN OR PRINTED**	**SPOKEN WORDS OR GESTURE**
NATURE OF WRONG	**CIVIL AS WELL AS CRIMINAL**	**ONLY CIVIL**
PROOF OF DAMAGE	**NO ACTUAL DAMAGE NEED TO BE PROVED**	**SPECIAL DAMAGE NEEDED TO BE PROVED AS ITS NATURAL CONSEQUENCE.**
MALICE	LIBEL SHOWS A GREATER DELIBERATION AND **RAISES A SUGGESTION OF MALICE**.	SLANDER **MAY BE UTTERING OR WORDS IN THE HEAT OF MOMENTS** AND UNDER A SUDDEN PROVOCATION.
LIABILITY	**ACTUAL PUBLISHER OF LIBEL MAY BE AN INNOCENT PERSON**	**IN EVERY CASE OF PUBLICATION OF SLANDER ONLY THE PUBLISHER CAN BE HELD LIABLE.**

Slander (when proof of special damage is not needed)

- **Hirabai Jehangir Mistry vs Dinshaw Edulji Karkaria on , 1926**
- Turning next to the limited exceptions, proof of special damage is not needed in the following cases as thus enumerated in Pollock on Torts, 2nd Edn., p. 216, viz. -
  a) **Where the words impute a criminal offence ;**
  b) **where they impute having a contagious disease which would cause the person having it to be excluded from society ; and**
  c) **where they convey a charge of unfitness, dishonesty, or incompetence in an office, profession, or trade, in short, where they manifestly tend to prejudice a man in his calling.**

Also in case of Imputation of unchastity or adultery of any woman or girl.

CONSTITUTIONAL VALIDITY OF DEFAMATION

- in the case of K.V. Ramaniah vs Special Prosecutor 1961 AP
  - The Andhra Pradesh High Court stated that there is reasonable restriction on the freedom of speech and expression and it is not violating Article 19(1)(g) of the Constitution of India. Defamation is but an abuse of the freedom of speech and expression.

Subramanian Swamy v Union of India 2016

- The Supreme Court held Sections 499 and 500 of the IPC dealing with criminal defamation as constitutionally valid and the following observations:
    1. It recognized the right to reputation as a part of the right to life assured to citizens under Article 21 of the Constitution. It declared that the right to free speech under Article 19(1)(a) had to be balanced against the right to reputation under Article 21.
    2. The Supreme Court said a free press is the heart and soul of political intercourse and is a public educator, but this freedom is not absolute and cannot be used by the media to cause injury to an individual's precious reputation.
    3. The Court held that the press has to also observe reasonable restrictions and its purpose is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments.

4. The Court said the reputation of an individual was an equally important right and stood on the same pedestal as free speech
5. The Court held that criminalization of defamation to protect individual dignity of life and reputation is a reasonable restriction on the fundamental right of free speech and expression.
6. Defamation is a crime committed against society at large and the State has a duty to redress the hurt caused to its citizen's dignity.
7. . The Supreme Court also rejected demands to strike down Section 199(2) to (4) of the Cr.P.C

Sr. No.	Defamation as a Tort	Defamation as a crime
1.	It is a civil wrong.	It is a criminal offence, which is bailable, non-cognizable and compoundable.
2.	It is based on tort law- an area of law which has no statutes to define wrongs and relies completely on case laws to define wrongs.	It has been defined as an offence under Section 499 and the punishment for the same is given in Section 500 of the Indian Penal Code, 1860.
3.	It provides redressal to the plaintiff by awarding damages in the form of monetary compensation from the accused.	It seeks to punish the offender and send a message to the society not to commit such an offence.
4.	Damages are awarded on the basis of probabilities.	The offence of defamation has to be established beyond a reasonable doubt.
5.	It is generally a slow process to seek relief in India.	The plaintiff can move to criminal court and ask the offender to take cognizance of his complaint.
6.	A person found guilty can be penalized only by making him pay damages.	A person found guilty can be punished with imprisonment up to two years or fine or with both.

MALICIOUS PROSECUTION & ABUSE OF LEGAL PROCEDURE

by Manoj Kr. Binwal

DEFINITION/MEANING

- Proceedings instituted maliciously may include not only malicious prosecution and malicious arrest but also malicious bankruptcy and liquidation proceeding (civil proceedings), malicious execution of process against property, and malicious search.
- malicious prosecution is defined as a judicial proceeding instituted by one person against another, from wrongful or improper motive, without any reasonable and probable cause to justify it.

❖ ***West Bengal State Electricity Board v. Dilip Kumar Ray 2007***

- *The court defined* "malicious prosecution" in the following words:-
- "A judicial proceeding instituted by one person against another, from wrongful or improper motive and without probable cause to sustain it is a malicious prosecution."

- Abrath v NE railway…**J Bowen**
  - In order to prevent false accusation against innocent persons, an action for malicious prosecution may be brought against person indulging in abuse of Legal process.

MALICIOUS PROSECUTION V ABUSE OF LEGAL PROCESS

West Bengal State Electricity Board v. Dilip Kumar Ray

- "A malicious prosecution consists in maliciously causing process to be issued, whereas an abuse of process is the employment of legal process for some purpose other than that which it was intended by the law to affect the improper use of a regularly issued process."

ESSENTIAL ELEMENTS OF MALICIOUS PROSECUTION

- Following are the essential elements which the plaintiff is required to prove in a suit for damages for malicious prosecution:-
  A. Prosecution by the defendant.
  B. Absence of reasonable and probable cause.
  C. Defendant acted maliciously.
  D. Termination of proceedings in the favor of the plaintiff.
  E. Plaintiff suffered damage as a result of the prosecution.

Prosecution By The Defendant

- The word “prosecution” carries a wider sense than a trial and includes criminal proceedings by way of appeal, or revision.
- In the case of *Musa Yakum v. Manilal* (1904)
  - it was held that it is no excuse for the defendant that he instituted the prosecution under the order of a Court, if the Court was moved by the defendant’s false evidence to give the order.
- *Khagendra Nath v. Jacob Chandra 1976*
  - the Court held that merely bringing the matter before the executive authority did not amount to prosecution and, therefore, the action for malicious prosecution could not be maintained.
- It is significant to note that departmental enquiry by disciplinary authority cannot be called prosecution.

Absence Of Reasonable And Probable Cause

- The question relating to want of reasonable and probable cause in a suit for malicious prosecution should be decided on all facts before the Court.
- *Antarajami Sharma v. Padma Bewa 2007*
  - it has been said that law is settled that in a case of damages for malicious prosecution, onus of proof of absence of reasonable and probable clause rests on the plaintiff.
- The dismissal of a prosecution acquittal of accused does not create any presumption of the absence of reasonable and probable cause.
- If a man prefers an indictment containing several charges, whereof for some there is, and for others there is not, probable cause, his liability for malicious prosecution is complete.

Defendant Acted Maliciously

- Plaintiff is required to prove that the defendant acted maliciously in prosecuting him and not with a mere intention of carrying the law into effect.
- Malice need not be a feeling of enmity, spite or ill will or spirit of vengeance but it can be any improper purpose which motivates the prosecutor, such as to gain a private collateral advantage.
- It is not necessary that the defendant should be acting maliciously right from the moment the prosecution was launched. If the prosecutor is innocent in the beginning but becomes malicious subsequently, an action for malicious prosecution can lie.

Termination of proceedings in the favour of the plaintiff

- it is essential to show that the proceedings complained of terminated in favour of the plaintiff.
- it means absence of judicial determination of his guilt.
- No action can be brought when the prosecution or the proceedings are still pending. It is a rule of law that no one shall be allowed to allege of a still pending suit that it is unjust

Plaintiff suffered damage as a result of the prosecution

- In a suit for damages for malicious prosecution, it is another essential element which the plaintiff is required to prove that The plaintiff suffered damage as a result of the prosecution.
- ***C.M. Agarwalla v. Halar Salt and Chemical Works,* AIR 1977 Cal. 356**
  - In a claim for prosecution, the plaintiff can thus claim damages on the following three counts:-
    - **Damage to the plaintiff's reputation,**
    - **Damage to the plaintiff's person,**
    - **Damage to the plaintiff's property.**

In case of malicious prosecution court shall consider

a) The nature of offence which the plaintiff was charged of.
b) The inconvenience to which plaintiff was subjected.
c) Monetary loss.
d) The status and position of person.

Differences between malicious prosecution and False imprisonment:

1. Malicious prosecution is wrongfully setting the criminal law in motion but false imprisonment is wrongfully restraining the personal liberty of the plaintiff.
2. The action of false imprisonment owes its origin to the writ of trespass whereas the history of malicious prosecution may be traced back to the old writ of conspiracy.
3. The purpose of the tort of false imprisonment is to protect the liberty of a person. The purpose of the law of malicious prosecution is to check the abuse of legal process.
4. To constitute false imprisonment restraint on the freedom of movement is essential but restraint on personal liberty is not an essential element of the tort of malicious prosecution.
5. In malicious prosecution must be before a judicial authority but in false imprisonment restriction on movement is by the defendant or any other person for whose acts he is responsible.[wills J.] [Austin v Dowling]
6. In case of malicious prosecution damage must be proved by the plaintiff but in false imprisonment damage is not an essential element.
7. In malicious prosecution malice is essential element and must be established by the plaintiff but malice is not essential in an action for false imprisonment.

by Manoj Kr. Binwal

Differences between malicious prosecution and False imprisonment:

GROUND	MALICIOUS PROSECUTION	FALSE IMPRISONMENT
PROCEEDING	setting the criminal law in motion	wrongfully restraining the personal liberty of the plaintiff.
ORIGIN	old writ of conspiracy.	writ of trespass
OBJECT	check the abuse of legal process.	protect the liberty of a person.
RESTRAINT	restraint on personal liberty is not an essential.	restraint on the freedom of movement is essential
JUDCIAL AUTHORITY	prosecution must be before a judicial authority.	Non-judicial authority.
DAMAGES	damage must be proved	damage is not an essential element
MALICE	malice is essential element	must be established by the plaintiff but malice is not essential in an action for false imprisonment

by Manoj Kr. Binwal

MALICIOUS CIVIL PROCEEDING

- General Rule: No action can be brought.
- Costs are considered adequate damage.
- Exception: when damages as cost is not adequate remedy.

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ABUSE OF LEGAL PROCESS

- ABUSE OF PROCESS is the tort that is said to exist when an individual obtains an advantage in litigation over his opponent through the malicious and unfounded use of some regular legal process or procedure.
- However, note that the proper use of this legal process (even though used for a bad intention and to satisfy malicious intentions) is not actionable.
- Abuse of process is not the act of starting an unjustified action. Rather it is the misuse or misapplication of process for an end other than that which it was designed to accomplish

by Manoj Kr. Binwal

Elements

- All of the following elements must be present in order to sustain an action for abuse of process:
  A. The defendant must have made **an illegal, perverted, improper** use of the process-a use which the process neither warranted, intended, nor authorized.
  B. The defendant must have had an **ulterior motive or purpose in exercising such illegal, perverted, or improper use of the process.**
  C. The plaintiff **must sustain damage** from this irregularity.

GENERAL DEFENCES

by Manoj Kr. Binwal

GENERAL DEFENCES

- A defence is a plea put forth by the defendant against the claims of the plaintiff.
- The following are the defences open to a defendant in an action for tortious liability.
    - Volenti non-fit Injuria
    - Inevitable Accident
    - Act of God
    - Necessity
    - Negligence
    - Self Defence (Sou assault demesne)
    - Novus Actus Interveniens (remoteness of damage)
    - Contributory Negligence
    - Mistake
    - Statutory Authority

by Manoj Kr. Binwal

What is not a good defence?

