NOSHIRVAN H. JHABVALA

THE LAW OF TORTS

(Including Statutory Torts)

2001



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THE LAW OF TORTS

(Including Statutory Torts)

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PREFACE TO THE TWENTY-FIFTH EDITION

We are happy to put before the student community the twenty-fifth Edition of this extremely popular book on *the Law of Torts.* This edition has been thoroughly revised and brought up-to-date. Recent decisions have been duly referred to. Although the Indian law of torts is mainly based on the law of England, in addition to several English cases, *American cases* are also referred to at relevant places. In *Appendix I,* a reference is made to *statutory torts,* where the most tragic disaster of *the* century, *the Bhopal gas leak disaster,* has also been discussed. The Index of cases adds to the utility of the book. Up-to-date questions set at the examinations of the Bombay University have also been incorporated. A Summary of the Law of Torts is given in Appendix II, which we hope will be of great use to students, especially on the eve of their examinations.

We are confident that students of law will give this edition the same warm and enthusiastic response given by them to all the earlier editions of the book.

— THE PUBLISHERS

Please note .....

All students of the Law of Torts are requested to note that a separate book is **now available** on Problems and Solutions on the Law of Torts **and** the Law of Crimes. This book is indispensable as a companion to the present book, as almost all problems asked at University examinations have been covered, **along with the solutions to the problems. This book is indeed a "must" for every student of the Law of Torts.**

PROBLEMS

(with solutions)

ON

THE LAW OF CRIMES

&

THE LAW OF TORTS

Written by : CASEMAN

Price : Rs. 25-00

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THE LAW OF TORTS

GENERAL REMARKS—The study of the Law of Torts is peculiar in the sense that the student has no enactment (Act) of the Legislature to fall back upon, as is the case with other branches of law, like the law of contract (where one can refer to the Indian Contract Act), or the law of crimes (where one can look into the Indian Penal Code). Nevertheless, this branch of the law is *most interesting,* and deals with problems which one commonly meets in everyday life.

The Law of Torts depends almost entirely upon *case-law (i.e.,* the law laid down in cases decided by the Courts), and an attempt is made to incorporate all the relevant caselaws at the proper places in this book. It is hoped that the *number* of cases discussed in the book will not be a source of fright to the reader, who will soon discover that the *principle* underlying *all* the cases on a given point will be the same. It may be clarified that this book is meant primarily for *students of law.* (Practitioners and those wishing to delve further in this fascinating subject are advised to refer to the "Books Recommended for Further Reading", a list whereof appears elsewhere in this Book.)

1

GENERAL PRINCIPLES

"TORT" DEFINED

[B.U. = Bombay University.]

[P.U. = Pune University.]

"A tort may be defined as a civil wrong, other than a breach of contract, for which the remedy is a common law action for unliquidated damages." Discuss.
B.U. Oct. 91
P.U. Apr. 93
Oct. 96

Much ink has been spilt in unsuccessful attempts at defining a *'tort'*. It is, therefore, *not* proposed to spill any more here ! The term has so far defined all attempts at precise or scientific definition, the reasons for this being mostly historical in nature.

The French word *'tort'* means *'wrong'*. The derivation of the word may also be traced to the Latin term *'tortum'* (to twist); thus, 'tort' implies conduct that is twisted—or wrongful. The word also corresponds to the Roman Law term *delict*. A *tort* is thus the breach of some duty (independent of any contract), which gives rise to a civil cause of action, and for which the Civil Courts award compensation.

The first reported case where the court used the word *"tort"* is an old (1597) English case, *Boulton* v. *Hardy* (1597, Cro. Eliz. 547)

According to *Ratanlal and Dhirajlal,* the leading Indian authors on the Law of Torts, a tort may be defined as "a civil wrong independent of contract, for which the appropriate remedy is an action of damages."

Salmond, the leading English authority on the subject, defines a *tort* as "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." This definition has received judicial approval in several English cases, and is adopted in S. 2 of the Indian Limitation Act, which defines a 'tort' as "a civil wrong which is not exclusively the breach of a trust".

According to *Winfield,* "Tortuous liability arises from the breach of a duty fixed by law; this duty is towards persons generally, and its breach is redressible by an action for unliquidated damages."

The Supreme Court of India, in *Jay Laxmi Salt Works* v. *State of Gujarat* (JT (1994) 3 S.C. 492) has quoted with approval the definition of the term given by *Salmond* and *Winfield*, above.

Keeton and Keeton (in a book entitled *Cases & Materials on the Law of Torts)* define the term as follows :

"Tort law is a body of law concerned with granting or denying claims of individuals or impersonal legal entities against each other for award of damages or other forms of legal relief."

Burdick defines a tort as "an act or omission which unlawfully violates a person's right created by law, and for which the appropriate remedy is a common law action for damages by the injured person".

The definition of the term given by *Clerk and Lindsell* seems to be based on that of Salmond. Tort is defined by these authors as "a wrong, independent of contract, for which the appropriate remedy is a Common Law action."

In the words of *Lord Denning*, "The province of tort is to allocate responsibility for injurious conduct."

Many more definitions of the term can be given — but that may only land the reader in a maze of definitions, and definitions ought *not* to obstruct one's true understanding of the subject. It will be seen that in *all* these definitions, the underlying reference is to an act or omission (*not* within the sphere of contract or trust), which prejudicially affects another person with respect to a legal right of that other person. Further the appropriate remedy for such an act or omission is a *suit for damages.* The person who commits the wrong is called the *tort-feasor,* and his wrongful act is termed a *tortious act or a tort.*

A review of all the above definitions of the term leads to the conclusion that a really satisfactory definition of *tort* has yet to be found. The numerous attempts which have been made to define the term have resulted only in using language which is so broad that it includes matters other than torts, —or else so narrow, that it leaves out some torts !

"A tort is a civil wrong, independent of contract, for which the appropriate remedy is an action for damages. Discuss fully, bringing out the distinction between a tort and other types of wrongs.

B.U. Oct. 92
Oct. 94

Define the term "tort", and discuss the elements of a tort.

B.U. Oct. 90

Define a tort and explain its ingredients. Distinguish between tortious liability and contractual liability.

B.U. Oct. '95

NATURE OF THE LAW OF TORTS

An interesting question arises when one considers the nature of the law of torts : Does the law of torts consist of a number of specific rules prohibiting only certain types of harmful activities, and leaving all the rest outside its sphere ? *Or* does it consist of a fundamental general principle that it is wrongful to cause harm to other persons ? The *first alternative* has been championed by several leading English jurists like Salmond and Sir Frederick Pollock, whereas the *second* is advocated by Sir Winfield, and is reflected in several English decisions, some of which are more than a century old.

A tort is a civil wrong independent of contract, the appropriate remedy for which is an action for damages. Discuss fully.

B.U. Oct. 96

Salmond maintained that there is no English law of *tort;* there is merely an English law of *torts.* According to this dictum, the law of torts consists of a number of specific rules prohibiting certain harmful acts. In other words, according to this school of thought, there is only a law of *torts* (i.e. specific well-defined wrongs) and no general law of *tort.* This means that there is a list of acts and omissions which, in certain circumstances, are actionable in a Court of Law. Only that harm which falls within one of these categories entitles a person to file a suit. Thus, just as there are specific crimes (like murder, theft, forgery, etc.), so also, according to this theory, there are certain specific torts, and all other wrongs fall outside the law of torts.

Is there a law of tort or only a law of torts ? Answer in the light of theories relating to foundations of tortious liability.

P.U. Apr. 92

According to this view, which finds the strong support of an eminent jurist, Sir Frederick Pollock, the law of torts may be said to consist of a *neat set of pigeon-holes,* each containing a specific tort. If the defendant's wrong does *not* fit any of these pigeon-holes, *he has committed no tort.* This theory, also known as "the pigeon-hole theory", was approved in the old English case *Allen* v. *Flood,* (1898, A.C. 1), where the Court observed that every plaintiff must bring his case under one or the other of the well-recognised heads of torts.

Salmond's theory has, however, been criticised by later writers, who have pointed out that if this theory is to be accepted, the categories of liability in tort would be closed, and the Courts would be prevented from recognising any *new torts.* And yet, there is not a single case

State and explain the general conditions of liability for tort.

P.U. Apr. 96

where the Court has refused to pass a judgement in favour of the plaintiff *only on the ground* that the case relates to a new tort. Ever since the famous judgement of *Ashby* v. *White* (which is discussed below in detail), it has been clearly established that *mere novelty will not prevent a person from suing in tort.* On the contrary, as the Court observed in one English case, "torts are infinitely various.... and *not* limited or confined."

The *second theory,* the chief supporter whereof is Sir Winfield, adopts the view that all injuries done to another person are torts, *unless* there is some justification recognised by the law. The English Court has also followed this view in *Skinner* v. *Shaw,* where it observed : "At common law, there was a cause of action whenever one person caused damage to another wilfully and intentionally, without just cause or excuse."

In further support of this theory, it is also pointed out that the Courts have, from time to time, recognised "new" torts, namely, torts to which no specific names had been given before. Thus, it was only in 1964 that the House of Lords confirmed the existence of the tort of *intimidation.* To take another example, although in 1888, a claim for damages for a *careless statement causing economic loss* was dismissed, in 1963, the House of Lords recognised the existence of such a tort. *This creation of new torts clearly shows that the categories of torts are never closed.*

In a landmark judgement, the Supreme Court of India has *held* that an enterprise which is engaged in hazardous or inherently dangerous industry, owes an absolute duty to the community at large. *(M.C. Mehta* v. *Union of India,* AIR 1987 S.C. 1086, discussed at length in a later Chapter). This decision indicates that the Indian courts will *not* hesitate to evolve a new principle of *tourtuous* liability if the occasion so demands, and in this respect, *courts in India appear to be more progressive than English courts.*

As Sahai J. observed, in another landmark decision of the Supreme Court of India, ``It would be primitive to class strictly, or close finally, the ever-expanding and growing horizon of tortuous liability." *(Jay Laxmi Salt Works* v. *State of Gujarat,* referred to above.)

In *Ushaben Trivedi & Another* v. *Bhagyalaxmi Chitra Mandir & Others,* (A.I.R. 1978 Guj. 13), the Gujarat High Court, whilst endorsing the second theory, observed as follows :

"It is true that tort is not defined. Torts are infinitely various, and not limited and confined. The novelty of claim may arise and the Court may recongise a novel claim. India is a country where various religions are followed, and this has to be kept in mind while evolving a new tort."

The Court *held,* in the above case, that hurt to religious feelings is *not* an actionable wrong (tort) in India.

In recent times, neither theory has been accepted in its totality, to the entire exclusion of the other. In conclusion, it may be said that whereas from the narrow practical point of view, Salmond's theory would be acceptable, if one takes a broader outlook, Winfield's theory appears to be more sound.

WRONGS WHICH ARE *NOT* TORTS

There are *four classes of wrongs which fall outside* the sphere of tort. These are :

(1) Wrongs which are exclusively *criminal*

"All torts are civil wrongs, but all civil wrongs are not torts." Discuss the statement in the light of the essential ingredients of a tort. B.U. Apr. 94

The important word to be noted here is *'exclusively'.* Ordinarily, wrongs are either *civil or criminal.* Thus, detention, conversion, wrongful dismissal are *purely civil* wrongs, *i.e., torts.* On the other hand, dacoity, murder, forgery, etc., are *purely criminal* wrongs, *i.e., crimes.* The remedy in case of the former is a suit in a *civil* Court for *damages* and *compensation.* In the case of crimes, the remedy is a criminal prosecution in a *criminal* Court, with the primary object of *punishing* the offender.

There are, however, certain wrongs which are *both torts* as well as *crimes, e.g.,* assault, defamation, and negligence. A civil suit and/or a criminal prosecution will lie in such cases.

(2) Civil wrongs which are exclusively *breaches of contract*

Several other civil wrongs fall outside the sphere of the law of torts, as they exclusively involve a breach of a contract. Thus, if *X* buys a car from *Y,* and after receiving the purchase money, *Y* fails to deliver the car to *X, Y* has done wrong to *X*; but this is a wrong arising out of a breach of contract, and is *not* a tort.

(3) *Breaches of trust* or other equitable obligations

"A tort is a civil injury, but all civil injuries are not torts." Discuss. P.U. Apr. 91

A breach of *trust* is neither a breach of *contract* nor a *tort.* Trust is a matter of *confidence,* and *not a matter of* contract or tort. It is merely an equitable wrong, and *not* a tort.

(4) Wrongs which are *quasi-contractual*.

Civil wrongs which create no right of action for unliquidated damages, but give rise to some other form of civil remedy exclusively, are *not* torts. A wrong, in order to be a tort, must have, as its remedy, a suit for *unliquidated damages,* and *not* a claim for liquidated damages. Such claims are classed as quasi-contractual, but in truth they belong neither to the category of contracts nor of torts, but a distinct category called *restitution.*

LAW OF TORTS IN INDIA

There is no *Act of the Legislature* (like the Indian Penal Code or the Indian Contract Act) in India dealing with the Law of Torts. The Law of Torts applicable in India is the *English Law of Torts* which, in its turn, is based on the *Common Law* prevailing in England. The rules of English law are to be applied *so far as they are applicable to Indian society and circumstances.* When in a given case, statutory or customary law does *not* exist, Courts in India will be guided by principles of *justice, equity and good conscience.*

Jurists in England and in India have often demanded that the Law of Torts be reduced to a *statutory form.* The advantage of such a step would be that the law would become definite and compartmentalized. However, one must not forget that this branch of the law has evolved out of judicial decisions, that its very basis is leading cases of the English Courts, and perhaps more harm than good may be done to the *development* of this branch of the law by reducing it to a statutory code.

In recent times, *some parts* of the law of torts have been codified, as for example, The Fatal Accidents Act, The Workmen's Compensation Act, The Employers' Liability Act, etc. However, *the major portion* of the field of this branch of the law is still based on judicial decisions.

CHARACTERISTICS OF A TORT

The following are the *five important characteristics* of a tort :

"A tort is a civil injury, but all civil injuries are not torts." Comment.
P.U. Apr. 97

1. Civil wrong

A tort is *a civil* wrong, as opposed to a *crime* on the one hand, and a *breach of contract or a breach of trust,* on the other.

It may be noted that a breach of contract and breach of trust *are civil wrongs,* but they are *not torts,* inasmuch as the remedies afforded for such breaches are governed by statutes, whereas the remedies for a *tort* owe their origin to *common law.*

2. Infringement of a right *in rem*

Secondly, a tort is an infringement of a right *in rem,* and *not* a right *in personam.* A *right in rem* is a right *vested in some determinate person* (either *personally* or as a *member* of the community) and *available against the world at large. i.e.* against everybody. Thus, one's rights not to be defamed or assaulted are rights available against the *whole world.* Such rights are rights *in rem,* and are, naturally, too numerous to be enumerated.

The opposite of a right *in rem* is a *right in personam.* A *right in personam* is a right available *only against some determinate person* or body. Thus, *X* agrees to sell his house to *Y* for a certain sum, but does not honour his obligations. In these circumstances, *Y* will have a right to sue *X,* and only *X* (and *not* the world at large) for a breach of the contract. Here, the *mutual* rights against one another are created by their *private agreement.* These rights are *personal to both of* them. Outsiders are *not* concerned with them. Such rights are, therefore, called rights *in personam.*

"Tortious liability arises from the breach of a duty fixed by the law, this duty is towards a person generally, and its breach is redressable by an action for unliquidated damages." Discuss.
B.U. Apr. 96

3. Right fixed by law

Thirdly, the right which is infringed in the law of torts must be a *right* which is *fixed by the law, independent* of the *consent* of the parties.

4. Common Law action

The remedy available in respect of the violation of such a right should be a *Common Law action (i.e.,* a suit filed under the English Common Law). Of course, there is nothing like Common Law in India. In England, there are numerous Common Law actions, of which actions for torts are a part. Such actions would also be actionable in India.

5. Remedy

Lastly, the remedy should be by way of *damages, i.e.,* compensation in *money.*

A suit for unliquidated damages is a good test of tortious liability. However, it is *not the only remedy,* and a suit for injunction, or a suit for specific restitution of land or chattels, and, at times, even self-help (as in ejecting a trespasser) are other remedies available in the case of torts.

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TORT AND *CRIME* DISTINGUISHED

Both a tort and a crime *resemble* each other in that *both* are violations of rights *in rem*, and in *both*, the rights and duties are fixed by law, *irrespective of the consent of parties.* The following are the *three points of distinction* between the two :

1. As to *nature* of the wrong

A *tort* is a *private* wrong. It is an infringement of the *private* or civil rights belonging to an *individual*; a *crime*, on the other hand, is an invasion of *public* rights and duties affecting the whole *society*.

"All torts are civil wrongs, but all civil wrongs are not torts." Explain the statement, and outline the essential characteristics of torts.

P.U. Oct. 94
Oct. 95

2. As to the *remedy* available

In tort, the wrong-doer has to *compensate* the injured party; in crime, he is *punished* by the State. The underlying principle of *redress* is, therefore, different in both. Crimes involve *punishment* of the offender in order to *deter* him from committing it again; in *torts*, *compensation* is awarded to the person injured.

It is true that in some cases, a Court may order a person convicted of a *crime* to pay a sum of money to the injured party by way of compensation. This, however, should *not* blur the essential distinction between a tort and a crime, for such compensatory sums do *not* form the principal subject-matter of the criminal suit; they are always *in addition* to some other punishment, as for instance, a jail sentence.

3. As to the *procedure*

In *tort*, the suit is filed by *the injured party himself*. In *crime*, the proceedings are taken and conducted in the name of the State, inasmuch as the party injured by a crime is the *State*, which conducts the prosecution either on its own initiative or on a complaint of a *private* party.

Discuss the nature of a tort, and distinguish it from (a) crime and (b) breach of contract.

B.U. Apr. 93

There *are* some acts which amount to a *tort* and *also* to a *crime*. For instance, *assault* and *libel* are torts *as well as* crimes. Thus, in the case of assault, the right which is violated is one which every man has and which guarantees that his bodily safety shall be respected. But the matter does *not* stop here. The act of violence is also a menace to the safety of the society in general, and will, therefore, be punished by the State also. In such cases, both the rights, *viz.*, rights *in rem* and rights *in personam* co-exist. In these cases, the wrong-doer may be ordered in a *civil* action to *make compensation* to the injured party, and may also be punished by a *criminal* Court and ordered to be imprisoned or fined.

Discuss : Distinction between tort and crime.

B.U. Apr. 90

Define "tort" and bring out the distinction between tort and crime.

P.U. Oct. 91

TORT AND *BREACH OF CONTRACT* DISTINGUISHED

Both tort and breach of contract are alike, inasmuch as in both, there is an *infringement* of *private* rights. Moreover, in both, action is taken by the *person injured*, and the remedy is by way of *compensation* or *damages*. The following are, however, *seven* points of difference between the two :

1. Nature of right infringed

A tort is violation of a right *in rem*, *i.e.*, a right exercisable against the *whole world*, whereas a breach of contract is an infringement of a right *in personam*, *i.e.*, a right exercisable against a *definite person or persons*.

"A tort is a violation of a right in rem, i.e. of a right vested in some determinate person." Explain, and bring out the difference between a tort and a breach of contract.
B.U. Apr. 95
Oct. 97

A *right in rem* is a right available against the whole world. Thus, every person has a right *not* to be defamed or assaulted, and this right is available to him, *not* against particular persons like *X, Y* or *Z*, but against *everybody in general*. A tort is always a violation of such *rights in rem*.

As opposed to this, a *right in personam* is available and enforceable only against a particular person or persons. Thus, if *X* enters into a contract with *Y*, and *Y* fails to fulfil the terms of the contract, *X* has a personal remedy against *Y*, and strangers to the contract are in no way concerned with the same. A contract always gives rise to a personal right, *i.e., a right in personam.*

2. Duty

In the case of a *tort*, the duty is imposed by the *law*, and is owed to the *society in general*; in the case of a *contract*, the duty is *fixed* by the will and consent of the *parties*, and it is owed to a *definite person or persons*. It must be remembered that when parties enter into a contract, they create for themselves rights and duties under such a contract.

3. Consent

In a contract, the obligation is founded on the *consent* of the parties. In a tort, the obligation arises *independently of any consent*, *i.e.*, a tort is inflicted *against* the will and without the consent of the other party. Thus, if *X* assaults *Y*, without any lawful cause or excuse, *X* commits a tort. Here, the duty imposed *i.e.*, the duty *not* to cause unlawful harm to another person, is a duty imposed by law. But if *X* agrees to sell 10 bales of cotton to *Y*, and later, fails to perform the contract, the case is one of a breach of contract. Here *X* owes a duty *only* to *Y*, and *not* to the community at large.

4. Privity

In a contract, there must always exist *privity* between the parties, *i.e.*, a *binding legal tie* between them. No such privity exists in tort, where the harm is always inflicted *against* the *will* of the party injured.

5. As to damages

So far as *damages* are concerned, there are *three points of difference* between a tort and a breach of contract.

(a) Measure of damages

In a tort, the measure of damages is *not* limited or fixed with precision. The Court may award any sum of money as it thinks fit and just. In other words, in case of a tort, the suit is for *unliquidated* damages. In a breach of contract, the measure of damages is determined either by an agreement between the parties or according to fixed legal principles. The suit, therefore, is for *liquidated* damages.

(b) Remoteness of damages

The rules as to remoteness of damages in tort are different from those in contract. Thus, in tort, a man may be held liable for damages arising from special circumstances of which he had no knowledge. If there are special circumstances under which a contract was made, and they were wholly unknown to the party breaking the contract, he is *not*

liable for damages due solely to those special circumstances. *(Hadley v. Baxendale,* (1854) 8 Ex. 341)

(c) Exemplary damages

In a breach of *contract,* exemplary damages are normally *not* awarded, whereas in tort, exemplary damages can be given in a fit case. [*Exemplary* (or *punitive*) damages are sometimes referred to (especially in the U.S.A.) as *"smart money".*]

6. Starting point of the period of Limitation

In a contract, for purposes of considering whether a suit is time-barred, time runs from the date of the breach; *in tort,* it *usually* runs from the date when the damage is suffered.

7. Motive

In the case of breach of contract, the *motive* of the defendant is generally immaterial, while in the case of a tort, it is often (though not always) taken into consideration.

Tort combined with a breach of contract

It sometimes happens that the *same* set of facts may give rise to an action in *contract* as well as in *tort.* In fact, there are certain cases of breach of duty which may give rise *simultaneously* to an action in *tort and* also to an action *in contract, e.g.,* a *breach of duty* arising in the course of the employment of an *attorney,* or a surgeon, or a *carrier.* In these cases, the injured party may, at his option, file a suit under the law of contracts for the *breach* of the *particular* undertaking, *or* in *tort* for the *injury caused.* For instance, a physician, who causes injury to a patient by negligently administering him a poisonous drug, is liable *both* in tort *and* in contract. In such a case, it is open to the patient to sue the physician *either* for the tort, *or* for the breach of contract, *or* for *both.*

Similarly, where a person goes to the defendant, a dentist for having her tooth extracted by the defendant's (so-called) painless process, and the defendant extracts the tooth so unskilfully that portions of the tooth are left in the jaw, with the result that the person suffers acute pain, an action *can* lie in *tort* for *negligence,* as well as in *contract* for *breach* of the *undertaking.*

Or, take the case of the father who employs a surgeon to treat his son, and the son is injured by the surgeon's carelessness. Here, the father can sue the surgeon *for breach of contract.* However, as there is no contract between the son and the surgeon, the son can sue him only in *tort.*

But, when the relationship does *not give* rise to any *duty of care to the plaintiff,* no action in tort can be maintained. Thus, where a message is delivered by a telegraph company by mistake to a person for whom the message was not intended, and who in consequence suffers damage, no suit will lie, for *there is no privity of contract between the parties,* nor is any duty of care cast upon the telegraph company *independent of contract.*

In *Dickson* v. *Reuter's Telegram Co.,* (1887) 3 C.P.D.1, *A* sent a telegram to *B* for the shipment of certain goods. The telegraph

company, mistaking the address of *C* for that of *B,* delivered the telegram to *C,* who acting on the telegram, sent the goods to *A. A* refused to accept the goods, stating that he had ordered the goods, not from *C,* but from *B. C* sued the telegraph company for damages for the loss suffered by him. In the circumstances, the Court *held* that *C* had *no* cause of action against the company, for the company did not owe any duty of care to *C,* and no legal right of *C* was infringed.

