BBA LLB 2nd Semester Paper Code: 104

Subject: Law of Torts and Consumer Protection

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UNIT-1 : INTRODUCTION – Definition, Nature and Scope

INTRODUCTION:

The Tort is of French origin. The root is 'Tortum' in Latin which means 'twist'. It implies a conduct which is 'tortious', or, twisted.. The equivalent word in English is "Wrong". In Roman it is "delict" and in Sanskrit it is "Jimha" which means 'crooked'.

Development of tort;

How did the French word 'Tort' comes to India?

a) It came to India through England. In 1065 England was conquered by Normans who were the French speaking people of Normandy, a region of France. After Norman Conquest, French became the spoken language in the Courts in England, and thus many technical terms in English law owe their origin to French, and 'Tort' is one of them.

b) In British India, the first courts were established by the British in the Presidency town's of Madras, Bombay and Calcutta as Mayor's courts. The Charter that established these courts required them to adopt the English common law of torts in force at that time to their Indian jurisdiction. Thus, 'tort' was introduced into the Indian legal system.

c) As for the other courts in India, which were established by local acts, there was no such express provision. However, these local acts contained a section that required them to act according to "justice, equity and good conscience" in cases where there was no specific law or usage. The expression "justice, equity and good conscience" has been interpreted by courts to mean English common law insofar as they are applicable to the situation, facts and circumstances of the case before the courts.

Meaning of Tort:

At a general level, tort is concerned with allocation of responsibility for losses, which are bound to occur in society. Tort is a branch of law governing actions for damages for injuries to private legal rights of a person, say, right to property, right to personal security, right to reputation, etc.,

DEFINITION OF TORT:

1. SALMOND's Definition: Tort is a civil wrong for which the remedy is a common law action for

unliquidated damages, and which is NOT exclusively the breach of a contract, or, the breach of a trust, or, other merely equitable obligation

2. WINFIELD's Definition: 'TortIous liability' arises from the breach of duty primarily fixed by law. This duty is towards persons generally and its breach is redressible by an action for unliquidated damages.

3. FRASER's Definition: Tort is an infringement of a right in rem of a private individual giving a right of compensation at the suit of the injured party.

4. POLLOCK's Definition: 'Tort' is an act or omission (not merely the breach of a duty arising out of a personal relation, or undertaken by contract) which is related to a harm suffered by a determinate person, giving rise to a civil remedy which is not an action of contract. 'The law of tort's in civil wrongs is a collective name for the rules governing many species of liability which, although their subject matter is wide and varied have certain broad features in common, are enforced by the same kind of legal processes that are subject to similar exceptions.

5. Clerk & Lindsell's Definition: A tort may be described as wrong independent of contract, for which the appropriate remedy is common law action

6. Limitation Act 1963 Sec 2 (m) of the Limitation Act 1963 defines "Tort means a civil wrong which is not exclusively a breach of contract or trust." This is quite similar to Salmond's definition.

C. ANALYSIS OF WINFIELD'S DEFINITION OF TORT:

1. Duty primarily fixed by law: An essential principle of tortious liability is that the duty is always fixed by law itself and NOT by any agreement between parties. Therefore parties cannot create a tortious liability through a contract, nor, can they 'negate' a tortious liability through a contract. For Example I am under a legal duty not to trespass on my neighbour's property. This is a duty primarily fixed by law on me. Similarly, by the same principle my neighbor cannot trespass into my property. As per Winfield's definition, liability arises from

the breach of such duties fixed by law. Any person who commits such abreach can be proceeded against in a court of law by the person whose rights are breached. There are in some cases, (called 'vicarious liability cases') though the breach is not committed by him yet he could be held liable, if the breach is committed by his servant, or, agent, or partner.

Example: A who is the driver of B's car knocks down C through his rash and negligent driving. Though, A has breached the duty fixed by law, his master B will become liable n an action initiated by C in court under the law of tort.

2. Duty is towards persons generally: Here, the word 'generally' implies that applies to all. For example I am duty bound not to trespass into my neighbours' land. Similarly he is also duty bound not to trespass into my land. Likewise, all our other neighbours and also others who are not our neighbours are bound by the same law not to trespass into each other's lands. In other words, it is common or, not unusual for the parties in a 'tort action' to know each other. This character distinguishes tort from contract, bailment and quasi-contract.

3. Action for unliquidated damages: In tort the damages are unknown and 'unquantified' till an action for damages arises in a court. Thereafter, the court decides the quantum of damages based on merits of the claim and circumstances of the case. Hence, theses damages are by its nature, "unliquidated', unlike in a contract where it is possible to calculate the damages (in the event of a breach) in advance where, this is known as 'liquidated damages'.

4. Other Remedies: Besides un-liquidated damages, which are usually in the form of monetary

compensation, there are also other remedies available in a case of tortious liability. These are: a) Injunction, b) Self –help, and c) Restitution of property.

5. Criticism (shortcomings) of Winfield's definition: a) In framing this definition, Winfield is not seeking to indicate what conduct is and what is not sufficient to involve a person in tortuous liability, to distinguish from certain other branches of law

b) The phrase 'duty towards persons generally' is vague and not adequate to include duties arising from special relationships like doctor and patient etc., and to exclude duties arising between guardian and ward or trustee and beneficiary etc. which fall outside the ambit of law of tort.

c) The phrase 'liability arises from the breach of duty', may be true at an earlier stage of development of law of tort, but it is not applicable or appropriate to an important category of liability at the present day, for example, vicarious liability of a master for his servant's

d) 'Unliquidated damages' is not the only remedy. There are other remedies such as self help, injunction and specific restitution of property also available.

ANALYSIS OF SALMOND'S DEFINITION OF TORT

1. Tort is a civil wrong. A 'Wrong' can be civil or criminal. Tort belongs to the category of civil wrongs. In the case of a civil wrong, the injured party institutes civil proceedings against the wrongdoer and the remedy is damages. The injured party is compensated by the defendant for the injury caused to him by another party. Whereas, in the case of a criminal wrong, the State brings criminal proceedings against the accused and the remedy is not compensation. Punishment is provided to the wrongdoer. In a case where the act results in both civil as well as criminal wrong then both the civil and criminal remedies would concurrently be available

2 Tort is other than Breach of Contract or Breach of Trust: In order to determine whether the wrong is tort or not, the following steps are to be followed,

a) Whether the wrong is civil or criminal.

b) If it is civil wrong, it has to be further seen that whether it belongs to another recognized category of the civil wrongs, such as breach of contract or breach of trust.

c) It is only when the wrong does not belong to any other category of the wrong that is, breach of contract or trust, it is tort and if the wrong is breach of contract or trust, it is not a tort. However, if the act involves two or more civil wrongs, one of which may be a tort, in such a case injured party can either claim damages under law of torts or under other breach of civil wrong for example, breach of contract, but cannot claim damages twice.

3 Tort is redressible by action for unliquidated damages: Damages is the most important remedy for a tort. After the commission of the wrong, it is not possible to undo the harm which has already been caused but it is the monetary compensation which can be awarded to the injured party. For example, if there is attack on the reputation of the person, there is nothing that can be done restore his lost reputation, but monetary compensation equivalent to harm can be paid to the injured. Unliquidated damages means when the compensation has

not been determined previously or agreed by the parties but it is left to the direction of the court. These are the unliquidated damages which distinguish tort from breach of contract or breach of trust in which damages may be liquidated that is, previously determined or agreed to by the parties.

4. Criticism of Salmon's definition: The definition given by Salmond fails to underline the essential characteristics of tortuous acts. According to this definition tort is a wrong but it does not explain what is wrong and what kinds of wrong explaining jural features of tort. Moreover

the expression "civil wrong" itself requires explanation. Besides, Salmon's definition also suffers from all the shortcomings of Winfield's definition. While this definition is more informative, this is still far from perfect.