- Mistake of law
- Mistake of fact
- Plaintiff is a wrongdoer

VOLENTI NON FIT INJURIA

by Manoj Kr. Binwal

VOLENTI NON FIT INJURIA

- The general rule is that a person cannot complain for harm done to him if he consented to run the risk of it.
- However the maxim must not be confused with Scienti Non Fit Injuria which means that a person who has the knowledge of danger cannot claim damage.
- For example a boxer, footballer, cricketer, etc. cannot seek remedy where they are injured while in the game to which they consented to be involved.
- Where a defendant pleads this defense, he is in effect saying that the plaintiff consented to the act, which he is now complaining of.
- Smith V. Baker >>> cutting rocks by drill >> stone fell>> damage awarded>>> held – **there was only knowledge of risk but not the assumption of it.**
- Application of VNFI **depends upon competence of the decision making capacity of the person at the time of giving consent.**

- Case: Khimji Vs Tanga Mombasa Transport Co. Ltd (1962),
  - The plaintiffs were the personal representatives of a deceased who met his death while traveling as a passenger in the defendant's bus. **The bus reached a place where road was Flooded and it was risky to cross. The driver was reluctant to continue the Journey but some of the passengers, including the deceased, insisted that the Journey should be continued**. The driver eventually yielded and continued with some of the passengers, including the deceased. The bus got drowned together with all the passengers aboard.
  - The deceased's dead body was found the following day. It was held that the plaintiff's action against the defendants could not be maintained because the deceased knew the risk involved and assumed it voluntarily and so the defense of Volenti non fit injuria rightly applied.
- In Dr. Laxman Balkrishan Verses Trimbak Bapu, 1968
  - the Supreme Court **held that if a doctor does not apply due care during the operation, operation**. In the case the patient died because proper primary care was not taken while giving anesthesia.

Essential Conditions of Doctrine of Volenti Non fit Injuria

a) **Consent must be freely given**:
   - White Verses Blackmore 1972, the plaintiffs husband paid for admission of his family for witnessing a car race. During the race a car got entangled in the safety rope and the plaintiff was catapulted some twenty feet and died consequently.
   - It was *held* that since the deceased did not have full knowledge of the risk he was running from the faulty lay out of the ropes, he did not willingly accept the risk .

b) **Consent cannot be given to an illegal act**.

c) **Knowledge of risk is not the same thing as consent to run the risk:**
   - The maxim is ***volenti non fit injuria*** and not the ***scienti non-fit injuria*** — knowledge of danger does not necessarily imply a consent to bear that danger. This doctrine was for the first time enunciated in Smith Verses Baker 1891 .
   - In this case, the plaintiff worked in a cutting on the top of which a crane was carrying heavy stone over his head while he was drilling the rock face in the cutting. Both he and employers knew that there was a risk of stones falling, but no warning was given to him of the moment at which any particular jibbing commenced. A stone from the crane fell upon him and injured. The House of Lords held that defendants were liable.

- Slaster Verses Clary Cross Company Limited: 1956
  - the plaintiff was struck and injured by a train driven by the defendant's servant while she was walking along a narrow tunnel on a railway track owned by the defendant. The defendants, knew it that the tunnel was used by the members of public and, therefore, they had instructed their servants to drive vehicle slow while entering the tunnel, The accident took place because of the negligence of the servant as he did not observe the instructions.
  - It was held that the defendants were liable. Denning, LJ, said, "It seems that when this lady walked in the tunnel although it may be said that she voluntarily took the risk of danger from the running of the railway in the ordinary and accustomed way, nevertheless, she did not take the risk of negligence by the driver "
- In Dr. J.N. Srivastava Verses Ram Bihari Lal and others, 1984
  - where the doctor observed after opening the abdomen cavity that patient's appendix was all right but the operation of Gallbladder was needful. He proceeded with the operation— later on the patient died.
  - The Court held that it was not possible to seek the consent for the Gall-bladder operation. In such situations doctor was not responsible.

- Thus, for the maxim *volenti non fit injuria* to apply two things are necessary,
  (1) knowledge that risk is there, and
  (2) voluntary acceptance of the risk.

- **LIMITATIONS TO THE MAXIM VOLUNTI NON FIT INJURIA**
  - Unlawful acts
  - Breach of statutory duty, it is no answer to claim made by a workman against his employer for injury caused through a breach by the employer of a duty imposed on him by statute **(Wheeler Verses Mertor Board MillsLimited, Bradley Verses Earl Granville)**
  - The maxim does not apply in rescue cases such as where the plaintiff has, under an exigency caused by the defendant's wrongful misconduct, consciously and deliberately faced A risk, even of death to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes A duty of protection as in A member of his family, or is A mere stranger to whom he owes no such special duty.
  - Negligence
  - The defendant was under a duty to prevent the very act.

- **Other leading case laws:**
  - **Hall v Brooklyn Auto Running club ->>>**
    - Spectator was injured during the game where there was inherent danger.
    - Held not liable.
  - **Illot v Wilkies 1820**
    - Owner setup a spring gun trap on his field and warned the defendant about it>>> defendant still entered and got injured.
    - Held not liable.
  - **Baddley v Eael Granville**
    - Volunti non fit injuria had no validity in an action based on breach of statutory duty.

RESCUE CASES

- Winfield described rescue cases as under — Rescue cases are typified by:
- *A's* death or injury in rescuing or endeavoring to rescue *B* from an emergency or danger to B's life or limb created by the negligence of C Is C liable to *A"!*
- Rescue cases form an exception in the applicability of the doctrine. When the plaintiff voluntarily jumps into the risk for saving somebody else, happened because of the wrongful act of the defendant he will not be liable to find shelter under the doctrine Volenti Non fit Injuria.
- *Baker vs. T.E. Hopkins & son*
  - in this case, due to the fault on the defendant's side, the well was filled with the poisonous fumes of the petrol driven pump. Two of his workmen were to overcome by those fumes. Dr Baker was called to save them, he was also told about the risk involved in the same. Even after that, he jumped into the well knowingly of the danger involved. But soon after he was driven out from there, although on the way to the hospital he died. The widow of Dr Baker sued the workman's employer for compensation. It was held that the defendant was liable for the compensation, as it was the rescue case. Even though he voluntarily agreed to take the risk, the plaintiff was liable to compensation.

- *Haynes vs. Harwood*
  - here the defendant's servant left two-horse van unattended in the street. Nearby there were some children were playing. A boy from one of them threw a stone towards the horse and horse bolted as a result the horse started running here and there. This created danger to women and children in the street living nearby. A policeman saw all this and dived into the scene to prevent the danger. Though he succeeded but was severely injured in doing so. Defendant was held liable, even when the defendant pleaded that he was just a policeman and was doing his duty.
- If the plaintiff is not acting under compulsion of any duty, moral or legal he will not be entitled to recover anything.
- For instance, in Cutler Verses United Dairies London Limited.,
  - the plaintiff saw a horse belonging to a driver getting out of his control and voluntarily went to his assistance and was thrown back by the horse and hurt.
  - It was held that the maxim applied and the plaintiff was disentitled from recovering damages, as he knew that the act was fraught with danger and he willingly undertook the same.

INEVITABLE ACCIDENT

by Manoj Kr. Binwal

Inevitable Accident

- This means an **accident, which cannot be prevented by the exercise of ordinary care, caution or skill of an ordinary man. It occurs where there is no negligence on the part of the defendant** because the law of torts is based on the fault principle; an injury arising out of an inevitable accident is not actionable in tort.
- In A. Krishna Patra Verses Orissa State Electricity Board, 1996 HC Orissa
  - the Court explained inevitable act and held that an inevitable accident is an event which happens not only without the concurrence of the will of the man, but in spite of all efforts on his part to prevent it.
- This principle was derived from American case known as Nitro Glycerin case 18712
- **Green MR:**
  - An accident is one out of the ordinary course of things, something so unusual as not to be looked for by person of ordinary prudence.
- It is both a defence and denial of liability.

- **Case: Stanley Vs. Powell (1891)**
  - In this case, the plaintiff was employed to carry cartridge for a shooting party when they had gone pheasant-shooting. A member of the party fired at a distance but the bullet, after hitting a tree, rebounded into the plaintiff's eye.
  - The plaintiff sued. It was held that the defendant was not liable in the light of the circumstance of inevitable accident.
- Fardon vs. Harcourt-Rivington,(1932)48 TLR,215
  - Lord Dunedin stated observed, **"People must guard against reasonable probabilities, but they are not under duty to guard against fantastic possibilities“**.
- Inevitable accident however is not a defense in
  - strict liability case by the rule in Ryland Vs. Fletcher
  - Cattle trespass cases

ACT OF GOD

by Manoj Kr. Binwal

Vis Major (ACT OF GOD)

- This is also an inevitable accident caused by natural forces unconnected with human beings e.g. earthquake, floods, thunderstorm, etc.
- **Case:** Nichols V s. Marshland (1876)
  - The defendant has a number of artificial lakes on his land. **Unprecedented rain such as had never been witnessed in living memory caused the banks of the lakes to burst and the escaping water carried away four bridges belonging to the plaintiff.** It was held that the plaintiff's bridges were swept by act of God and the defendant was not liable.

Essentials

- The act should result from a natural force.
- No human intervention.
- Extraordinary in nature
- Ryde Vs. Bushnell (1967): Sir Charles Newbold observed,
  - "Nothing can be said to be an act of God unless it is an occurrence due exclusively to natural causes of so extraordinary a nature that it could not reasonably have been foreseen and the result avoided".

- **Present scenario:**
  - Today the scope of act of god is very limited.
  - Today the scope of this defence is very limited because with the increase in knowledge the foresight also increases and it is expected that the possibility of the event could have been visualized.
  - Whether a particular circumstance or occurrence amounts to an act of God is a question of fact in each case and the criterion for deciding it "is no human foresight and prudence could reasonably recognize the possibility of such an event."
  - There is a tendency on the part of courts to limit the application of the defence of act of God not because of the fact that its application in the cases of absolute liability is diminished but because advancement in the scientific knowledge which limits the unpredictable.

- In Ramalinga Nadar Verses Narayana Reddiar, 1998
  - the Kerala High Court held that the criminal activities of the unruly mob cannot be considered to be an Act of God.
- In Saraswati Parabhai Verses Grid Corporation of Orissa and Others 1999,
  - where an electric pole was uprooted and fell down with live wire which caused death of a person. Orissa High Court rejecting the defence of Act of God held that it was the responsibility of the Grid Corporation authorities to provide protection in such situation of storm and rain.
- Municipal Corporation of Delhi v. Sushila Devi, AIR 1999 SC 1929
  - a person passing by the road died because of fall of branch of a tree standing on the road, on his head. The Municipal Corporation was held liable.

NECESSITY

by Manoj Kr. Binwal

Necessity

- Where intentional damage is done so as to prevent greater damage, the defense of necessity can be raised. Sometimes a person may find himself in a position whereby he is forced to interfere with rights of another person so as to prevent harm to himself or his property.

- **Cope Vs. Sharpe (1912)**
  - The defendant committed certain acts of trespass on the plaintiff's land in order to prevent fire from spreading to his master's land. The fire never in fact caused the damage and would not have done so even if the defendant had not taken the precautions he took. But the danger of the fire spreading to the master's land was real and imminent. It was held that the defendant was not liable as the risk to his master's property was real and imminent and a reasonable person in his position would have done what the defendant did.
- The general rule is that a person should not unduly interfere with the person or property of another. It is only in exceptional cases of imminent danger that the defense of necessity maybe upheld. It is based on the principle that the welfare of the people is the supreme law. Whether the defense of necessity would extend to inflicting injuries to the person is debatable.

- **In the case of Esso Petroleum Ltd. Vs. Southport Corporation (1956)**
  - It was held that the safety of human beings belongs to a different scale of value from the safety of property. These two are beyond comparison and the necessity for saving life has all times been considered, as a proper ground for inflicting such damage as may be necessary upon another's property.

Mistake

by Manoj Kr. Binwal

Mistake

- The **general rule is that a mistake is no defense in tort**, be it a mistake of law or of fact.
- **Mistake of fact**, however, maybe relevant as a defense to any tort in some exceptional circumstances e.g. malicious prosecution, false imprisonment and deceit. Thus where a police officer arrests a person about to commit a crime but the person arrested turns out to be innocent the police officer is not liable. Mistake however, cannot be a defense in actions for defamation.