FELONIOUS TORTS

Merger of tort in felony

Write a short note on : Felonious torts.
P.U. Oct. 93
Oct. 94

As seen earlier, the *same* wrongful act may sometimes constitue *both a tort and a crime, e.g.,* assault, defamation, malicious prosecution, etc. Assault is *a civil* wrong, *i.e.,* a *tort* when looked at from the point of view of *an individual,* it being a violation of the right of every person to his *personal* safety being preserved unmolested. But, at the same time, such an act of violence is looked upon as a *menace to the safety of society in general.* It will, therefore, be *punished* by the *State as a crime.* In all such cases, there are *two* different kinds of *remedies — civil and criminal.* The wrong-doer may be *punished criminally,* and he may also be compelled in a civil action to pay damages to aggrieved party. Now, where an act is *both* a tort *and* a felony (crime), it is called a *'felonious tort'.*

Explain the doctrine of "the merger of a tort in felony".
B.U. Oct. 93

It was at one time supposed that there could not be a *double* proceeding, civil *and* criminal in respect of the *same act.* If the act was a *felony,* it was said that it *drowned* the particular *private wrong.* This doctrine of *merger of tort in felony* prevailed for a considerable time, but subsequently it was modified, and it was held that the civil remedy was *suspended* until the wrong-doer was *prosecuted. (Wills* v. *Abrahams,* (1872) 7 Q. B. 554)

Thus, the later view, which prevailed till 1967, was that an action for damages based on a *felonious act* of the defendant was *not* maintainable until the defendant was prosecuted, or alternately, a reasonable excuse was shown for his not having been prosecuted. Thus, in *Smith* v. *Selwyn* [(1914) 3 K. B. 98], it was *held* that where a suit was filed without instituting a criminal prosecution against the wrong-doer, the civil proceedings (for tort) would have to be stayed. The *sole object* of this rule was to guard against stiffling prosecutions.

Under this rule *(which prevailed prior to 1967),* the following *five exceptions* were made. In other words, in the undermentioned *five* cases of felonious torts, a civil suit for damages *was* maintainable, even in the absence of a criminal proceeding :

(i) Cases of misdemeanours.

(ii) Cases where the plaintiff was *not* the person injured by the felonious act of the defendant, as for instance, when a father sues for the seduction of his daughter.

(iii) Cases where the defendant himself is *not* the person guilty of the crime, as for instance, when stolen goods are recovered from an innocent purchaser, though the thief is not yet caught.

(iv) Cases where, despite the due diligence of the plaintiff, prosecution of the offender has not been possible, as for instance, when the latter has escaped and is not traceable.

(v) Suits filed in *England* under the Fatal Accidents Act, 1846.

However, this common law rule has now been abolished in England by the Criminal Justice Act, 1967. In other words after 1967, *it is no longer necessary to prosecute the felon before suing him in tort for damages.*

Application of the doctrine in India

In India, this artificial rule (of merger of tort in felony) has *not* been accepted, and it has been *held,* in many cases, that an injured person *can* maintain an action for damages for a wrongful act, even though it amounts to a crime, *without* first instituting criminal proceedings against the offender. (*Abdul* v. *Mera,* (1881) 4 Mad. 410).

In India, there is no law which requires an injured person to institute criminal proceedings before bringing an action in tort. (*Jina* v. *Jodha,* (1863) 1 M. H. C. 1)

In fact, it has rightly been observed that it is difficult to reconcile this artificial rule of English law with the provisions of our Civil Procedure Code.

There is, however, an *old case* decided by the Calcutta High Court, where it was observed that where a person brings such a suit, he must show that he has done his best to procure a conviction on the criminal charge, before the Civil Court will entertain such a suit. (*Coonamull* v. *Sarno Raws,* 1867, 2 Ind. Jus. N. S. 187)

WAIVER OF TORT

There are some cases in which a party is allowed to treat that which is purely a tort, as having created a contract between himself and the wrong-doer, and is allowed to waive his right to sue in tort, and instead, pursue his remedy for breach of the supposed contract. Thus, if a man is wrongfully deprived of his goods, which are afterwards sold away, he may bring an action for damages in tort, *or* he may file a suit for the price received by the defendant. Such cases are, however, not many, and when a man selects one remedy and *waives* the other, he is deemed to have made an election, and he *cannot* afterwards pursue the remedy waived by him. Of course, it will be a question of fact in each case, whether there is an act which amounts to a final *election* as to the remedy to be pursued.

Waiver may be *express or implied.* It is said to be *express,* when the person entitled to a right in terms gives it up; it is said to be *implied* when such person does, or acquiesces in, something else which is inconsistent with that to which he is entitled.

Write a short note on: Waiver by election.
P.U. Oct. 96

It may be noted that the expression *"waiver of tort"* does *not* mean that the *tort* itself is waived; it is only the *right to recover damages for the tort* that is waived.

2

CONSTITUENT ELEMENTS OF A TORT

THREE INGREDIENTS OF A TORT

In order that a particular act may amount to a tort, *three conditions* must be satisfied. In other words, there are *three main ingredients* which constitue a *tort,* which are as follows :

What are the essential ingredients of a tort ? Discuss in light of two maxims, with case - law.
P.U. Apr. 94

1. A wrongful act by the defendant

First of all, a *wrongful act* should have been committed by the defendant. An act is *wrongful* if it invades any of the *three* private rights of a person, *viz.,* his right to-*(i)* good *reputation, (ii) property,* and *(iii)* his right of bodily *safety* and *freedom.*

WRONGFUL ACT - A wrongful act is an act *contrary* to the rule of *right* and *justice.* It may be of *two* kinds : *(i)* a *moral* or *natural* wrong, *i.e.,* an act which is *morally or naturally* wrong, being contrary to the rules of *natural justice; or (ii) a legal* wrong i.e. an act which is legally wrong, being contrary to the rules of *legal* justice and a violation of the law. A legal wrong is an act which is authoritatively determined to be wrong by a *rule of law,* and is therefore treated as a wrong for the *purpose of the administration of justice* by the State. The essential of a legal wrong consists in its recognition as a wrong *by the law.* It is synonymous with *injuria,* that is, the violation of a legal right. A mere loss without the violation of a legal right does *not* give rise to a cause of action. A wrongful act is actionable *(i.e.* a suit can be filed for such an act) *only if* the wrong complained of is a *legal wrong,* and not otherwise. [See the maxim, *"Injuria sine damnum",* discussed below.]

Define "tort", and explain its essential characteristics.
P.U. Apr. 95

2. Legal remedy

The *second ingredient* of a tort is that such a wrongful act should give rise to a legal remedy in the shape of a *suit for damages.* In other words, the act complained of must fall under the category of civil wrongs, for which the law allows a civil suit to recover damages.

As stated above, a tort is a civil injury. However, *all* civil injuries are *not* torts. The wrongful act must come under the category of wrongs for which the remedy is a civil action for damages. No doubt, the law of torts also recognises other remedies, like injunction and specific restitution of property. However, it is principally the *right to damages* that brings such wrongful acts within the category of torts.

3. Legal damage to the plaintiff

Lastly, there must be *legal damage* to the plaintiff. Legal damage means an invasion of a person's *legal* right. Unless and until a person's *legal right* is violated, a tort does *not* arise. A person may be exercising his

own right, and in the course of doing so, he may cause pecuniary loss to some other. But if that loss is *not* a violation of a legal right, the wrong is *not* a tort.

As the Privy Council observed in *Rogers* v. *Rajendro Dutt* (1860) 8 M.I.R. 103, "The foundation of every action in tort ....is an act which is wrongful, and which may be qualified legally as an injury."

Thus, harm done to a person *in a moral sense will not* be enough, *unless* such harm or damage is also recognised *legally* as affording grounds for relief.

TWO KINDS OF *INJURIA*

Damnum sine injuria

At the outset, *two important terms* used in the law of torts need to be clarified. By *damnum* is meant damage in the ordinary sense *(i.e.,* as the layman understands it.) This may be a loss of money, physical hurt, loss of health or service, or the like. By *injuria* is meant a legal injury. I.e., a tortious act. This *injuria may or may not* be accompanied by *damnum, i.e.,* actual loss or damage.

The maxim "*damnum sine injuria*" refers to damage which is inflicted *without* infringement of any legal right. Where there is no infringement of a *legal* right, the *mere* fact of *harm* or *loss* resulting from an act or omission will *not* render such act or omission *wrongful,* even though the loss is *substantial,* nay, even *irreparable.* Damage thus suffered in the absence of the violation of any *legal right* is known as *damnum sine (or absque) injuria.*

Every possible form of harm or damage is *not* recognised by the law. The law takes no account of several forms of harm. Thus, for instance, a violation of the rules of ethics does *not* always amount to an infringement of legal rights.

In order to make a person liable in law, the plaintiff must, therefore, prove *legal injury.* Damage without injury *(damnum sine injuria) is not actionable.* There are many acts which though harmful, are *not wrongful* in the eyes of law, and therefore, do *not* give rise to a right of action in favour of the person who sustains the harm. No one is to be considered a wrongdoer who *merely* avails himself of his *legal* rights, though his action may result in damage to another. Hence the dictum, "You must have injury *as well as* damage."

In cases of *damnum sine injuria, i.e.,* actual and substantial loss without infringement of any legal right, *no action lies, i.e.,* no suit can be filed. Mere loss of money or money's worth does *not,* of itself, constitue legal damage. The most terrible harm may be inflicted by one man on another *without legal redress being obtainable.* There are many acts which, though harmful, are not wrongful and give no right of action. *Damnum* may be *absque (i.e.* without) *injuria.* Thus, if *X* has a flour mill, and his neighbour sets up another mill, and thereby the profits of *X*'s mill fall, *X cannot* bring an action against the neighbour; and yet *X* has suffered substantial damage. But if the other mill-owner hinders the water from running to *X*'s mill, or causes any other like nuisance, *X* will have a legal remedy against the other person.

"Every injury imparts damage, but every damage is not injury." Discuss the statement in the light of decided cases.
B.U. Apr. 90
Apr. 97

Principle of the maxim

The cases which illustrate the maxim, *damnum sine injuria,* are based on various grounds, but the *general principle* is that the exercise of one's *common* or *ordinary* rights, *within reasonable limits,* does *not* give rise to an action in tort, *merely because* it causes *damage* to another. The *reason* underlying it is simple, *viz.,* that it would be impossible to carry on the common affairs of life without doing various things which are more or less likely to cause loss or inconvenience to others. In every civilised society, the exercise, however legitimate, by each member of his particular rights, or the discharge, however, legitimate by each member of his particular duties, can hardly take place without occasionally causing a conflict of interest which will be detrimental to some.

A few cases where the Courts have recognised this maxim may now be discussed.

Write a short note on: Gloucester Grammar School case.
B.U. Apr. 94
Oct. 96
P.U. Apr. 92
Oct. 94

GLOUCESTER GRAMMAR SCHOOL CASE - (1410 Y.B. 11 Hen. IV) — The defendant, a schoolmaster, set up a rival school next to that of the plaintiff, with the result that the boys from the plaintiff's school flocked to the defendant's. The plaintiff sued the defendant for the loss. It was *held* that no suit could lie, because *bona fide competition can afford no ground of action, whatever damage it may cause.*

Violation of legal rights, and not damage, is necessary to an action for unliquidated damages. Discuss this statement in the light of two maxims, with one case law for each maxim.
B.U. Oct. 93

It may be noted that although free and *fair* competition is allowed, a competition in which the *legal* rights of a rival are infringed, will be a good ground of action. Thus, an action lies against a person for causing injury to another by *illegally interfering* with the latter's trade, business or employment. Thus, in the *Gloucester Grammar School case* (above), *if* besides setting up a rival school, the defendant had interfered with the plaintiff by *illegal* means, as for example, by procuring a person to *waylay* children going to the plaintiff's school, *or* by *intimidating* them so that they cease to go there, the defendant would have been liable. In such a case, the plaintiff would be entitled to damages, or injunction, or both.

PROBLEM — "Best Coaching Classes" were started in the vicinity of "Sucess Coaching". As a result, the latter had to close down their classes. Can Success Coaching Classes take any action in the matter ?

Ans. — No. Free and fair competition does not amount to a tort, even if actual loss is caused thereby. It is a case of *damnum sine injuria.* (See *Gloucester Grammar School's case,* above.)

Explain the rule laid down in : Moghul Steamship. Co. v. McGregor.
P.U. Oct. 93

MOGHUL STEAMSHIP CO. v. *McGREGOR,* (1892) A.C. 25 (*Shipowner's case*).- This case affords another interesting illustration of *damnum sine injuria caused by fair competition.* In the case *A, B, C* and *D,* shipowners, who shipped tea from one port to another, combined together to drive *F,* a rival shipowner, out of the trade, by offering special terms to customers who would deal with them to the exclusion of *F. F sued A, B, C,* and *D* for the loss caused to him by their act. It was *held* that *F* had no right of action, for no legal right of *F* had been infringed. Damage caused by competition in trade is not actionable. (To-day, however, such trade combines are controlled by legislation relating to monopolies and restrictive trade practices, as for instance, the M.R.T.P. Act in India.)

CHASEMORE v. *RICHARDS*, (1895) 7 H.L.C. 349 *(Watermill case).*— In this case, the plaintiff was the owner of an ancient water-mill. For more than 60 years, the occupier of the mill had been using and enjoying the flow of a river for the purpose of working the mill. The Local Board of Health (whom the defendant represented) sank a well in their own land and pumped up large quantities of water, with the result that percolating underground water which would have found its way to the river and helped to work the plaintiff's mill, was obstructed, and with the diminution of water in the river, the plaintiff found it impossible to work his mill. The plaintiff sought to make the defendant liable, but the Court *held* that the doing of an act which is otherwise lawful *cannot* give rise to an action in tort, however much it may be attended with loss to the party complaining.

The real significance of legal damage is illustrated by the maxims, "Injuria sine damnum" and "Damnum sine injuria.".

B.U. Apr. 94
P.U. Oct. 96

As the Privy Council pointed out, in *ROGER* v. *RAJENDRA DUTT*, (1860) 8 M.I.A. 103, "it is essential to an action in tort that the act complained of, should under the circumstances, be *legally* wrongful as regards the party complaining. That is, it must prejudicially affect him in some *legal right."*

In one *interesting case decided* by the Gujarat High Court, a suit was filed against the Producer, Writer, Director and Distributor of a Hindi film, *"Jai Santoshi Ma",* on the ground that certain scenes in the movie would hurt the religious feelings of persons having an interest in Hindu religion and mythology. The *Court held* that the courts of law have *not* recognised hurt to religious feelings as a civil actionable wrong. It was, therefore, *held that no legal right of the plaintiffs was infringed.* The Court observed that the mere fact that the defendants' movie might have shocked the religious sentiment of the plaintiffs is *not* itself a matter which would give rise to a cause of action. *(Ushaben Trivedi & Another* v. *Bhagyalaxmi Chitra Mandir & Others,* A.I.R. 1978 Guj. 13)

Write a short note on : Damnum sine injuria.

P.U. Oct. 92

In another case, the principal of a college, mis-interpreting the regulations of the Board of Education, detained a student for shortage of attendance. Later, his detention was found by the Court to be illegal, but, by then, the student had already lost one year, and filed a suit for compensation for such loss of a year. The Court observed that every breach of a legal provision does *not* give rise to an action in tort, and the mere fact that the Principal had mis-interpreted the regulations did *not* mean that he had committed an actionable wrong. It was, therefore, *held* that the suit was *not* maintainable. *(V. D. Sharma* v. *Board of High School & Intermediate Education & Others,* A.I.R. 1981 All. 46)

EARL COWLEY v. *COUNTESS COWLEY,* (1901) A.C. 405. — Miss *X,* a commoner, married a peer. Earl Cowley, and thereby acquired the title of Countess. However, even after the marriage was dissolved by the Court at her own instance, she continued to use the title. On a suit filed by her ex-husband, the Court *held* that although she did not have a legal right to do so, she did *not* thereby commit such legal wrong against her former husband, which would entitle him to an injunction to restrain her from using the title.

BUTT v. *IMPERIAL GAS CO.,* (1866) L.R. 2 Ch. App. 158.— Mr. *B* carried on his business in a shop which had a board to indicate the materials in which he dealt. Under certain statutory powers, a Gas Company erected a gasometer, which obstructed the view of his premises. Mr. *B* sued the Gas Company for an order of the Court restraining the company from erecting the gasometer. The Court *held* that no injunction could be granted for the injury complained of.

DHADPHALE v. *GURAV,* (1881) 6 Bom. 122.— This was a case where the servants of a Hindu temple had a right to get the food offered to the idol, but the person who was under an obligation to the idol to offer food, did not do so. The servants brought a suit against him for damages. It was *held* that the defendant was under no legal obligation to supply food to the temple's servants, and though his omission to supply food to the idol might involve a loss to the plaintiffs, it was a case of *damnum absque injuria,* and the plaintiffs could *not,* therefore, maintain the suit.

ROUSE v. *GRAVEL WORKS LTD.,* (1940) 1 K.B. 489 *(Gravel case).*— The plaintiff owned a field which he cultivated. The defendants were the owners of adjoining land containing gravel, which they excavated in the course of their business as gravel merchants. The excavated area, which was close to the boundary of the plaintiff's land, became filled with water by rain and percolation, thus forming a pond. The water, by being blown against a strip of the plaintiff's land by wind, removed some material from the land, deprived the land of lateral support, and prevented the plaintiff from making a profitable use of the strip. In an action (suit) by the plaintiff for damages, it was *held* that the defendants had a legal right to excavate the gravel on their land, and the accumulation of the water in the excavation and its effects upon the plaintiff's land were caused, *not by* the direct action of the defendants, *but by* the natural agencies of rains, percolation and wind, over which the defendants had no control, and for which they were *not responsible.*

DAY v. *BROWNING,* (1878) 13 Ch. D. 394 (*'Ashford Lodge'* case).— The plaintiff's house was called "Ashford Lodge" for sixty years, and the adjoining house belonging to the defendant was called "Ashford Villa" for forty years. The defendant then altered the name of his house and called it Ashford Lodge. The plaintiff alleged that this act of the defendant had caused him great inconvenience and annoyance, and had materially diminished the value of property. It was *held* that the defendant was *not liable,* as he had not violated any legal right of the plaintiff.

Legal damage is neither identical with actual damage, nor is it necessarily pecuniary. Discuss in detail with case law.
B.U. Apr. 91
Apr. 92
Oct. 94
P.U. Oct. 93
Oct. 97

PROBLEMS. 1. *A* was a manageress of Jay Ltd., a firm dealing in ladies' clothes. For several years, *A* was known to her customers as Miss Jay. *A,* after leaving service of Jay Ltd., started a rival establishment in the name of Miss Jay. On seeing this, Jay Ltd., sued *A* for deceptive use of their trade name. Advise *A.*

Ans.— In these circumstances, *A* will succeed, as it is a case of *damnum sine injuria.*

2. A University, through oversight, did not place the name of a student who had in fact passed the examination, in the list of successful candidates published by the University. Can the student sue the University for a declaration that he has passed the examination ?

Ans. :— The Allahabad High Court has *held* that, in such a case, the student *cannot* maintain such an action, because no action will lie to vindicate a right to mere dignity, unconnected to any fees or profits. (*Ram Sing* v. *Benares Hindu University,* (1924) 47 All. 434)

Injuria sine damnum (or damno)

This maxim is just the *reverse* of the maxim discussed above. This maxim refers to *injury without damage.* Whenever there is an invasion of a legal right, the person in whom the right is vested, is entitled to bring an action, and may recover damages, *although he suffered no actual harm.*

Where a tort is actionable, *although it has not been the cause of any actual damage,* it is a case of *injuria sine damno (i.e.,* infringement of *legal right without damage).* Actual perceptible damage is *not,* therefore, *indispensable;* it is sufficient to show the *violation of a legal right,* in which case, the law will *presume* damage. Thus, in cases of assault, battery, false imprisonment and trespass on land, the *mere wrongful* act is actionable, *without proof of any actual damage.* Every invasion of private property, be it howsoever minute, is a *trespass,* though there may be no actual damage. Similary, libel (written defamation) is actionable, even though person defamed may *not actually have suffered even the slightest harm.*

ASHBY v. *WHITE,* (1703) 2 Ld. Raym. 938 *(Refusing to register vote).* — In this case, *which is one of the leading English cases illustrating the maxim,* the defendant, a returning officer at a voting booth, *wrongfully and maliciously refused* to register a duly tendered vote of the plaintiff, who was a qualified voter. The candidate for whom the vote was sought to be tendered was, however, elected, and no actual loss was suffered by the rejection of the plaintiff's vote. The Court *held* that nevertheless an action lay. The action was allowed on the ground that the violation of the plaintiff's statutory right was an *injury* for which he must have a remedy, and was actionable *without* proof of actual damage.

Write a short note on:
Ashby v. *White.*
B.U. Oct. 95
Oct. 96
Oct. 97
P.U. Oct. 95
Apr. 96

Discuss : Ashby v. *White.*
B.U. Oct. 92

In *Ashby* v. *White* (above), the returning officer had acted with malice. Where, however, the returning officer had acted without any malice or improper motives, and had honestly refused to accept the vote of a genuine voter, it was held that he could *not* be sued in tort. (*Tozer* v. *Child,* 1857, 7 El & B 377)

The ruling in *ASHBY* v. *WHITE,* has been followed in India in *THE MUNICIPAL BOARD OF AGRA* v. *ASHARFILAL* (1921 44 All. 202). In that case, it was *held* that if a voter's name is wrongly omitted from the electoral roll, he suffers a legal wrong, for which he can file a suit.

Courts in India have taken the view that, in such cases, express malice need *not* be proved. If it is shown that the refusal to register a vote is not in good faith, the returning officer would be liable in tort. (*Draviam Pillai* v. *Cruz Fernandes,* AIR 1916 Mad. 569)

In an interesting *American case (Morningstar* v. *Fafayette Hotel Co.,* 211 N.Y. 465, 105 N.E. 656), the plaintiff, who was a guest at the

defendant's hotel, was fed up with the food served at the hotel, and so, he purchased some spare ribs outside the hotel, and gave them to the hotel chef to be cooked and brought to his room. This was done, but the spare ribs were accompanied by a bill for one dollar, which the plaintiff refused to pay. The following morning, the plaintiff was publicly informed at the breakfast table that he would not be served. The plaintiff sued for wrongful refusal of service, including damages for humiliation and injury to his feelings. The Court *held* in favour of the plaintiff, on the ground that his legal right had been infringed. *Cardozo J.* in the course of the judgement observed as follows :

> "It is no concern of ours that the controversy at the root of this law suit may seem to be trivial. However, to enforce one's rights when they are violated is never a legal wrong, and may often be a moral duty."

MARZETTI v. *WILLIAMS* (1830 1 B. & Ad. 415) *(Bankers' case).* — An action will lie against a banker, having sufficient funds in his hands belonging to a customer, for refusing to honour the customer's cheque, although the customer may *not* thereby sustain any actual loss *or* damage. In this case, a banker, having such funds, refused to honour his cheque. Although the customer did *not* suffer any actual loss, the Court *held* that he was entitled to damages.