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

Distinctions between Contract and Tort

1. In a contract the parties fix the duties themselves whereas in tort, the law fixes the duties.

2. A contract stipulates that only the parties to the contract can sue and be sued on it (privity of contract) while in tort, privity is not needed in order to sue or be sued.

3. In the case of contract, the duty is owed to a definite person(s) while in tort, the duty is owed to the community at large i.e. duty in- rem.

4. In contract remedy may be in the form of liquidated or unliquidated damages whereas in tort, remedies are always unliquidated.

Distinctions between Tort and Crime

1. In tort, the action is brought in the court by the injured party to obtain compensation whereas in crime, proceedings are conducted by the state.

2. The aim of litigation in torts is to compensate the injured party while in crime; the offender is punished by the state in the interest of the society.

3. A tort is an infringement of the civil rights belonging to individuals while a crime is a breach of public rights and duties, which affect the whole community.

4. Parties involved in criminal cases are the Prosecution verses the Accused person while in Torts, the parties are the Plaintiff versus the Defendant.

Distinction between Tort and Quasi – Contract

Quasi contract cover those situations where a person is held liable to another without any agreement, for money or benefit received by him to which the other person is better entitled. The judicial basis for the obligation under a quasi contract is the existence of a hypothetical contract which is implied by law the purpose being prevention of "unjust enrichment".

Tort and Quasi - Contract

Duty is fixed by the law No Duty owed to persons for duty to repay money, or, benefit received.

Victim is compensated for unliquidated damages as per the judgment of the judges. In quasi – Contracts, the damages recoverable are usually liquidated damages. A tort can occur between strangers. There need not be any relationship between parties. In case of quasi-contract the parties are not usually strangers.

CONSTITUENTS OF TORT

Damage.

The sum of money awarded by court to compensate damage is called damages. Damage means the loss or harm caused or presumed to be suffered by a person as a result of some wrongful act of another. Legal damage is not the same as actual damage.

Every infringement of the plaintiff‟s private right or unauthorized interference with his property gives rise to legal damage.. There must be violation of a legal right in cases of tort. Every absolute right, injury or wrong i.e. tortuous act is complete the moment the right is violated irrespective of whether it is accompanied by and actual damage. In case of qualified right, the injury or wrong is not complete unless the violation of the right results in actual or special damage. Every injury, thus imports damage, though may not have cost the victim a penny, but simply by hindering the right, as an action for a slanderous word, though a man does not lose a penny by speaking them yet he shall have an action. Likewise a man shall

have an action against him who rides over his ground, though it does him no damage, for it is an invasion of his property and the other trespasser has no right to come there. The real significance of legal damage is illustrated by two maxims namely: Injuria sine damno and Damnum sine injuria. Damnum is meant damage in the substantial sense of money, loss of comfort, service, health or the like. By injuria is meant a tortuous act.

Injuria sine damno. This is the infringement of and absolute private right without any actual loss or damage. The phrase simply means Injury without damage. The person whose right is infringed has a cause of action e.g. right to property and liberty are actionable per-se i.e. without proof of actual damage.

Example: Refusal to register a voter was held as and injury per-se even when the favorite candidate won the election - Ashby Vs. White (1703). This rule is based on the old maxim of law „Ubi jus ibi remedium" which means that where there is a right, there is a remedy.

Damnum sine injuria

This is the occasioning of actual and substantial loss without infringement of any right. The phrase simply means Damage without injury. No action lies. Mere loss of money or moneys' worthy does not constitute a tort. There are many acts, which though harmful are not wrongful, and give no right of action. Thus Damnum may be absque injuria i.e. damage without injury. Example: In the case of Mayor & Bradford Corporation Vs. Pickles (1895), Pickles was annoyed by the refusal of Bradford Corporation to purchase his land for their water undertaking. Out of spite, he sank a shaft on his land, which had the effect of discoloring and diminishing the water of the Corporation, which percolated through his land. The House of Lords held that the action of Pickles was lawful and no matter how ill his motive might be he had a right to act on his land in any manner that so pleases him. In the case of Mogul Steamship Co. Vs. Me-Gregory (1892). Certain ship owners combined together. In order to drive a ship-owner out of trade by offering cheap freight charges to customers who would deal with them. The plaintiff who was driven out of business sued the ship-owner, for loss caused to him by their act. The court held that a trader who is ruined by legitimate competition of his rivals could not get damages in tort.

Justification in Tort

1. Volenti Non fit Injuria

When a person consents for infliction of an harm upon himself, he has no remedy for that in Tort. That means, if a person has consented to do something or has given permission to another to do certain thing, and if he is injured because of that, he cannot claim damages. For example, A purchases tickets for a Car race and while watching the race, an collision of cars happens and the person is injured. Here, by agreeing to watching the race, which is a risky sport,it is assumed that he voluntarily took on the risk of being hurt in an accident. Thus, he cannot claim compensation for the injury.
Such a consent may be implied or express. For example, a person practicing the sport of Fencing with another, impliedly consents to the injury that might happen while playing. In Woolridge vs Sumner 1963, the plaintiff a photographer was taking photographs at a horse show, during which one horse rounded the bend too fast. As the horse galloped furiously, the plaintiff was frightened and he fell in the course. He was seriously injured. It was held that the defendants had taken proper care in closing the course and the plaintiff, by being in the show, agreed to take the risk of such an accident. The defendants were not held liable.

However, the action causing harm must not go beyond the limit of what has been consented. For example, in a sport of fencing, a person consents to an injruy that happens while playing by the rules. If he is injured due to an action that violates the rules, he can claim compensation because he never consented to an injury while playing without rules. In Laxmi Rajan vs Malar Hospital 1998, a woman consented for a surgery to remove a lump from her breast. But the hospital removed her uterus as well without any genuine reason. It was held that removing of her uterus exceed beyond what she had consented for.

Also, the consent must be free. It must not be because of any compulsion. Thus, if a servant was compelled by the master to do a certain task despite his protests, and if he is injured while doing it, the master cannot take the defence of volenti non fit injuria because the consent was not free.

Exceptions - In the following conditions, this defence cannot be taken even if the plaintiff

has consented -

Rescue Conditions - When the plaintiff sufferes injury while saving someone. For example, A's horse is out of control and is galloping towards a busy street. B realizes that if the horse reaches the street it will hurt many people and so he bravely goes and control's the horse. He is injured in doing so and sue's A. Here A cannot take the defence that B did that act upon his own consent. It is considered as a just action in public interest and the society should reward it instead of preventing him from getting compensation.

Unfair Contract Terms - Where the terms of a contract are unfair, the defendant cannot take this defence. For example, even if a laundry, by contract, absolves itself of all liability for damage to clothes, a person can claim compensation because the contract is unfair to the consumers.

NECESSITY

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

In Leigh v Gladstone Leigh was imprisoned and went on hunger strike. She was forcibly fed by warders. She sued the prison staff for assault and battery. The defence of necessity was good. Had the prison staff not fed the plaintiff she would have died.

Force feeding of hunger striking prisoner to save her was held to be a good defence to an action for battery.