Statutory Authority

by Manoj Kr. Binwal

Statutory Authority

- When the commission of what would otherwise be a tort, is **authorized by a statute the injured person is remediless,**
- **Legislature may provide remedy expressely**.
- The statutory authority **extends** not merely to the act authorized by the statute but **to all inevitable consequences of that act.**
- Consequence which can be avoided cannot claim statutory indemnity.
- But the **powers conferred by the legislature should be exercised with judgment and caution so that no unnecessary damage is done,** the person must do so in good faith and must not exceed the powers granted by the statute otherwise he will be liable.

- **Salmond:**
  - Statutory authority is also statutory indemnity taking away all the legal remedies provided by law of torts for persons injuriously affected.
- Vaugham Vs. Taff valde Railway Co. (1860)
  - A railway company was authorized by statute to run a railway, which traversed the plaintiff's land. Sparks from the engine set fire to the plaintiff's woods. **It was held that the railway company was not liable. It had taken all known care to prevented emission of sparks. The running of locomotives was statutorily authorized.**
- **Other leading cases:**
  - Metropolitan Asylum District Managers v Hill: HL 1881 (hospital to treat chicken pox near public place)

- Hammer Smith Rail Co. Verses Brand, 1869
  - The value of plaintiff's property had considerably depreciated due to the noise, vibration and smoke caused by the running of trains. The damage being necessarily incidental to the running of the trains authorised by the statute, it was held that no action lies for the same.
- Smith Verses London & South Western Railway Company, 1869
  - the servants of a Railways Company negligently left trimmings of grass and hedges near a rail line. Sparks from an engine set the material on fire. By a heavy wind the fire was carried to the nearby plaintiff's cottage which was burnt. Since it was a case of negligence on the part of the Railways Coach, they were held liable.
  - When a statute authorises the doing of an act, which would otherwise be a tort, the injured has no remedy except the one (if any) provided by the statute itself.
- Bhogi Lal Verses The Municipality of Ahmedabad,2015
  - The Municipality of Ahmedabad demolished the wall of the plaintiff under their statutory powers. The demolition of the wall also resulted in the falling of the roof of the defendant on the wall. On an action by the plaintiff for the damage to his property, it was held by the court that the defendant would not be liable.
  - For no suit will lie on behalf of a man who sustain a private injury by the execution of powers given by a statute, these powers being exercised with judgment and caution.

Self Defense

by Manoj Kr. Binwal

Self Defense

- Everyone has a right to defend his person, property and family from unlawful harm. A person who is attacked does not owe his attacker a duty to escape.
- Everyone whose life is threatened is entitled to defend himself and may use force in doing so.
- The force used must be reasonable and proportionate to that of the attacker. Normally, no verbal provocation can justify a blow.\
- Thus a man must use force as is reasonably necessary and the means of defense must be related to the harm, which would otherwise be suffered. It is therefore sound to take reasonable steps to protect his property e.g. by keeping fierce dog, broken glass on a boundary wall etc.

by Manoj Kr. Binwal

Novus Actus Interveniens

by Manoj Kr. Binwal

Novus Actus Interveniens

(remoteness of consequence)

- This is when a chain of events results from a tort so that the loss suffered is not within the scope of those that would naturally occur from the first tort.
- To refer to a novus actus interveniens is in fact merely another way of saying that the loss was not reasonably foreseeable.
- This however, does not become an excuse if: -
  - An act done in the agony of the moment created by the defendants tort.
    E.g. **If you threw a lighted firework into a crowded market place. Several people threw the firework from their vicinity until it explodes on another‟s face. (Scott Vs. Shepherd (1773)**
  - Where the intervening act is a rescue.

by Manoj Kr. Binwal

Contributory negligence

by Manoj Kr. Binwal

Contributory negligence

- The defendant may rely upon this defense if the plaintiff is also to blame for his suffering. The defendant must prove that:
  a) The plaintiff exposed himself to the risk by his act or omission.
  b) The plaintiff was at fault or negligent.
  c) The plaintiff's negligence or fault contributed to his suffering.
- This defense does not absolve the defendant from liability. It merely apportions compensation of damages between the parties who contributed to the loss. This defense is not available if the plaintiff is a child of tender age.
- Contributory negligence is not a defence if plaintiff is a child.

- In English Law the rule of Contributory Negligence was demonstrated for the first time in 1809, in the case of Butterfield Verses Forrester
  - **FACTS:**
    - The defendant for the purpose of making some repairs to his house, wrongfully obstructed a part of the highway by putting a pole across it. The plaintiff who was riding on his horse very violently on the road in the evening collided against the pole and injured. It was also found as a matter of fact that there was sufficient light and the pole was visible from a distance of 100 yards.
    - The court held that the plaintiff had no cause of action against the defendant as he himself could have avoided the accident by exercising due care.
- The above rule caused a great hardship to the plaintiff because he may lose an action for a slight negligence on his part even if the defendant's negligence was the main cause of damage to the plaintiff. In such circumstances a new development took place and the court modified the law by introducing 'Last opportunity rule'. **An important case** of Devis Verses Mann, **illustrate this rule.**

- **Rule of Last opportunity:**
  - A person charged with contributory negligence may still recover damages if he can prove that , in spite of his negligence it was defendant who had the last opportunity of avoiding the accident by taking ordinary care.
- The introduction of the doctrine is widely attributed to the English case of *Davies v. Mann*,152 Eng. Rep. 588 (1842).

Devis v Mann

- The facts briefly were that the plaintiff left his donkey with its forelegs tied in a narrow public street. The defendant coming with his wagon at a smart pace negligently ran over and killed the donkey.
- The court held the defendant liable because he had the last opportunity to avoid the accident by the exercise of ordinary care that is, by going at such a pace as would be likely to avoid the mischief.
- It was observed by the court that "although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man may justify the driving over goods left on public high way, or even over a man lying asleep there, or purposely running against a carriage going on the wrong side of the road.

Exceptions to contributory Negligence

1. **Rescue Cases:**
   - The doctrine of contributory negligence does not apply to rescue cases. The rule of voluntary assumption of risk does not apply where the plaintiff has under an exigency caused by the defendant's wrongful conduct, consciously and deliberately face risk, even of death, to rescue another from imminent danger, injury or death, whether the person endangered is one to whom he owes a duty of protection as a member of the family, or is a mere stranger to whom he owes no such special duty.
   - In RIDLEY V. MOBILE, Etc. Rly. Co (1905 Sw Rep. 606)
     - the plaintiff's husband saw a boy standing on a track in imminent danger from an approaching train, which had failed to give the statutory signals. To rescue the boy the deceased rushed upon the track immediately in front of the moving train, and in that process was killed.
     - It was held that the deceased was not guilty of contributory negligence, and the plaintiff's claim succeeded.

2. Alternative Danger

- The law permits the plaintiff to encounter an alternative danger to save himself from the danger created by the defendant. If the course adopted by the plaintiff result in some harm to himself, his action against the defendant will not fail. The judgment of the plaintiff should not, however, be rash.
- The Supreme Court in SHYAM SUNDER V. State of Rajasthan (AIR 1947 Sc.890)
  - has applied the doctrine of alternative danger. In that case due to the negligence of the defendant's driver, a truck belonging to them caught fire hardly after it had covered a distance of only four miles on a particular day. One of the occupants, Navneetlal jumped out to save himself from the fire; he struck against a stone lying by the roadside and died instantaneously.
  - The defendant state was held liable for the same.

3. PRESUMPTION

- The plaintiff, under certain circumstances, can take for granted that the defendant will be careful. In such cases he has no duty to guard against the negligence of the defendant which is unforeseen. When the duty to take care does not exist, the defendant cannot blame the plaintiff for not having guarded against the accident.

- Gee V. METROPOLITION RLY Co.(1873)
  - The plaintiff was a passenger in the defendant's railway. He slightly leaned against the door of a carriage not long after the train had left the station. As the door had been negligently left unfastened by the defendant's servants, it flew open and the plaintiff fell off the train.
  - He was held entitled to recover damages, even though he did not check up that the door had been properly fastened because he had a right to presume that the railway servant's were not negligent in leaving the door unfastened.

4. Statutory Exception:

- The motor vehicles Act, 1988 has fixed amount of compensation as Rs 25,000/- in case of death, and Rs 12,000/- in case of permanent disablement, of the accident victim. Hence, the right to claim compensation is not affected by any wrongful act, neglect or default of the accident victim, and the quantum of compensation payable shall not be reduced on account of contributory negligence

Is it law of Tort or Law of Torts?

by Manoj Kr. Binwal

It Is Law Of Tort

- Winfield is the chief supporter of this theory.
  - He says, all injuries done to another person are torts, unless there is some justification recognized by law.
  - Thus according to this theory tort consists not merely of those torts which have acquired specific names but also included the wider principle that all unjustifiable harm is tortuous.
  - This enables the courts to create new torts.
  - Winfield while supporting this theory comes to the conclusion that law of tort is growing and from time to time courts have created new torts.
- The theory of Winfield was recognized by the courts in the case of (Asby v. White)
- It was endorsed in India in case of Ushaben Trivedi v. Bhagyalaxmi Chitra Mandir. – it was held that hurt to religious feeling is an actionable wrong.

Supporters of This Theory

- **HOLT, C.J.**
  - clearly favoured Winfield's theory, by recognizing the principle of ubi jus ibi remedium. He said that, if man will multiply injuries, actions must be multiplied too; for every man who is injured ought to have recompense [Ref. case- Ashby v. White (1703) 2 Ld. Raym. 938].
- **PRATT, C.J.**
  - said that, torts are infinitely various, not limited or confined [Ref. case- Chapman v. Pickersgill (1762)2 Wils 145].

- **In 1893, BOWEN, L.J.**
  - expressed an opinion that at common law there was a cause of action, whenever one person did damage to another willfully or intentionally without a just cause or excuse.
- **LORD MACMILLAN**
  - observed that, the common law is not proved powerless to attach new liabilities and create new duties where experience has proved that it is desirable [Ref.- Donoghue v. Stevenson (1932) AC 595].

Creation Of New Torts

This theory is also supported by the creation of new torts by courts of law. For example:-

- The tort of **inducement to a wife to leave her husband** in Winsmore v. Greenbank (1745) Willes 577 (581).
- Tort of **deceit** in its present form had its origin in Pasley v. Freeman (1789) 3 TR 51
- Tort of **inducement of breach of contract** had its origin in Lumley v. Gye (1853) 2 E & B 216.
- The tort of **strict liability** had its origin in Rylands v. Fletcher (1868) LR 3 HL 330.
- The tort **of intimidation** in Rookes v. Barnard (1964) 1 All ER 367
  From the above mentioned cases it is clear that the law of tort is steadily expanding and that the idea of its being in a set of pigeon-holes seems to be untenable.

It Is Law Of Torts

- Salmond on the other hand, preferred the second alternative and for him, there is no law of tort, but there is law of torts.
- According to him the liability under this branch of law arises only when the wrong is covered by any one or other nominate torts.
- There is no general principle of liability and if the plaintiff can place his wrong in any of the pigeon-holes, each containing a labelled tort, he will succeed.
- This theory is also known as 'Pigeon-hole theory'.
- If there is no pigeon-hole in which the plaintiff's case could fit in, the defendant has committed no tort

Supporters of This Theory

- Professor Dr. Jenks favoured Salmond's theory. He was, however, of the view that Salmond's theory does not imply that courts are incapable of creating new tort. According to him, the court can create new torts but such new torts cannot be created unless they are substantially similar to those which are already in existence [Ref.- Journal of Comparative Legislation, Vol. XIV (1932) p. 210].
- Heuston [Editor of Salmond's Torts] is of the view that Salmond's critics have misunderstood him.
- Professor Glanville Williams wrote: To say that the torts can be collected into pigeon-holes does not mean that those pigeon-holes may not be capacious, nor does it mean that they are incapable of being added to.