The *result of the two maxims* is that there are *moral* wrongs for which the law gives *no legal remedy*, though they cause *great loss or* detriment; and, on the other hand, there are *legal* wrongs for which the law *does* give a *legal* remedy, though there is only violation of legal right, *without* actual *loss or detriment.*

TWO KINDS OF TORTS

Torts are of *two kinds* — those which are actionable *per se (i.e., without* proof of any actual damage) and those which are actionable *only on proof of actual damage* resulting therefrom.

(a) Tort actionable *per se*

In the case of torts which are actionable *per se,* the defendant is liable merely because he does a particular act, *even though the plaintiff has not suffered the slightest harm.* The act of trespassing on another's land is actionable, even though the plaintiff does *not* suffer the slightest harm and no actual damage is done to the land. So too, trespass to the person, even though it is only a technical assault which causes no damage, gives rise to a right of action. Similarly, libel is actionable *per se.* In these cases, the law conclusively *presumes* damage.

(b) Torts which are actionable only on proof of actual damage

However, in the case of torts which are actionable only on proof of actual damage, the defendant will be held liable *only if,* in consequence of his act, *damage is inflicted on the plaintiff.* Thus, the tort of slander is, in most cases, *not* actionable without proof of *special damage.*

UBI JUS IBI REMEDIUM

Meaning of the maxim

Discuss : Ubi jus ibi remedium.
B.U. Apr. 91

Write a short note on : Ubi jus ibi remedium.
B.U. Apr. 92
Oct. 94
P.U. Oct. 91

Closely connected with the topics of *damnum* (actual damage) and *injuria* (legal harm) is the maxim *ubi jus ibi remedium.* The maxim means that "whenever there is a *legal* right, there is a *legal remedy",* or as it is sometimes expressed, "there is no wrong without a remedy". '*Jus*' means the legal authority to do or demand something, and *'remedium'* means the right of action in a Court of law. The *principle* is that if a man has a right, he must, of necessity, have a means to *vindicate* or *maintain* it, and a remedy, if he is injured in the exercise or employment of it; and it is a vain thing to imagine a right *without* a remedy, for want of right and want of remedy are *reciprocal.* It must not be forgotten that in such a *case, both the right* infringed and *the remedy* sought should be *legal.*

In a way, the law of torts owes its development to this maxim. However, the maxim does *not* lay down that there is a legal remedy for *every* wrong. There are many moral and political wrongs which are *not* recognised by law — and are therefore *not* actionable. A cruel war may raze houses to the ground, *or* oppressive legislation may reduce men to moral slavery, *or* a contract required to be made on a stamped paper may be made orally;— in all these cases, irreparable harm may be caused, and yet, a legal remedy may not be available. Thus, the maxim does *not* mean that there is a legal remedy for *every* moral or political wrong. It has, therefore, aptly been remarked by *Justice Stephen* (in an English case) that the maxim would be more intelligibly and correctly stated if it were to be *reversed* to say that "where there is no legal remedy, there is no legal wrong."

EX TURPI CAUSA NON ORITUR ACTIO

As seen above, the damage sustained by the plaintiff must be a *legal damage...* an *injuria.* If the damage is in any manner tainted with *immorality,* no cause of action can be maintained.

The maxim *ex turpi causa non oritur actio* means that an action does *not* arise from an immoral or a base cause. Thus, if *P* is infected by *D,* her paramour, with a venereal disease, the existence of which was concealed by *D, P* is *not* entitled to sue *D,* because an action does *not* arise from an immoral cause : *Hegarty* v. *Shine,* (1878) I Cox C.C. 145.

It must, however, be noted that despite the maxim, *ex turpi causa non oritur actio,* the mere fact that the plaintiff is also a wrong-doer is no *general* defence. If it were otherwise, absurd consequences would follow, and, to take the example of *Winfield,* if *X* stole a bottle of whisky from *Y,* the latter would not be able to maintain an action, if it turned out that *Y* had purchased the bottle on a "dry" day.

It is one of the well-established maxims of equity that he *who seeks equity must come with clean hands.* However, this does not mean that the plaintiff should have led an absolutely blameless life. The plaintiff will not be barred from suing, unless, in the words of *Sir Frederic Pollock,* "some unlawful act or conduct on his own part is connected with the harm suffered by him *as part of the same transaction."*

MALICE

Write a short note on : Malice in fact.
P.U. Apr. 93
Apr. 97

Write a short note on : Malice in law.
P.U. Apr. 94

The word "malice" is a very slippery word, and its use in legal parlance is, at times, ambiguous.

The term *malice* is used *in two quite different senses* in the Law of Torts : (1) In its *ordinary* sense, it means *ill-will, spite or hatred.* Such malice is called *express* malice or *actual* malice, or *malice in fact.*

(2) Legal *malice* or *malice in law, means any wrongful* act done *intentionally without just cause or excuse.*

As was observed by Bayley, J. in *Bromage* v. *Prosser,* (1825) 4 B.C. 247, "Malice, in common acceptance, means ill-will against a person, but in its legal sense, it means a wrongful act done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it out of *malice,* because I do it intentionally and without just cause or excuse. If I maim cattle without knowing whose they are, if I poison a fishery without knowing the owner, I do it out of *malice,* because it is a wrongful act, and done intentionally."

(a) Malice in fact (express malice)

A *lawful* act does *not* become unlawful *merely* because it is done *with a bad motive or with malice;* conversely, a good motive is *no justification* for an act which is otherwise *illegal.* "Where a man has a *right* to do an act, it is not possible to make his exercise of such right actionable by alleging or proving that his *motive* in the exercise was *spite* or *malice* in the popular sense." (Bowen Ja)

In law, malice depends, *not* on the evil motive which prompted the doer of the act, *but* upon the unlawful character of the act committed. As *Cooly J.* once remarked, "Malicious motives make a bad case worse, but they cannot make that wrong which is, in its essence, lawful."

Torts in which malice is an essential element are :

(1) Defamation,
(2) Malicious prosecution,
(3) Wilful and malicious damage to property,
(4) Maintenance, and
(5) Slander of title.

Thus, in an action of defamation, where a defendant pleads qualified privilege, the plaintiff can repeal this defence by proving *malice in fact.* So, it is *not* correct to say that malice *is entirely irrelevant* in the Law of Torts. Moreover, damages may be aggravated by the evil motive with which the defendant acted.

The following is an illustrative case on the above-mentioned principle, viz., that a *lawful* act does *not* become unlawful *merely* because it is done with a *bad motive* or *malice.*

MAYOR OF BRADFORD v. *PICKLES,* (1985) A.C. 587. — In this case, the defendant sunk a well on his land, and thereby cut off the underground water from the plaintiff, his neighbour. The plaintiff's well, in consequence, was dried up. In a suit by the plaintiff, it was *held* that the defendant was *not* liable, *however, improper and malicious his motive*

might be. It is *not* unlawful for a landowner to dig a well on his own ground, thus, drying up his neighbour's, even though his *motive* in so doing was not to benefit himself, but to *injure* the neighbour. A malicious motive *per se* (i.e., by itself) does not amount to an *injuria* or a legal wrong.

(b) Malice in law (implied malice)

As stated above, malice in law (also called *implied malice)* means a *wrongful* act done intentionally, without just cause or excuse. Thus, if one knocks down a perfect stranger on the road, without any excuse, and without knowing who it is, he would be guilty of *malice* (in the legal sense), because here is an act done intentionally and without just cause or excuse. Such malice is implied in every case where a person had inflicted injury upon another *in contravention of the law,* without just cause or excuse. A man may, therefore, be guilty of malice in law, even though he acts *ignorantly or innocently,* or *even with a good motive.*

The following case illustrates this principle :

QUINN v. *LEATHEM,* (1901) A.C. 495. — *A,* without just cause or excuse, induced *B*'s workmen to discontinue their work in breach of their contract with *B. A* did this, prompted by a good motive to do good to both, *B* and *B*'s workmen. It was *held* that, nonetheless, *A* was liable, inasmuch as the procurement of a breach of contract, without just cause, is a tort, and therefore, actionable.

MOTIVE

As a rule, *motive,* by itself, is *irrelevant* in the Law of Torts. An act which is lawful *cannot* become unlawful *merely* because it is done with an *evil motive;* see *Chasemore* v. *Richards,* discussed above. It is the act, and *not* the *motive* for the act, that is relevant. If the act, apart from the motive, gives rise merely to damage *without* legal injury, the motive, *however reprehensible it may be,* will *not* supply the missing element.

How far is motive relevant in an action in tort ? Will a bad motive render tortious, an act giving rise merely to damage without legal injury ?
B.U. Apr. 91

The best illustrative case on the point is one which has already been discussed above, namely, *Mayor of Bradford Corporation* v. *Pickles,* (1895) A.C. 587, — *X* made excavations on his own land with the intention of intercepting the underground water that would otherwise have flowed into the adjoining reservoir belonging to *Y. Y* brought a suit against *X* claiming damages and an injunction. It was proved at the hearing of the case that in making the excavation, *X* was actuated solely by the malicious motive of doing injury to *Y,* and thus coerce *Y* into buying *X*'s land.

The Court *held* that *X* was entitled to deal with his land as he liked. He could lawfully make excavation on it. *An act which is lawful cannot become unlawful, merely because it is done with a malicious motive.* It is the act, not the *motive* for the act, that must be regarded. No use of property, which would be *legal,* if due to a *proper motive,* can become illegal because it is prompted by a *motive* which is *improper* or even *malicious.* Therefore, the Court gave its judgement against *Y.*

Motive has been described as the *ulterior intent.* "Although the rule may be otherwise with regard to *crimes,* the law of England does *not* take into account motive as constituting an element of *civil* wrong. An invasion of the civil *rights* of another person is, in *itself,* a legal wrong carrying with

it liability to repair its necessary or natural consequences, in so far as these are injuries to the person whose right is infringed, whether the motive which prompted it be *good, bad* or *indifferent.*" (Lord Watson in *Allen* v. *Flood*)

On the other hand, a good motive will *not* excuse a person from liability, where the act is *prima facie a legal* injury, as will be clear from the following case.

The Case of Tithes' Imperilled (From *Kenny's Case of Torts,* p. 376)— The plaintiff was a village peasant. Due to his carelessness, the tithes (a tenth of the harvest) had been left in the fields. Finding that the corn was being eaten by horse, the defendant, solely with the benevolent object of helping the plaintiff, put the corn in the plaintiff's barn. The plaintiff sued the defendant for unlawfully interfering with his corn. The Court *held* that even a benevolent desire to protect another's property will *not* justify any interference with it. The judge observed that even though the defendant put the corn into the plaintiff's *own* barn, it might very well be that the plaintiff intended to reserve the barn for some other purpose.

The cases in which a bad motive may be relevant in law of torts are :

(1) Malicious prosecution,
(2) Defamation,
(3) Conspiracy, and
(4) Nuisance.

INTENTION

It is no defence to an action in tort for the wrong-doer to plead that he did not *"intend"* to cause damage, if damage has resulted owing to an act or omission on his part which is *directly the effect of his volition.* When the doer of an act adverts to a consequence of his act and *desires* it to follow, he is said to '*intend*' the consequence. A person who does a wrongful act *intentionally* would be liable in law. *Every man* is *presumed to intend the natural and ordinary consequences of his acts*, and this presumption is *not* rebutted by proof that he did not *think* of the consequences, *or* that he *hoped* or *expected* that they would *not* follow. The defendant will be liable for the *natural* and *necessary (not remote)* consequences of his act, whether he, in fact, *contemplated* them or *not.*

To take the classic example given by Prof. Street, if a man throws a stone at a woman, his act is *intentional.* If it turns out that he did so because she had jilted him, he would still be liable in tort, as that would only show his motive.

GUILLE v. *SWAN,* (1822) 18 Johns, 381 (*Balloon Case*). — The defendant, a balloonist, descended in the plaintiff's garden. A crowd of people broke into the garden, and considerable damage was done to the plaintiff's vegetables and flowers, *both* by the *balloon* and the *crowd.* The Court *held* that the defendant's descent was a *trespass,* and he was, therefore, liable for the damage done by the *balloon and* also by the *crowd.*

WILKINSON v. *DOWNTON*, (1892) 2 Q.B. 57 (*The Grey Hair Case*). — The defendant played a practical joke by falsely informing the plaintiff that the husband of the plaintiff had met with a serious accident whereby both his legs were broken. The plaintiff suffered a severe shock. She fell seriously ill, her hair turned white, and she was for some time in great danger of her life. In a suit by the plaintiff for damages for nervous shock, the question arose whether the defendant could be exonerated from liability on the ground that he had intended only to play a practical joke, and never intended the consequences, even though his act was wrongful. The Court *held* that every man must be presumed to intend the *natural* and *probable* consequences of his act, and if what followed from the defendant's words was the *natural* and *probable* consequence, the defendant could *not* escape liability. As a result, the plaintiff was awarded damages.

Write a short note on: Malfeasance, misfeasance and non-feasance.
B.U. Apr. 91
Apr. 93

MALFEASANCE, MISFEASANCE, NON-FEASANCE

Malfeasance is the commission of an unlawful act. It is generally applicable to those unlawful acts which are actionable *per se*, and do not require proof of negligence or malice. For example, *trespass* is malfeasance, and it is actionable *per se*.

Misfeasance is the improper performance of some lawful act. Even if a person has undertaken to do something gratuitously, if he commits a misfeasance, he is liable. (*Elsee* v. *Gatward*, (1763) 5 T.R. 143)

Non-feasance is the failure or omission to perform an obligatory act. Non-feasance of a gratuitous undertaking does *not* impose liability. But where there is an obligatory duty, and the failure or omission to do such duty causes injury to a person, it gives rise to a cause of action in favour of such individual towards whom the duty exists. In this respect, misfeasance and non-feasance give rise to a cause of action to the same extent.

3

DISABILITY TO SUE AND TO BE SUED

This chapter is discussed under the following *two* heads :

I. Who *cannot sue.*

II. Who *cannot be sued.*

1. WHO *CANNOT* SUE

Point out the persons who cannot sue in tort, owing to personal disability.
P.U. Apr. 91
Apr. 95

Who are the persons who cannot sue in tort owing to personal disability ?
B.U. Apr. 97

Ordinarily, *all persons* are entitled to sue in tort. But there are *seven exceptions* to this rule. These *seven* classes of persons *cannot sue* due to *personal disability :*

1. An alien enemy
2. Felons or convicts
3. Bankrupts
4. Husband and Wife
5. A corporation
6. A child *in his mother's womb*
7. Foreign State.

Each of these is discussed below in *necessary details.*

1. Alien enemy

An *"alien enemy"* is any person of enemy nationality, or a person (whatever his nationality) residing in enemy territory.

An alien enemy *cannot* sue. *In England*, he *cannot* maintain an action, *except* when duly *licensed* or by an *Order in Council,* or *unless* he comes into British Dominions under a flag of truce.

In India, an alien enemy can sue by obtaining the permission of the Central Government under S. 83 of the Civil Procedure Code.

2. Felons or convicts

A felon or convict is a person against whom a judgement of *death or penal servitude* has been pronounced on any charge of *treason or felony. In England*, a convict whose sentence was in force and unexpired and who was not lawfully at large could *not* sue for any damage to his *property* or for recovery of a *debt.* However, this disability was removed by the Criminal Justice Act, 1948.

In India, until 1921, certain offences entailed forfeiture of the property of the offender. But forfeiture has now been *abolished* except in three cases (contained in Secs. 126, 127 and 169 of the Indian Penal Code). A convict in India may sue for torts both to his *person* and *property.*

3. Bankrupts

A bankrupt is also under a disability to sue for wrongs in respect of his *property*, for, in bankruptcy, all his property vests in a Trustee in Bankruptcy according to English Law, and the Official Assignee or the Official Receiver (as the case may be) under Indian Law. So, under either system of law, the right of action for tort or injury to *property* will vest in the Trustee, Assignee or the Receiver for the benefit of the insolvent's creditors.

But in the case of *personal wrongs* (*e.g.*, assault, defamation, or seduction of servants), the right to sue is *not* taken away.

Where, however, a tort causes injury *both* to the *person* and *property*, the right of action will be *split*, and will pass, so far as it relates to *property*, to the *Trustee or Official Assignee* or the *Official Receiver*, and will remain in the *bankrupt*, so far as it relates to his *person*.

Write a short note on : Action between spouses.
P.U. Apr. 92

4. Husband and Wife

Formerly, in England, a *wife* could not sue her *husband* for a tort, nor could a *husband* sue his *wife*, following the principle of English law that husband and wife form, in the eyes of the law, *one person.* By virtue of the Married Women's Property Act, 1882, a wife could sue her husband for the protection and security of her *separate* property. But the husband had no such corresponding right against the wife. A wife could *not* sue her husband for his *ante-nuptial* tort; nor could she sue him for a *personal* wrong, such as assault, libel or injury caused to her by her husband's negligence. So, in those days, it was rightly said that a husband may, with impunity, break his wife's *wrist*, but *not* her *wrist-watch* ! So also, a divorced wife could *not* sue her husband for a *personal* tort committed *during* coverture (*i.e.*, while married).

The Law Reform (Husband and Wife) Act, 1962, made drastic changes in the English Law on the point, and under this Act, both a husband and a wife *now* have the same rights of action in tort against the other, as they would have if they had not married each other.

In India, the notion of the legal identity of husband and wife does *not* apply, and therefore, an action in tort by one against the other is maintainable.

Suit by one spouse against a third party for injury caused to the other spouse.— A recent (1974) American judgement of the California Supreme Court has laid down that a married partner can sue a third party for damages if the injuries to a spouse deprives him or her of conjugal fellowship and sexual relations. Overruling its own decision of 1958, the Court *held* that a wife can sue for the loss which she personally suffered because of injury to her husband. In this case, the 22-year old husband was paralysed for life when a 600-pound pipe fell on him. His 20-year old wife was held entitled to sue the third party (who was responsible for the mishap) for loss of earnings as a secretary, and the value of nursing care she had to provide for her husband.

5. Corporation

A corporation *cannot* maintain an action for *personal* wrongs, for, by its very nature, such injuries *cannot* be inflicted on a corporation. But, a corporation *can* sue for a *libel* affecting its *property* or *business.*

In general, a corporation may sue for any tort in the same way as an individual. The only *qualifications* are :

(i) The tort must *not* be of a kind which it is impossible to commit against a corporation, for example, assault or false imprisonment.

(ii) In case of defamation, it must be shown that the defamatory matter has a tendency to cause actual damage to the corporation in respect of its property or business. Thus, a trading corporation may maintain a suit if it is charged with insolvency or with dishonest management.

Can a corporation sue for defamation ?

A corporation may sue for a libel or any other wrong affecting its property or business. It *cannot*, however, maintain an action for personal wrongs, *e.g.*, libel charging, the corporation with corruption, for it is only *individuals,* and not the *corporation* in its corporate capacity, who can be guilty of such an offence. (*Mayor of Manchestor* v. *Williams*, (1891) 1 Q.B. 94)

The *case of the Mayor of Manchestor* (cited above) has recently been distinguished, and its ruling doubted in another English case, where it was *held* that a corporation has a right to sue, not only for a libel affecting its property, but also for one affecting its personal reputation. (*Bognor Regic UDC* v. *Campion*,) (1972) 2 All E.R. 61)

A corporation can, however, sue for defamation if the words, spoken or written, are defamatory when directed against an individual, *and* damage, actual or threatened, is suffered by the corporation. If a libel or slander affects the management of its trade or business, then the corporation itself can sue. Thus, a corporation *can sue* for defamation if it is charged with *insolvency* or with dishonest or incompetent *management.* In short, a corporation can sue for *any* tort, *except* one of a purely *personal nature.*

Unincorporated Associations and Trade Unions

An unincorporated association of persons is *not* a legal entity, and *cannot* sue or be sued as such. No action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of the trade union or its members as a body, in respect of any tortious act alleged to have been committed by or on behalf of the trade union can be entertained in any Court. (S. 4, Trade Disputes Act, 1906) This provision confers immunity on Trade Unions in respect of any tort, whether connected with a trade dispute or not, but the individual tort-feasors remain personally liable. It is to be noted, however, that this immunity does *not* extend to a strike or lock-out, (S. 1, Trade Disputes and Trade Unions Act, 1927)

6. Child in the womb

An infant can sue for any tort done to him,— subject to the procedural rule that he must sue by his 'next friend' or guardian; but he

cannot maintain an action for injuries sustained *en ventre sa mere*, (*i.e.*, when he was in the mother's womb).

WALKER v. *GREAT NORTHERN RAILWAY*, (1890) 28 L.R. Ir. 69— In this case, a pregnant woman was injured in a railway accident, as a result of which the child was born deformed. The Court *held* that the *child* could *not* maintain an action for damages. The decision was probably based on the ground that there was no duty of care to an *unborn person*.

(N.B.—When, however, a similar case arose in Canada, the Supreme Court of Canada granted compensation to the infant.)

7. Foreign State

In England, a foreign State *cannot* sue in any Court, *unless* such State has been recognised by Her Majesty.

In India under Sec. 84 of the Civil Procedure Code, a foreign State may sue in any Court in India, *provided that such* State has been recognised by the Central Government *and provided that* the object of the suit is to enforce a private right vested in the head of State or in any *officer* of such State, in his *public capacity*.

Generally, violation of a legal right gives rise to a cause of action. However, certain classes of persons cannot be sued even if there is a violation of a legal right. Discuss briefly the classes of persons who are entitled to claim this privilege. P.U. Apr. 97

II. WHO *CANNOT* BE SUED

There are nine classes of persons who *cannot* be sued in tort, *viz.* :

1. The Crown
2. Foreign sovereigns
3. Ambassadors
4. Public officials
5. Infants
6. Lunatics and drunkards
7. Corporations
8. Trade Unions
9. Married women.

1. The Crown (or Government)

ENGLISH LAW

Discuss fully the liability of the state for the acts of its servants in torts. B.U. Apr. 90, Oct. 91, Oct. 92, Apr. 95, Oct. 96, Oct. 97

An action for a *personal* wrong will *not* lie against the Sovereign, because under the famous English maxim. "The King can do no wrong". It follows, therefore, that the Crown *cannot* be sued for the tortious acts of its servants *acting in the course of their employment*. This law, has, however, been considerably modified by the Crown Proceedings Act, 1947, as discussed below.

The historic and jurisprudential support for the doctrine of State Immunity can be found in the following famous words of *Blackstone* in 1887 :

> "The king can do no wrong..... The king, moreover, is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing; in him is no folly or weakness".

Explain the position of a sovereign as a defendant in an action in tort.
P.U. Apr. 96

In the early twentieth century, the chief proponent of the doctrine of sovereign immunity was Mr. Justice Holmes, who (in *Kawanakoa* v. *Polybank*, (1903) 205 U.S. 349) observed as follows :

> "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."

Today, the ground of exemption stated by Justice Holmes (above) appears neither logical nor practical, and total immunity of the State from tortious liability is *not* acceptable in the modern context.

Effect of the Crown Proceedings Act

The Crown Proceedings Act, 1947, has effected the following *main changes* : *Firstly*, the Crown is made liable in all cases in which, if it were a private person of full age and capacity, it would be liable on the ordinary principles of vicarious liability. The law of contributory negligence also applies in proceedings against the Crown. *Secondly*, petitions of right are abolished. Liability in tort also extends to a breach by the Crown of statutory duty. The law as to indemnity and contribution as between joint tort-feasors is also enforceable by or against the Crown.

INDIAN LAW

Under Article 361 of the Constitution of India, the President, Governors and *Rajpramukhas* of States are *not* answerable to any Court — (1) for the exercise and performance of the powers and duties of their office, *or* (2) for any act done by them in the exercise of those powers and duties.

Though the general rule in India is that State is immune in the field of torts, this principle of immunity is subject to certain qualifications.