In Surroco v. Geary, Wildfires had swept through San Francisco around the time when this incident occurred, destroying houses and businesses. Surocco’s house was directly in the path of the fire, and he was racing to get his possessions out of the house as quickly as possible

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

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

PLAINTIFF THE WRONG DOER (PLAINTIFF'S DEFAULT)

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

This defence of ex turpi causa can be closely related to the legal maxims "jus ex injuria non oritur" which means that no right can arise out of a wrong and "Commodum Ex Injuria Sua Nemo Habere Debet" meaning that a wrongdoer should not be enabled by law to take any advantage from his actions. We have heard the common phrase that one who approached the courts must come with clean hands. The defence of illegality is close to this principle and works on the logic that when a person is doing a wrongful act he need not be helped by the state in getting damages as this would essentially be against public policy.

In Bird v Holbrook , Holbrook (D) set up a spring-gun trap in his garden in order to catch an intruder who had been stealing from his garden. D did not post a warning. Bird (P) chased an escaped bird into the garden and set off the trap, suffering serious damage to his knee. Bird sued Holbrook for damages. May a property owner set up a trap without notice in order to harm or catch an intruder? No. One who sets traps without posting a notice is liable for any damages caused. No man can do indirectly that which he is forbidden to do directly. If P had come into D's garden while D was there, D would not have been able to use the same force to expel P from the garden. The court held that in such a case even a thief can recover damages. The court stated that while setting traps or "man traps" can be valid as a deterrent when notice is also posted, D's intent was to injure someone rather than scare them off.

In the case of Ashton v. Turner and another, the claimant was injured when the defendant crashed the car in which he was a passenger. The crash occurred after they both had committed a burglary and the defendant, who had been drinking, was driving negligently in an attempt to escape. Justice Ewbank dismissed the claim holding that as a matter of public policy the law would not recognise a duty of care owed by one participant in a crime to another. He also added that even if there was a duty of care the claimant had willingly accepted the risk and knowingly sat in the car with the defendant.

In Stone & Rolls, a fraudster used a company of which he was the sole director and shareholder to commit a letter of credit fraud. Following the company's insolvency, its liquidators, acting in the company's name, sued its auditors in negligence for having failed to detect the fraud. The House of Lords held (by 3-2) that the claim was barred on the ground ex turpi causa, because the state of mind of the fraudster was to be attributed to the company, which was thus treated as the perpetrator of the fraud.

Act of God

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

agency." A natural necessity proceeding from physical causes alone without the intervention of man. It is an accident which could not have been occasioned by human agency but proceeded from physical causes alone.

Thus, the essential conditions of this defence are:-

1. the event causing damages was the result of natural forces without any intervention from human agency, and

2. the event was such that the possibility of such an event could not be recognized by using reasonable care and foresight.

Whether a particular event amounts to an Act of God is question of fact. 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 recognise the possibility of such an event."

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

In Saraswati Parabhai Verses Grid Corporation of Orissa and Others, 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.

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

INEVITABLE INCIDENTS

All recent authorities support the view that 'inevitable accident'"negatives liability. An 'inevitable accident' is that which could not possibly be prevented by the exercise of ordinary care, caution and skill. It means an accident physically unavoidable. It does not apply to anything which either party might have avoided. It is an accident such as the defendant could not have avoided by use of the kind and degree of care nece'ssary to the exigency, and the circumstances, in which he was placed. If in the performance of a lawful act, done with all due care, damage ensues through some unavoidable reason, such damage affords no cause of action. "People must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities.

Charlesworth on Negligence, 4th Edn, in paragraph 1183 describes an 'inevitable accident' as follows:– "There is no inevitable accident unless the defendant can prove that something happend over which he had no control and the effect of which could not have been avoided by the exercise of care and skill."

In A. Krishna Patra Verses Orissa State Electricity Board, 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 effects on his part to prevent it. Limitations of this defence, In trespass as well as in negligence, inevitable accident has no place. Similarly, under the rule in Ryland Verses Fletcher, the defendant is liable even if he has taken reasonable care. In the same way the defence has no role in cases of absolute liability.

Distinction between "inevitable accident" and "act of God", Dr. Winfield says that "an act of God" is much older, much simpler and much more easily grasped by primitive people than is the idea of 'inevitable accident.' A falling tree, a flash of lightning, a tornado, or flood presents to the observer a simple and dramatic fact which a iayman would regard as an excuse for harm done without further argument.... But the accidents which are not convulsions of nature are a very different matter. To know whether injury from a run away horse was inevitable, one must ask 'would a careful driver have let it run away'..,. 'Inevitable accident' differs from the act of God in

(1) not depending on 'natural forces,

(2) being a general defence.

All cases of 'inevitable accident' may be divided into two classes,

1. those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause, and

2. those which have their origin either in whole or in part in the agency of man, whether in the commission or omission, non-feasance or misfeasance, or in any other causes independent of the agency of natural forces. The term "act of God" is applicable to the former class. The latter type of accidents are termed 'inevitable accident' or "unavoidable accidents."

An act of God will be extraordinary occurrence due to natural cause, which is not the result of any human intervention, which could not be avoided by any foresight and care, for example, a fire caused by lighting. But an accidental fire, though it might not have resulted from any act or omission of common carrier, cannot be an act of God.

In Stanley v. Powell, the plaintiff was employed to carry cartridge for a shooting party when they had gone pheasant-shooting. A member of the party fired at a distance but the bullet, after hitting a tree, rebounded into the plaintiff's eye. When the plaintiff sued it was held that the defendant was not liable in the light of the circumstance of inevitable accident.

PRIVATE DEFENSE

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

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

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

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

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

duties. In case of trespass one must use reasonable force in the course of protecting the property.

Indian Penal Code extends the benefit of this defense even in case of causing death in certain circumstances. In India the right of private defence has been given a statutory recognition in Sections 96 to 106 of the Indian Penal Code. Though provisions of these sections are applicable to the criminal law, the principles contained therein may profitably be imported into the Law of Torts. Self defence as a permissible defence against an action in torts has recently been discussed by Orissa High Court in Devendra Bhai Verses Megha Bhai, the principle extends not only to the right of person to protect himself but also to protect others' life, his wife, his parents and his child. He is to use only necessary force or not to use force in excess of what is necessary.

Bird v Holbrook --for facts refer to the case in Plaintiff the wrong doer.

In Cresswell V Sirl (1948), the defendant was responsible for shooting the claimants dog, which had been worrying the defendant's pregnant sheep. Although the dog was not attacking the sheep at the time, it was held that shooting it was justified by the threatened harm, and therefore lawful.

UNIT –II SPECIFIC TORTS

NEGLIGENCE

According to Judge Alderson, negligence means the breach of a duty caused by the omission to do something, which a reasonable man would do, or doing of something, which a prudent and reasonable man would not do. Negligence consist of neglect to use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect, the person has suffered injury to his person or property. The plaintiff suing under tort of negligence must prove that:

1. The defendant owed him a duty of care,

The circumstances must be such that the defendant knew or reasonably ought to have known that acting negligently would injure the plaintiff. A road user owes other users a legal duty of care. An inviter owes his invitees a legal duty of care. A manufacturer of products owes a legal duty of care to consumers. As a general rule, every person owes his neighbor a legal duty of care. The neighbor principle was enunciated by Lord Atkin in his dictum celebrated case of Donohue Vs Stevenson (1932), a man bought a bottle of ginger beer from a retail shop. The man gave the bottle to his girlfriend who became ill after drinking the contents. The bottle contained the decomposed remains of a snail. The bottle was opaque so that the substance could not be discovered until the lady was refilling her glass. The consumer sued the manufacturer for negligence. Lord Atkin in his ruling said "the law that you are to love your neighbor becomes in law that your must not injure your

neighbors…who then is my neighbour? The answer seems to be persons who are so closely and directly affected by my acts that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omission which are called in question" In the Case of Dulieu Vs. White & Sons (1901), the plaintiff, a pregnant woman, was sitting behind the counter of her husband‟s bar when suddenly a horse was driven into the bar. Fearing her personal safety, she suffered nervous shock and gave birth to a premature baby. In the circumstances, the court held that the plaintiff was entitled to recover in negligence. The standard of care expected of the defendant is that of a reasonable man. This is a man of ordinary prudence. A reasonable person is an objective stand created by law for all circumstances. Where professionals or experts are involved, the standard of care is that of a reasonably competent expert in that field. There are some circumstances however where not even a reasonable person could have foreseen the plaintiff suffering any loss, in which case, there is no liability upon the person who has committed the injurious act.