Conclusion

- Winfield made a modification in his stand regarding his own theory.
- **He thought that both his and Salmond's theories were correct,** the first theory from a broader point of view and the other from a narrower point of view.
- In the **words of Winfield, from a narrow and practical point of view, the second theory will suffice**, but from a broader outlook, the first is valid [Ref.- Winfield and Jolowicz, Tort, 10th Edition, p. 19].
- **It is thus a question of approach and looking at the things from a certain angle**. each theory is correct from its own point of view.

NERVOUS SHOCK

by Manoj Kr. Binwal

What is Nervous Shock?

- It is a shock to the nerve and brain structures of the body
- It is not a physical injury either by stick, bullet or sword but merely by what has been seen or heard.
- E.g., injury through agitation caused by a false alarm or unlawful threats may result in a nervous breakdown or a mental shock which may injure the plaintiff for his ordinary activities.
- It is a shock which arises from a reasonable fear to immediate personal injury to oneself

REQUIREMENTS

- For a case under nervous shock, the plaintiff has to prove the following things: -
  - Necessary chain of causation between nervous shock and the death or injury of one or more parties caused by the defendant's wrongful act;
  - Plaintiff is required to prove shock caused to him by seeing or hearing something.
  - Physical injury is not necessary;
  - His proximity to the accident was sufficiently close in time and space.
- Thus, a man who came up on a scene of serious accident for acting as a rescuer, when suffered a nervous shock, was allowed to claim the damages

Page v. Smith (1995) 2 All ER 736) (House of Lords case),

- In Page v. Smith (1995) 2 All ER 736) (House of Lords case), the plaintiff, though directly involved in the motor accident remained physically unhurt but suffered a psychiatric illness.
- The House of Lords held the defendant liable for damages and laid down the following important propositions: -
  - In cases involving nervous shock, it is essential to distinguish between the primary victims and secondary victims;
  - In claims of secondary victims, the law insists on certain control mechanisms, to limit the number of potential claimants;

- Thus, defendant will not be liable unless the psychiatric injury/nervous shock is foreseeable in a person of normal health. The control mechanism has no place where the plaintiff is a primary victim.
- in claims of secondary victims, it may be legitimate to use hindsight/observation in order to be able to apply the test of reasonable foreseeability;
- subject to the above, whether the defendant can reasonably foresee that his conduct will expose the plaintiff to the risk of personal physical injury or nervous shock?
- If the answer is YES, then the duty of care is established, even though physical injury does not in fact occur.

- the defendant who is under a duty of care to the plaintiff, whether primary or secondary victim,
- defendant is not liable for damages for nervous shock unless the nervous shock results in some recognized psychiatric illness. .
- A mere bystander not in the vicinity of danger zone and who suffers injury by nervous shock cannot recover damages from the defendant

Development through case laws:

- in Victorian Railway Commissioners Verses Coultas, 1888
  - the privy council did not recognize injury caused by a shock sustained through the medium of eye or ear without direct contact
- Bourhill Verses Young, [1943]
  - **Lord Macmillan** observed in this regard, "The crude view that the law should take cognizance only of physical injury resulting from actual impact has been discarded, and it is now well recognized that an action will lie for injury by shock sustained through the medium of the eye or ear without direct contact."
- *Chadwick v British Railways Board* [1967] 1 WLR 912
  - a man who came up on a scene of serious accident for acting as a rescuer, when suffered a nervous shock, was allowed to claim the damages.
  - The defendant owed Mr Chadwick a duty of care since it was reasonably foreseeable that somebody might try to rescue the passengers and suffer injury in the process.

TRESPASS TO LAND (sec 6 of SRA)

by Manoj Kr. Binwal

DEFINITION

- Trespass etymologically means ‘passing beyond’ or ‘transgression’.
- Trespass to land means unlawful interference with possession of land without lawful justification.
- Trespass to land is the unjustifiable interference with the possession of land. (Winfield)
- In trespass interference with the land is direct and through some tangible object. If it is not direct it may be nuisance but not trespass.
- Under English Common Law the maxim that is used for trespass is ‘trespass quare clausam fregit’ which means “**because he (the defendant) broke or entered into the close**.
- The tort of trespass requires essentially only the possession of land by the plaintiff and jut encroachment by some way by the defendant.
- There requires no force, unlawful intention or damage nor the breaking of an enclosure.
- Every continuing trespass is not a fresh trespass.

- Trespass can be committed in two ways:
  - Entering the premises of person himself.
  - Or through some material object.

    Like throwing stone or planting tree of neighbor's land.
- Going beyond the purpose for which a person has entered certain premises or crossing authority where he has authority to go amounts to trespass.(trespass ab initio).
- There must an active act on part of defendant to give rise to an action for trespass.
- **Six carpenter's case:**
  - six carpenters entered into an inn ordered food and refused to pay
  - Held it was an act of non-feasance and not misfeasance and thereby it was not trespass.
- t is a well known principle that if a person enters upon another's land and stays on it, the act is connoted as continuing trespass.

Two Essentials

1. Invasion of or entry on the land
2. Invasion must be unjustifiable

- Homes V. Wilson
  - **FACTS:** Authorities had constructed a road/bridge and to support such infrastructure had erected buttresses on the plaintiff's land and had not removed them.
  - **HELD:** The authorities were liable to pay full compensation and had a further action in continuing trespass in which they were held liable. The act of continuing trespass remains until such object or act is removed or stopped respectively.
- Hurst v Picture Theatres [1915]
  - **Facts:** The claimant purchased a ticket, and therefore had a contractual licence, to watch a theatre performance. The defendant, acting under a mistaken belief that the claimant had not paid for a ticket, forcibly ejected the claimant
  - **Issue:** Was the licence revocable; could the claimant obtain damages for trespass to the person?
  - **Decision:** Not revocable; damages available;
  - **Reasoning:** As the claimant was not a trespasser, damages for trespass to the person were available

AERIAL/SUB-SOIL TRESPASS

- The owner of a land is entitled to the airspace above his land and the soil and minerals below his land.
- However there is an important test to the tort of aerial trespass i.e.
  - The object that enters the air space of the plaintiff must be at such a height to interfere with ordinary use of plaintiff's land and violate his right to use his property.

Person must be in direct possession and not mere possession.

- Direct possession means animus possidendi and corpus possessionis element of possession must be present.
- A servant living in master's land cannot bring an action for trespass.
- A tenant or lessee can bring an action for trespass.
- Trespasser is not allowed to take the defense of 'Jus Terti'
- If the occupier of the land himself acquiesces in frequent acts of trespass, the visitors no more remain trespassers.

Graham v Peat

- **FACTS:** The plaintiff was occupier of a land as a lessee however the agreement of lease was void.
- **HELD:** It was held that he can bring an action of trespass against the unauthorized access of the defendant as "any possession is a legal possession against wrongdoer"

Trespass is wrong against the possession.

- Person in direct possession though not owner can bring suit for trespass.
- Conversely, **owner of the property neither in direct possession nor having immediate right to possess cannot bring an action** for trespass.
- A reversioner may sue however if by trespass any **permanent damage to his reversionary interest i**s imminent.

Trespass is actionable per se

- No damage or special damage needed to be proved.
- Even an honest mistake by defendant is not a defense in case of trespass.
- Inevitable accident is a good defence for trespass.

REMEDIES

- **RE-ENTRY**
- **ACTION FOR EJECTMENT**
- **ACTION FOR MESNE PROFIT**
- **DISTRESS DAMAGE FEASANT**

by Manoj Kr. Binwal

It is a wrong against possession

- The one in possession can bring action.
- The possession may be direct or constructive.
- WINKFIELD CASE 1902
  - The postmaster-general who was Bailee of the mails was held to be entitled to recover damages from the wrongdoer due to whose negligence the mails were lost despite the fact that he himself was not liable to compensate the owners.

INTERFERENCE MUST BE DIRECT/ HONEST MISTAKE NOT A GOOD DEFENCE

- Direct interference is essential.
- The wrong may be committed intentionally, negligently or by an honest mistake.
- KIRK V GREGORY
  - On A's death his sister removed his jewellery from his room and moved it into her room with the honest belief that it is necessary for its safety. The jewellery was now stolen from place it was kept.
  - In an action for trespass by executors she was held liable.
- Roop Lal v. UOI :
  - Military jawans took unmarked woods believing it to be Govt's. > held liable.
- Hollins v Fowler
  - Defendant being unaware obtained stolen good and sold them for commission.

DETINUE

by Manoj Kr. Binwal

DETINUE (sec 7 and 8 of SRA)

- When the defendant is wrongfully detaining the goods belonging to the plaintiff and refuses to deliver the same on lawful demand. The plaintiff can bring an action for detinue.
- Provided in sec 7 and 8 of SRA.
- Abolished in England by Torts (interference with goods) Act 1977.

CONVERSION

by Manoj Kr. Binwal

CONVERSION

- Conversion (also known as Trover) consists in wilfully and without any justification dealing with goods in such a manner that another person, who is entitled to immediate use and possession of the same, is deprived of that.
- E.g. transferring the good to third person, destroying it or damaging it or refusing to deliver it to plaintiff.
- RICHARDSON v ATKINSON
  - The defendant drew out some wine out of the Plaintiff's cask and mixed water to the rest to make good the deficiency.
  - He was held liable for conversion of the whole cask as he converted part of contents by taking them away and remaining part by destroying their identity.

M.S Chokkaligam v State of Karnataka 1991

- The respondent, the Forest Department of the State Government of SG has purchased 206 Rosewood logs from the petitioner and refused to pay for the same for 9 years inspite of repeated demands.
- The HC directed respondent to pay price equivalent to price of 206 Rosewood and interest @ 6%/annum from date of purchase to date of payment of value and the cost of Rs.2000.

TRESPASS TO PERSON

by Manoj Kr. Binwal

MEANING

- Trespass to the person involves the wrongful invasion of a persons' right to freedom from interference with his body or his right to personal liberty. This is in contrast to trespass to land that involves the wrongful invasion of another's premises.
- Fowler v Lanning [1959]
  - Trespass to person can only be intentional or negligent, burden of proof is on claimant.
  - Facts: claimant shot by defendant at an event.
- In modern times, trespass to the person has been replaced by the three (3) separate torts of:
  - 1. False Imprisonment
  - 2. Assault
  - 3. Battery

FALSE IMPRISONMENT

- This is the wrongful or unreasonable restraint of an individual's liberty [without lawful justification].
- Collins v wilcock J. Goff
  - The unlawful imposition of constraint on another's freedom of movement from a particular place
- **LORD ATKIN** in Meering v Grahame- White Aviation.[1920]
  - False imprisonment does not require awareness, as long as requirements are met.
  - A person may be imprisoned while he is asleep, while he is in a state of drunkenness, while he is unconscious, and while he is lunatic.
  - Facts: claimant asked to wait in room, did on his own freewill but unknowingly wasn't able to leave.
- Time period of restraint is immaterial.
- Restraint must be complete.

- Restraint may be actual or constructive.
- There is NO need to show damages.
- In FI once arrest is established burden to prove justification lies on the defendant who made or caused the arrest.
- For example, police officers may arrest or detain individual without legal justification

False imprisonment deals with:

A. Inconvenience sustained by the intentional restriction of movement;
B. Total restraint by external limits or powers, even if it is temporary;
C. Compelled or confined to stay in one place, against one's will for which there is a complete loss of freedom

- CLARKE v DAVIS
  - held that police officers may be liable where they order a person, without physically holding him, to accompany them to the police station, and that person submits to the show of authority.
- Bird v Jones
  - The plaintiff was not allowed to cross the bridge through footway but he was allowed to cross through carriage way.
  - Since restraint was not total, there was held to be no false imprisonment.
- Garikipati V Araza Biksham
  - For false imprisonment detention should be without lawful justification.
  - Making false complaint against the plaintiff to the police officer leading to his arrest will make defendant liable for false imprisonment.