The Constitution of India provides that the Government of India and a Government of a State may sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces of Indian States might sue or be sued, *if* the Constitution had not been passed (Art. 300). Therefore, the law which prevailed on the subject before 26th January, 1950, continues to remain in force, though it may be modified by legislation.

Explain the principle, "The King can do no wrong", with reference to the Indian law.
P.U. Oct. 91

The following rules can be stated regarding the liability of Government :

(i) The Government is liable for the torts of its servants in the course of a transaction which any private person can engage in. This principle was upheld by the Privy Council in *Peninsular and Oriental Steam Navigation Co.* v. *The Secretary of State of India in Council.* (1868-69), 5 Bom. H.C.R. App. A.1). In this case, it was *held* that the East India Company could be sued for the torts of its servants committed in the course of transactions which it, as a trading company, engaged in. In a later Nagpur case (*Secretary of State for India in*

Council v. *Shivranji*, 1 L.R. (1949) Nag. 875), *the Government was held* liable for loss caused by the improper interference of a Forest Range Officer in the removal of the timber by the plaintiff who had purchased a forest.

(ii) The Government *cannot* be sued in respect of acts done by its servants in the exercise of its sovereign powers. This principle has consistently been followed by the Indian Courts. They have *held* that a suit will *not* lie against the Government in regard to the following matters :

Making war or treaty, annexation of a Native State, commandeering goods during a war, the use of land as a practice bombing ground by the army, etc.

(iii) The Government is liable for injury to any of its subjects resulting from an act done by itself or by its servants, if such act is done under colour of municipal law. For example, suits have been allowed against the Government for illegal levy of customs-duty under the Customs Act, illegal acquisition of land under the Land Acquisition Act, etc.

(iv) The Government is liable to restore property or money wrongfully obtained or detained by it or its servants on its behalf. In such cases, a suit lies against the Government where a Petition of Right lay against the Crown in England.

(v) The Government is *not* liable for any wrong done by its servants in the course of their official duty, *unless* the wrong was expressly authorised or ratified by it. It has been *held* that the Government is *not* liable for an improper arrest or seizure of property by a Police Officer. The *principle* involved is that the act done by a servant of the Government is done in exercise of the authority or discretion vested in him by law or statute, and not in pursuance of any implied authority of the Government. (*District Board of Bhagalpur* v. *Province of Bihar*, (1954) Pat. 429).

Write a short note on : State of Rajasthan v. Vidyawati.
B.U. Oct. 94
Apr. 96
P.U Oct. 94
Apr. 96
Oct. 96
Oct. 97

Case law

In a leading Indian case, *State of Rajasthan* v. *Vidyawati* (A.I.R. 1962 S.C. 933), the defendant was a motor driver employed on probation by the State of Rajasthan. While he was driving a jeep car to a workshop for necessary repairs, he knocked down one Jagdishlal who was walking on the footpath by the side of the public road. On account of multiple injuries received in the accident, Jagdishlal died three days later. The widow of Jagdishlal filed a suit against the defendant and the State of Rajasthan claiming Rs. 25,000 as damages for the said tort.

State and explain the principle laid down in : State of Rajasthan v. Vidyawati.
P.U. Apr. 92
Apr. 93

In this case, the Supreme Court has *held* that the State was *liable* for the tortious acts of its servants like any other employer, on the ground that the maxim "The King can do no wrong", had no place in the Republican Constitution of India. It was observed that the immunity of the Crown was based on a feudal concept not accepted or recognised in India.

Discuss : Kasturilal v. State of U.P.
P.U. Oct. 92
Apr. 96

However, in *Kasturilal* v. *State of U.P.* (A.I.R. 1956 S.C. 1039), the Supreme Court *held* that the State was *not liable* for the tortious acts of its servants where such acts were referable to the exercise of *sovereign power*. In the judgement, it was observed that the law on the question needed immediate reform.

In *Kasturilal's case* (referred to above), the police officers of the State of U.P. acting in exercise of their statutory powers, seized gold from the appellant, and as a result of their negligence in dealing with its safe custody, the gold was not returned to him. In a suit filed by him against the State for the return of the gold, or its value, it was *held* by the Supreme Court that the act was committed by the employees of the State during the course of employment, and the employment in question being of the category which could claim the special characteristics of sovereign power, the appellant's claim could *not* succeed.

In *Kasturilal's case* (above), the distinction between acts done in the exercise of sovereign powers and acts not referable to the delegation of any sovereign powers was emphasised, and the Court observed as follows :

> "If a tortious act is committed by a public servant, and it gives rise to a claim for damages, the question to ask is : Was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant ? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will *not* lie. On the other hand, if the tortious act has been committed by a public servant in discharging of duties assigned to him not by virtue of the delegation of any sovereign power, an action for damages *would* lie."

The High Court of Jammu and Kashmir has reiterated the principle that the State is liable for the tortious acts of its employees if such act, in discharge of a statutory function, is *not* referable to delegation of any sovereign powers. In this case, a head-on collision took place between a private vehicle and a water-tanker of the Border Security Force, due to the negligence of the driver of the tanker, and the Union Government was *held* liable for damages. (*Union of India*, v. *Abdul Rehman*, A.I.R. 1981 J & K 60)

In one case, *A*, a military driver of a School of Artillery, was transporting in a lorry, a machine for locating enemy guns. Due to his rash and negligent driving of the military truck, he knocked down and killed *B*. A suit was filed against the Government of India by *B's* widow, for damages. The Government pleaded that the driver was doing a duty in discharge of the Government's sovereign power. However, this plea was *rejected*. The Court observed that the transport for the machine could even have been arranged through a private carrier. The Government was, therefore, *held liable* for the tortious act of *A*. (*Union of India* v. *Sugrabai*, 70 B.L.R. 212)

The Madhya Pradesh High Court has *held* that the powers of the State Police to regulate processions and to quell riots are "sovereign functions". Hence, when regulating a procession, if the Police make a *lathi-charge* in which the Respondent's property is damaged, the State Government would *not* be liable. (*State of M.P.* v. *Chironji Lal*, A.I.R. 1981 M.P. 65)

The Allahabad High Court has observed that the *onus* of establishing that a particular act was committed in the course of an employment which is referable to the exercise of sovereign power is upon the state. (*State* v. *Hindustan Lever Ltd.*, A.I.R. 1972 All. 486)

The Supreme Court of India, in *State of Bihar* v. *Abdul Majid* (1954 S.C.R. 786), *held* that the English rule that a civil servant cannot maintain a suit against the State for recovering his arrears of salary, does *not* prevail in India.

In one case decided by the Madras High Court, *X* took his newly born infant to a Government hospital for treatment. A few days later, the nurse in charge of the children's ward informed *X* that the child was all right, and that it should be taken away. However, she advised *X* to buy a rubber apparatus for the child before taking it away, *X* bought the apparatus, and on returning to the hospital, was shocked to receive the information that someone had already come and taken the child away. *X* made frantic efforts, but was unable to find the child.

In a suit by *X* against the Government for the negligence of the hospital authorities, the Court *held* that the Government was *not liable* for the torts of the hospital employees because in running the hospital, the Government was merely discharging governmental function; and was *not* engaged in any commercial business. (*Etti* v. *Sec. of State of India* (1939) Mad. 843) (This case is also discussed in Chapter V.)

In one *American case,* the plaintiff was admitted to a State Hospital in a pregnant condition. Later, she gave birth to a baby, who began to lose blood. Although the baby's blood group was "A-Negative", she was negligently administered "B-Positive" blood, resulting in the baby's death. The plaintiff alleged that the negligence of the doctors could be imputed to the hospital, which denied all liability in the matter on the ground of governmental immunity. The *Supreme Court of North Carolina held* that the operation of a public hospital is not one of the "traditional services" rendered by local governmental units in the U.S.A. Hence, such Hospitals, like any other corporate employer, are liable in tort for the negligent acts of their employees committed within the course and scope of their employment. (*Sides* v. *Cabarrus Memorial Hospital Inc.*, 287 N.C. 14)

In another case, some military jawans in the employment of the Union of India lifted some drift wood belonging to the plaintiff and carried it away in army vehicles for the purpose of their camp fire, presumably under the belief that the wood did not belong to anyone. The Court *held* that the action of the *jawans* was in the course of employment, and therefore, the Union of India was liable to make good the loss to the plaintiff.

The Allahabad High Court has *held* that where an accident occurred due to the negligent driving by a *sepoy* of a Government truck, when he was going with the truck for imparting training in motor driving to new recruits, the driver, as well as the Union of India, would be liable in damages. Such an act *cannot* be said to be an act in the exercise of the sovereign power of the Government. (*Smt. Iqbal Kaur* v. *Chief of Army Staff,* A.I.R. 1978 All. 417)

An interesting exposition of the law on this subject is contained in a case decided by the High Court of Jammu and Kashmir, where *jawans* were being transported in an army vehicle, and the negligence of the driver resulted in an accident with a private tempo. The occupant of the tempo was injured and he filed an application for damages against the Government. The Court rejected the Government's contention that the act was performed in the exercise of delegated sovereign powers. It *held* that, even if it is conceded that the driver of the truck was driving the vehicle to the Railway Station to bring the *jawans* to the headquarters, it could *not* be said that the statutory duty which he was performing was referable to the exercise of sovereign powers. Here, the *jawans* could have been transported to the headquarters in a private bus, or a truck, or in any vehicle whatsoever. The act of so transporting the *jawans* could be said to be done in exercise of sovereign powers *only if* it could be shown that such an act could *not* have been performed by private individuals. It was, therefore, *held* that the *State was liable for damages* arising out of the negligence of the driver. (*Union of India* v. *Miss Savita Sharma*) A.I.R. 1979 J. & K. 6)

In a decision of the Orissa High Court, the Government was vicariously *held liable* to compensate the heirs of the deceased, where a Government servant was travelling in a Government jeep with his father and other family members. The Government servant and the father died in the accident and the father's heirs were also *held* entitled to claim damages, although the father was an unauthorised occupant in the jeep. (*State of Orissa* v. *M. Ray*, A.I.R. 1981 NOC 223)

In another case, it was *held* that the State was liable for the negligence of a driver of a police jeep, resulting in injuries to the Plaintiff. (*N.S. Jayanandan* v. *State of Kerala*, A.I.R. 1983 Ker. 46)

(**Note** .—The Law Commission has recommended changes in the law which would remove some of the restrictions on the liability of Government as an employer.)

2. Foreign sovereigns

Write a short note on : Foreign sovereigns. P.U. Oct. 97

Foreign sovereigns *cannot* be sued, *unless* they themselves submit to the jurisdiction of the local Court and waive the privilege. Even by residing in a foreign country, a sovereign does *not* waive his privilege or submit to the jurisdiction of the local Courts. Thus, the rule extends to all acts of the foreign sovereign, including those done in his private capacity.

The only remedy that is available against a foreign sovereign would be action at a governmental or diplomatic level.

Under S. 87B of the Civil Procedure Code, foreign sovereigns can be sued in Indian Courts only with the previous consent of the Central Government.

3. Ambassadors

Foreign ambassadors, their families and servants also *cannot* be sued, *unless* they *waive* their privilege by submitting to the jurisdiction of the Court.

An ambassador *cannot* be sued during his term of office. Thus, the right to sue him in tort is *not non-existent*, but is *merely suspended* as long as he holds the office.

Of course, it is open to such a person to waive his privilege, but this may not be inferred *unless* he actually appears in Court and thus submits to its jurisdiction.

4. Public Official

No action lies against public officials in their *official capacity* in respect of torts committed by them — for they are the representatives of the Crown. But public officials are liable in damages for tortious acts committed by them in their *private capacity*. The command or authority of Crown is no defence to the ordinary liability for *one's own acts.*

Thus, if an act is done by an officer of the Government, and such act is found to be done under lawful sovereign power, no action will lie against the Government on the principle of *respondent superior.* (Let the superior be responsible)

However, it must be noted that if the act is *unlawful in itself*, the order of the superior is no defence. The principle of *respondent superior* is *not* applicable to such unlawful acts. It is a fundamental principle of English law that every public officer acts on his own responsibility. If his act is unlawful, the order of the superior does *not* protect him.

The Madhya Pradesh High Court has *held* that a suit for damages can be filed against the Union of India for torts committed by its servants in connection with an undertaking, if the act in question was *not* done in exercise of its sovereign powers. (*Union of India* v. *Bhagwati Prasad*, A.I.R. 1957 M.P. 43)

Liability of Public Officials for their servants' acts

Public officials are *not* personally liable for the wrongs of their *subordinates, unless* expressly authorised or ratified by them, because the subordinates are *not* their servants. They are both servants of the Government, and there is no relation of master and servant between the superior officer and his inferior.

5. Infants

Infancy no defence

The first rule as to liability of minors for their torts is that ordinarily, infancy *per se is no defence* to an action for tort. Infants are liable for wrongs of *omission* as well as for wrongs of *commission.* Thus, infants have been *held* liable for assault, false imprisonment, libel, slander,

seduction, trespass, wrongful detention of goods, fraud, embezzling money, and for nuisances and injuries to their neighbours arising from the negligent use and management of their property. In other words, a minor is, in general, liable for his torts in the same *manner* and to the same *extent* as an *adult*.

Exception to the above rule

What is the capacity of a minor to sue and be sued ? Can he bring an action for an injury suffered by him before birth ?
P.U. Oct. 92

But where *intention, knowledge, malice* or some other condition of the *mind* of the wrongdoer forms an *essential ingredient of liability* (*e.g., deceit*), extreme youth *is* a good defence. If, however, there is a sufficient maturity of understanding in an infant, he *will* be liable.

Write a short note on : Liability of an infant in tort.
B.U. Apr. 97

On the same principle, before a child is made liable for *negligence*, it must be proved that he failed to show the amount of care *which can reasonably be expected from a child of that age.* Thus, in a *Canadian case, Walmsey* v. *Humonick* (1954 2 D.L.R. 232), two little little boys (both aged about 5) were playing "cowboys and Indians". One of them was hurt in the eye by an arrow from the other boy's bow. The Court *held* in favour of the defendant, observing that he had not aimed at the plaintiff — and that even though it might amount to negligence if adults were similarly involved — the defendant could *not* be held to be liable.

Rules where a child's act amounts to tort and a breach of contract

It is, however, possible that the act of an infant may amount either to a tort *or* a breach of contract. Where the wrong committed by an infant is a tort as well as a breach of contract, the following two rules apply :

Can the following persons be sued :
(a) a corporation;
(b) an infant;
(c) a married woman ?
B.U. Oct. 90

Rule 1.— Contract cannot be converted into tort

(a) The law will *not* permit a suit based on a contract to be converted into a suit under the law of torts, nor permit an infant to be used for *tort,* if such an action is only an *indirect way of enforcing a contract* on which he is not *otherwise* liable. In other words, an action against an infant will *not* lie if it is *nominally* in tort, but *in substance*, in *contract.* Hence, he cannot be sued for a tort which is so *connected* with his contract as to be *part of the same transaction.* In other words, "You cannot convert a contract into a tort to enable you to sue an infant."

Explain the position of a minor as a defendant in an action in tort.
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JENNING v. *RUNDALL,* (1799) S.T.R. 335. — An infant hired a mare. He killed it by overriding, and an action was filed in tort. The Court *held* that it was, *in essence*, an action for a *breach of contract,* and that it could *not* be converted into an action in *tort* merely to fasten a liability upon the infant. As Lord Kenyon observed, if it were in the power of a plaintiff to convert that which arises out of a *contract* into a *tort,* there would be an end of that protection which the law affords to infants.

(*b*) But if the tort is *independent* of a contract and *not contemplated by the contract,* the infant *will* be liable.

BURNARD v. *HAGGIS,* (1893) 14 C.B.N. 45. — An infant hired a mare for riding. He was *expressly* told that the mare was *not* fit for *jumping.* But the infant gave the mare to a friend for jumping over

fences, and the more was killed in clearing a fence. The Court *held* that there was a tort wholly *independent of the contract for which the infant would be answerable.* The act of the infant was bare trespass, not within the object and purpose of hiring.

Rule 2.— Tort cannot be converted into contract

The *second rule* is the very *converse of the first.* Thus, the law will *not* permit an action *in tort,* if it would be to defeat the rule against suing a minor in *contract.* Thus, an action for deceit will *not* lie against an infant where he has procured a contract by means of fraudulent representation either as to his age or to any matter. If an action in tort for deceit were to be allowed, it would defeat the rule against suing a minor in contract. No action, therefore, lies for the *tort* of deceit where an infant, by a *false representation* that he is of full age, procures a contract.

If, however, the infant obtains property *through fraud,* and the property is *still in his possession,* he is liable to *restore* that property to the other party, the principle being that an infant will *not* be allowed to take advantage of his own fraud.

A a minor, falsely representing himself to be a major, hires a motor-car at a monthly charge of Rs. 300. He fails to pay the hire charges amounting to Rs.1,500, and also by his negligent driving, causes damages to the extent of Rs. 2,000. The minor is sued for the recovery of Rs.1,500 and 2,000. Now, a minor is *not* liable in contract, and, therefore, *A* cannot be made to pay the *hire charges.* But, as regards a minor's liability in *tort,* different considerations come in. As a rule, he is liable for his torts, except in few cases, *e.g.,* where the action is nominally in tort but is in substance in contract, *or* where the tort is founded on contract. In the case of hire, reasonable care of the goods is an implied term of the contract. Damage due to negligent driving is a breach of this term. So damage to the car, though a tort, in this case *cannot* be said to be *independent* of contract. Therefore, *A* is *not* liable also for the damage.

Liability of parent for child's tort

As a rule, a father, as such, is *not liable* for the torts of his children, even while they are under-age and living with him. However, a father may be liable for the acts of his child in the following circumstances :

(1) When the child is acting as the servant of the father; in such cases, the father's liability will be the same as that of any other employer.

Example : If the son is driving the car for the father, the son's negligence will make the father liable.

(2) A father may be liable for his own personal negligence in affording or allowing his child an opportunity of doing a mischief.

Example : When a father negligently left his 12 year old son with a rifle, without giving him proper instructions in handling it, the father was *held* liable. *(Newton* v. *Edgerley,* (1959) I W.L.R. 103)

6. Lunatics and Drunkards

Ordinarily, *lunacy is no answer* to an action in *tort*. But a lunatic will *not* be liable for *those* torts in which some *mental condition* forms an *essential ingredient*. A person who is sane enough to be accountable under the criminal law would probably be liable for any kind of *tort*.

Drunkenness–Akin to lunacy is drunkenness. *Drunkenness* is no excuse for the commission of a *crime;* it will hardly therefore, excuse a tort. It is otherwise (as it is in the case of criminal law) if the intoxicant is administered against his will, *or* by fraud or mistake. The rule as to drunkenness applies also to acts of an epileptic person.

7. Corporations

A corporation or a company *cannot* be sued, *unless* (i) the act done was *within the scope of the agent* employed by it, *and* (ii) the act done was *within the purpose of the incorporation*. The same principles which govern the *vicarious liability of a principal* for the torts of his *agents*, or of a *master* for the torts of his *servants*, govern the liability of a *corporation* for the torts of its *agents* and *officials*.

But a corporation *can sue and be sued*, for (i) defamation, (ii) deceit, (iii) malicious prosecution. When the suit is against the corporation for any of these torts, the plaintiff, in addition to the necessary ingredients, must prove that the *servant* or *agent was acting in the course of the employment*, and the act complained of was done by him for the benefit of the corporation and *within the scope of his authority*. If the act is *ultra vires*, the corporation is *not* liable.

A corporation is liable for torts committed by its *agents or servants* to the *same* extent as a *principal* is liable for the torts of his *agent*, or an *employer* for the torts of his servant, *provided* that the tort is committed *in the course of doing an act* which is *within* the scope of the powers of the corporation. It may thus be liable for assault, false imprisonment, trespass, conversion, libel or negligence.

A corporation, however, will *not* be liable, if the act of its servant is *not authorised* by the articles of its incorporation.

Explain the rule laid down in : Poulton v. London & S.W. Rly. Co.

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The leading case on the subject is *Poulton* v. *London and S.W. Rly. Co.* (1867 L.R. 2 Q.B. 534). In that case, a station-master, in the employment of the defendant company, arrested the plaintiff for refusing to pay the freight for a horse that had been carried on the defendant's railway. The railway company had authority under the Act of Parliament to arrest a person who did not pay his fare, but none to arrest a person for non-payment for the carriage of goods. It was *held* that the railway company was *not* liable. The company itself having no power to arrest for such non-payment, it could *not* give the station-master any power to do so. The plaintiff's remedy for the illegal arrest in such a case would be against the station-master only.

Whether liable for fraud or malice

It was thought, at one time, that a corporation could *not* be held liable for wrongs involving malice or fraud, on the ground that to support an action for such a wrong, it must be shown that the wrong-doer was actuated by a motive in his mind, and that "a corporation has no mind". But it is now settled that a corporation is *liable* for wrongs *even* of *malice and fraud*. A corporation, therefore, may be sued for *malicious prosecution* or for *deceit*.

In this connection, it may be noted that, in India, an *idol* of a Hindu temple stands in the *same* position as a corporation. So also does a *mosque*. They are recognised as *juristic persons* capable of owning property. An idol can, therefore, be sued in respect of a tort committed by its *shebait, manager or trustee.*

8. Trade Unions

In *Taff Vale Rly. Co.* v. *Amalgamated Society,* (1901) A. C. 406, the House of Lords *held* that a trade union could be sued *in its registered name.* To nullify the effect of this ruling, the Trade Disputes Act of 1906 was passed, which provided that no suit could lie against a trade union or its members for torts committed by them *on behalf of the union.* This rule was subsequently modified in 1927, and a trade union was held liable *for promoting a general strike.*

Discuss the capacity of the following under the law of torts :
(a) Married women.
(b) Infants.
(c) Trade Unions.
P.U. Apr. 93

The position *in India* is similar in that the Indian Trade Union Act of 1926, on the analogy of the Trade Disputes Act of 1906, provides that a registered trade union *cannot* be sued, or its funds proceeded against, in respect of any act done by its officers in contemplation or furtherance of a trade dispute. A subsequent enactment of 1939 has made provision for the creation of Conciliation Boards of settlement of trade disputes on the lines of the English Act of 1927. Thus, under the Indian Trade Unions Act, 1926, a trade union may be sued in its registered name. A registered trade union and its officers and members are exempted from liability for certain torts only.

9. Married women

English Law

Under the English law of torts prior to 1935, a married woman could sue and be sued, but her husband had to be joined with her, as under the former English procedural law, she had no separate existence (apart from him). However, this was also subject to the following three qualifications :

Write a short note on : Married women.
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(i) A married woman was *not* liable beyond her separate property. (This lacuna was removed by the Law Reform (Married Woman and Tortfeasors) Act, 1935.)

(ii) Action in tort *between* the husband and wife were *not* possible under common law. Under the Married Women's Property Act, 1882, she was given a limited right to sue her husband in tort "for the protection and security of her property." However, the rule that spouses could not generally sue each other in tort was abolished in 1962. Today, both husaband and wife have the same right of action in tort against each other, as if they were not married.

(iii) At common law, a husaband was liable for his wife's torts. However, this scandalous rule was abolished in 1935, and today a husband is *not* liable for his wife's torts. Of course, if he has participated in such a tort, he can be liable as a joint tort feasor.

From what is stated above, it will be seen that today, under English law, a married woman is exactly in the same position as any unmarried woman, and can freely sue and be sued under the law of torts.