In the landmark case of Bourhill Vs. Young (1943), the plaintiff (a pregnant woman) heard the noise of a road accident some distance away and walked to the scene. On reaching there, she suffered nervous shock and subsequently miscarried. In the circumstances, the Court held that the plaintiff could not recover in negligence because the injury she suffered or the manner in which it was caused which was not foreseeable. Had the plaintiff not walked to the scene of the accident, she would not have suffered the injury complained of. Such injury was legally termed as remote.

2. There has been a breach of that legal duty of care.

The plaintiff has to prove that there was a duty imposed by common law, statute or otherwise, upon the defendant and that the defendant was in breach of this duty. However, at certain times, negligence is presumed without proof of breach of duty by the plaintiff. This is in the case of res-ipsa loquitor.

RES IPSA LOQUITOR As a general rule, the burden of proving negligence lies with the plaintiff. He must prove that the defendant owed him a duty of care, that the defendant has breached that duty and that he has suffered damage. However, in certain cases, the plaintiff's burden of proof is relieved by the doctrine of res ipsa loquitor. Where it is applicable Res ipsa Loquitor means that „thing or facts speaks for themselves". This for example, occurs where an accident happens in circumstances in which it ought not to have occurred e.g. a car

traveling on a straight road in clear weather and good visibility suddenly swerves off the road and overturns, where a barrel of flour suddenly drops from a warehouse, etc. Such an accident ought not to have occurred except for the negligence of the defendant. Res ipsa loquitor is a rule of evidence and not of law. It merely assists the plaintiff in proving negligence against the defendant. Before it can be relied upon, three conditions must be satisfied, namely:

a) The thing inflicting the injury must have been under the control of the defendant or someone whom he controls.

b) The event must be such that it could not have happened without negligence and;

c) There must be no evidence or explanation as to why or how the event occurred, as the accident is such as in the ordinary course of things does not happen if those who have the duty use proper care.

In the case of Bryne Vs. Boadle (1863), a barrel of flour fell from a warehouse o the defendant onto the plaintiff injuring him in the street while he was passing through.

In the circumstances, the Court held that the plaintiff was not required to show how the accident took place because on the facts, negligence could be presumed and the rule of res ipsa loquitor applied. Effect of Res ipsa rule

1. It provides prima facie evidence of negligence on the part of the defendant.

2. It shifts the burden of proof form the plaintiff to the defendant.

3. The plaintiff has suffered injury to his person or property.

Plaintiff has to prove that if it were not of the defendant‟s act he would not have suffered loss or damage. There must be a traceable link between the act and the loss, otherwise it would be considered remote and so, irrecoverable. If the plaintiff act is traceable to an independent intervening act (novus actus), the defendant is not liable.

Nervous Shock

"The law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify", Lord Steyn, Frost v Chief Constable of South

Yorkshire Police [1999] 2 AC 455 at 500.Discuss this statement in a critical evaluation of the common law duty of care for negligently inflicted "nervous shock".

The question of recovery for nervous shock (or psychiatric injury) negligently caused by another has been one which has perplexed various courts in various common law jurisdictions throughout the world since it was first established in the case of Byrne v Southern and Western Railway Co.[1]. Can you recover for nervous shock? In what circumstances could people recover for nervous shock? Who could recover for nervous shock? In the course of this essay I will look at discuss the various ways in which courts in various common law jurisdictions have attempted to deal with these questions.

What is nervous shock?

Nervous shock is the onset of a psychiatric illness caused by witnessing the negligent action, or the results thereof, of another. For the purposes of succeeding in a suit it must be diagnosed as more than grief or sorrow i.e. an actual psychiatric illness. Nicholas N Chin says that the nervous shock ". . . label refers to a wide range of recognized psychiatric illnesses such as phobic anxiety, neuroses and post-traumatic stress disorder, which are more than simply grief, upset or unhappiness."[2] John Eric Erichsen described nervous shock injuries as part of a clinical pattern following railway accidents[3]. Erichsen said that many of the railway accidents lead to "severe and prolonged" nervous shock, "weariness", "cramps" and other symptoms. Lords Keith and Oliver in Alcock & Others v Chief Constable Of South Yorkshire Police[4]feel that the term nervous shock is a "misleading" one as in fact it covers a wide variety of possible claims in that area of negligence.

Can you recover for psychiatric injuries?

There exists some uncertainty as to whether the courts can accurately determine the extent of a psychiatric injury with regard to the appropriate level of recovery that could or should be awarded. This is illustrated in the 19th Century case of Lynch v Knight[5].

"Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone"[6] This view was echoed in Gatzow v Buening[7].The judges on this side of the argument say that in matters relating to psychiatric injury the monetary value of recovery would be purely based on speculation or conjecture and also that injuries could be feigned[8]. In his book[9], Butler argues that this would be no more uncertain than the attempts by judges in other cases to try to "restore the plaintiff to

the position he or she occupied prior to an accident". Particularly in today's world where there have been so many medical advances since the time of the Lynch decision recovery on the basis of purely psychiatric injury should really be no more difficult then recovery for a physical injury.

Irish decision of Byrne v Southern and Western Railway Co.[10] paved the way for recovery for nervous shock. It concerned a superintendent of the telegraph office (plaintiff) at Limerick Junction railway station. The railway points were left open negligently. A train then arrived and broke through the wall of the telegraph office. The plaintiff sued for shock and the judgement of the trial court and Court of Appeal was in his favour.

This decision sparked many decisions which increasingly recognised and compensated victims of nervous shock. However it would've helped more claims had the case have been reported. Palles C.B said "It is a sad commentary upon our system of reporting that a decision so important and so novel has never found its way into our Law Reports". Therefore it wasn't used in the case that came before the Privy Council of Victoria Railway Commissioners v Coultas[11].

The issue of nervous shock was dealt with again in the Irish court in the case of Bell v Great Northern Railway Co.[12]. The judgement of the court this time was significant as they had the choice of both the Byrne and Coultas verdicts. Luckily enough for the plaintiff in this situation the decision of Coultas was that of the Privy Council, for if it had been a decision of the House of Lords then the Irish courts would have been bound by precedent to follow it. Instead they followed that of Byrne. Palles CB said "As the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any court to lay down, as a matter of law, that if negligence causes fright, and such fright, in its turn, so affects such structures as to cause injury to health, such injury cannot be a consequence which in the ordinary course of things would flow from the negligence unless such injury accompanies such negligence in point of time". Former Chief Justice Ronan Keane said in an address to NUI Galway's Law Society[13] that Palles CB's judgement was ahead of its time.

Dulieu v White[14] followed Byrne and Bell despite the defendant' reliance in the case on Coultas. The plaintiff in this case was the pregnant wife of a publican. The defendants and their servant negligently drove a pair-horse van into the public-house. The plaintiff was severely shocked, was subsequently ill and then gave birth to a premature child who was

born an idiot. The plaintiff sought damages and was awarded them by the court. In this case Kennedy J in his dictum said that you can only claim nervous shock if the fright is for yourself and not for a third party.