ASSAULT

- “Assault is an act of the defendant which causes to the plaintiff reasonable apprehension of the infliction of battery on him by the defendant”**(Winfield)**
- *collins v wilcock* [1984] Goff LJ
  - An assault is 'an act which causes another person to apprehend the infliction of immediate, unlawful force on his person'
- **Mere words do not amount to assault.**
- However, since the House of Lords' decision in ***R v Ireland*** **[1998]** it is clear **that words alone can amount to an assault**.
  - **Facts:** defendant made a series of silent telephone calls over 3 months to three different women, caused psychiatric harm**.**
- Tortious assault is the calculated threat of violence which causes reasonable fear of immediate physical contact. Assault entails conduct reasonably leading to battery, such as:
  - Intimidation,
  - Apprehension of harm,
  - Unlawful contact,
  - Manifestation of violent propensities,
  - Threats

by Manoj Kr. Binwal

- Test
  - whether a reasonable person would have to fear that violence is immediate or about to be committed in the circumstances to constitute assault. [notwithstanding the type of object or subjective motive of the perpetrator]
  - For example, the intimidating use of a toy gun against one who believes the toy to be real may constitute tortious assault.
- In STEPHENS v MYERS,
  - an altercation took place between the plaintiff and the defendant at a parish council meeting. The defendant approached the plaintiff with a clenched fist but his blow was intercepted by a third party and the defendant successfully sued for assault.
- Tuberville v Savage [1669]
  - Facts: x put his hands on his sword and said 'if it were not the right time, I would not take such words from you.'
  - Held: words shows that no violence will ensue. Hence not liable.
- R. Versus S. George and also to Blake versus Bernard 1840,
  - the defendant was held liable for pointing an unloaded gun at the plaintiff.

- In HULL v ELLIS
  - the defendant held the revolver in her hand and accosted the plaintiff while riding his donkey on a public road an inquired the source of wood he was carrying. It was held that she committed assault.

Battery

- Battery is intentional application of force to another without lawful justification. (Winfield)
- Collins v wilcock Goff LJ
  - The actual infliction of unlawful force on another.
- The wrong of battery consist of intentional application of force to another person without lawful justification.
- Use of force however trivial, is enough physical hurt need not be there.
- It is equivalent to use **of criminal force u/s 350 of IPC.**
- Mere touching of body of another without lawful justification is battery.
- Throwing of water, splitting on someone's face, or making a person fall by pulling of chair are example of use of force.
- Winfield:
  - Infliction of heat, electricity, gas, odour, etc. would probably be battery if it can result in physical injury or personal discomfort.

- Use of force must be intentional and without lawful justification.
- Harm voluntarily suffered is no ground for action.

DIFFERENCE BETWEEN ASSAULT AND BATTERY

GROUNDS	ASSAULT	BATTERY
Justification	Self defense or defense	Self defense, defense, necessity
Common Law	Intentional tort	Intentional tort or negligent tort.
Important aspect	Threat of violence is enough to constitute assault; no physical contact is necessary	Physical contact is mandatory
Purpose	To threaten	To cause harm
Nature of crime	Not necessarily physical	Definitely physical
TEST	whether a reasonable person would have to fear that violence is immediate or about to be committed in the circumstances to constitute assault	Use of force however trivial, without lawful justification

by Manoj Kr. Binwal

INTERFERENCE WITH CONTRACT OR BUSSINESS

by Manoj Kr. Binwal

INTERFERENCE WITH CONTRACT OR BUSSINESS

- INDUCING BREACH OF CONTRACT
- INTIMIDATION
- CONSPIRARY
- MALICIOUS FALSEHOOD
- PASSING OFF

by Manoj Kr. Binwal

INDUCING BREACH OF CONTRACT

by Manoj Kr. Binwal

INDUCING BREACH OF CONTRACT

- It is tortious to knowingly and without lawful justification induce one person to make a breach of subsisting contract with another as a result of which the other person suffers damage.
- It is essence of decision is Lumley v Gyel.
  - In this case the defendant paid a large sum of money to break contract with plaintiff and sing for him.

Various ways in which this tort may be committed

1. By direct inducement.
2. By doing some act which render the performance physically impossible.
   - E.g. physically detaining one of the parties
3. Knowingly doing an act, which if done by one of the parties to contract would cause breach of contract.
   - **Case: GWK Ltd V Dunlop Rubber Co. Ltd**
     - A entered into contract with B that former will use tyres made by B during exhibition in their cars. C aware of this clause secretly changed tyres with his own company's tyres.
     - C was held liable to A for trespass and B for inference with contract.

Exceptions

- It is no tort to persuade a person from entering into contract with other.
- It is also no tort to persuade a person to terminate a contract lawfully.
  - Allen v Flood
- Inducing breach of such agreements which are null and void.
- Inducing a breach with a lawful justification.
- Statutory exceptions
  - E.g. Sec 18(1) of Trade Union Act

INTIMIDATION

by Manoj Kr. Binwal

Intimidation

- It signifies a treat delivered by A to B whereby A intentionally cause B to act or refrain from an act, to the detriment of himself or C.
- ESSENCE: use of unlawful threats.
- Rookes v Barnard
  - A was part of union. There was agreement b/w union and company that union will not stop the work in case of dispute. A left the union and refused to join. The union notified the company that if A is not terminated the union will withdraw its labour. A was thereby terminated after being given due notice.
  - A had no remedy against the company so he proceeded against the union. It was held by house of lords that the act of union amounted to intimidation as result of which plaintiff suffered and therefore the union was liable.

SINE QUA NON

- Threat to do an unlawful act.
- The act must be to detriment of such person of some other person.

CONSPIRACY

by Manoj Kr. Binwal

DEFINITION

- When two or more persons without lawful justification combine for the purpose of willfully causing damage to the plaintiff, and actual damage results there from, they commit the tort of conspiracy.
- In other words a conspiracy is an unlawful combination of two or more persons to do, that which is contrary to law, or to do that which is wrongful and harmful towards other person, or to carry out an object not in itself unlawful by unlawful means.

Conspiracy: A Tort and/or a Crime?

- Conspiracy is both a tort and a crime.
- Criminal conspiracy is different from conspiracy as tort.
- Under criminal law, merely an agreement between the parties to do an illegal act or a legal act by illegal means is actionable.
- The tort of conspiracy, is, however, not committed by a mere agreement between the parties, the tort is completed only when actual damage results to the plaintiff.

by Manoj Kr. Binwal

Sine Qua Non for Conspiracy

- There should be more than one person
- The act done should be without any lawful justification
- It should be done willfully
- Damage on the part of the plaintif

There should be more than one person

- The tort requires an agreement, combination, understanding, or concert to injure, involving two or more persons.
- At least two persons.
- Husband and wife are considered as one.

The act done should be without any lawful justification

- The plaintiff has to prove that the defendant combined to do the act was illegal or legal but done by an illegal means.
- that there should not be any lawful excuse or it should be without any lawful justification.
- Unless this requirement is made out there shall have no conspiracy on the part of the defendants.

It should be done willfully

- The object or the purpose of the combination must be to cause damage to the plaintiff.
- The test is not what the defendants contemplated as a likely or even an inevitable consequence of their conduct. It is “what is in truth the object in the minds of the conspirators or combiners when they acted as they did?
- Malice in the sense of malevolence, spite of ill will is not essential for liability;
- what is required is that the combiners should have acted in order that (not with the result that, even the foreseeable result) the plaintiff should suffer damage.
- The act should be done willfully, if isn’t then no action can be made out for conspiracy.

Damage on the part of the plaintiff

- Damage is an essential element of the tort of conspiracy
- The gist of the cause of action. It has been held that the damage constituted by the expense incurred by plaintiffs in exposing and resisting the wrongful activities of the defendants can be awarded to them as damage directly caused by the conspiracy.
- Damages for injury to feelings or to reputation, however, cannot be recovered in an action based upon a “lawful means” conspiracy to injure.

Who can be sued for this offence?

- All conspirators are Jointly and severally liable.
- The mere act of conspiracy is not the subject of a civil action. To sustain an action special damage must be proved.

Judicial Pronouncements:

- Mogul Steamship Co. v. McGregor Gow and Co
  - Tea reade >>> defendant to gain monopoly formed association and provided discount.
  - Held the purpose was lawful expansion of business.
- Hunteley v. Thornton
  - The plaintiff, a member of a union, refused to comply with the union's call for strike. The defendants, the secretary and some members of the union, wanted the expulsion of the plaintiff from the union but the executive council of the union decided not to do that. The defendants acting out of grudge against the plaintiff made efforts to see that the plaintiff remained out of work.
  - The acts of the defendants were not in furtherance of any union interest but were actuated by malice and grudge. The defendants were held liable and the plaintiffs were entitled to recover damages.

MALICIOUS FALSEHOOD

by Manoj Kr. Binwal

MALICIOUS FALSEHOOD

- Malicious falsehood consists in making malicious statements concerning the plaintiff to some third person adversely affecting the pecuniary interest of the plaintiff.
- **Types of Malicious Falsehood:**
  A. Publication in permanent form
  B. Publication by words, sign or gestures.
     I. Slander of title
     II. Slander of goods

SINE QUA NON OF MALICIOUS FALSEHOOD

- **1.MALICIOUS PUBLICATION**
- **2.FALSITY**
- **3.DAMAGE**
- **4.MALICE**

1.MALICIOUS PUBLICATION

- The defendant must have intended to publish the statements complained of, and have done so with an improper motive. Evidence of malice might include proof:
  - That the defendant knew the relevant statements were false;
  - That the defendant was reckless as to the truth or falsify of the statements when publishing them, or;
  - That, even though the defendant believed the statements to be true, their dominant motive in publishing the statements was to injure the claimant's interests.

2.FALSITY

- It is up to the claimant to prove that the statements complained of were untrue unlike in defamation claims, where the falsity is presumed and the burden falls on the defendant to prove that the statements are true.
- Furthermore, the statements complained of, even if false, must be more than “mere puff” between trade rivals, such ass that often seen in comparative advertising.

3.DAMAGE

- That the said publication caused special damage as a natural consequence, e.g.; the loss of business, customers, a bargain, property, income or profits, or costs incurred by being compelled to defend his title.

4.MALICE

- That the statement was published maliciously, i.e. Out of some motive other than a bona fide claim of right. Absence of belief in the truth of the statement will be conclusive evidence of malice, but a merely careless publication of its not by itself enough.

SLANDER OF TITLE

- Slander of title is a false malicious statement about a person's property or his business or relates to his material interest.
- The disparagement need not necessarily relate to title but may be of any description, e.g., a false statement that a person's house, which he was proposing to sell, was haunted.

SLANDER OF GOODS

- The phrase “slander of goods” is used when the disparagement relates to goods.
- The disparagement may be depreciating the quality or pointing out some other defects, e.g. A false statement alleging A’s goods to be an infringement to B’s trademark and warning A’s customers not to buy them.
- Ractliffe vs. Evans
  - The defendant was held liable for publishing in his newspaper a false statement that the plaintiff has ceased to carry on his business and that his firm didn’t then exist, and thereby causing loss of customers to the plaintiff.

REMEDY FOR SLANDER OF TITLE OR SLANDER OF GOODS

- DAMAGES
- INJUNCTION
- DECLARATION

by Manoj Kr. Binwal

PASSING OFF GOODS

- The action for passing off goods is the remedy for a false representation tending to deceive purchaser into believing that the goods, which the defendant is selling, are really the plaintiff's.
- The representation may be by a direct statement to that effect, or as is more usually the case, by conduct or by way of using the distinctive mark, name number, design, get up or appearance of another's goods.
- In an action for passing off, the plaintiff need not prove either an intent to deceive or actual damage. It is enough if he shows that the conduct of the defendant was calculated or likely to deceive or mislead the public, ie, the unwary or incautious and not the caref.ul or intelligent purchaser

TRESPASS TO GOODS, DEINUE AND CONVERSION

- It consist of direct interference with the goods which are in the plaintiff's possession, without any lawful justification.
- It may take numerous forms like throwing stone on car, shooting bird, harming animals etc.
- It is actionable per se.
- No loss = nominal damage.

by Manoj Kr. Binwal

Passing off

- It is a wrong by which a trader uses deceptive devices to push up his sales and allow his goods to pass off under the “impression that goods are of some other person”.
- All that is needed to be proved is that defendant’s goods are so marked, made up, or so described by them as to be **calculated to mislead ordinary purchaser** and to lead them to mistake the defendant’s good for goods of the plaintiff.
- Purpose to protect the goodwill.