Indian Law

In India, under the Married Women's Property Act, 1874, a married woman (not being a Hindu, Mahomedan, Buddhist, Jain, or Sikh) may *sue* and *be sued alone.* In India, a husband is *not* liable for the torts of his *wife.*

4

FOREIGN TORTS

Definitions

Write a short note on : Foreign torts.
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A *foreign tort* means a tort which is committed *abroad, i.e.,* a tort, the *cause of action* regarding which has *arisen abroad.* Such a tort may be :

1. A tort of *realty, i.e.* in the nature of an injury to *land* situated *outside* the country; *or*

2. A *personal* tort, *i.e.,* in the nature of an injury to *personal or movable* property.

1. Torts to realty

When a tort is committed with respect to *immovable* property *in a foreign country,* no suit can be filed in England, though the wrongdoer is a British subject resident in Britain.

In *British South Africa Co.* v. *Compania de Mecambique* (1953 A.C. 602), the plaintiffs sued the defendants in England for trespass to their mines which were situated in South Africa. The House of Lords *held* that the suit was *not maintainable.*

Discuss : Foreign tort.
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2. Personal tort

Where, however, the tort is committed with respect to *movable property* or against the *person* of the plaintiff, an action is maintainable, *provided* that the following *two conditions* are fulfilled :

(1) *The act complained of must not be* justifiable according to the law of *the place where it was committed.* No action will lie in respect of an act, which, though tortious if committed in England, *is lawful in the country of its commission.* The best illustration is afforded by the following case :

PHILPS v. *EYRE,* (1870) 6 Q.B. I. *(The Jamaica Governor's Case)* — In the case, the plaintiff filed a suit against the Governor of Jamaica for false imprisonment. The Governor pleaded that the arrest was made in connection with the suppression of a rebellion, and that he was so authorised by an Act of the Jamaica Legislature. It was *held* that the plaintiff could *not* succeed. The Court observed : "It appears to us clear that where, by the law of another country an act complained of is *lawful,* such act, though it *would* have been wrongful by *our* law if *committed here, cannot* be made the ground of an action in an *English Court.*"

In another case, pursuant to a proclamation issued by the Sultan of Muscat, goods on board a British ship within the territorial waters of Muscat were seized. It was *held* that no suit could be filed by the owner of the goods, since the seizure was lawful by the law of Muscat. *(Carr* v. *Fracis Times & Co.,* [(1902) A. C. 176)]

But if the cause of action is not of a *merely local nature,* a suit *will* lie in an English Court for a tort *committed abroad.* The following case illustrates this principle :

MOSTYN v. *FABRIGAS,* (1774) I Cowp. 161 *(The Minorca Governor's Case).* — Fabrigas, having rendered himself obnoxious to Mostyn, the Governor of Minorca, the latter, without any lawful excuse, locked him up while in Minorca for a few days. Fabrigas sued the Governor of Minorca in England. The Court *held* that the suit was maintainable in an English Court *as the cause of action was not of a merely local nature.*

But take a case like this :

A published a libel against *B* in Brazil. When *A* comes to India, *B* sues him for damages. Can he do so ? (According to Brazilian law, libel is not a cause for civil action, but exclusively a criminal offence.) It would be *held* that *B can* sue *A* for damages. It is no defence to *B's* suit that, in Brazil, libel is a crime but not civil injury. It was *held* in *Machado* v. *Fontes,* (1892) 2 Q. B. D. 231, that it was sufficient even if the act is not legally justifiable and is punishable. In that case, even a crime in a foreign country, which was not actionable in civil law, was *held* to be actionable before an English Court. But the rule in *Machado* v. *Fontes* has been overruled in *Boys* v. *Chaplin* (see below) by the House of Lords. Therefore, the present rule is that the act must be actionable *both* in the country where the tort was committed *and also* in the country in which the suit is filed.

BOYS v. *CHAPLIN,* (1969) 2 All. E. R. 1085 — In this case, the plaintiff was injured in a motor accident in Malta, caused by the negligence of the defendant. Both the plaintiff and the defendant were British nationals, domiciled and resident in England. According to Maltese law, the damages to be awarded by the Court could *not* include compensation for pain, suffering and loss of amentities of life (which heads of damage are recognised by English law), but only compensation for monetary loss. The Court *held* that damages ought to be assessed in accordance with the English law.

(2) *The second condition* is that the act complained of must be of such a character that it *would have been actionable if committed in England.*

The *reason* for this is obvious. If the wrong complained of is not actionable according to the *English* law, to permit a civil action because it is actionable according to the law of the *place in which it was committed,* will be to administer, *not* the English law, but the foreign law. Therefore, the English Courts do *not* recognise the idea of enforcing liability for a wrong not recognised as redressible to the *English* law.

THE HALLEY, (1868) 2 P. C. 193 — The maritime case of *The Halley,* (1868) 2 P.C. 193, illustrates this aspect. In that case, an English steamer plying in Belgian waters, with a compulsory pilot on board, ran down a Norwegian bargue. Under the Belgian law, the English steamer was liable, but *not* under the English law, where the defence of compulsory pilotage was open. It was *held* that the suit was *not* maintainable in the English Court.

TORTS ON SHIPS

The relevant law in cases of torts committed on the high seas will be the *law of the country whose flag the ship is flying.*

5

DEFENCES TO AN ACTION IN TORT

There are *fifteen defences* which are available in a suit under the law of torts. They constitute, what is sometimes called, "justifications or grounds of immunity from liability to an action in tort." They are the classes of wrongs which stand outside the sphere of "tort". There are, as it were, the various conditions which will prevent an act from being wrongful, which, in their absence, would be a wrong. They are, what Sir Frederick Pollock calls, the *rules of immunity which limit the rules of liability.*

There are various conditions which will prevent an act from being wrongful which, in their absence, would be a wrong. Under such conditions, the act is said to be *justified* or *excused.* And, when an act is said in general terms to be wrongful, it is *assumed* that no such qualifying condition exists. These justifications from civil liability for acts which are *prima facie* wrongful are based principally upon *grounds of public policy.*

What are the defences available to a defendent for tortuious acts ?
B.U. Oct. 97

Briefly discuss the various justifications provided under the law of torts in case of tortious liability.
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The following are the *fifteen* justifications (or defences) in an action in tort :

1. Acts of State.
2. Judicial acts.
3. Quasi-Judicial acts.
4. Executive acts.
5. Acts done under parental or quasi-parental authority.
6. Authorities of necessity.
7. Works of necessity.
8. Statutory authority, *i.e.* acts authorised by statute.
9. Leave and licence (*Volenti non fit injuria)*
10. Inevitable accident.
11. Mistake of acts.
12. Exercise of common rights.
13. Private defence.
14. Plaintiff a wrong-doer.
15. Acts causing slight harm.

If any one of the above conditions is *present,* it will *prevent* an act from being *wrongful,* whereas, in its *absence*, the act complained of would be a tort.

1. ACT OF STATE

ENGLISH LAW

The first *important* defence or justification with reference to a tort is that the act complained of is an *act of State.* An act of State is "an act

injurious to the person or property of some person who is *not,* at the time of the act, a *subject of Her Majesty,* and which is down by any representative of Her Majesty's authority, civil or military, and is either *previously sanctioned or subsequently ratified* by Her Majesty".

Thus, an act of State is an injury -

(i) done against an *alien,*

(ii) by a servant of the Crown,

(iii) which act is either *previously authorised or subsequently ratified* by the Crown on State Policy, and

(iv) which would *otherwise,* constitute a wrong, but being done *under State policy, is not cognizable* by any municipal Court.

In short, it is an *arbitrary* act, which is done, *not* under colour of any legal *title,* but in the exercise of *sovereign power,* intending that *no remedy* should lie. A good illustration of an act of State is to be found in the following case :

BURNON v. *DENMAN,* (1848) 2 Ex. 167.— The commander of a battleship, in pursuance of a treaty made by him with native chiefs, and afterwards ratified by the Crown, confiscated slaves and burnt the plaintiff's plantation. It was *held* that it was an act of State for which the commander was *not liable.*

Write a short note on : Act of State.
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It must be noted, however, that the term "act of State" applies to *aliens* only, and *not to British subjects. As between the sovereign and his subjects, there can be no such thing as an act of State. So,* if a British subject suffers damage from any wrongful act done by a *British officer,* he has a remedy against that *officer personally, even if the act was expressly authorised by the Crown.* The authority of the Crown is *no* defence to a public official in an action of tort brought by a *British* subject. The King can do no wrong; nor can he authorise any wrong, and the wrong-doer is *personally responsible for it.*

INDIAN LAW

The same principles generally apply *in India* also. To be an act of State, the act must be one which is *not* purported to be done under colour of a legal title at all, but which must rest for its jurisdiction on considerations of external politics and internal duties and rights. (*Jehangir* v. *Secretary of State,* (1903) 6 Bom. L.R. 131). For example, seizure or acquisition of a territory by a Government as a sovereign power, *or* an act done by an agent of the Government in his political capacity, *cannot* be complained of in civil courts.

In one case decided by the Madras High Court, *X* took his newly born infant to a Government hospital for treatment. A few days later, the nurse in charge of the children's ward informed *X* that the child was all right and it should be taken away. However, she advised *X* to buy a rubber apparatus for the child before taking it away. *X* brought the apparatus and on returning to the hospital, was shocked to receive the information that some one had already come and taken the child away. *X* made frantic efforts, but was unable to find the child.

In a suit by *X* against the Government for the negligence of the hospital authorities, the Court *held* that the Government was *not* liable for the torts of the hospital employees, because in running the hospital, the Government was merely discharging a government function, and was *not* engaged in any commercial business. (*Etti* v. *Sec. of State for India*) (1939 Mad. 843) (This case has also been discussed earlier in Chapter III.)

But, in the following circumstances, the plea of an act of State will *not* be available to the State :

(1) Where the sovereign act is towards its own subjects, the plea of an act of State is *not available*. [*In the matter of Amir Khan,* (1870) 6 Beng. L.R. 392]. In this case, a citizen was arrested under a warrant of the Governor-General-in-Council, taken into the Mofussil, and detained in jail. It was *held* that such an act did *not* constitute an act of State.

(2) Where the act complained of is done under the sanction of Municipal law and in the exercise of the powers conferred by the law, the fact that it is done by the sovereign power, and not an act which could possibly be done by a private individual, does *not* make it an act of a State. [*The Secretary of State for India* v. *Hari Bhanji*, (1882) 5 Mad. 273]. In this case, a Government officer had illegally extracted a sum of money from the plaintiff as an import duty. The plaintiff successfully sued to recover that amount.

(3) The doctrine of act of State is *not* applicable to a case where a citizen of the Republic of India goes to the Court for redress of his grievances against the officers of the Republic interfering with his rights. [*Madangopal Kobra* v. *Union of India,* (1951) 1 Raj. 96]

Further, in the following *three exceptional cases,* the Government *can* be made liable, *even though* the acts complained of may be acts of State :

(a) trespass to immovable property ;

(b) an obligation imposed by a Statute; and

(c) cases where it can be shown that some benefit has resulted to the Government from the tort of its servants.

2. JUDICIAL ACTS

The second defence to an action in tort is that the act done by the defendant was a "judicial act". No suit will lie against a judge for any act done or words spoken in his *judicial capacity.*

This rule of judicial immunity is founded on the principle of public benefit — that Judges should be at liberty to exercise their functions *with independence* and *without fear of consequences.* And this is so *even if his motive is malicious,* for the remedy for judicial *errors* is in the form of an *appeal* to a higher Court, and the remedy for judicial *corruption* is criminal *prosecution* or *removal* of the Judge, but in neither case, can he be called upon to defend his judgement in a Civil Court.

The same immunity which is enjoyed by Judges is extended to Members of Naval and Military Court-Martials and Courts of Inquiry, arbitrators, jurymen and coroners.

Thus, if a judge gives a wrong verdict, an action will *not* lie against him. So also, a *coroner* is a judicial officer, and no suit lies against him for any matter done by him in the exercise of his judicial functions. Likewise, if an *arbitrator* acts honestly, he is *not liable* for errors in judgement or for negligence in the discharge of the duties entrusted to him, although he would be liable if he is guilty of *misconduct* or *corruption.*

Under English Law, there is an important distinction between superior and inferior courts as to proof of jurisdiction. If the plaintiff is suing a Judge of a superior court for exceeding his jurisdiction, the burden of proof is on the plaintiff to show that the Judge has no jurisdiction, but the rule is reversed in an action against an inferior judge, for he must prove that he had jurisdiction. (*Peacock* v. *Bell,* (1967) 1 Saund. 73)

In India, the principle of immunity has been enacted in the Judicial Officers' Protection Act, 1850, but no distinction has been maintained in this Act between Superior and Inferior Courts. This act lays down that no Judge or other person, acting judicially can be sued in any Civil Court for any act done by him in the discharge of his judicial duty, whether or not within limits of his jurisdiction, *provided that* he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of. Thus, if a Magistrate fails to act reasonably and carefully, and by reason of such failure, does something for which he has no legal authority, it *cannot* be said that he, in good faith, believed that he had jurisdiction to do that act.

LAW v. *LLEWLLYN* (1906) 1 K.B. 487.— A magistrate, on allowing a prosecutor to withdraw a charge, said that he considered it a gross attempt to blackmail, and that if the prosecutor found himself in gaol for twelve months, it would probably do him good. The court *held* that the magistrate was *not* liable for slander.

ANDERSON v *GORRIE* (1895) 1 Q.B. 668.— A judge acted oppressively and maliciously to the prejudice of the plaintiff, and committed the plaintiff for contempt of court and asked for excessive bail. Nevertheless, the plaintiff was *not entitled to damages,* as the defendant judge had acted in his *judicial capacity.*

3. QUASI-JUDICIAL ACTS

Various persons and bodies such as Universities, Colleges, Committees of Societies and Clubs, Inns, Courts, etc., often exercise *quasi-judicial* authority in the management of their respective institutions, either by virtue of the *conventional rules* of those bodies or of Parliamentary *Statutes* creating them. The general rule is that persons or bodies exercising quasi-judicial powers are protected from civil liability *if they observe* (i) rules of *natural justice,* and also (ii) the particular statutory or conventional rules (if any), which prescribe their course of action. Thus, a man *cannot* be removed from office or membership, *unless* the persons exercising such powers have (1) acted in *good faith,* (2) given him a fair and sufficient *notice* of his offence;

and (3) given him an *opportunity of defending* himself. The same principles apply in the case of *expulsion* of a member from a caste.

Rules of natural justice

Write an explanatory note on : Quasi - Judicial acts.
P.U. Oct. 93
Oct. 97

In a broad sense, rules of natural justice prescribe that (i) No man can be judged without giving him an opportunity to be heard, and (ii) No man can be a judge in his own case. If these conditions are satisfied, the Court will *not* interfere, *even* if the ultimate decision is wrong. Otherwise, the act complained of will be declared void.

Thus, in *Dawkins* v. *Antrobus* (1881) 17 Ch. D. 615, the plaintiff, a member of a club, sent a pamphlet which reflected on the conduct of *S*, another member of the club, to *S* enclosed in an envelope on the outside of which was printed "Dishonourable conduct of *S*". The committee, being of opinion that this action was injurious to the character and interests of the club, called upon the plaintiff for an explanation which he refused to give. They then called on him to resign, and as he did not comply with their recommendation, they duly summoned a general meeting, at which a resolution was passed by the requisite majority expelling the plaintiff from the club. It was *held* that Court would *not* interfere to restrain the committee from excluding the plaintiff from the club.

In *Devchand* v. *Ghanashyam* (1935 37 B.L.R. 417), the plaintiff was a member of a caste, whose members resolved that all persons of that caste who followed a particular religion would be excommunicated. As the plaintiff was following that religion, he was excommunicated. On a suit filed by him, it was *held* that the caste had the jurisdiction to excommunicate its members, and that the proceedings were in order.

In another case, a member of a society spoke to another using menacing language. Thereupon, a majority at a general meeting of the society voted that he should no longer be considered a member of the society. The Court *held* that the expulsion was invalid, as the member was not given an opportunity to defend himself, and that, therefore, he was still a member of the society. (*Innes* v. *Wylie,* (1884) 1 C & K. 257)

4. EXECUTIVE ACTS

Valid orders of a public authority form a good defence to a tort committed by its officers in executing them, *e.g.,* orders of a Court of Justice. But, if an officer *purposely* or *maliciously* arrests a person or takes his goods, he will be liable. If a public officer is guilty of misfeasance in the exercise of the powers entrusted to him by law, he is liable in a suit for any damage resulting from that act, without proof of malice or want of probable cause.

In India, the Judicial Officers' Protection Act (referred to under item 2 above) protects officers of Court as well. Police officers are protected in the performance of their executive duties by express legislative enactments in India, like the various Police Acts.

5. ACTS DONE UNDER PARENTAL OR QUASI-PARENTAL AUTHORITY

Parents or persons *in loco parentis* may, for the purpose of correcting what is bad in the child, inflict corporal punishment, always however, with this condition, that such punishment is *moderate and reasonable.*

Quasi-parental authority

The authority of a *schoolmaster,* is, while it exists, the *same* as that of a parent. The *earlier view* was that a parent, when he places his child with a schoolmaster, *delegates* to him all his authority, so far as it is necessary for the welfare of the child. The master can, therefore, inflict a *moderate* chastisement on his pupil or apprentice, as for instance, a couple of smacks on the cheek. However, the *modern view* is that a schoolmaster has his own independent authority to act for the welfare of the child. This authority is *not* limited to offences committed by the pupil *upon the premises of the school,* but may extend to acts done by such pupil while *on the way to* and *from* the school.

Write a short note on : Parental and quasi - parental authority.

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REX v. *NEWPORT (SALOP) JUSTICES,* (1929) 2 K.B. 416.— A schoolmaster caned a student who had, contrary to the school regulations, been smoking in the street during term after having returned home. It was *held* that the father of the boy, by sending him to the school, was deemed to have authorised the schoolmaster to administer reasonable punishment to the boy for breach of a school rule, and that the punishment administered was quite reasonable.

State & explain the principle laid down in : Rex v. *Newport.*

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Write a short note on : Quasi-parental authority.

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6. AUTHORITIES OF NECESSITY

The master of a vessel on the high seas or in a foreign port has disciplinary powers, not only over the *crew,* but the *passengers* also. Such powers are based upon *necessity* and are limited to *preservation* of necessary *discipline* and *safety* of the ship. The English Courts have also observed that this authority of the captain to inflict moderate punishment is *not* confined to a case where the ship is at sea beyond the reach of other assistance.

7. WORKS OF NECESSITY

There are many cases in which individuals sustain an injury for which the law gives *no* action, as where private houses are pulled down to stop a fire, or goods cast overboard to save a ship or the lives of those on board. The welfare of the people is the supreme law — *salus populi suprema lex. Individual welfare must* in cases of *necessity,* yield to that of *community;* and a person's property, liberty and life, may be placed in jeopardy, or even sacrificed, for the *public good.*

Thus, a fire originates in *A's* house through some unknown defect in the electrical installation. In extinguishing the fire, *B's* adjoining property is damaged by water. *B* brings an action against *A,* claiming damages for the damage done to his property. *B cannot* succeed, since *A* was acting under sheer necessity.

In one English case, on the death of *X* in a state of *delirium tremens,* his sister-in-law removed *X's* jewellery, from the room where he lay dead, to another room, where she thought they would be safer. However, the jewellery was stolen by some unknown persons. The Court *held* that she was liable, as there was no proof that her interference was reasonably necessary. (*Kirk* v. *Gregory,* (1876) 1 Ex. D. 55)

Write a short note on : Jus necessitatis.

B.U. Oct. 91

Write a short note on : Necessity. P.U. Apr. 94

In another case, where 150 Negro slaves were ordered, by the Captain of a ship, to be thrown overboard owing to a shortage of water, the Court *held* that no sufficient necessity was shown to justify the Captain's act. (*Gregson* v. *Gilbert,* (1783) 3 Dougl. 232)

In *Cope* v. *Sharpe* (1912 1 K.B. 496), a fire broke out on *A*'s land. While *A*'s servants were trying to put off the fire, the gamekeeper of *C* (who had shooting rights over *A*'s land) set fire to some strips of heather between the fire and some nesting pheasants of *C*. Soon thereafter, *A*'s servants succeeded in extinguishing the fire. When *A* sued the gamekeeper for trespass, it was *held* that he was *not liable,* for there was a real and imminent danger to the birds at the moment at which he acted, and that what he did was reasonably necessary.

8. STATUTORY AUTHORITY (i.e. ACTS AUTHORISED BY STATUTE)

If the Legislature has *authorised* the doing of an act, no action can be maintained for that act. The person injured by such an *authorised* act can have no remedy, except the one (if any) provided by the statute itself. Thus, in *Vaughan* v. *Taff Vale Rly.,* (1860) 5 H & N. 679 (*Engine Spark Case*), the defendant company, having statutory authority to use steam locomotives, was *held not liable* for a fire caused by escaping sparks, it being proved that the engines were constructed with all due care and skill, and that it was impossible to totally prevent the escape of sparks.

It may be noted that if the Legislature directs that a thing shall, *in all events,* be done, the right of action is taken away. If, however, the terms of a statute are *permissive,* and not *imperative,* the powers conferred by the legislature should be exercised with due regard to the common rights of others. Thus, in *Metropolitan Asylum District* v. *Hill,* (1818) 6 App. Cas. 193 (*Small-pox Hospital Case),* a local authority having statutory authority to erect a small-pox hospital was restrained from erecting one in place where it would have been a danger to neighbouring residents; the authority was construed as conditional only — *viz.,* to erect the hospital, and the authorities could obtain a suitable site where no nuisance would result.

Ram Gulam v. *U.P. Govt.* (1951) 1 All. 135 (*Ornaments case*).— The plaintiff's ornaments were exhibited in a theft case. By a strange coincidence, they were once again stolen while in custody of the Court. The plaintiff sued the Government for the ornaments or their value. The Court *held* that the Government was *not liable,* as the alleged tortious act was performed in discharge of an obligation imposed by law.

A gas company had statutory powers to place mains and pipes under certain highways within the jurisdiction of the defendants, who were, by virtue of a statute, bound to repair the highways. The defendants began to use steam-rollers of considerable weight for the purpose of repairing the highways, and thereby damaged the pipes belonging to the company laid under the highways. The gas company sued the defendants for an injunction restraining the defendants from using such rollers. The defendants pleaded that the damage complained of was incidental to an authorised act.

It was *held* that the gas company was entitled to an injunction. The defendants had the power to use steam-rollers for repairing the highways, but that did *not* mean that they were obliged to use such heavy rollers as would damage the gas pipes. (*Gas Light Coke* v. *Vestry of St. Mary Abbots, Kensington,* (1885) Q.B.D.I.)

9. LEAVE AND LICENCE (*VOLENTI NON FIT INJURIA*)

Discuss : Leave and licence.
B.U. Apr. 90
Oct. 93

The maxim, *volenti non fit injuria,* means that an act is *not actionable* as a tort at the instance of any person who has expressly or impliedly consented to it. When a person has voluntarily given up or waived a right against a person, he *cannot* enforce the same right against that person. If an act is done with the consent of the plaintiff, or the plaintiff has freely and voluntarily, with full knowledge of the nature and extent of risk, agreed to an act, he *cannot* complain against that act.

Discuss : Volenti non fit injuria.
B.U. Oct. 91

The maxim has a *double application.* It applies, *in the first place,* to intentional acts, which would otherwise be tortious; for instance, consent to a physical harm which would otherwise be an assault, *or* consent to any entry on land which would otherwise be a trespass. The act would be excusable only if it is within the scope of the consent. Moreover, no consent can legalise an unlawful act, much less a crime. No person can license another to commit a crime.

Discuss in detail the maxim, 'Volenti Non Fit Injuria', with case-law.
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The maxim applies, *in the second place,* to consent to run the risk of accidental harm, which would otherwise be actionable as due to the negligence of the person who caused it. In such a case, the plaintiff agrees, expressly or impliedly, to exempt the defendant from a duty to take care which the latter owed to him. On this ground, a master is *not* liable for an injury inflicted on a servant, who has undertaken the service *knowing* the risks incidental thereto. So also, spectators at cricket or football or hockey matches or at motor races are presumed to undertake the risks which may reasonably be expected to occur at such meets.