The Privy Council's decision in Coultas was overly harsh on the plaintiff. It appears that this was done so as to prevent floodgates from opening in the case of a false claim. Not only does this wrongly victimise the worthy plaintiffs out there but it also has a very negative view of the legal system as a whole almost implying that if such a case came about the legal system wouldn't be able to identify it. It can be argued that this view is affirmed in the decisions of the courts in both Bell and Dulieu.

In Hambrook v Stokes Bros.[15] Mrs. Hambrook, who was pregnant at the time, had just dropped her three children off at the corner by the school. As she was walking away she saw a lorry, negligently left unattended with the engine running, coming rapidly towards her. She wasn't in personal danger but she feared for her children. A crowd gathered and rumours that a young girl with glasses had been injured. This fit the description of her daughter. She became very anxious and raced to the school to find her children. There she discovered that the girl who was injured was her daughter. She went to the hospital and found her child seriously injured. Mrs. Hambrook developed nervous shock from which she haemorrhaged. Two months later she was operated on and the dead foetus removed and several days after this she died. The plaintiff (her husband) sued for the loss of her services as manager in his restaurant. The question was could there be recovery for apprehension or fear for a third party. It was held by the majority that in certain circumstances it is unduly harsh to say that you can only recover for fear for your own safety. Two of the judges offered up scenarios where two mothers and children are on a street with a car hurtling towards them. They ask should the mother whose thought is only for herself be allowed to recover or the mother whose fear is for her child? Since this case it has been held that it is possible to recover damages for nervous shock occurring after either actual or apprehended physical injury not only to the plaintiff but also to a third party.

It is apparent from the views of the majority of the court in Hambrook that they feel that Kennedy J requirement that the fear must be for oneself would be too harsh in certain circumstances and that it shouldn't be considered good law in every case concerning third party nervous shock. This is a much more reasonable outlook. It takes into account that there are circumstances where the nervous shock of fear for a third party should be recoverable, particularly in the situation in the analogy made by the judges.

In Hinz v Berry[16] the plaintiff was out for a drive with her husband and four children. On the way home they stopped for a picnic in a lay-by. The plaintiff crossed the road with one child to pick bluebells. A car driven by the defendant was out of control and it crashed into the van where her husband and other children were making tea. On hearing the crash the plaintiff turned around and saw the accident. Her husband was very seriously injured and died a short while after and most of the children suffered injuries. After the shock of witnessing the crash she suffered prolonged morbid depression. The Court held that she was entitled to recover damages because she had a recognisable psychiatric illness. This was in part due also to the close relationship between her and some of the parties to the crash.

NUISANCE

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 his use or enjoyment of that property or of some right over, or in connection with it, we may say that tort of nuisance occurred. In other words, Nuisance is an unlawful interference with a person's use or enjoyment of land, or of some right over, or in connection with it. Nuisance is an injury to the right of a person in possession of a property to undisturbed enjoyment of it and result from an improper use by another person in his property.

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

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

ESSENTIALS OF NUISANCE

In order that nuisance is actionable tort, it is essential that there should exist:

· wrongful acts;

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

In Ushaben v. Bhagyalaxmi Chitra Mandir, AIR 1978 Guj 13, the plaintiffs'-appellants sued the defendants-respondents for a permanent injunction to restrain them from exhibiting the film "Jai Santoshi Maa". It was contended that exhibition of the film was a nuisance because the plaintiff's religious feelings were hurt as Goddesses Saraswati, Laxmi and Parvati were defined as jealous and were ridiculed.

It was held that hurt to religious feelings was not an actionable wrong. Moreover the plaintiff's were free not to see the movie again.

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

The defendants were held liable to the plaintiff in respect of emission of acid smuts, noise or smell.

KINDS OF NUISANCE

Nuisance is of two kinds:

. Public Nuisance

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

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

annoyance to persons who may have occasion to use any public right."

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

Thus acts which seriously interfere with the health, safety, comfort or convenience of the public generally or which tend to degrade public morals have always been considered public nuisance.

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

Public nuisance can only be subject of one action, otherwise a party might be ruined by a million suits. Further, it would give rise to multiplicity of litigation resulting in burdening the judicial system. Generally speaking, Public Nuisance is not a tort and thus does not give rise to civil action.

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

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

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

plaintiff was held entitled to an injunction.

In Leanse v. Egerton, (1943) 1 KB 323, The plaintiff, while walking on the highway was injured on a Tuesday by glass falling from a window in an unoccupied house belonging to the defendant, the window having been broken in an air raid during the previous Friday night. Owing to the fact that the offices of the defendant's agents were shut on the Saturday and the Sunday and to the difficulty of getting labour during the week end, no steps to remedy the risk to passers by had been taken until the Monday. The owner had no actual knowledge of the state of the premises.

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

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

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

"S. 91.(1) In the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted-

by the Advocate General, or with the leave of the court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions."

Thus a suit in respect of a public nuisance may be instituted by any one of the followings:
By the Advocate-General acting ex officio; or
By him at the instance of two or more persons or
by two or more persons with the leave of the Court.

. Private Nuisance

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

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

Elements of Private Nuisance

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

Thus the elements of private nuisance are:
1. unreasonable or unlawful interference;
2. such interference is with the use or enjoyment of land, or some right over, or in connection with the land; and
3. damage.

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

1. Injury to property

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

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

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

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

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

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

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

2. Physical discomfort

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

a. In excess of the natural and ordinary course of enjoyment of the property – In order to be able to bring an action for nuisance to property the person injured must have either a proprietary or possessory interest in the premises affected by the nuisance.

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

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

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

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

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

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

It was held that the running of the mill amounted to a private nuisance which should not be permitted.

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

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

In Sturges v. Bridgman (1879) 11 Ch D 852, A confectioner had for upwards of twenty years used, for the purpose of his business, a pestle and mortar in his back premises, which abutted on the garden of a physician, and the noise and vibration were not felt to be a nuisance or complained of until 1873, when the physician erected a consulting room at the end of his garden, and then the noise and vibration, owing to the increased proximity, became a nuisance to him. The question for the consideration of the Court was whether the confectioner had obtained a prescriptive right to make the noise in question.

It was held that he had not, inasmuch as the user was not physically capable of prevention by the owner of the servient tenement, and was not actionable until the date when it became by reason of the increased proximity a nuisance in law, and under these conditions, as the latter had no power of prevention, there was no prescription by the consent or acquiescence of the owner of the servient tenement.

DEFENCES TO NUISANCE

Following are the valid defences to an action for nuisance

It is a valid defence to an action for nuisance that the said nuisance is under the terms of a grant.

. Prescription

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

Three things are necessary to establish a right by prescription:

1. Use and occupation or enjoyment;
2. The identity of the thing enjoyed;
3. That it should be adverse to the rights of some other person.

A special defence available in the case of nuisance is prescription if it has been peaceable and openly enjoyed as an easement and as of right without interruption and for twenty years. After a nuisance has been continuously in existence for twenty years prescriptive right to continue it is acquired as an easement appurtenant to the land on which it exists. On the expiration of this period the nuisance becomes legalised ab initio, as if it had been authorised in its commencement by a grant from the owner of servient land. The time runs, not from the day when the cause of the nuisance began but from the day when the nuisance began.

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

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

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

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

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

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

. Statutory Authority

Where a statute has authorised the doing of a particular act or the use of land in a particular way, all remedies whether by way of indictment or action, are taken away; provided that

every reasonable precaution consistent with the exercise of the statutory powers has been taken. Statutory authority may be either absolute or conditional.

In case of absolute authority, the statute allows the act notwithstanding the fact that it must necessarily cause a nuisance or any other form of injury.