LIABILITY FOR MISSTATEMENT

by Manoj Kr. Binwal

LIABILITY FOR MISTATEMENT

- Deciet or Fraud
- Negligent misstatements
- Innocent misrepresentation

DECEIT OR FRAUD

- The act of wilfully making a false statement with an intent to induce the plaintiff to act upon it and is actionable when the plaintiff suffers damage by acting upon the same.

Sine qua non

- Defendant made a false representation of statement.
- The defendant knew the statement is false or at least honestly did not believe it to be true.
- The statement was made with the intention to deceive the plaintiff.
- The plaintiff acted upon the statement and suffered damage in consequence.

False statement of fact

- Edington v Fitzmaurice
  - Director of company raised loan by issuing debentures. Used the money for the purpose other that the money was borrowed for. Held the director was liable for deceit.
  - It may be by words or conduct.
  - Mere silence will not amount to deceit except where:
    - There is a duty to speak.
      - E.g. contracts of insurance
    - Subsequent discovery that the statement made was false and had time to correct it.
    - Speaking half truth.
    - Active concealment of defect

Knowledge about falsity of statement

- An honest man cannot be held fraudulent.
- Derry v Peak
  - A made a statement in NEWS P. that his engines will run on steam power and not animal power. The consent was to be obtained from the Board of trade, A believed that he will get the licence and that it was mere formality. Licence was denied as the result company was wound-up.
  - Shareholders brought an action against A. it was held that he cannot be held liable for fraud as he had honest belief.
- Lord Herschell observerd:
  - In order to sustain an action for deceit, proof of fraud is necessary nothing short of it will succeed.
  - There could be no liability for deceit in respect of negligent statement.

Intention to deceive plaintiff

- Langridge v Levy
  - Fraudulent statement made to plaintiff's father that the gun sold was made by celebrated manufactures and was quite safe. The gun burst while shooting and the plaintiff got injured.
  - Held plaintiff can sue the defendant as the statement made by defendant was intended to be and conveyed to defendant.

Plaintiff must be actually deceived

- Horsfall V Thomas
  - Defedant did not examined the gun and brought it. Later he pointed out defect in the gun and refused to pay. It was held that defendant was claim to be deceived as he did not examined the gun and formed no opinion as to its soundness.

Negligent misstatement

by Manoj Kr. Binwal

Negligent misstatement

- Generally negligent statement is not a ground for action in tort.
- Exception(Hedley v Byrne and co. ltd v Heller and partners):
  - Where someone possessed with special skills undertakes the contract for assistance another person and such other person relies on skills of such person, a duty of care will arise.
  - False statement which were made carelessly by one person and acted upon by another to his disadvantage cannot be actionable unless there was contractual or fiduciary relation between parties.

Innocent Misstatement

by Manoj Kr. Binwal

Innocent Misstatement

- No liability.
- England:
  - Misrepresentation Act allows action for damage caused due to innocent misstatement.

Death in relation to Tort

by Manoj Kr. Binwal

Effect of Death on Subsisting cause of Action.

- **GENERAL RULE:**
  - a personal cause of action comes to an end with the death of that person – “actio personalis moritur cum persona.”
- The common law rule has been abrogated by passing Law reforms Act of 1934
  - The general rule now is that if a cause of action comes into existence in the life time of the parties, the death of either the parties or the defendant doesnot effect the cause of action.
  - i.e. the subsisting cause of action survives even if either/both parties to suit died.

How far causing death is actionable in tort?

- General Rule: death of a person cannot be compensated in tort.
- The rule is that causing of death is not actionable wrong under the civil law. This rule was laid down in the case of Baker v Bolton and therefore it is known as Baker v Bolton rule.
- Rule:
  - The plaintiff could recover compensation for injury to himself and also the loss of wife's society and distress , from the date of accident to the date of her death but could not recover anything for such loss after her death.

Exception to the rule

1. Death caused due to breach of contract:

- If death is a result of breach of contract then this fact can be taken into account while deciding damages for the breach of contract.
- JACKSON V WATSON:
  - Plaintiff's wife died after eating salmon from a tin sold by defendant.
  - Held: the defendant was liable as he sold the food injurious for human consumption. There the defendant was liable to compensate plaintiff for loss of services of the wife.

2. Compensation under statute:

- Workmen's compensation act 1855
- Indian railways act 1890
- Carriage by air act 1972
- Motor vehicle act
- Fatal accident act 1855

REMEDIES

by Manoj Kr. Binwal

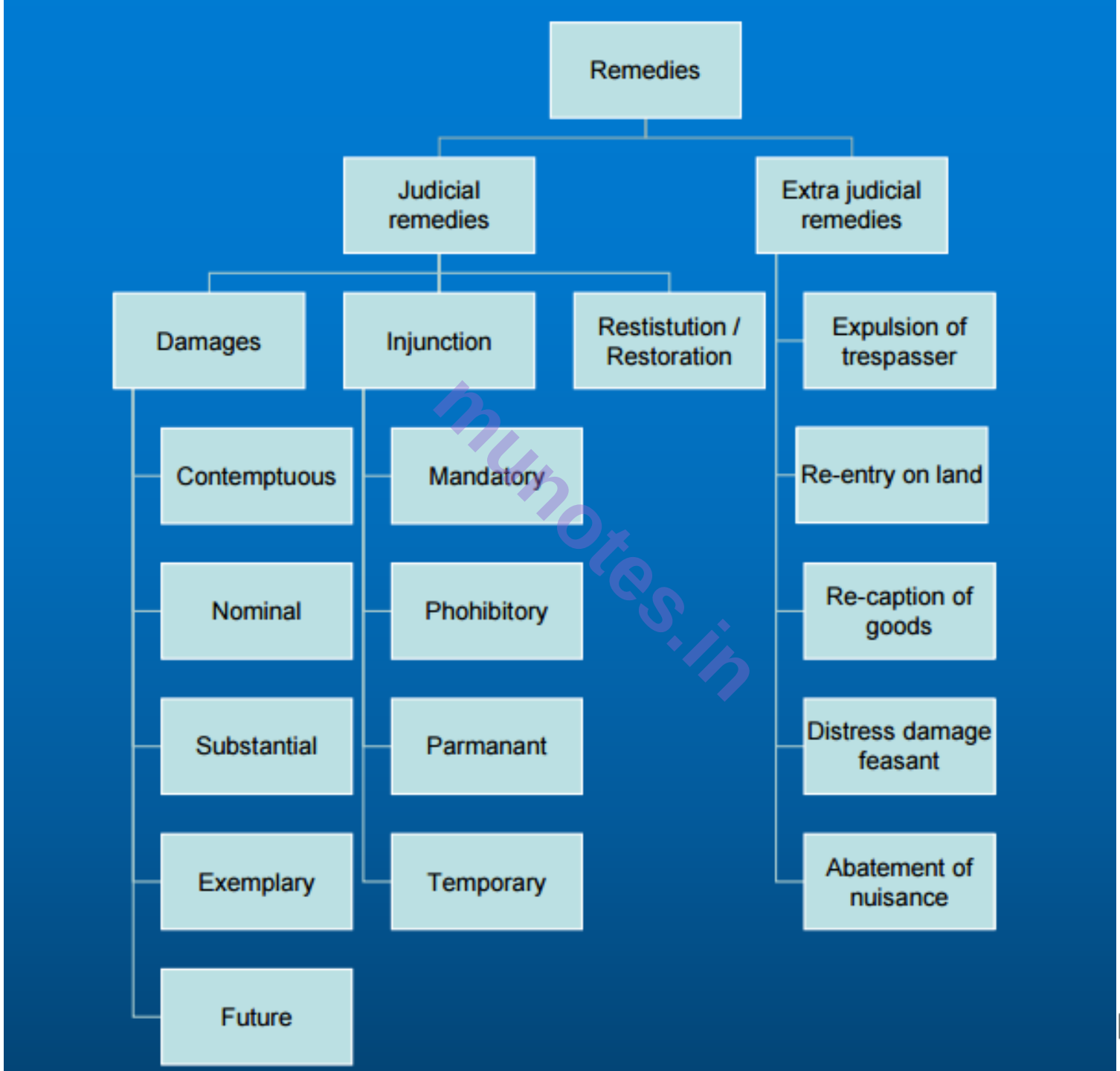
RULES FOR CLAIMING DAMAGES

- If the facts alleged by the injured person amount to felony then no action can be brought against the defendant unless he has been prosecuted. Or there should be reasonable cause for not so prosecuted.
- All the remedies which are available to the plaintiff must be claimed at once.
- Where plaintiff's two distinct rights are violated; two separate suit may be filed.
- Where defendant has violated plaintiff's one right by two distinct act; two suit may be filed.
- For one injury one suit can be filed.
- If the injury is continuing one; then successive suit can be filed for every fresh injury

WHAT ARE REMEDIES IN TORT?

- JUDICIAL REMEDIES
  - DAMAGES
  - INJUNCTION
  - RESTITUTION
- EXTRA JUDICIAL REMEDIES
  - EXPULSION OF TRESPASSER
  - RE-ENTRY ON LAND
  - RE-CAPTION OF GOODS
  - DISTRESS DAMAGE FEASANT
  - ABATEMENT OF NUISANCE

by Manoj Kr. Binwal



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DAMAGES

- Damages are most common remedy for a torts. It is pecuniary compensation which law awards for an injury.
- In tort damages awarded are unliquidated damages.
- Damages cannot be awarded more than what is claimed by the plaintiff.
- Measures of damages depend upon various things like causes, facts, circumstances of the case.
- There is no hard and fast rule to decide quantum of damages.

by Manoj Kr. Binwal

- The damages claimed should not be remote.
- Court can consider the general rules of damages under the accident claims and workmen's compensation law.
- There may be apportionment of damages on the basis of wrongful act or the loss sustained.
- While calculating damages, court has to consider what amount will be sufficient to overcome from the loss or injury.
- damages may be contemptuous, nominal, substantial, exemplary or future.

Contemptuous damages

- Contemptuous damages are awarded when it is considered that an action should never have been brought.
- When the plaintiff has technically a legal claim but there is no moral justification for it or he morally deserved what the defendant did to him, the Court may award a half penny or a paisa showing its disapproval of the conduct of the plaintiff.
- Such damages are awarded usually in actions of defamation where the court finds that the defendant is in fault and the plaintiff's conduct and character are such that he does not deserves to be compensated.

Nominal damages

- In this the amount of damages are so small that it may be just negligible.
- Nominal damages are awarded by the court merely for the purpose of recognition of the legal right infringed. Ex- trespass, assault, breach of easementory right.
- Ashby v White
- Constantine v Imperial London Hotel Ltd.

Substantial damages/general/ordinary

- This is also known as real damages which are awarded as compensation for damage actually suffered by the plaintiff.
- This is as fair and equitable compensation for injury suffered by the plaintiff.
- Bhim singh v State of J&K 1986
  - In this case Bhim Singh a member of legislative assembly was arrested and detained to prevent him from attending assembly session.

Special damage

- The expression “special damages‟ has three different meanings :-
  - It is employed to denote that damage arising out of the special circumstances of the case which, if properly pleaded, may be super-added to the general damage which the law implies in every infringement of an absolute right.
  - Where no actual and positive right (apart from the damage done) has been disturbed. the expression “special damage,” when used of this damage, denotes the actual and temporal loss which has, in fact, occurred.
  - In actions brought for a public nuisance, such as the obstruction of a river or a highway, “special damage” denotes that actual and particular loss which the plaintiff must allege and prove that he has sustained beyond what is sustained by the general public, if his action is to be supported, such particular loss being, as is obvious, the cause of action.
- Hadley v Baxendale
  - Facts: late delivery under contract led to closure of mill and damage to plaintiff.