The maxim is based on sound principles of *justice* and *good sense.* It protects the surgeon who undertakes a difficult operation and the sword-fencer, boxer or football player, so long as they follow the rules of the game.

However, *mere knowledge* of an impending wrongful act or existence of a wrongfully caused danger does *not* amount to consent of the plaintiff, even though he made no attempt to prevent or avoid that act or danger. It may be noted that the maxim is *"Volenti non fit injuria"*, and *not "Scienti* (knowledge) *non fit injuria"*. The maxim comes into operation only when there is either an express or implied *agreement* to run the risk. In all such cases, the person injured must have knowledge of the risk and must voluntarily undertake it.

In an American case, the plaintiffs were injured by the explosion of a bomb during a display of fireworks conducted by the defendant in a square falling on a public highway. It was proved that the defendant, in firing the bomb, had in fact exercised reasonable care. It was also

shown that the plaintiffs were present at the fireworks display as voluntary spectators, and were of ordinary intelligence. The Court *held* in favour of the defendant, observing that a voluntary spectator, who is present merely for the purpose of witnessing the display, must be held to the consent to it, and he suffers no legal wrong if he is accidentally injured without any negligence on anyone's part. If, of course, an ordinary traveller on the highway had been similarly injured, different considerations would have applied. *(Scalon v. Wedgor,* 156 Moss. 462)

In *another American case,* the defendant operated an amusement park, where a "flopper" was installed for those who might be amused by a contest between their reactions and an undulating moving belt. The plaintiff, after watching it operate upon others, took a try himself, in the process of which he was thrown away, resulting in a knee fracture. The Court *held* in favour of the defendant, observing that one who takes part in such a sport accepts the dangers inherent in it, so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his opponent, or a spectator at a ball game the chance of being hit by the ball. (*Murphy* v. *Steeplechase Amusement Co.,* 250 N.Y. 479)

Write an explanatory note on : Volenti non fit injuria.
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CUTLER v. *UNITED DAIRIES,* (1933) 2 K.B. 297 (*Holding restive horse case*).— A horse belonging to the defendants and attached to one of their vans was seen by the plaintiff running past his house without a driver. It entered the field adjoining the plaintiff's garden, and the driver, who had followed it, was trying to pacify it, but as it continued to be restive, the driver shouted for help. The plaintiff went and attempted to hold the horse, but it threw him on the ground causing him injuries, in respect of which he sued the defendant. The Court *held,* dismissing the suit, that the plaintiff must have known that his attempt to hold the horse was attended with risk, and therefore, the maxim *volenti non fit injuria* applied.

HALL v. *BROOKLANDS AUTO-RACING CLUB,* (1933) 1 K.B. 205 (Racing car case).— A racing car shot over the railing and killed two spectators. It was proved to the Court that this was the first time that such an accident took place. It was *held* that there was no negligence, and that this type of danger to spectators was inherent in car racing. The defendants were, therefore, *not liable.*

Implied consent

Although consent is sometimes manifested by words, it may often be implied by conduct or by acts which speak louder than words. If the plaintiff is proved to have said "Oh it's all right with me", he will, of course, *not* be permitted to deny that he did not consent. But even silence and inaction may manifest consent where a reasonable person would speak if he objected. As observed by one American author, the girl who makes no protest at a proposal to kiss her in the moonlight may have mental reservations that it is without her consent, but the man who kisses her is nonetheless protected.

Exceeding consent

It is to be remembered that this defence available to the defendant is limited to the conduct to which the plaintiff consents, and to acts of a substantially similar nature. Thus, permission to dump "a few stones" upon another's property is *not* a permission to cover it with boulders. So also, consent to operate on the left eye is *not* necessarily a consent to operate on the right (— and this is not an imaginary illustration—), and consent to a minor operation on one's nose does not imply consent to a spinal puncture or the removal of one's tonsils.

Consent under mistake

If the plaintiff manifests consent to the defendant's act under a *mistake* as to its nature or character, the consent will still be effective, *unless* the defendant is aware of the mistake *and* takes advantages of it, as for instance, where he himself misrepresents the matter to the plaintiff.

However, such a mistake must extend to the essential character of the act itself, rather than to some collateral matter which merely operates as an inducement. Thus, consent to sexual intercourse will still be consent, and if it later turns out that counterfeit money was received for this favour the disappointed girl will *not* be able to sustain an action for battery, if she subsequently decides that she has been raped.

Four limitations (or exceptions) to the maxim

Discuss the maxim, "Volenti non fit injuria", and explain its exceptions.
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The following are the *four important limitations* to the application of the maxim *volenti non fit injuria* :

(a) No consent — no leave or licence — can legalise an *unlawful act, e.g.,* a dual with sharp swords, where such a dual is prohibited by law.

(b) The maxim has no validity against an action based on a *breach of statutory duty.* Thus, the maxim is no answer to a claim made by a workman against the employer for injury caused through a breach by the employer of a *duty imposed by law.*

(c) *Rescuing — The maxim does not apply where the plaintiff* has, under an *exigency caused by the defendant's wrongful misconduct,* consciously and deliberately faced a risk, even of death, to rescue another from *imminent* danger of personal injury or death, — whether the person endangered is one to whom he owes a duty of protection (as a member of his family), *or* is a mere stranger to whom he owes *no* such special duty.

BRANDON v. OSBORNE, (1914) 1 K.B. 548 (*Skylight case).*— While the plaintiffs, husband and wife, were in a shop as customers, a skylight in the roof of the shop broke, owing to the negligence of contractors engaged in repairing the roof, and a portion of the glass fe and struck the husband causing him a severe shock. His wife, who wa standing close to him was not touched by the falling glass, but reasonably believing her husband to be in danger, she instinctively clutched his arm and tried to pull him from the spot. In doing th she

strained her leg in such a way as to bring a recurrence of thrombosis. In an action to recover damages from the contractors, it was *held* that the wife was also entitled to damages, along with the husband, inasmuch as what she did was, in the circumstances, a natural and proper thing to do.

BAKER v. *T.E. HOPKINS & SONS LTD.,* (1959) I W.L.R. 966.— A doctor went down a well to rescue two men overcome by fumes caused by the defendant's negligence, and in doing so, himself lost his life. The Court rejected the defendant's plea of *volenti non fit injuria,* and *held* that the defendant was *liable.*

(d) The maxim does not apply to *cases of negligence.*

The *reason* behind not applying the maxim to cases of negligence is that one gives consent to the risk arising out of certain acts, but *not* to the risk of negligently doing such acts. For example, one would give consent to the risk arising out of surgical torts. But such a person can never be deemed to give consent for such operations being conducted negligently.

Thus, in the course of gymnastic training, *A*, a schoolboy, was required to vault over a horse. For some reason, *A* landed in a stumble and was injured. The master in charge did nothing to assist *A* in landing properly. *A* sues (i) the master and (ii) the school authorities for damages.

It will be observed that this is a case of pure negligence, and therefore, the *maxim, Volenti non fit injuria* does *not* apply. The master is liable for his negligence, and the school authorities are also vicariously liable for the master's negligence. Therefore, *A* will succeed.

Explain the rule laid down in : Haynes v. *Harwood.*
P.U. Apr. 93

HAYNES v. *HARWOOD,* (1935) I K.B. 146 (*The Police Constable's Case*).— The defendant's horses, negligently left unattended in a crowded street, bolted when a boy threw a stone at them. The plaintiff, a constable on duty inside a police station, saw that persons were in grave danger, ran out, stopped the horses, and was severely injured in doing so. It was *held,* in the circumstances, that he was entitled to recover. The defendant was negligent in keeping the carriage unattended in the public street. Therefore, the defence of subsequent wrongful act of a third person, and also the defence of voluntarily incurring the risk, would *not* be open to him. He could have foreseen the consequences.

Discuss : Dann v. *Hamilton.*
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DANN v. *HAMILTON* (1939) I K.B. 609. (*Drunken driver's case.*)— The plaintiff, knowing that the driver of a motor-car was under the influence of drink, and that, consequently the chances of accident were thereby increased, chose to travel by that car, although there was no compulsion of necessity or otherwise, to do so. She was injured in an accident caused by the drunkenness of the driver, in which the driver was killed. In an action against the personal representative of the driver, the defendant raised the defence of *volenti non fit injuria.* The Court *held* that, except perhaps in extreme cases, the maxim did *not* apply to the tort of negligence, and that the plaintiff was entitled to recover.

(Note : In *Dann* v. *Hamilton* (above), the *contributory* negligence of the plaintiff was *not* pleaded in defence. In a subsequent case, *NETTLESHIP* v. *WESTON* (1971 2 Q.B. 691), it was observed that a passenger going with a drunken driver may be unable to sue, because he is aiding and abetting the offence.

Dann v. *Hamilton* was also *not followed* by the High Court of Australia in *Insurance Commissioner* v. *Joyce* (1948 77 C.L.R. 39)

WHILE v. *BLACKMORE*, (1972) 3 W.L.R. 296.—The defendants had organised a "Jalopy" racing (old-car racing), in which the plaintiff's husband had entered as a competitor. Notices warning the public were displayed, in which it was stated that the defendants were absolving themselves from all liabilities from accident, howsoever caused to the spectators. The plaintiff's husband was also given a programme in which there was a warning in small print on an inside page. After taking part in his race, he stood just outside the spectator's rope, close to a stake to which the spectator's rope and two safety ropes were tied. During the next race, the wheel of a car got entangled in a safety rope, and in the accident that followed, he was catapulted about twenty feet, and died from his injury. In a claim by the plaintiff for damages in negligence, it was *held* that since the deceased did not have full knowledge of the ropes, he had not willingly accepted the risk of injury arising from the defendant's default, and therefore, the doctrine of *volenti non fit injuria* did *not* apply.

10. INEVITABLE ACCIDENT

Write a short note on : Inevitable accident.
B.U. Apr. 92
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An *inevitable accident* is that which could *not* possibly be prevented by the exercise of ordinary care, caution and skill. It means an accident which is *physically unavoidable.* The accident should *not* have been capable of being prevented by ordinary skill and diligence. As was said in an English case, "People must guard against *reasonable probabilities,* but they are not bound to guard against *fantastic possibilities.".* If, in the prosecution of a *lawful act,* a purely accidental casualty arises, no action can be supported for any injury arising therefrom. But if the act done is *unlawful,* an action lies.

Discuss : Inevitable accident.
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Inevitable accident may be caused by :

(a) factors beyond the control of man, *i.e.,* those caused by forces of nature. [termed *acts of God (vis major)]; or*

(b) factors which are within human control, i.e., those independent of the forces of nature.

Under what circumstances can an inevitable accident be pleaded as a valid defence ?
B.U. Oct. 94

HOLMES v. *MATHER,* (1875) L.R. 10 Ex. 261 (*Runaway horses' case*).— The defendant's horses, while being driven by his servant in the public highway, ran away by the barking of a dog, and became so unmanageable that the servant could not stop them, but tried to guide them as best as he could. At last, he failed to turn them clear round a sharp corner, and they struck the balcony of the plaintiff's house. The plaintiff who was standing on the balcony was injured. It was *held* that no action was maintainable by the plaintiff, for the servant had done his best under the circumstances.

Write a short note on : Act of God.
B.U. Oct. 97

BROWN v. *KENDALL,* (1850) 6 Cush, (60 Mass.), 292 (*Fighting dogs' case*). — In this American case, the plaintiff's and the defendant's dogs were fighting. The defendant was beating them in order to separate them and the plaintiff was looking on. In so doing, the defendant accidentally hit the eye of the plaintiff, inflicting upon him a severe injury. When the plaintiff filed a suit, it was *held* that the action of the defendant was a lawful and proper act in itself, which could be done by proper and safe means. Now, if in doing this act, he accidentally hit the plaintiff in the eye and wounded him, it was the result of a *pure accident,* and the defendant was *not liable.*

Discuss inevitable accident as a defence in an action of tort.
B.U. Apr. 94

NITRO-GLYCERINE CASE. (1872) 15 Wallace 524.— The defendants, who were carriers, received a wooden case for transmission, without being informed of the nature of the contents. The contents were found to be leaking, and the defendants thereupon took the case to their office for examination. While the case was being opened, the nitro-glycerine contained in the case exploded, and the building was damaged. In an action by the owner of the building against the carriers, it was *held* to be a case of *sheer accident,* and the defendants were *not* in fault, as they were not bound to know the nature of the contents, unless the appearance excited suspicion. As the Court observed, "No one is responsible for injuries resulting from unavoidable accident whilst engaged in lawful business. The measure of care against accident which one must take to avoid responsibility is that which a *person of ordinary prudence and caution* would use, if his own interest were to be affected and the whole risk were his own."

FARDON v. *HARCOURT,* (1932) 48 T.L.R. 215 (*Barking dog's case*).— The defendant parked his saloon motor-car in a street and left his dog inside. The dog had always been quiet and docile. As the plaintiff was walking past the car, the dog, which had been barking and jumping about in the car, smashed a glass panel, and a splinter entered the plaintiff's left eye, which had to be removed. In an action for damages, it was *held* that the plaintiff could *not* recover, as *a motor-car with a dog was not a thing which was dangerous in itself,* and as such an accident was so unlikely, there was no negligence in taking precautions against it. As the Court observed in this case, "People must guard against *reasonable probabilities,* but they are *not* bound to guard against *fantastic possibilities."*

STANLEY v. *POWELL,* (1891) 1 Q.B. 86 (*Pellet case*).— The defendant, who was with a shooting party, fired at a pheasant. One of the pellets from his gun glanced off the bough of a tree and accidently wounded the plaintiff, who was engaged in carrying cartridges and game for the party. It was *held* that the defendant was *not liable.* (The *ratio decidendi* in this case has been criticised as erroneous, though the decision itself can be supported on the ground of *volenti non fit injuria).*

11. MISTAKE OF FACT

A mistake of fact is *no excuse,* except in the cases where *motive* is an *essential* ingredient constituting the wrong.

In *Consolidate Company* v. *Curtis & Son.* (1892) 1 Q.B. 425, the owner of certain household furniture assigned it by a bill of sale to the plaintiffs. Subsequently, the assignor employed the defendants, a firm of auctioneers, to sell it by auction at her residence. The defendants, who had no notice of the bill of sale, accordingly sold the furniture and delivered it to the purchasers. The defendants pleaded that they had *acted under a mistake as* to the true ownership of the property. But the Court *held* that the mistake of *fact* was *no excuse* for trespassing or interfering with plaintiff's property so wrongfully sold and delivered.

The above decision has been profusely criticised. The *reason* underlying the rule is said to be that, if it were otherwise, it would be difficult for Courts to decide whether the mistaken belief was in fact honest and reasonable. However, there is little force in such an argument, because a similar inquiry is made in matters of criminal law, where mistake of fact is generally a good defence. Even in the law of tort itself, the Courts are often required to ascertain whether a person has acted "reasonably" (*e.g.,* in the case of negligence).

12. EXERCISE OF COMMON RIGHT

The exercise of ordinary rights for a *lawful purpose* and in a *lawful manner* is no wrong, *even if it causes damage.* It will be a case of *damnum sine injuria.* Men are free to seek their own advantage in the ordinary pursuit of business or use of property, though a probable or intended result may be to diminish the profit or convenience of others.

Thus, competition in trade or business is, in itself, no cause of action, whatever damage it may cause. Even selling at unremunerative prices to attract customers, *or* offering advantages to customers who will deal with oneself to the exclusion of a rival, are *not* torts. On the same principle, it has been *held* that the disturbance or removal of the soil from a man's own land, though it is the means (by process of natural percolation) of drying up his neighbour's spring or well, does *not* constitute an invasion of a *legal* right, and will *not* sustain an action. Even proof of *malice* will not improve the plaintiff's position. It is with reference to such cases that the phrase *damnum sine injuria* is used.

(A reference may be made to the cases discussed under the head, *"Damnum sine injuria"* in Chapter II.)

13. PRIVATE DEFENCE

It is human instinct to repel force by force, and this instinct is allowed, nay, even approved, by law as a natural right. Every person has a right to defend his own person and property against an unlawful harm. This may even be done for a wife or husband, a parent or child, a master or servant. The force employed must not be *out of proportion* to the apparent urgency of the occasion. The necessity, moreover, must be proved.

Write a short note on : Private defence.
B.U. Apr. 91
P.U. Apr. 92

In *Morris* v. *Nugent* [(1836) 7 C. & P. 572)], the defendant shot the plaintiff's dogs *after* the dog attempted to bite him. The Court *held* that the right of private defence could *not* be pleaded. But, in a case where a horse continued injuring the defendant, who was compelled to disable him with a spear, it was *held* that the defendant could successfully plead the right of a private defence.

In another case, (*Turner* v. *Jagmohan Singh,* (1905) 27 All. 531), a vicious stallion attacked a pair of mares of the carriage in which the defendant was riding, and continued doing so in spite of the defendant's efforts to calm it. Ultimately, the defendant got hold of a spear and inflicted a wound on its hind quarters. Subsequently, the stallion died of the spearwound, and its owner sued the defendant. It was *held* that the defendant's act was justifiable, and the owner of the stallion was *not* entitled to any damages.

The Orissa High Court has also confirmed that self-defence is a permissible defence in a suit for torts. The Court added that although the general exceptions of the Indian Penal Code do *not,* in terms, apply to a suit based on a tort, the *principle* of self-defence is applicable in such cases. (*Debendra Bhoi* v. *Meghu Bhoi*, A.I.R. 1986 Ori. 226)

14. PLAINTIFF A WRONG-DOER

A person is *not disabled* from recovering damages for an injury caused to him by reason of he *himself* being a wrong-doer, *unless* some *unlawful* act or conduct on his own part is connected with harm suffered by him *as part of the same transaction.*

Write a short note on : Bird v. Holbrook. P.U. Oct. 95

BIRD v. *HOLBROOK.* (1828) 4 Bing. 628 (*Spring Gun Case*).— The plaintiff climbed over defendant's wall in pursuit of a fowl. While in the defendant's garden, an injury was caused to him by a spring gun set by defendant without any notice. It was *held* that even though the plaintiff was a *trespasser,* he was entitled to recover damages, although the injury would not have occurred if the plaintiff had not trespassed on the defendant's land.

15. ACTS CAUSING SLIGHT HARM

The law does not take account of trifles — *de minimis non curat lex.* Nothing is a wrong of which a person of ordinary sense and temper would not complain. The principle is also recognised in S. 95 of the Indian Penal Code.

Discuss : De minimis non curat lex. B.U Apr. 90 P.U. Apr. 94

COWARD v. *BADDELEY,* (1859) 4 H & N 478.— A bystander touched a fireman on the arm to attract his attention to another part of a building where a fire was raging. On a suit filed by the fireman for battery, the Court *held* that the bystander was *not* liable for battery.

PROBLEM.— *A* is driving along a dusty road at a good speed, and the wheels of his motor-car throw a little dust on the clothes of *B*, a pedestrian, which does him no harm. Is *A* liable in tort ?

ANSWER.— *A* is *not* liable. This is a case of *de minimis non curat lex.*

But, the maxim has no application where there is an *injury to a legal right.* Thus, *A* walks across *B's* land (without *B's* permission), not thereby damaging, in any way, the soil of *B.* This will amount to a tort, because, if repeated, such an act would establish *A's* right of way across *B's* land.

Likewise, *X* casts and draws a net in water where *Y* has the exclusive right of fishing. Now, whether any fish is caught or not, *X* has committed a tort against *Y,* because the act, if repeated, would tend to establish a claim or right to fish in that water. (*Holford* v. *Bailey,* (1849) 18 L.J.Q. B. 109)

6

DISCHARGE OF TORTS

The *seven* different modes in which the tort is discharged, that is to say, the various cases in which no remedy will lie for a tort, are discussed in this Chapter.

Where there is a *vested right of action for a tort,* such a right of action may be discharged in the following *seven* ways :

1. Death of either party
2. Waiver
3. Accord and satisfaction
4. Release
5. Acquiescence
6. Judgement recovered
7. Statutes of Limitation

Write a short note on : Discharge of torts.
P.U. Oct. 92

Write a detailed note on discharge of torts.
P.U. Oct. 95

Explain briefly the various modes of discharge of a tort.
B.U. Oct. 93
Apr. 94
Oct. 94
Apr. 96

Discuss the various ways in which a tort may be discharged.
P.U. Oct. 93
Apr. 97

Discuss the various modes of discharge of a tort.
B.U. Oct. 91
Oct. 95
Apr. 97

Discuss the following : Actio personalis moritur cum persona.
B.U. Oct. 91
Oct. 92
Apr. 96

Elucidate the maxim, "Actio personalis moritur cum persona" as a mode of discharge of tort. Are there any exceptions to this maxim ? Discuss.
P.U. Apr. 92

1. Death of either party

This topic falls into two parts. In a suit for damages for a tort, what is the position in law if the *plaintiff* dies — *and* what is the legal position if the *defendant* dies ? Can the heirs of the deceased plaintiff or defendant *continue* the suit, *or* does the right of action die with him ?

(a) Death of the person wronged, *i.e.,* the *plaintiff*

Actio personalis moritur cum persona.— This *important* maxim means that a *personal* right of action dies with that person.

At Common Law, if an injury was done either to the person or property of another, for which *damages only* could be recovered, the action *died* with the person to whom, or by whom, the wrong was done. This was embodied in the maxim, *actio personalis moritur cum persona* (a personal right of action dies with the person). A personal action *did* not *survive* on the death, either of the person who *sustained*, or of the person who *committed,* the wrong. The Law Reform (Miscellaneous Provisions) Act, 1934 has, however, virtually *abolished* the maxim.

Exceptions to the maxim 'Actio personalis moritur cum persona'

There are, in English law, *four* cases in which the right of action *does* survive to the heirs or legal representative of a deceased party. They are, therefore, the *four exceptions* to the maxim. These are :

(a) *The Law Reform (Miscellaneous Provisions) Act,* 1934.— Since the passing of this Act, the maxim *actio personalis moritur cum persona*, no longer holds good. Under this Act, on the death of any person, *all causes of action* vested in him survive for the benefit of his

estate, *except* actions for *(i) defamation, (ii) seduction, (iii)* inducing one *spouse* to leave or remain apart from the other, *and* (iv) claim for damages for *adultery.*

(b) *The Fatal Accident Act,* 1846.— This Act enables the executor or administrator of a person, whose death is caused by the wrongful act or default of another, to bring an action for the benefit of the widow, husband, or child of the deceased.

(c) *The Employer's Liability Act, 1883.*— This Act empowers the legal representatives of a *workman*, who dies of injuries sustained whilst in the employer's service, through any of the causes mentioned in the Act, to bring an action for compensation against the employer.

(d) *The Workmen's Compensation Act, 1925.*— Under this Act, the dependant of a workman can claim compensation, where the workman *dies of injury* which, if he had survived, would have given him a claim to *compensation.*

Indian Law.— In India, there are *three* Acts which constitute the exceptions to the maxim *actio personalis moritur cum persona.* These are :

(i) *Legal Representatives' Suits Act, 1855.*— Under this Act, an action may be maintained by the executors or administrators or representatives of a deceased person for any *wrong* committed in the life-time of the deceased *which has occasioned pecuniary loss to the estate of such person.*

Discuss : Death of the parties.
B.U. Apr. 90

(ii) *Fatal Accidents Act, 1855.*— This Act enables the legal representative of a person whose death is caused by the wrongful act, neglect, or default of another, to bring an action for the benefit of the widow, husband or child of the deceased. Such a suit is to be brought within *one year* from the death of the person so killed.