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

In Vaughan v. Taff Vale Rly (1860) 5 H.N. 679, The defendants who had authority by Statute to locomotive engines on their railway, were held not liable for a fire caused by the escape of sparks.

In a suit for nuisance it is no defence:
1. Plaintiff came to the nuisance: E.g. if a man knowingly purchases an estate in close proximity to a smelting works his remedy, for a nuisance created by fumes issuing therefrom is not affected. It is not valid defence to say that the plaintiff came to the nuisance.

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

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

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

5. That the nuisance complained of although causes damages to the plaintiff as an individual, confers a benefit on the public at large. A nuisance may be the inevitable result of some or other operation that is of undoubted public benefit, but it is an actionable nuisance nonetheless. No consideration of public utility should deprive an individual of his legal rights

without compensation.

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

REMEDIES FOR NUISANCE

The remedies available for nuisance are as follows:

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

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

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

False Imprisonment and Malicious Prosecution

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

The elements of malicious prosecution are: (1) a criminal case was brought against the plaintiff; (2) the criminal case was brought as a result of oral or written statements made by the defendant; (3) the criminal case ended in the favor of the plaintiff; (4) the defendant's

statements against the plaintiff were made without probable cause; and (5) the defendant's statements were motivated by malice toward the plaintiff. CJI 4th, Civil, 17:1.

The elements of malicious prosecution pose a significant burden to the Plaintiff. As the elements note, the criminal case must be resolved in the favor of the Plaintiff. This means that the case must be dismissed or the plaintiff must be acquitted. Even if the plaintiff is actually innocent, the claim will not succeed if the plaintiff is found guilty at trial. Additionally, the claim must be made without probable cause. Probable cause means that the reporter of the crime must have a good faith and reasonable belief that the Plaintiff was guilty of the offense. It is not enough that the plaintiff is innocent. It must be apparent to a reasonable person that the plaintiff is not guilty of the offense. Finally, it should be noted that prosecuting attorneys generally cannot be held liable for malicious prosecution. See, e.g., McDonald v. Lakewood Country Club, 461 P.2d 437 (Colo. 1969).

False imprisonment is a tort separate from malicious prosecution. The elements of false imprisonment are: (1) the defendant intended to restrict the plaintiff's freedom of movement; (2) the defendant, directly or indirectly, restricted the plaintiff's freedom of movement; and (3) the plaintiff was aware that his or her movement was restricted. False imprisonment is viable tort in a number of circumstances. One such circumstance is when an individual levels a false allegation against another leading to an arrest and detention. The defendant must directly or indirectly restrict the plaintiff's freedom of movement. Accordingly, even if the falsely accused has been detained by the police, the reporting party can be held liable for indirectly restricting the plaintiff's freedom of movement.

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

e. Judicial and Quasi: Judicial Acts

The rule is that "no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice". And the exemption is not confined to judges of

superior courts. It is founded on the necessity of judges being independent in the exercise of their office, a reason which applies equally to all judicial proceedings. But in order to establish the exemption as regards proceedings in an inferior court, the judge must show that at the time of the alleged wrong-doing some matter was before him in which he had jurisdiction (whereas in the case of a superior court it is for the plaintiff to prove want of jurisdiction); and the act complained of must be of a kind which he had power to do as judge in that matter.

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

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

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

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

The rule of immunity for judicial acts is applied not only to judges of the ordinary civil tribunals, but to members of naval and military courts-martial or courts of inquiry constituted in accordance with military law and usage. It is also applied to a limited extent to arbitrators, and to any person who is in a position like an arbitrator's, as having been chosen

by the agreement of parties to decide a matter that is or may be in difference between them. Such a person, if he acts honestly, is not liable for errors in judgment. He would be liable for a corrupt or partisan exercise of his office; but if he really does use a judicial discretion, the rightness or competence of his judgment cannot be brought into question for the purpose of making him personally liable.

According to Judicial Officers Protection Act,1850-

No judge, magistrate, justice of peace, collector, or any other person acting judicially shall be liable to be sued in any civil court or any act done or ordered to be done by him in discharge of his judicial duty whether or not within the limits of his jurisdiction provided that he at the time in good faith believed himself to have jurisdiction to do so or order the act complained of and no officer of the court or any other person who is bound to execute the order shall be sued in civil court.

QUASI-JUDICIAL ACTS

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

The general rule as to quasi-judicial powers of this class is that persons exercising them are protected from civil liability if they observe the rules of natural justice, and also the particular statutory or conventional rules, if any, which may prescribe their course of action. The rules of natural justice appear to mean, for this purpose, that a man is not to be removed from office or membership, or otherwise dealt with to his disadvantage, without having fair and sufficient notice of what is alleged against him, and an opportunity of making his defence; and that the decision, whatever it is, must be arrived at in good faith with a view to the common interest of the society or institution concerned. If these conditions be satisfied, a court of justice will not interfere, not even if it thinks the decision was in fact wrong. If not, the act complained of will be declared void, and the person affected by it maintained in his rights until the matter has been properly and regularly dealt with. These principles apply to the expulsion of a partner from a private firm where a power of expulsion is conferred by the partnership contract.

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

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

Parental and Quasi-Parental authority

There are also several kinds of authority in the way of summary force or restraint which the necessities of society require to be exercised by private persons. And such persons are protected in exercise thereof, if they act with good faith and in a reasonable and moderate manner. Parental authority (whether in the hands of a father or guardian, or of a person to whom it is delegated, such as a schoolmaster) is the most obvious and universal instance. It is

needless to say more of this here, except that modern civilization has considerably diminished the latitude of what judges or juries are likely to think reasonable and moderate correction.

Persons having the lawful custody of a lunatic, and those acting by their direction, are justified in using such reasonable and moderate restraint as is necessary to prevent the lunatic from doing mischief to himself or others, or required, according to competent opinion, as part of his treatment. This may be regarded as a quasi-paternal power; but I conceive the person entrusted with it is bound to use more diligence in informing himself what treatment is proper than a parent is bound (I mean, can be held bound in a court of law) to use in studying the best method of education. The standard must be more strict as medical science improves. A century ago lunatics were beaten, confined in dark rooms, and the like. Such treatment could not be justified now, though then it would have been unjust to hold the keeper criminally or civilly liable for not having more than the current wisdom of experts. In the case of a drunken man, or one deprived of self-control by a fit or other accident, the use of moderate restraint, as well for his own benefit as to prevent him from doing mischief to others, may in the same way be justified.

Unit-III: Specific Torts-II

a. Vicarious Liability

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

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

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

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

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

- The master is financially better placed than the servant.

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

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

1. There was a lawful relationship between the parties.

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

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

- To hire or fire the servant.

- To determine the tasks to be discharged.

- To provide implements.

- To determine how the tasks would be discharged.

- To determine the servants remuneration.

- That the tort was committed by the servant in the course of his employment. This is irrespective of whether the servant was acting negligently, criminally, deliberately or wantonly for his own benefit. In Patel Vs Yafesi, where an employee was carrying 3 excess passengers in the vehicle contrary to the master‟s instructions, it was held that the master was liable as the driver was acting in the course of his employment.

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

INDEPENDENT CONTRACTOR

An independent contract means a person who undertakes to produce a given result without being controlled on how he achieves that result. These are called contract for service. Because the employer has no direct control of him, he (the employer) is not liable for his wrongful acts. However, there are certain cases (exception) under which the employer may still be liable. These are: - a). Where the employer retains his control over the contractor and personally interferes and makes himself a party to the act, which causes the damage. b). Where the thing contracted is in itself a tort. c). Where the thing contracted to be done is likely to do damage to other people's property or cause nuisance. d). Where there is strict liability without proof of negligence e.g. the rule in Ryland vs. Fletcher.