Exemplary damages

- This is known as punitive damages.
- This type of damages are awarded where the wrong or injury is grievous in nature and which is associated with a deliberate intention to injure.
- **Rookies v Barnard**
  - The object of such damages being to deter and punish awardee of such damages “confuses the civil and criminal function of law” **(lord Devilin)**

Future damages

- This is also known as prospective damages.
- Plaintiff can claim the loss which is possible in future due to the wrongful act of the defendant.
- But plaintiff must claim past, present and future damages at once.
- Subhash Chander V. Ram Singh
  - Got injured in an accident resulting in permanent disability causing loss of employment.
  - Held: damages to compensate future loss of revenue was provided.
- Y.s Kumar v Kuldip Singh

Injunction

- Injunction is an order of the court to the party to suit, to do or to refrain from doing some act.
- Injunction is granted at the discretion of the court.
- Object of injunction is to stop damage or limit the damage by issuing injunction.
- Where damages are sufficient remedy; injunction is not granted by the court.
- Injunction is granted under the provisions of Specific Relief Act and Civil Procedure Code.

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Types of injunction

- Mandatory injunction
- Prohibitory injunction
- Permanent or perpetual injunction
- Temporary injunction

Restitution

- This remedy is given by the court wherever it is possible. In this remedy; original position is which before the wrongful act is tried to be restored.
- Ex. Restoration of dispossessed immovable property, recovery of things.

Effect of receipt of disablement pension or insurance money on right to compensation

- Perry v Cleaver (house of lords)
  - No effect
  - Reason:
    - Plaintiff bought them
    - Why should tort feasor be benifitted from plaintiff's money.

EXTRA JUDICIAL REMEDIES

- EXPULSION OF TRESPASSER
- RE-ENTRY ON LAND
- RE-CAPTION OF GOODS
- DISTRESS DAMAGE FEASANT
- ABATEMENT OF NUISANCE

by Manoj Kr. Binwal

Expulsion of trespasser

- A person who is lawful possessor of an immovable property can expel or eject the trespasser.
- He can use legitimate force to expel such trespasser

Re-entry on the land

- A person who has been wrongfully dispossessed of his land can take back possession of his land.
- He can use legitimate force.

Re-caption of goods

- A person who has been wronfully dispossessed of his chattel can take back possession of his chattel.
- He can use legitimate force to retake possession.

Distress damage feasant

- Disrtess = Detain
- Damage = loss/injury
- Feasant = object; which has done a wrong
- It is remedy by which a person can detain the cattle or things which entered on his land and causing any harm till he receive damages from the owner of such cattle or things.
- Person who detained cattle/things has a responsibility to take care of detained cattle/things.

by Manoj Kr. Binwal

Abatement of nuisance

- In case of nuisance, person injured has a right to remove it; peaceably, without causing any danger to life/limb.

Nuisance

by Manoj Kr. Binwal

MEANING

- The word “nuisance” is derived from the French word “nuire”, which means “to do hurt, or to annoy”.
- One in possession of a property is entitled as per law to undisturbed enjoyment of it.
- If someone else’s improper use in his property results into an unlawful interference with plaintiff’s use or enjoyment of that property or of some right over, or in connection with it, we may say that tort of nuisance occurred.
- Nuisance is an unlawful interference with a person’s use or enjoyment of land, or of some right over, or in connection with it.

Definitions

- **STEPHEN:**
  - “anything done to the hurt or annoyance of the lands, tenements of another, and not amounting to a trespass.”
- **SALMOND:**
  - “the wrong of nuisance consists in causing or allowing without lawful justification the escape of any deleterious thing from his land or from elsewhere into land in possession of the plaintiff, e.g. water, smoke, fumes, gas, noise, heat, vibration, electricity, disease, germs, animals.”
- **POLLOCK**
  - “Nuisance is the wrong done to a man by unlawfully disturbing him in the enjoyment of his property, or in some cases in the exercise of a common right”

Sine qua non of nuisance

Unreasonable interference:

- Every interference is not nuisance.
- Must cause damage to plaintiff's property or personal discomfort to plaintiff.
- So far interference is not unreasonable no action can be brought.
- Inconvenience or discomfort to be considered must be more than mere delicacy or fastidious and more than producing sensitive personal discomfort or annoyance.

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

KINDS OF NUISANCE

- PUBLIC NUISANCE
- PRIVATE NUISAMNCE

by Manoj Kr. Binwal

PUBLIC NUISANCE

- Section 268 of the Indian Penal Code, defines it as
  - “an act or illegal omission which causes any common injury, danger or annoyance, to the people in general who dwell, or occupy property, in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.”
- Simply speaking, public nuisance is an act affecting the public at large, or some considerable portion of it; and it must interfere with rights which members of the community might otherwise enjoy.

Examples of Public Nuisance

- Malton Board of Health v. Malton Manure Co., (1879) 4 Ex D 302
  - Carrying on trade which cause offensive smells
- Lambton v. Mellish, (1894) 3 Ch 163;
  - Carrying on trade which cause intolerable noises,
- Lister's case, (1856) 1 D & B 118;
  - Keeping an inflammable substance like gunpowder in large quantities,
- Attorney General v. Hornby, (1806) 7 East 195
  - Drawing water in a can from a filthy source

When a suit for public nuisance can be filed?

- Public Nuisance is not a tort and thus does not give rise to civil action.
- However, In the following circumstances, an individual may have a private right of action in respect a public nuisance.
  - He must show a particular injury to himself beyond that which is suffered by the rest of public i.e. he must show that he has suffered some damage more than what the general body of the public had to suffer.
  - Such injury must be direct, not a mere consequential injury; as, where one is obstructed, but another is left open.
  - The injury must be shown to be of a substantial character, not fleeting or evanescent.

Leading Judgements

- Solatu v. De Held (1851) 2 Sim NS 133,
  - The plaintiff resided in a house next to a Roman Catholic Chapel of which the defendant was the priest and the chapel bell was rung at all hours of the day and night. It was held that the ringing was a public nuisance and the plaintiff was held entitled to an injunction.
- Leanse v. Egerton, (1943) 1 KB 323
  - The plaintiff, while walking on the highway was injured on a Tuesday by glass falling from a window in an unoccupied house belonging to the defendant, the window having been broken in an air raid during the previous Friday night. Owing to the fact that the offices of the defendant's agents were shut on the Saturday and the Sunday and to the difficulty of getting labour during the week end, no steps to remedy the risk to passers by had been taken until the Monday. The owner had no actual knowledge of the state of the premises.

    It was held that the defendant must be presumed to have knowledge of the existence of the nuisance, that he had failed to take reasonable steps to bring it to an end although he had ample time to do so, and that, therefore, he had "continued" it and was liable to the plaintiff.

Without Proving Special Damage

- In India under Section 91 of the Civil Procedure Code, allows civil action without the proof of special damage.
- Acc. to sec 91 of CPC the suit in respect of public damage may be filed by:
  - Advocate General
  - Two or Persons with the leave of the court

Private Nuisance

- Private nuisance is the using or authorizing the use of one's property, or of anything under one's control, so as to injuriously affect an owner or occupier of property by physically injuring his property or affecting its enjoyment by interfering materially with his health, comfort or convenience.
- In contrast to public nuisance, private nuisance is an act affecting some particular individual or individuals as distinguished from the public at large. The remedy in an action for private nuisance is a civil action for damages or an injunction or both and not an indictment.

by Manoj Kr. Binwal

Elements of Private Nuisance

- Private nuisance is an unlawful interference and/or annoyance which cause damages to an occupier or owner of land in respect of his enjoyment of the land
- ***Thus the elements of private nuisance are:***
  a) Unreasonable or unlawful interference;
  b) Such interference is with the use or enjoyment of land, or some right over, or in connection with the land; and
  c) Damage.

- In Allen v Flood, it was held that no proprietor has absolute right to create noises upon his own land, because any right the law gives him is qualified by the condition that it must not be exercised to the nuisance of his neighbor or the public. If he violated that condition, he commits a legal wrong and if does so intentionally, he is guilty of malicious wrong, in its strict legal sense.

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

1. Injury to property
   - in the case of damage to property any sensible injury will be sufficient to support an action.
- St. Helen Smelting Co. v. Tipping, (1865) 77 HCL 642
   - The fumes from the defendant's manufacturing work damaged plaintiff's trees and shrubs. The Court held that such damages being an injury to property gave rise to a cause of action.
- Ram Raj Singh v. Babulal, AIR 1982 All. 285:
   - The plaintiff, a doctor, complained that sufficient quantity of dust created by the defendant's brick powdering mill, enters the consultation room and causes discomfort and inconvenience to the plaintiff and his patients.

2. Physical discomfort

- *In case of physical discomfort there are two essential conditions to be fulfilled:*
  a) In excess of the natural and ordinary course of enjoyment of the property –

     In order to be able to bring an action for nuisance to property the person injured must have either a proprietary or possessory interest in the premises affected by the nuisance.
  b) Materially interfering with the ordinary comfort of human existence-

     The discomfort should be such as an ordinary or average person in the locality and environment would not put up with or tolerate.

Following factors are material in deciding whether the discomfort is substantial:

- its degree or intensity;
- its duration;
- its locality;
- the mode of use of the property;

- In Broadbent v. Imperial Gas Co. (1856) 7 De GM & G 436:,
  - an injunction was granted to prevent a gas company from manufacturing gas in such a close proximity to the premises of the plaintiff, a market gardener, and in such a manner as to injure his garden produce by the escape of noxious matter
- In Shots Iron Co. v. Inglis, (1882) 7 App Cas 518:
  - An injunction was granted to prevent a company from carrying on calcining operations in any manner whereby noxious vapours would be discharged, on the pursuer's land, so as to do damage to his plantations or estate.
- In Palmar v. Loder, (1962) CLY 2233:
  - In this case, perpetual injunction was granted to restrain defendant from interfering with plaintiff's enjoyment of her flat by shouting, banging, laughing, ringing doorbells or otherwise behaving so as to cause a nuisance by noise to her.

Defence to nuisance

1. **STATUTORY AUTHORITY.**
   - In case of absolute authority, the statute allows the act notwithstanding the fact that it must necessarily cause a nuisance or any other form of injury.
   - In case of conditional authority the State allows the act to be done only if it can be without causing nuisance or any other form of injury, and thus it calls for the exercise of due care and caution and due regard for private rights.
2. **PRESCRIPTION**
   - <u>On expiration of 20 years. Nuisance becomes a right.</u>
   - <u>Three things are necessary to establish a right by prescription:</u>
     1. Use and occupation or enjoyment;
     2. The identity of the thing enjoyed;
     3. That it should be adverse to the rights of some other person.

by Manoj Kr. Binwal

REMEDIES

- Damages
- Abatement

NEGLIGENCE

by Manoj Kr. Binwal

MEANING

- In everyday usage, the word ‘negligence’ denotes mere carelessness.
- In legal sense it signifies failure to exercise standard of care which the doer as a reasonable man should have exercised in the circumstances.
- In general, there is a legal duty to take care when it was reasonably foreseeable that failure to do so was likely to cause injury. Negligence is a mode in which many kinds of harms may be caused by not taking such adequate precautions.
- Negligence is state of conduct.

DEFINITION:

- **WINFIELD AND JOLOWICZ:**
  - Negligence is the breach of a legal duty to take care which results in damage, undesired by the defendant to the plaintif.
- Blyth v. Birmingham Water Works Co ; **ALDERSON, B.**
  - negligence is the omission to do something which a reasonable man…….. would do, or doing something which a prudent or reasonable man would not do.
- Lochgelly Iron & Coal Co. v. Mc Mullan; **LORD WRIGHT**
  - negligence means more than headless or careless conduct, whether in commission or omission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing.

- **SALMOND:**
  - Negligence is culpable carelessness
- **AUSTIN:**
  - Negligence is faulty mental condition which is penalised by awarding damages.
- **LORD MACMILLAN**
  - The categories of negligence are never closed.