(iii) *Indian Succession Act, 1925.*— Under S. 306 of this Act, all rights to prosecute any action existing in favour of a deceased person survive to his executors or administrators, except an action for — (i) defamation, (ii) assault, as defined in the Indian Penal Code, *and* (iii) personal injuries *not* causing the death of the party.

Explain the maxim, 'Actio personalis moritur cum persona'. Discuss the application of this maxim by the Indian courts.
B.U. Apr. 93

(b) Death of the wrong-doer, *i.e.*, the *defendant*

It is a general principle of the Common Law that an action in tort abates on the death of the wrong-doer, and the personal representatives *cannot* be sued in respect of torts committed *by* the deceased, *except* where the deceased has committed a tort which involves the wrongful appropriation of the plaintiff's *property, and has added it (or its proceeds) to his own estate,* in which case, an action *can be* maintained.

To the above-mentioned principle, there is one *statutory exception* in England, namely, the *Law Reform (Miscellaneous Provisions) Act,* 1934. This Act practically abolishes the maxim, *actio personalis moritur cum persona.* Under this Act, on the death of any person, *all causes of action subsisting against* him *survive* against his estate, *except* actions for (i) defamation, (ii) seduction, (iii) inducing one spouse to leave or remain apart from the other, and (iv) claim for damages for adultery.

Indian Law

(i) *Legal Representatives' Suits Act, 1855.*— Under this Act, an action may be maintained *against* the executors or administrators or representatives of any deceased person for any wrong committed by him for which he would have been subject to an action.

(ii) *Indian Succession Act.*— Under S. 306 of the Indian Succession Act, all rights of action existing against a person at the time of his demise survive against his executors or administrators, *except* an action for (i) defamation; (ii) assault, as defined in the Indian Penal Code; and (iii) personal injuries *not causing* the death of the party. [The words "personal injuries" means *corporeal or bodily* injuries to the *person*, as opposed to injuries to *property* or *reputation*.]

The Orissa High Court has *held* that where a money-decree was passed against a Hindu in respect of the amount received by him from the decree-holder by misrepresentation of facts, the liability would be personal, and could *not* be extended to his son under *Hindu law*. It was *further held* that whatever relief the decree-holder had against the father under the *law of tort* did *not* subsist against his son, as it ended with the father's death. (*Prusti* v. *Mohanty*, A.I.R. 1978 Ori. 217)

2. Waiver

The second factor which will discharge a tort is *waiver*. *If* a man has *more* than *one* remedy for the *same* wrong, and *elects* to pursue *one* of them, *abandoning the others*, he must stand or fall by his election. The other remedies are said to have been *waived* by him. In short, a waiver is simply an *election between remedies*. For instance, if the injured person had remedies in tort *and* breach of contract, and he elects to sue for the *latter*, the cause of action in *tort* is *waived*, and he *cannot revert to it* in law.

Instances of torts which can be waived are conversion, trespass to land or goods, deceit and extorting money by threats. In these cases, the injured party may waive his remedy in tort, in favour of some other remedy (*i.e.,* criminal action) and if he does so, this extinguishes the right of action in tort.

Waiver may be *express or implied*. It is *express* when a person, in terms, gives up the alternate remedy, and in this, it closely resembles a *release*. Waiver is *implied* when the person does or acquiesces in anything which is inconsistent with the alternate remedy to which such a person is entitled.

Write a short note on : Waiver by election.
P.U. Oct. 91
Apr. 93

The *principle* underlying the doctrine of waiver is *twofold*. The *first* is to avoid multiplicity of proceedings, and the *second* is that if a person reasonably gives the impression that he has waived a particular remedy, it would *not* be equitable to allow him to go back to that alternate remedy.

The process of waiver is, however, not applicable to certain torts, like defamation and assault.

Write a short note on : Accord and satisfaction.
B.U. Apr. 92
Apr. 95
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3. Accord and satisfaction

The *third* ground for discharge of a tort is what is known as 'accord and satisfaction'. And *accord* means a mutual *agreement* to pay or to

do something as compensation, and *satisfaction* means the *actual payment of the sum or the doing* of the thing agreed upon. When such an agreement is executed, and satisfaction, has been made, the agreement is called accord *and satisfaction*, and operates as a *bar* to the right of action. "Accord" signifies consideration which makes it operative. The satisfaction may be either executed or executory.

Discuss : Accord and satisfaction. B.U. Apr. 90

Just as a civil obligation can be discharged by accord and satisfaction, so also, tortious liability can be discharged by accord and satisfaction, *i.e.,* it can be extinguished by an agreement for valuable consideration between the injured party and the tort-feasor.

Thus, if a person is injured in a train accident, he may agree to accept a specific sum of money as compensation and agree further *not* to sue the Railway authorities for injuries suffered by him.

4. Release

A release means the *surrender* of right of action against the wrong-doer. It is open to the injured party to *release the wrong-doer from liability*. Release closely resembles accord and satisfaction (discussed above), with the difference that a release is usually embodied in a formal document.

According to English Law, however, a release of right must be either supported by consideration *or* by a formal document which is signed, sealed and delivered. A covenant not to sue the tort-feasor would operate as a release, and may be put up in defence in an action on the tort. However, a release which is executed under mistake, or in ignorance of one's rights or obtained by fraud, is *not binding.*

Further, a mere covenant not to sue one of the joint tort-feasors, does *not* operate as a release so as to discharge the other. Thus, if a tort is committed against *A* by *X* and *Y*, and *A* covenants with *X* not to sue him, this will *not* operate to discharge *Y* from liability.

5. Acquiescence

Where a person who *knows* that he is entitled to enforce a right, *neglects* to do so for a length of time, the other party may fairly *infer* that he has *waived* or *abandoned* the right. The law helps the active and the diligent, and not those who sleep or slumber over their rights. But, to deprive a man of his legal remedies, there must be something *more* than *mere delay*. Direct acquiescence takes away a right of action. If an injured person, with full knowledge of his rights to bring an action for tort, neglects to do so for a long time, it may fairly be inferred that he has waived or abandoned the right, and the tort is discharged.

Thus, in one case, it was *held* that the right to a house was taken away by acquiescence after it was dedicated as a house of prayer. (*Sufroo Shaikh* v. *Futteh Shaikh*, (1871) 15 W.R. 505).

(*Today*, the statutes of limitation categorically lay down the period after which the legal remedy of recovering damages for various torts would become time-barred. See under the heading, *"Limitation"*, below.)

6. Judgement recovered

The damages resulting from *one* and the *same* cause of action must be assessed and recovered *once and for all.* When a suit is filed,

and a judgement pronounced, the original right of action is *merged* therein, and the plaintiff will *not* be permitted to agitate the matter over *again*, and his *second* suit based upon the *same* cause of action will be *barred* on the *principle of res judicata*, which *prevents* a Court from hearing the same matter which has been *adjudicated upon* by a competent Court in a previous suit. The plaintiff, who has sustained a broken arm and a broken leg by *one and the same assault*, *must* sue for *both* the injuries in the *same* action.

In one case, the plaintiff was assaulted by the defendant and was awarded damages in a suit against the defendant. Long after obtaining such damages, he discovered that he would require further surgery. So, he sued again for further damages. The Court *held* that damages are recoverable only once for the same injury. Accordingly, he was *not* entitled to file the second suit. (*Fitter* v. *Veal*, 1701 12 Mod. Rep. 542)

Exceptions

The above rule admits of the following exceptions :

(a) Where two or more *distinct* rights are violated, a fresh suit can be filed for violation of each right.

PROBLEM — The plaintiff, a cab-driver, in an action (*i.e.*, a suit), had already recovered compensation for damage done to his cab by a collision with the defendant's van. He brings another action in respect of personal injuries suffered by him in consequence of the same accident. The defendant objects to the second suit brought on the same cause of action. Discuss.

Ans.— Here, *two distinct rights* are violated, *viz.*, damage to *property* and damage to *person*. The cab-driver is, therefore, *entitled* to bring the second action for his personal injuries, for they were caused by the violation of a *different* right. (*Brunsden* v. *Humphrey*, (1884) 14 Q.B.D. 141)

(b) *Secondly*, in cases in which damage is *not of the essence* of the action (as in trespass), a fresh cause of action arises *de die in diem* (*i.e.*, every time the tort is committed).

(c) *Thirdly*, in cases in which damage is *of the essence of the action* (*as* for instance *in nuisance)*, *a fresh cause* of action arises as often as *fresh damage* accrues. In cases of continuing nuisances, successive actions may, from time to time, be brought in respect of the continuance.

(d) Lastly, where the injury is of a *continuing* nature, the bringing of an action and the recovery of damages for the reparation for the *original* wrong do *not* prevent the injured party from bringing a *fresh* action for the *continuance* of the injury.

7. Limitation

Actions for tort must be brought within the prescribed statutory periods; otherwise the right to sue is barred.

In India, the Limitation Act has laid down the various periods within which one must sue for different torts. For instance, a suit to recover compensation for false imprisonment becomes time-barred after *one year* from the date when such imprisonment ends. Similarly, a suit for compensation for trespass upon immovable property cannot be filed after *three years*.

7

LIABILITY FOR WRONGS COMMITTED BY OTHERS (VICARIOUS LIABILITY)

Vicarious liability

Discuss the theory of vicarious liability.
B.U. Apr. 95
Apr. 96

Discuss fully the principle of vicarious liability.
B.U. Apr. 94
Oct. 96
P.U. Apr. 93

Vicarious liability means liability which is incurred for, or *instead* of, another. Every person is responsible for *his own acts.* But there are circumstances where liability attaches to a person for the wrongs committed *by others.* The most common instance of vicarious liability is the liability of the *master* for wrongs committed by his *servant.* In such cases, liability is *joint as well as several.* The wrong-doer himself is liable, be he a servant or an agent, as much as his principal. As *Salmond* observes, "In general, a person is responsible only for his own acts, but there are exceptional cases in which the law imposes on him vicarious responsibility for the acts of others, however, blameless himself."

Now, liability for *another's* wrongful acts or omissions can arise in the following *three* ways :

A. *Liability by ratification, i.e.*, where the defendant has *authorised* or *ratified* the particular wrongful act or omission.

B. *Liability arising out of a special relationship, i.e.,* where the defendant stands to the wrong-doer in a relationship which makes him answerable for wrongs committed by the latter, though not specially authorised, *e.g.,* master and servant.

C. *Liability by abetment, i.e.*, where the defendant has induced another to commit a wrong.

Each of these *three* cases will now be discussed.

A. LIABILITY BY RATIFICATION

Any person who *authorises* or *procures* a tort to be committed *by another* is responsible for that tort *as if he had committed it himself.* The maxim underlying the doctrine is *"Qui facit per alium facit per se", i.e.*, he who does an act through another, does it himself. In such a case, the person authorising is liable, *not only* for the tort *actually* authorised, *but also* for its *direct* consequences.

What is ratification

An act done by *A*, not for himself, but for *B*, though *without the authority of B,* becomes the act of the *principal B*, if subsequently *ratified* (*i.e.*, assented to and approved) by *B*. If one person commits a tort, purporting to act on *behalf of another,* but *without* his authority, and that other subsequently *ratifies*, and *assents* to that act, he thereby

becomes responsible for it. The person *ratifying* the act is bound by the act, whether it be to his *detriment* or *advantage.* Such an act becomes the act of the *principal* in the same way as if it were done with his *previous authority, according to* the maxim *"omnio ratihabitio retrorahitur et mandato priori oequiparatur" (i.e.,* every ratification of an act relates back and thereupon becomes equivalent to *previous request).*

Four conditions of ratification –

The following *four* conditions have to be satisfied before one person can be held liable for another's tort on the ground of ratification :

1. Only *such* acts bind a principal by subsequent ratification as were *done* at the time *on his behalf.* What is done by a person on *his own account* cannot be effectually adopted by another later on.

2. The person ratifying the act must have *full knowledge* of its tortious character.

3. Further, ratification must take place at a time when the person ratifying the act could himself have done that act.

4. An act which is *illegal* and *void cannot* be ratified.

B. LIABILITY ARISING OUT OF SPECIAL RELATIONSHIP

How does vicarious liability arise ? Discuss.
B.U. Oct. 97

It may be noted that normally, the person who is liable for a wrong is *he who does the wrong.* To this maxim, the persons mentioned in items 1 to 6 below form *exceptions.*

Vicarious liability may arise where the *doer* of the act and the *person* sought to be held *liable* therefor are *related* to each other as :

1. Master and Servant.
2. Owner and Independent Contractor.
3. Principal and Agent.
4. Company and its Directors.
5. Firm and its Partners.
6. Guardian and Ward.

1. MASTER AND SERVANT

Explain vicarious liability, with special emphasis on master and servant.
B.U. Apr. 92

A servant is a person who voluntarily agrees, whether for wages or not, to subject himself, and at all times during the period of service, to the *lawful* orders and directions of another, in *respect* of certain *work* to be done. A *master* is the person who is *legally* entitled to give such orders and to have them obeyed. The relation of master and servant exists where the employer can not only direct what work the servant is to do, but also control the manner of doing such work. A son, for example, is *not* in the eyes of law, a servant of his father.

HEWITT v. *BONVIN,* (1940) 1 K.B. 188 (*Son driving father's car*).— A son obtained from his mother, who had authority to grant it, permission to drive his father's motor-car. The son wanted the car for his own purpose, in order to drive two girl-friends to their home. Neither the father nor the mother knew the girls, and it was no concern of either of them that the girls should be driven to their home. On the

way, back, due to the negligent driving of the son, the car met with an accident, and a friend who had accompanied the party was killed. In an action by the administrator of the deceased man against the father as the owner of the car, it was *held* that the son was *not* driving the car as his father's *servant* or *agent,* or for his *father's purposes,* and, therefore, the father was *not liable* for his son's tortious acts.

It has been *held* that when the owner of a motor-car leaves his vehicle at a workshop for repairs, the relationship between the owner and the proprietor of the workshop is *not* that of a master and servant. In such cases, the proprietor is in the position of an independent contractor, and if he takes the vehicle out, and an accident follows, the owner is *not* vicariously liable. (*Devinder Singh* v. *Mangal Singh,* A.I.R. 1981 Pun. & Har. 53)

Discuss the maxim, Qui facit per alium facit per se, with case law.
B.U. Oct. 93

Principle on which vicarious liability is based

Explain the principle of vicarious liability.
B.U. Apr. 97

Now, a *master* is held liable for his *servant's* wrongful acts or omission; a *principal* is held liable for his agent's wrongful acts; and so on. The *reason* is that he who does a thing through another does it himself. *Qui facit per alium facit per se.* The *second* principle on which a master's liability is fixed is that of *respondent superior* : Let the superior be responsible.

(a) *Qui facit per alium facit per se*

The master's responsibility for his servant's act has its origin in the maxim, *qui facit per alium facit per se.* (He who does an act through another, is deemed in law to do it himself.) A person who puts another in his place to do a class of acts in his absence, necessarily leaves him to determine, according to circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done. Consequently, he is answerable for the wrongs of the persons so entrusted, either in the *manner* of doing such an act, *or* in *doing* such an act under circumstances in which it ought *not* to have been done, *provided* that what is done is not done from any *caprice of the servant, in the course of his employment.*

(b) *Respondeat superior*

Write a short note on : Respondeat Superior.
P.U. Apr. 92

The master is answerable for every such wrong of the servant or agent as is committed *in the course of the service,* though no *express command* or privity of the master is proved. The rule is based on the maxim, *"Respondeat superior"* (let the superior be responsible), and has its origin in the legal presumption that all acts done by the servant *in and about his master's business* are done by his master's express or implied *authority,* and are in truth the acts of the *master.*

The *two* main *reasons* for the recognition of this rule are : (a) the difficulty in the way of proving actual authority; and (b) that the employers usually *are,* while their servants *are not,* financially capable of bearing the burden of civil liability. In the absence of such a rule, a rich man, who employs a poor servant to commit a wrong, would go scot free, and the person wronged would *not* be compensated. Further, it is also evident that imposition of such liability on the master helps to

prevent accidents, because the master himself would be more careful in *choosing* the servant than he would have been if the rule were otherwise.

In an interesting *American case,* the issue before the Court was whether, under the doctrine of *respondeat superior,* a client is liable for the tortious conduct of his lawyer, which causes injury to a third party. In the present case, the plaintiff's sustained serious injuries in a collision due to negligence of their lawyer, *Mr. H,* who was in an intoxicated condition at the relevant time. *Mr. H* was returning home after representing his client's case when the accident occurred. The client denied any vicarious liability on his part. The Court *held that* even though the relationship between the client and *Mr. H* was one of the agency at the time of the collision. *Mr. H* was *not* engaged in the furtherance of the client's business to such a degree that it could be said that the client had the right to direct and control the physical conduct of *Mr. H.* Accordingly, it was *held* that the client was *not vicariously liable* (under the doctrine of *respondeat superior*) for the consequences of *Mr. H's* misconduct. (*Brinkly* v. *Farmers Elevator Mutual Insurance Co.,* 485 F 2d 1283)

Discuss : Respondeat superior.
B.U. Apr. 91
Oct. 92

FOUR KINDS OF LIABILITIES

It may be noted that the relation between a master and servant gives rise to *four* kinds of liabilities :

I. Liability of the *master* to *third* persons.

II. Liability of the *servant* to *third* persons.

III. Liability of the *master to servant.*

IV. Liability of the *servant* to *master.*

1—MASTER'S LIABILITY TO THIRD PERSONS FOR TORTS OF HIS SERVANT

Explain the nature of vicarious liability when a master is liable for the acts of his servant.
P.U. Oct. 96
Oct. 97

Torts committed in servant's course of employment

A master is liable to third persons for every such wrong of his servant as is *committed in the course of his employment.* A wrongful act is said to be done *"in the course of employment"* if it (i) is *authorised* by the master, *or* (ii) is a wrongful and unauthorised *mode* of doing some act *authorised* by the master. Thus, although the particular act which gives rise to the cause of action may *not* be authorised, still if the act is done *in the course of employment which is authorised,* the master is *liable.*

Explain the liability of a master to third persons for the torts of his servant.
B.U. Apr. 93
P.U. Apr. 95

In other words, to hold a master liable for the wrongful act of a servant, it must be shown that such act was committed in the course of the master's business, so as to form part of it, and not merely coincidental in time with it. For torts committed in any manner *beyond* the cope of employment, the master is liable only if he has expressly *authorised,* or subsequently *ratified,* such an act.

In an *American case, Birmingham Electric Co.* v. *Hawkins* (37 Ala. App. 282, 67), the defendant's bus-driver, *D* apparently angered

because he was unable, for several blocks, to get ahead of the plaintiff's automobile, blew his horn loudly. Later, he told the plaintiff to stop, and when he did so, *D* followed him and assaulted him with a revolver. Holding that *D*'s employer was *not* liable, the Court observed that *D* was *not* acting within the scope of his employment, but was performing an act entirely personal to himself.

Discuss the liabilities which arise out of the relationship of master and servant.
B.U. Oct. 92

ROBBERTS v. *SHANKS,* (1924) 27 Bom. L.R. 548 (*Chauffeur's case*).— On alighting from his car, the defendant ordered his chauffeur to take the car directly to the garage. The chauffeur, however, drove the car to his *own* residence, took his meal, and whilst driving the car to the garage, negligently drove it into the plaintiff's car, and caused damage to it. The Court *held* that the defendant was liable in damages, for, at the time of the accident, the chauffeur was acting *in the course* of his employment.

When is an employer liable for the tortious acts of his workmen ?
B.U. Oct. 97

CENTURY INSURANCE CO. LTD. v. *NORTH IRELAND ROAD TRANSPORT BOARD,* (1942) A.C. 509 (*Petrol fire case*).— *A,* a driver of a petrol lorry belonging to *B,* whilst transferring petrol from the lorry to an underground tank, struck a match to light a cigarette and threw it on the floor, and thereby caused fire and an explosion, which caused damage to the property of *C. C* sued *B* for damages, and it was *held* that *B* was liable, as *A* was clearly negligent in the discharge of his duty. It was observed that although the act of lighting a cigarette was done by the driver for his own comfort, and was an act both innocent and harmless by itself, the careless act was done in the course of the driver's employment and was a negligent mode of conducting his work.

Explain vicarious liability, with special reference to the liability of a master for the acts of his servants.
B.U. Oct. 94

According to the Bombay High Court, the course of employment normally begins when the employee reaches his place of work. To extend it to the journey to and from work, it must be shown that, in travelling by that particular route, and at that particular time, the employee was fulfilling an express or implied term of his contract of service. According to the Court, the *test* is whether the employee was exposed to the particular risk by reason of his employment, *or* whether he took the same risk as those incurred by any member of the public using the highway. (*Gajanan Bhav* v. *E.S.I. Corporation* — 75 B.L.R. 637)

In a case decided by the High Court of Punjab and Haryana, the deceased was a passenger in a goods truck, and was allowed to board the same by the driver of the truck in contravention of the Punjab Motor Vehicles Rules, 1940. The accident in which the passenger succumbed to his injuries took place due to the negligence and carelessness of the driver. The question before the Court was whether the owner of the truck could be made vicariously liable on the ground that the driver was acting in the course of his employment. Answering this question in the *negative,* the Court *held* that the owner of the truck had *not*, in any way, authorised or acquiesced in the carriage of the deceased as a passenger in the truck. In the circumstances, it could *not* even remotely be said that the driver was acting in the course of his employment, as no employer can be deemed or assumed to

authorise the contravention of the law or the commission of an offence. (*Jiwan Dass Roshan Lal* v. *Karnail Singh and Others,* A.I.R. 1980 Punj. & Har. 167)

In another case (*decided* by the Andhra Pradesh High Court), the master had ordered the driver to take the car for servicing, specifically permitting him to allow one police constable (known to the master) to travel with him, and expressly forbidding him from picking up other passengers *en route.* However, intending to make some money for himself, the driver picked up other people on the way, and in the accident that followed, these other (unauthorised) passengers were killed. The Court *held* that the master could *not be held liable* in the circumstances. In picking up other passengers, the driver had done something for himself, which was not part of his job, and which his master had expressly forbidden. The Court also observed that the master could *not* be made liable for the wrongful act of his servant, simply because the accident occurred when the latter was engaged in the course of his master's business. (*Machiraju Vishlekshi* v. *The Treasurer, Council of Indian Mission of Lutheran Church,* A.I.R. 1978 A.P. 310)

DEATONS PROPRIETORY LTD. v. *FLEW* (1949) 79 CLR, 370.— In this *Australian case, X* entered the defendant's hotel and spoke to a barmaid, who threw a glass of beer in his face. According to *X,* he had asked her a polite question, but the barmaid said that he had insulted her. The Court *held* that although the barmaid was *liable,* the defendant (*i.e.,* the owner of the hotel) was *not liable,* as the barmaid's act was an independent personal act, *not* connected to the work she was employed to perform.

HEASMANS v. *CLARITY CLEANING CO. LTD.* (1987 ICR 949).— An office-cleaning contractor company employed a cleaning lady to clean the office *after office* hours. It was discovered that she had used the office telephone to make personal calls worth £ 1,500 in all. The owners of the office sued the contractor as vicariously liable for the tort of the cleaning lady. The Court of Appeal *held* that the contractor was *not liable* for the lady's torts. The calls were *not* made in the course of employment, as telephoning was *not* part of her duties, although cleaning the phone was.

MAKANJUOLA v. *COMMISSIONER OF POLICE* (1989 The Times 8)— A Nigerian student was found to have undertaken part-time work in contravention of her visitor's permit. A policeman called at her house and told her that she was liable to be deported. He added that he would not report her if she granted him sexual favours, which she did to avoid deportation. In a suit filed against the policeman *and* the Commissioner of Police, the Court awarded exemplary damages against the policeman himself, and *held* that the Commissioner was *not vicariously* liable.