STRICT LIABILITY

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

Strict liability may be considered in the following case namely:

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

ii. Liability for fire and;

iii. Liability for animals.

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

Limits of the rule.

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

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

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

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

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

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

Defenses in rule in Ryland vs. Fletcher.

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

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

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

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

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

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

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

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

DEFAMATION

Defamation means the publication of a false statement regarding another person without lawful justification, which tends to lower his reputation in the estimation of right thinking members of society or which causes him to be shunned or avoided or has a tendency to injure him in his office, professions or trade. It has also been defined as the publication of a statement that tends to injure the reputation of another by exposing him to hatred, contempt

or ridicule. In the case of Dixon Vs Holden (1869) the right of reputation is recognized as an inherent right of every person, which can be exercised against the entire world. A man‟s reputation is therefore considered his property. Following are the essential elements of defamation: -

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

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

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

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

Where the defamatory statement is kept under lock and key and no one ever gets to read it, there is no defamation.

TYPES OF DEFAMATION 1. Slander: Slander takes place where the defamatory statement are made in non-permanent form e.g. by word of mouth, gestures, etc. Slander is actionable only on proof of damage. However, in exceptional cases, a slanderous statement is actionable without proof of damage. This is so in cases: a) Where the statement inputs a criminal offence punished by imprisonment. b) Where the statement inputs a contagious disease on the plaintiff. c) Where the statement inputs unchastely on a woman. d) Where the statement imputes incompetence on the plaintiff in his trade, occupation or profession. 2. Libel: Libel takes place where the defamatory permanent form e.g. in writing, printing, television broadcasting, effigy, etc. Where a defamatory matter is dictated to a secretary and she

subsequently transcribes it, the act of dictation constitutes a slander while the transcript is a libel. An action for libel has the following essential requirements:

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

ii) in writing,

iii) is defamatory, and

iv) has been published.

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

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

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

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

Defenses against defamation

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

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

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

judges or magistrates in the course of judicial proceedings, statements made in Parliament by Legislators and communication between spouses, etc.

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

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

The defendant can make an offer of amends where the publication was without malice and it was published innocently.

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

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

Unit-IV: The Consumer Protection Act, 1986

a. Definitions of Consumer, Goods and Service

Introduction 1.1 The moment a person comes into this would, he starts consuming. He needs clothes, milk, oil, soap, water, and many more things and these needs keep taking one form or the other all along his life. Thus we all are consumers in the literal sense of the term. When we approach the market as a consumer, we expect value for money, i.e., right quality, right quantity, right prices, information about the mode of use, etc. But there may be instances where a consumer is harassed or cheated. The Government understood the need to protect consumers from unscrupulous suppliers, and several laws have been made for this purpose. We have the Indian Contract Act, the Sale of Goods Act, the Dangerous Drugs Act, the Agricultural Produce (Grading and Marketing) Act, the Indian Standards Institution (Certification Marks) Act, the Prevention of Food Adulteration Act, the Standards of Weights and Measures Act, etc. which to some extent protect consumer interests. However, these laws require the consumer to initiate action by way of a civil suit involving lengthy legal process which is very expensive and time consuming. The Consumer Protection Act, 1986 was enacted to provide a simpler and quicker access to redressal of consumer grievances. The Act for the first time introduced the concept of 'consumer' and conferred express additional rights on him. It is interesting to note that the Act doesn't seek to protect every consumer within the literal meaning of the term. The protection is meant for the person who fits in the definition of 'consumer' given by the Act. Now we understand that the Consumer Protection Act provides means to protect consumers from getting cheated or harassed by suppliers. The question arises how a consumer will seek protection ? The answer

is the Act has provided a machinery whereby consumers can file their complaints which will be entertained by the Consumer Forums with special powers so that action can be taken against erring suppliers and the possible compensation may be awarded to consumer for the hardships he has undergone. No court fee is required to be paid to these forums and there is no need to engage a lawyer to present the case. Following chapter entails a discussion on who is a consumer under the Act, what are the things which can be complained against, when and by whom a complaint can be made and what are the relief available to consumers.

Who is a consumer 1.2 Section 2(d) of the Consumer Protection Act says that consumer means any person who— (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment, and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or (ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment, and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person; Explanation.—For the purposes of the sub-clause (i), "commercial purpose" does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment. 1.2-1 Consumer of goods - The provision reveals that a person claiming himself as a consumer of goods should satisfy that— 1-2-1a THE GOODS ARE BOUGHT FOR CONSIDERATION - There must be a sale transaction between a seller and a buyer; the sale must be of goods; the buying of goods must be for consideration. The terms sale, goods, and consideration have not been defined in the Consumer Protection Act. The meaning of the terms 'sale', and 'goods' is to be construed according to the Sale of Goods Act, and the meaning of the term 'consideration' is to be construed according to the Indian Contract Act. 1-2-1b ANY PERSON WHO USE THE GOODS WITH THE APPROVAL OF THE BUYER IS A CONSUMER - When a person buys goods, they may be used by his family members, relatives and friends. Any person who is making actual use of the goods may come across the defects in goods. Thus the law construe users of the goods as consumers although they may not be buyers at the same time. The words "....with the approval of the buyer" in the definition denotes that the user of the goods

should be a rightful user. Example : A purchased a scooter which was in B's possession from the date of purchase. B was using it and taking it to the seller for repairs and service from time to time. Later on B had a complaint regarding the scooter. He sued the seller. The seller pleaded that since B did not buy the scooter, he was not a consumer under the Act. The Delhi State Commission held that B, the complainant was using it with the approval of A, the buyer, and therefore he was consumer under the Act. [Dinesh Bhagat v. Bajaj Auto Ltd. (1992) III CPJ 272]

Note : This is an exception to the general rule of law that a stranger to a contract cannot sue.

ANY PERSON WHO OBTAINS THE GOODS FOR 'RESALE' OR COMMERCIAL PURPOSES' IS NOT A CONSUMER - The term 'for resale' implies that the goods are brought for the purpose of selling them, and the expression 'for commercial purpose' is intended to cover cases other than those of resale of goods. When goods are bought to resell or commercially exploit them, such buyer or user is not a consumer under the Act. Examples : 1. A jeep was purchased to run it as a taxi. The question was whether the buyer of the jeep was a consumer under the Act. The Rajasthan State Commission held that to use the jeep as a taxi with the object to earn profits was a commercial purpose, and therefore, the buyer/user was not a consumer within the meaning of the Act. [Smt. Pushpa Meena v. Shah Enterprises (Rajasthan) Ltd. (1991) 1 CPR 229]. 2. L Ltd. purchased a computer system from Z. The computer system was giving constant trouble and Z was not attending it properly. L Ltd. filed a complaint against Z with the National Commission. Z contended that L Ltd. was not a consumer under the Act because computer system was used for commercial purposes. L Ltd. argued that computer system was not directly used of commercial purposes rather it was used to facilitate the work of the company. The Commission rejected the argument on the grounds that the system made part of the assets of the company, and its expenses were met by it out of business income. Thus the said purchase was a purchase for commercial purposes and L Ltd. was held not to be a consumer under the Act. One thing is plain and clear from the decided cases that what is important to decide is - Whether a particular good is used for commercial purposes. If it is the buyer/user is not a consumer, and if it is not - the buyer/user is a consumer. 1.2-1d PERSON BUYING GOODS FOR SELF EMPLOYMENT IS A CONSUMER - When goods are bought for commercial purposes and such purchase satisfy the following criteria : - the goods are used by the buyer himself; - exclusively for the purpose of earning his livelihood; - by means of self-employment, then such use would not be termed as use for commercial purposes under the Act, and the user is recognised as a

consumer. Examples : 1. A buys a truck for plying it as a public carrier by himself, A is a consumer. 2. A buys a truck and hires a driver to ply it, A is not a consumer. 3. A has one cloth shop. He starts another business of a photocopier and buys a photocopy machine therefor. He hasn't bought this machine exclusively for the purpose of earning livelihood. He is not a consumer under the Act. Note : That this is an exception to the rule that a buyer of commercial goods is not a consumer under the Act.