Sine qua non

- According to Winfield, in an action for negligence plaintiff has to prove following things:
  1. DUTY TO TAKE CARE
  2. BREACH OF DUTY TO TAKE CARE
  3. CONSEQUENT DAMAGE OR CONSEQUENTIAL HARM TO THE PLAINTIFF

The requirements for establishing a duty of care are as follows

a) Duty means a legal duty.
b) Foreseeability of injury
c) No foreseeability, no liability of the defendant
d) Proximity in relationship, which implies that the parties are so related that it is just and reasonable that the duty should exist.
e) Duty must be towards the plaintiff
f) Policy considerations do not negative the existence of duty.

Legal Duty

- It means a legal duty rather than a mere moral, religious or social duty.
- No general rule defining such duty is in existence.
- Donoghue Verses Stevenson:
  - Snail found in plaintiff's syrup. Caused mental and physical injury to defendant.
  - The suit was defended on the following two grounds,
    1. That the defendant did not owe any duty of care towards the plaintiff and
    2. That the plaintiff was a stranger to the contract and thus her action was not maintainable
  - The House of Lords rejected both the pleas of the defendant and held that the manufacturer of the bottle was responsible for his negligence towards the plaintiff .

- **According to Lord Atkin:**
  - "A manufacturer of products which he sell in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination and with the knowledge that the absence of the reasonable care in the preparation of putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."
  - who then in law is my neighbor? The answer seems to be that the persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

2.BREACH OF DUTY TO TAKE CARE

- Yet another essential condition for the liability in negligence is that the plaintiff must prove that the defendant committed a breach of duty to take care or he failed to perform that duty.
- Municipal Corporation of Delhi v. Subhagwanti, AIR 1966 SC 1750
  - a clock-tower in the heart of the Chandni Chowk, Delhi collapsed causing the death of a number of persons. The structure was 80 years old whereas its normal life was 40-45 years. The Municipal Corporation of Dellhi having the control of the structure failed to take care and was therefore, liable.
- Municipal Corporation of Delhi v. Sushila Devi, AIR 1999 SC 1929
  - a person passing by the road died because of fall of branch of a tree standing on the road, on his head. The Municipal Corporation was held liable.

3.CONSEQUENT DAMAGE OR CONSEQUENTIAL HARM TO THE PLAINTIFF

- The last essential requisite for the tort of negligence is that the damage caused to the plaintiff was the result of the breach of the duty. The harm may fall into following classes:-
  - physical harm, i.e. harm to body;
  - harm to reputation;
  - harm to property, i.e. land and buildings and rights and interests pertaining thereto, and his goods;
  - economic loss; and
  - mental harm or nervous shock.
- Achutrao Haribhau Khodwa v. State of Maharashtra (1996) 2 SCC 634
  - a cotton mop was left inside the body by the negligence of the doctor. The doctor was held liable.

DEFENCES FOR NEGLIGENCE

- **CONTRIBUTORY NEGLIGENCE**
- **ACT OF GOD OR VIS MAJOR**
- **INEVITABLE ACCIDENTS**

by Manoj Kr. Binwal

Res Ipsa Loquitur

- literally means Things speak for itself.
- There is a popular joke among students of law, "Res Ipsa Loquitur, sed quid in infernos dicetne?" ("The thing speaks for itself, but what is it saying?")
- Res Ipsa Loquitur is a maxim, the application of which shifts the burden of proof on the defendant.
- There is a presumption of negligence on part of the defendant and it is upto him to prove his non-liability and that it was not his act which caused the plaintiff's injury.
- The maxim was explained by court of exchequer in the case of Scott v London & St. Catherine Dock Co. (1865)

Sine qua non

- The event that caused injury to the plaintiff does not occur unless someone has acted negligently.
- The evidence adduced rules out all the possibilities of the fault of the plaintiff or third party.
- The thing which caused the harm must be under the control of defendant.
- There is a duty of care of defendant towards the plaintiff which he breached.
- The defendant give no explanation

APPLICATION

- Res Ipsa Loquitur is an inappropriate form of circumstantial evidence enabling the plaintiff in certain cases to establish the defendant's likely negligence. Hence the doctrine properly applied does not entail any covert form of strict liability. It just implies that the court doesn't know and cannot find out, what actually happened in the individual case. Instead, the finding of likely negligence is derived from knowledge of causes of the type or category of accidents involved.
- Res Ipsa Loquitur **can be applied in medical cases** and several tort-feasors where the plaintiff is not able to ascertain as to whose negligent act had caused his injury
- In case of offences which are unintended and the commission of the offence itself was not known, the defendant cannot be held liable as in this case its an unidentified tortfeasor.
- Defendant would be liable without proof of negligence if the injury is caused by an act that the defendant was not entitled to do.
- Res Ipsa Loquitur can be applied in matters where all the procedures have not been followed and is not just limited to the commission of an act.

LAND MARK CASES

- Ybarra v. Spangard 6

FACTS:

- the plaintiff consulted the defendant after developing pain in the stomach region. He was diagnosed with appendicitis and was admitted for operating upon the same. On the day of the operation the plaintiff was given anesthesia and operated upon. On the following morning, when the plaintiff got up he felt a sharp pain in his right arm. His complaint was answered to as ordinary pain symptoms which follow an operation. A few days after discharge paralysis was set in the right arm making it impossible to move or rotate his arm. Plaintiff sues the doctor and the nurse involved in the operation along with the hospital for negligence. He was however not able to ascertain as to whose negligence had caused his injury. The proceeding was on the basis of Res Ipsa Loquitur that the injury would not have occurred in the absence of the doctor's negligence and that they were in total control of the situation. Though there were many defendants.

HELD:

- it was held that Every defendant in whose custody the plaintiff was placed for any period was bound to exercise ordinary care to see that no unnecessary harm came to him and each would be liable for failure in this regard.

- Roe v. Minister of Health 7
  - In this case the plaintiff was admitted to the hospital for minor operations. The plaintiff was administered spinal anaesthetics by injections of nupercaine and developed spastic paraplegia. The anaesthetics were stored in glass ampoules immersed in a solution of phenol, and the judge found that the injuries were caused by phenol, which could have entered the ampoules through flaws not detectable by visual examination. The plaintiff contended that the doctrine of Res Ipsa Loquitur be applied against the hospital as the injury would not have occurred had the hospital not been negligent.
  - The court held that the doctrine cannot be applied and the defendant cannot be held liable as the very occurrence of the injury or damage was not foreseeable. And the cause for the injury was beyond the control of the defendants. It was said to be a case of unknown tort-feasance.

- Mint v. Good
  - The plaintiff had been injured by the collapse of a wall adjoining the highway. The wall formed part of two houses let on weekly tenancies and the collapse was due to lack of repair, in respect of which neither the landlord nor the tenants were under covenant. The plaintiff proceeded against the landlord on the basis of Res Ipsa Loquitur that the injury would not have occurred had the defendant been not negligent in maintaining the wall.
  - It was observed that if a person is hurt on the highway he must first enquire whether the act which hurt him was incidental to the defendants reasonable use of the highway. If it was then subject to Res Ipsa Loquitur he must prove carelessness in the actor.
  - If however the damage is due to an act which the actor had no right to do on the highway at all, the victim can recover for foreseeable harm without having to prove carelessness. Thus the defendant was held negligent and liable for damages.

Houghland v. R.R. LOW (luxury of coaches) Ltd

- The plaintiff's suitcase was deposited with the defendant bus-owner's driver at the beginning of a journey. The bus broke down and the luggage was transferred by the owner's servants from the bus's boot to another bus. At the end of the journey the suitcase could not be found. The plaintiff was awarded damages and the court held that if the luggage had been lost then it was upto the defendant to prove that he was not negligent, which is nothing but Res Ipsa Loquitur.

A.S. Mittal and Anr v. State of U.P. and Ors

- The defendants had organized an eye camp at Khurja along with the Lions Club. 88 low-risk cataract operations were undertaken during the period of the camp. It was however, disastrous as many of those who had been operated upon lost their eye sight due to post medical treatment.
- Proceedings against the government initiated for negligence of the doctors. Damages worth Rs 12500 were paid as interim relief to each of the aggrieved.
- The decision was on the basis of Res Ipsa Loquitur as the injury would not have occurred had the doctors not been negligent in not having followed up with post-operation treatment.
- Res Ipsa Loquitur can be applied in matters where all the procedures have not been followed and is not just limited to the commission of an act.

LIABILITY OF MINOR UNDER LAW OF TORT

by Manoj Kr. Binwal

Tort and Contract

- A minor is liable in tort as an adult but the tort must be independent of the contract.
- A minor's agreement is void even if he fraudulently represents himself to be of full age as established in Sadik Ali Khan v. Jaikishore.
- Similarly, in **R. Leslie Ltd v. Shiell**[1914] 3 K.B. 607 at 620
  - a minor was immune to any contractual charges or reimbursement inspite of availing loan facilities by fraudulently projecting himself of full age.
  - In the same case it was established that it is possible to compel a minor for specific restitution if he fraudulently acquired some property and is still in control and possession of that property.

Contributory Negligence of a child

- When contributory negligence is alleged against any minor then the test is, what degree of care for his own safety can an infant of the particular age reasonably be expected to take.
- The Pearson Committee (UK) in 1978 took the view that a child less than 13 should not be held contributory negligent. But, unusually in Armstrong v. Cottrell and Morales v. Eccleston court dealt with facts and children of less than 13 years of age were held liable. Explicitly, almost same standard of care i.e. ability to do an act according to the age is applied in contributory negligence.

- Nitin walia V. Union of India (AIR 2001 Delhi 141)
  - a boy of 3 years went to national zoological park, Delhi along with his family members. All family members were keenly watching the white tigers kept inside iron bars followed by a railing before that. As the boy reached near the railing, the tigers all of a sudden grabbed his right hand and had bit it. The boy was taken to the hospital situated in the zoo but no treatment was given for want of any medicine. He was then taken to all India institute of medical sciences where the right arm of the boy had to be amputed.
  - After the incident the zoo authorities have fenced the area by putting wire mesh on iron bars. That itself showed. The type of caution, which was required, was not taken earlier.
  - By rejecting the defence of contributory negligence on the part of the child a compensation of Rs.5 Lakhs was awarded.

- However, this does not give a child a license to be careless. A child capable of knowing the danger and of discrimination was held guilty of contributory negligence.
- M and SM Railway Co. LTD V. Jayammal , (1924) 48 Mad 417.
- In that case a girl of 7 years was knocked down by an engine while she was crossing the railway line after passing through a wicket-gate.
- It was held that the proximate cause of the accident was the negligence of the girl in not looking out for a passing engine when she was crossing the line and that as she was capable of appreciating the danger and was old enough to have a sense of discrimination.
- Thus each case would be judged having regard to the child's capacity to cope with the danger. Allowance must be made for the child's inexperience and infirmity of judgment. Hence, the defence of contributory negligence is more difficult to make out against the child than against an adult.

en ventre sa mere

- a child who is born ‘alive’ can bring an action for the disability/injury suffered in his mother’s womb by some wrongful act of the tortfeasor.
- The nature of duty in these cases is derivative i.e. court should come to a decision after wary examination of the facts that whether a person is really liable.
- For instance, a child may sue manufacturer for damages if he suffered injury due to some drug intake by his mother even if it doesn’t affect the mother but contravenes the law under Consumer Protection Act.

MAXIMS

by Manoj Kr. Binwal

MAXIMS

- **Imperita culpae adnumeratur - >>>**
  - unreasonably assuming the work of a specialist but failing to show the skills of a specialist.
- **Alterum non laedere - >>>**
  - to hurt nobody by words or deed.
- **Actio personalis moritur cum personnam->>>**
  - a person's right of action ends with person
- **Salus populi suprema lex - >>>**
  - The welfare of the people is the supreme law

by Manoj Kr. Binwal

- **Ignorantia juris non excusat ->>>**
  - Ignorance of law is no excuse
- **Exturpi causa non orotur action - >>>**
  - From an immoral cause no action arises
- **Sou assault demesne - >>>**
  - The attack complained of is result of Plaintiffs own attack.
- **Qui Facit Per Alium Facit Per Se - >>>**
  - He who does an act through the instrumentality of another does it himself.
- **Scienti non fit injuria - >>>**
  - No injury is done to one who has the knowledge of the facts.