The intention of the legislature is to exclude big business houses carrying on business with profit motive from the purview of the Act. At the same time it is pertinent to save the interests of small consumers who buy goods for self employment to earn their livelihood, like a rickshaw puller buying rickshaw for self employment, or a farmer purchasing fertilizer for his crops, or a taxi driver buying a car to run it as a taxi, etc. Example : A was running a small type institute to earn his livelihood. He purchased a photocopy machine-canon NP 150. It proved defective. He sued the seller who contended that A is not a consumer under the Act as he purchased the photocopier for commercial use. The Commission held that by no stretch of imagination it can be said that the photocopier would bring large scale profits to A. It was a part of his small scale enterprise. He was construed as consumer under the Act. However, if such a buyer takes assistance of two or more persons to help him in operating the vehicle or machine, etc., he does not cease to be a consumer. Examples : 1. A buys a truck, ply it himself and hires a cleaner who accompany him all the time and at times drives also when A is busy otherwise, A is a consumer. 2. P, an eye surgeon, purchased a machine from R for the hospital run by him. The machine was found to be a defective one. R contended that P was not a consumer under the Act as the machine was bought for commercial purposes. The National Commission rejected this contention and held that P is a medical practitioner, a professional working by way of self employment by using his knowledge and skill to earn his livelihood. It was not proved by any evidence that P is running a huge hospital. Thus the purchase of machinery is in the nature of self employment. [Rampion Pharmaceuticals v. Dr. Preetam Shah (1997) I CPJ 23 (NCDRC)]. 1.2-2 Consumer of services - A person is a consumer of services if he satisfy the following criteria : 1.2-2a SERVICES ARE HIRED OR AVAILED OF - The term 'hired' has not been defined under the Act. Its Dictionary meaning is - to procure the use of services at a price. Thus the term 'hire' has also been used in the sense of 'avail' or 'use'. Accordingly it may be understood that consumer means any person who avails or uses any service. Example : A goes to a doctor to get himself treated for a fracture. Here A is hiring the services of the doctor. Thus he is a consumer. What constitutes hiring has been an issue to be dealt with in

many consumer disputes. If it is established that a particular act constitutes hiring of service, the transaction falls within the net of the Consumer Protection Act, and vice-versa.

Examples :

1. A passenger getting railway reservation after payment is hiring service for consideration.

3. A presented before the Sub-Registrar a document claiming it to be a will for registration who sent it to the Collector of Stamps for action. The matter remain pending for about six years. In the meantime A filed a complaint under the Consumer Protection Act alleging harrassment by the Sub-Registrar and Collector and prayed for compensation. The National Commission held the view that A was not a "consumer" under the CPA. Because there was no hiring of services by the complainant for consideration and because a Government official doing his duty as functionary of the State under law could not be said to be rendering a service to the complainant. [S.P. Goel v. Collector of Stamps (1995) III CPR 684 (SC)]. 1.2-2b CONSIDERATION MUST BE PAID OR PAYABLE - Consideration is regarded necessary for hiring or availing of services. However, its payment need not necessarily be immediate. It can be in instalments. For the services provided without charging anything in return, the person availing the services is not a consumer under the Act. Examples : 1. A hires an advocate to file a suit for recovery of money from his employer. He promises to pay fee to the advocate after settlement of the suit. A is a consumer under the Act. 2. A goes to a Doctor to get himself treated for a fracture. The Doctor being his friend charged him nothing for the treatment. A is not a consumer under the Act. 3. B issued an advertisement that a person could enter the contest by booking a Premier Padmini car. S purchased the car and thus entered the contest. He was declared as winner of the draw and was thus entitled to the two tickets from New Delhi to New York and back. S filed a complaint alleging that the ticket was not delivered to him. The National Commission held that S was not a consumer in this context. He paid for the car and got it. B was not liable so far as the contract of winning a lottery was concerned. [Byford v. S.S. Srivastava (1993) II CPR 83 (NCDRC)]. The Direct and Indirect taxes paid to the State by a citizen is not payment for the services rendered. Example : T was paying property tax for his house to the local corporation. This corporation was responsible for proper water supply to the premises under its work area. T raised a consumer dispute over the inadequacy of water supply by the corporation. The National Commission held that it was not a consumer dispute as water supply was made by the corporation out of its statutory duty and not by virtue of payment of taxes by T. - Mayor, Calcutta Municipal Corporation v. Tarapada Chatterjee (1994) 1 CPR 87 (NCDRC).

BENEFICIARY OF SERVICES IS ALSO A CONSUMER - When a person hires services, he may hire it for himself or for any other person. In such cases the beneficiary (or user) of these services is also a consumer. Example : A takes his son B to a doctor for his treatment. Here A is hirer of services of the doctor and B is beneficiary of these services. For the purpose of the Act, both A and B are consumers. Note : This is an exception to the rule of privity to the contract. Note that in case of goods, buyer of goods for commercial purpose ceases to be a consumer under the Act. On the other hand, a consumer of service for commercial purpose remains a consumer under the Act. Example : S applied to Electricity Board for electricity connection for a flour mill. There was a delay in releasing the connection. S made a complaint for deficiency in service. He was held a consumer under the Act. - Shamsher Khan v. Rajasthan State Electricity Board (1993) II CPR 6 (Raj.).

b. Rights and Duties of Consumer

Rights of consumers in India

Rights of consumer:

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

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

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

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

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

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

Duties of consumer

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

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

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

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

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

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

District Forum [Section 10]

COMPOSITION - District Forum consist of one president and two other members (one of whom is to be a woman). The president of the Forum is a person who is, or has been qualified to be a District Judge, and other members are persons of ability, integrity and standing, and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration. 3.2-1b APPOINTING AUTHORITY - Every appointment of the president and members of the District Forum is made by the State Government on the recommendation of a selection committee consisting of the following, namely— (i) the President of the State Commission — Chairman. (ii) Secretary, Law Department of the State — Member. (iii) Secretary incharge of the Department dealing with consumer affairs in the State — Member.

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

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

(d) has acquired such financial interest in the matter as would prejudicially affect his functions as president or member, or (e) has abused his position so as to render his continuance to office prejudicial to public interest. 3.2-1e TERMS AND CONDITIONS OF SERVICE [SECTION 10(3)] - The salary or honorarium and other allowances payable to, and the other terms and conditions of service of the members of the District Forum shall be such as may be prescribed by the State Government. Different States have made different rules in this regard. 3.2-2 State Commission [Section 16] - After the District Forum, State Commission is next in the hierarchy of Consumer Rederessal Forums under the Act. 3.2-2a COMPOSITION - State Commission consists of a president and two members one of whom is to be a woman. President is a person who is or has been a Judge of a High Court, and the members, are persons of ability, integrity and standing and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration.

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experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration.

d. remedies

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

(a) Removal of Defects:

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

(b) Replacement of Goods:

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

(c) Refund of Price:

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

(d) Award of Compensation:

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

(e) Removal of Deficiency in Service:

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

(f) Discontinuance of Unfair/Restrictive Trade Practice:

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

(g) Stopping the Sale of Hazardous Goods:

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

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BOOKS RECOMMENDED

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