JOSEPH v. *CRAIG,* (1919) 1 Ch. 1. (*Refuse case*).— *X* employed his servants to carry refuse and to deposit it in a certain place set apart for the purpose. In order to save themselves trouble, and not for

the benefit of *X*, the servants wrongfully deposited the refuse upon *P's* premises, instead of carrying it further to its proper destination. *P* sues *X* for trespass.

In this case, what the servants did was *not only* contrary to express orders, *but* it was done not for the benefit of *X*, the master, but in order to save themselves the trouble of carrying the refuse further. Therefore, the master *cannot* be liable for what the servants did. If *X* had asked his servants to deposit the refuse *wherever they liked,* he would have been liable.

KEPPEL BUS COMPANY LTD v. *SA'AD BIN AHMAD,* (1974) 2 All. E.R. 700.— In this case, the Appellant was a Bus Company, and the Respondent a passenger on one of its buses. In the course of the journey, the conductor, who was employed by the Appellant, was rude to an elderly lady who wished to get off the bus. Thereupon, an altercation broke out between the conductor and the Respondent, but the other passengers prevented them from coming to blows. After the old lady got off, the conductor began to abuse the Respondent and struck him in the eye, breaking the Respondent's glasses and causing the loss of the sight of his eye. In a suit filed by the Respondent in the High Court of Singapore against the bus company *and* the conductor, it was *held* that when he hit the Respondent, the conductor was acting in the course of his duties, inasmuch as he was maintaining order amongst the passengers. It was, therefore, *held* that the bus company was vicariously liable for the act of the conductor. *On appeal to the Privy Council, it was held that the bus company was not liable.* The Court observed that even if it was assumed that one of the duties of the conductor was to keep order amongst the passengers, there was no evidence of any disorder amongst the passengers. Nor were there any circumstances, from which it could be infered that there was an emergency situation calling for forcible action on the part of the bus conductor.

PROBLEMS

1. *A*'s driver, after dropping him at his office, goes to buy some cigars for his master. The driver, however, waiting to meet a friend of his, takes a longer route to the shop than the one which *A* was accustomed to buy cigars, and while on his way to his friend's house, negligently runs down *B* and causes injury to *B*. Will *B* succeed in getting damages from *A* ? Give reasons.

Ans.— Here, *A*'s driver was acting in the course of his employment, *B* will succeed.

2. *A* sends his chauffeur with his car to meet a guest at the railway station. The chauffeur, desiring to do some private business of his own, take a circuitous route to the station, and while thus deviating from the usual route, by his negligence, injures a pedestrian. Is *A* liable ?

Ans.— In this case, the servant, being on master's business, takes a circuitous way in order to do some private work of his own, and the

master is responsible for the servant's negligence. Owing to this deviation, the servant does *not* cease to be in the employment of the master, so as to divest the latter of all liability. Therefore, *A* is liable : *Storey* v. *Asthon,* (1860) L.R. 4 Q.B. 476. If the servant was going on a frolic of his own, without being at all on his master's business, then of course, the master would *not* be liable : *Joel* v. *Morison,* (1834) 6 C & P. 502.

3. The defendant, a garage company, hired out a car to take the plaintiff on a journey and also provided a driver. The car was filled with luggage, but before the plaintiff got into the car, an air-raid warning obliged him to take shelter, and thereupon the driver drove off with the luggage. The plaintiff sues the garage company for damages for the loss of the luggage. Advise the garage company.

Ans.— The driver was acting in course of his employment. So, the garage company is liable.

A MASTER BECOMES LIABLE FOR THE WRONG DONE BY A SERVANT IN THE COURSE OF HIS EMPLOYMENT IN THE FOLLOWING *SIX* WAYS :

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

GREGORY v. *PIPER,* (1829) 9 B & C 591 (*'Rubbish' Case*).— The defendant and the plaintiff were neighbours, and there was a dispute between them as to a right of way. In order to obstruct the plaintiff from using the way, the defendant ordered his servant to place rubbish across the pathway, but to put it carefully, so that it should not touch the plaintiff's wall. The servant executed the orders of the master carefully, but the heaped-up rubbish began to slide down in course of time, with the result that a portion of it touched the plaintiff's wall. The plaintiff sued the defendant for trespass. The Court *held* that if what the servant did was what he was *authorised* to do, and if the wrong was the *natural consequence* of something done by a servant, however *carefully* it might have been done, the defendant would *be answerable.*

Explain the rule laid down in : Gregory v. *Piper.*
P.U. Oct. 93

However, an act of a servant, which is *not* in discharge of his duty, will *not* make the employer liable. Thus, in one English case, *X*, a truck driver, was allowed by his employer to stop for refreshments when undertaking a long journey. One day, he parked the truck and was crossing the road to reach a cafe, when, partly due to his own negligence, he collided with the plaintiff who was on a motor cycle. The plaintiff was injured, and he sued *X's* employer for his injuries, on the ground that at the time of the accident, *X* was acting in the course of his employment. The Court *held* that *X's* employer was *not liable,* because although he was permitted to obtain refreshments on long journeys, the obtaining of refreshments was *not* something he was specifically employed for, and that he could *not* be said to be discharging his duty towards his employer at the time when the accident occurred. (*Crook* v. *Derbyshire Stone Ltd.*, 1956 2 All E.R. 447).

2. The wrong may be due to the servant's want of care or negligence in carrying out the work or business in which he is employed.

The following cases will illustrate this point :

BAYLEY v. *MANCHESTER S. & L. RLY.,* (1873) L.R. 8. C.P. 148 (*Porter's Case*).— It was one of the duties of the porters of the defendant Railway Company to prevent passengers from getting into the wrong train. The plaintiff, a passenger, was in fact in the right train, but a porter, under the erroneous belief that the plaintiff was in the wrong train, violently put him out of the carriage. Now, when a master authorises his servant to do a particular class of acts, he is liable for the servant's errors of judgement or improper acts in exercising such authority. The act of the porter was merely a wrongful or mistaken way of doing the work entrusted to him, and an unauthorised assumption of work that did not pertain to him. Thus, the act was done in the course of the servant's employment, and the defendant Company was, therefore, held *liable.*

MILNER v. *GREAT NORTHERN RLY.,* (1884) 5 L.T.N. 367 (*The Cloak-room Clerk's Case*).— A cloak-room clerk in the defendant's employment used to take up parcels of the passengers from the cloak-room to the train as part of his duty. A passenger asked him to take a parcel to the train which he did, and as he was running back, he ran against another porter, who in his turn dashed against the ticket-collector, and the ticket-collector collided with the plaintiff's wife, causing injuries which resulted in her death. The plaintiff sued the Railway Company. The Court *held* that the Railway Company *was liable* in damages. The *reason* is that the master is liable for the injury caused by the servant's want of care or negligence in executing the work in which he is employed. At the time of the accident, the cloak-room clerk was acting within the scope of his employment, and hence, the defendants were liable.

RADLEY v. *LONDON PASSENGER BOARD,* (1942) 1 All. E.R. (*Infant passenger's case*).— The infant plaintiff was a passenger on the upper deck of an omnibus belonging to the defendant. While the omnibus was proceeding along a country road, its upper part brushed against the branches of a tree over-hanging the road, and some of the windows were broken. A splinter of glass penetrated the infant plaintiff's eye and necessitated its removal. The accident occurred at mid-day, and the tree was clearly visible along the road. It was *held* that it was the duty of the driver to keep a lookout for obstructions, and he had failed to perfrom that duty, and the defendant, i.e. the bus company, was, therefore, *liable.*

But if the servant, instead of doing that which he is *employed* to do, *does something he is not employed to do at all,* the master *cannot* be said to do it *by* his servant, and therefore, *is not* responsible for the *negligence* of the *servant in doing it,* as will be clear from the cases discussed below.

WILLIAMS v. *JONES,* (1865) 3 H & C. 602 (*Carpenter's Case*).— The defendant employed his servant, a carpenter, to make a signboard in a shed lent by the plaintiff. The carpenter, while lighting his pipe, negligently set fire to the shed. The Court *held* that the defendant was *not liable;* there was no negligence in making the signboard (the *master's business*) but only *in smoking the pipe (the servant's* business), and mere contemporaneity did *not* make it part of a single transaction done on the master's behalf. True, he was negligent in taking care of the shed, but the only business the master employed him for was to *make a signboard.*

POULTION v. *LONDON AND S. WEST RLY.,* (1867) L.R. 2 Q.B. 534 (*Station master's case*).— A station master, having demanded payment for the carriage of a horse, conveyed by the defendant railway company arrested and detained the plaintiff for non-payment until it was ascertained by telegraph that all was right. The railway company had no power to arrest for non-payment of carriage of a horse. Here, the *implied* authority of a station master did *not* extend to the doing of acts which were *ultra vires* the company. In the absence of any proof of *express* authority, the station master was acting beyond the scope of his employment, and the company was therefore *not liable* for the act of its servant.

NALINI SEN GUPTA v. *CORPORATION OF CALCUTTA,* 52 Cal. 983.— *A* and *B* were employed by *C,* as chauffeur and cleaner respectively of his car. One day, *A* and *B* were sent by *C* with his car for repairs to a workshop. The road leading to the workshop being closed to traffic, *A* had to leave the car at some distance from the workshop, in charge of *B,* the cleaner, whose duty was only to clean the car, and who was instructed *not* to drive the car. During *A's* absence, *B* drove the car, and by his negligence, dashed against a municipal lamp-post and damaged it.

It was *held* that *C* was *not* liable for the act of *B,* the cleaner, which lay outside the scope of his employment. Neither would he be liable for the act of *A,* the chauffeur, as in leaving the car with the cleaner he was not guilty of negligence under the circumstances. (However, in such cases, the municipality can successfully sue *B,* the wrongdoer.)

BEARD v. *LONDON GENERAL OMNIBUS CO.,* (1900) 2 Q.B. 530 (*Conductor driving bus*).— At the end of a journey, *C,* a conductor of an Omnibus Company, in the temporary absence of the bus driver, took himself to drive the omnibus for the purpose of turning it round for the return journey, and negligently caused a collision with *B's* motor car and damaged it. *B* sued the company for the damages done to his motor car.

In this case, driving *not* being part of the work which *C,* the conductor, was employed to do, it was *held* that the Omnibus Company was *not* responsible for his negligent driving.

WARREN v. *HENLEYS. LTD.,* (1948) 5 All E.R. 935 (*Petrol pump attendant's case*).— Erroneously believing that the plaintiff had evaded paying for the petrol just filled into his car, the attendant of the petrol pump used violent language with him. The plaintiff gave him bills, and

on the attendant's still abusing him, he called a policeman, whereupon the attendant assaulted the plaintiff. In these circumstances, the Court *held* that the defendant petrol company was *not liable* for the attendant's unauthorised acts.

3. The servant's wrong may consist of excess or mistaken execution of a lawful authority.

In cases where the wrong committed by the servant consists of excess or mistaken execution of a lawful authority, it must be shown—

(a) that the servant intended to do, on behalf of his master, something which he was, in fact, *authorised* to do; *and*

(b) that the act, if done in a proper manner, or under the circumstances erroneously supposed by the servant to exist, would have been lawful.

BAYLEY v. *MANCHESTER S. & L. RAILWAY,* (1873) L.R. 8 C.P. 148.— The plaintiff was a passenger on the defendant's railway. He sustained injuries in consequence of being violently pulled out of a railway carriage by one of the defendant's porters, who acted under a wrong impression that the plaintiff was in the wrong carriage. The Court *held* that the defendant Railway Company was liable.

[This case has been discussed above also.]

POLAND v. *JOHN PARR AND SONS,* (1927) 1 KB. 236 (*Carter's case*).— A carter in the employment of *X & Co.,* on his way home in the middle of the day, was following behind a wagon laden with sugar in bags, belonging to *X & Co.* He saw a boy walking beside the wagon with his hand upon one of the bags. Honestly and reasonably thinking that the boy was stealing sugar, he gave him a blow with his hand on the back of the neck. The boy fell and the wheel of the wagon injured his foot. The boy sued *X & Co.,* for the damages in respect of the injuries sustained by him. *X & Co.,* repudiated all liability. The Court *held* that the carter has implied authority to make reasonable efforts to protect the defendant's property, that the violence exerted was not excessive as to take his act outside the scope of the authority, and that *X & Co.* was therefore *liable.*

4. The wrong may be a wilful wrong, done on the master's behalf and with the intention of serving his purpose.

A master is responsible for the act of his servant, even if such act is wilful, reckless or improper, *provided that* the act is the act of the servant done *within the scope of employment.*

Write a short note on : Limpus v. London General Omnibus Co.
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LIMPUS v. *LONDON GENERAL OMNIBUS CO.,* (1861) 1 H. & C. 526.— The driver of the defendant company's omnibus, wilfully and contrary to the company's express orders forbidding racing with and obstructing other omnibuses, drove across the road in order to obstruct the plaintiff's omnibus and caused it to upset. The Court *held* that the company was *liable,* because "the act of driving was not inconsistent with the employment, when explained by his desire to get before the other omnibus."

JAFFERSON v. *DERBYSHIRE FARMERS LTD.*, (1921) 2 K.B. 281 (*Fire by spirit*)— The defendants were using the plaintiff's premises as a garage. Their servant, engaged on their business, poured out motor spirit from a drum and while doing so, lit a cigarette and threw away the match, whereby the spirit ignited and burned down the garage. The Court *held* that the defendants were liable; to pour out spirit while smoking is a negligent way of working— *i.e.*, it was negligence in *performing the master's business.*

PETTERSSON v. *ROYAL OAK HOTEL LTD.* (1948) N.Z.I.R. 136— An intoxicated customer was refused a further drink, whereupon he threw a glass at the barman. Not to be outdone, the barman picked up a piece of the glass and flung it on the customer. A splinter of this glass struck the plaintiff in the eye. The Court *held* that the barman's employer was *liable.*

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

A master is liable, not only for the wrongful acts of the servants, whether done carefully, *bona fide,* negligently, intentionally, wifully or even contrary to express orders, but also *fraudulently.*

LLOYD v. *GRACE SMITH & CO.*, (1912) A.G. 716 (*Solicitors's clerk case*)— In this case, the plaintiff, a widow, owning a small cottage and some money, due on a mortgage to the extent of £ 1,000, approached the manager of the defendants, a firm of solicitors, for adivce as to how to improve her income. She was advised by the manager to sell the cottage and call in the mortgage money. She authorised the manager to sell the cottage and to collect the money. The manager absconded with the money, and the plaintiff sued to recover the amount from the defendants. The Court *held* that an employer would be liable for all frauds committed by the servant, whether for the benefit of the employer *or* for his own benefit, so long as he was acting within the scope of the employment entrusted to him.

CHESHIRE v. *BAILEY*, (1905) 1 K.B. 237 (*Silversmiths's case*).— The plaintiff, a silversmith, engaged the defendant's motor-car and driver, for the purpose of being driven about Bombay with samples of silver-ware to be shown to customers. While the plaintiff was temporarily absent from the car in the course of business, the driver, acting in collusion with certain thieves, drove the car into a corner, where some of the samples were stolen by the thieves. The plaintiff sued the defendant for the value of the goods.

It was *held* that the defendant, *viz.*, the driver's employer, was *not* liable, because the driver, in so conspiring with thieves, was no longer acting within the scope of his employment.

UXBRIDGE BUILDING SOCIETY v. *PICKARD*, (1939) 2 K.B. 248 (*Managing Clerk's fraud case*).— *P* was a solicitor practising in London with a branch office at *S*, which at all material times was managed by his managing clerk, *C. A. & Co.*, were induced by a fraud, to which *C* was a party, to advance money to a person alleged by *C* to be a client of the *S* branch, on a mortgage of free-hold property. The supposed title to the poroperty was fictitious and the title deeds were forgeries. Though there were no allegations against *P, A and Co.* filed a suit against *P*, claiming damages for fraud.

Here, so long as a servant is acting within the scope of the employment entrusted to him, his employer is liable for all frauds committed by that servant, whether for the benefit of the employer or for his own benefit. Although it is not within the *actual* authority of a clerk to commit a fraud, it is within the scope of his ostensible authority, and so long as he is acting within the scope of his ostensible authority, the employer will be bound, whether he is acting for his own purpose, or for his employer's purpose. Therefore, notwithstanding the fact that the persons defrauded were not *P's* clients, and that *C's* fraud involved the committing of a forgery, *P* was *held* to be answerable in damages.

6. The wrong may be due to the servant's criminal act

A master is liable, though *not* in *criminal* proceedings, yet in *civil action,* even in respect of *criminal* acts of his servant, *provided they are committed in the course of his employment.*

(See *Uxbridge Building Society* v. *Pickard, above.*)

Master's liability where servant delegates duty

In certain circumstances, a servant may delegate his duty to another. Where a servant has his master's *authority to delegate,* or happens to delegate in a *real emergency* when it is *impossible* to *communicate* with the master and obtain his instructions, the person to whom he so delegates becomes the servant of the master, so that the master becomes responsible for the negligence also of this servant by delegation.

But in cases where a servant, *not* being authorised to delegate, does so, or delegates when there is no *emergency, or* in an emergency *without* communicating with the master though there was time enough to obtain his order,— the master will *not* be liable for the conduct of the servant's delegate, though in some cases, he might be liable for the servant's negligence in so delegating.

Thus, in *Ricketes* v. *Thos. Tilling,* (1915) 1 K.B. 644, the driver of the defendant's omnibus allowed the conductor to drive the omnibus, and in doing so, the conductor injured the plaintiff. It was *held* that though the defendant was not liable for the conductor's negligence, yet he would be liable for the *driver's act in wrongfully delegating his duties to the conductor.* In this case, the driver was sitting by the side of the conductor, and so it was held to be an unauthorised mode or method of doing the authorised thing, *viz.,* the driving.

Explain vicarious liability, with special emphasis on master and servant; and also when a master would not be liable for the acts of his servant.
B.U. Apr. 91

MASTER WHEN *NOT* LIABLE FOR SERVANT'S TORT

From what is stated above, it will be seen that a master is liable for his servant's torts in the *six* cases mentioned above. But in the following *three* cases, a master will *not* be *liable* for the tort of his servant.

1. When he has temporarily lent his servant to another person

When a master lends his servant to another person, in a general sense, he is a servant of the master who lends him. But from the practical point of responsibility, when he is doing the work of, and under the orders or control of, the *other* employer to whom he is *lent,*

he is, in the eyes of the law, the servant of the *latter,* and the *latter* is, in the eyes of the law, his *employer.*

2. Where he has been obliged by law to employ a particular person, e.g., a compulsory pilot.

In cases where a master has been obliged by law to employ a particular person, (as for instance, a compulsory pilot), as he does not have any freedom in the choice of his servant, he is *not responsible* for the conduct of the servant whom he was compelled to employ.

Similarly, where the law itself enjoins a duty to be performed by a certain person, the employer will *not* be liable for torts committed by such person in the course of such employment.

3. Where the relation between the parties is that of a head of a Government department and an employee in that department

The head of a Government department is *not* liable for the wrongful acts of his subordinates. The rule of master's liability does *not* apply here; *e.g.,* the Postmaster General will *not* be liable for the negligent act of a telegraph cable repairer.

II–LIABILITY OF SERVANT TO THIRD PERSONS

Whoever commits a wrong is liable for it *himself,* and it is no excuse that he was acting as an *agent* or *servant* on behalf of, and for the benefit of, another. Indeed, not even the command of the king himself can excuse the doing of an *illegal* act. In such cases, the injured party will have his remedy against *both* the master and the servant, or *either* of them at his option.

III–MASTER'S LIABILITY TO SERVANT

The liability of a master to his servant for injuries caused to *the servant during service* can be examined from the following two angles :

1. At Common Law; and
2. Under the Workmen's Compensation Act.

1. Master's liability to servant *at Common Law*

At Common law, a master is *not liable* to his servant for injuries received from any risk which is *ordinary* or *incidental* to the service, including the acts or defaults of *any other* person employed in the *same* service. He will *not* be liable if the servant had *assented* to undertake the risk of injury. The maxim governing this doctrine is *volenti non fit injuria.* It is *not* enough for the master to show that the servant *knew* about the danger. The master is bound to take all reasonable precautions to secure the safety of his workmen, and to carry on his operation, so as *not* to subject those employed by him to unnecessary risk.

Four duties of a master

The Common law imposes the following *four duties* on a master :

(i) He must provide proper and competent fellow-servants.

(ii) He should *not* be guilty of personal negligence.

(iii) He must take reasonable care to provide proper appliances, and to maintain them in a proper condition.

(iv) He must take all reasonable precautions to secure the safety of his servants.

SMITH v. *BAKER,* (1891) A.C. 325 (*Stone quarry case*).— *A* was employed as a workman in the stone quarry of *B,* and worked there for some months, with full knowledge of the fact that he was exposed to danger by reason of the negligent practice, prevailing in the quarry, of swinging stones over the quarrymen's heads by means of a crane. *A* was injured by the fall of a stone, and in consequence sued *B.*

Now, a master is *not* liable to his servant for injuries from any ordinary risk of, or incidental to, the service. *A,* knowing of the danger to which he was exposed, was willingly working in the quarry. But, the master is bound to take all reasonable precautions to secure the safety of his workmen and to carry on his operations so as not to subject those employed by him to unnecessary risk. Again, a negligent system or a negligent mode of using perfectly sound machinery may make the employer liable. In this case, there was a negligent practice of swinging stones over the workmen's heads by means of a crane, which unnecessarily exposed them to danger. Under these circumstances, it was *held* that *A* could successfully sue *B.*

State & explain the principle laid down in : Smith v. *Baker.* P.U. Apr. 92

PARIS v. *STEPNEY BOROUGH COUNCIL,* (1951) A.C. 367 (*Goggles case*).— The plaintiff, a workman, had, to the knowledge of his employers, only one good eye. While at work, where he was not supplied with goggles (to protect his eye) a metal chip flew off, seriously injuring his good eye. He claimed damages from his employers, for having failed to provide him with goggles. He was *held* entitled to succeed.

2. Master's liability to servant *under the Workmen's Compensation Act*

English Law — The Workmen's Compensation Act, 1925, provides for compensation to workmen by employers, in the cases to which the Act extends, for accidental injuries and death. The obligation to compensate is *independent* of any negligence on the part of the employees or fellow-servants. The Act, in effect, compels employers to insure their servants against accidental injuries and death. Such insurance is not compulsory, but it is obvious that having regard to the obligation imposed upon them by the Act, the employers have no option but to insure their workmen against these risks.

Under this Act, the workman is in a more favourable position than a stranger. Where a workman sues his employer for injuries sustained by an accident arising out of and in the course of his employment, the employer *cannot* set up the defence of (1) *volenti non fit injuria,* or (2) inevitable accident, or (3) contributory negligence on the part of the workman.

There were several shortfalls in the working of the Act, which were remedied by the National Insurance Acts, 1945 to 1960.

Indian Law — In India, the Workmen's Compensation Act was passed in 1923. Under this Act, if personal injury is caused to a workman by an accident arising out of any work in the course of his employment, his employer is liable to pay compensation.

Additionally, a note must also be made of the Personal Injuries (Compensation Insurance) Act, 1963, which (1) imposes on the employers of factories, mines, major ports, plantations and essential services, the liability to pay compensation in respect of personal injuries; and (2) provides for a scheme of insurance with the Government in respect of this liability.

The Act makes special provisions for Government employees. Section 7 lays down the amount of compensation. Section 8 describes the scheme of insurance. Section 9 makes the insurance compulsory for the employers of various categories mentioned above. Exemption from compulsory insurance is granted to small establishments whose total wagebills for a quarter do not exceed specified monetary limits.

The Doctrine of 'Common Employment'

Legal position prior to the Law Reform (Personal Injuries) Act, 1948

Formerly, the Courts took the stand that a master was *not responsible* for negligent harm done by his servant to another servant engaged on a *common employment* with him. This rule often led to unjust and inequitable results, and was widely criticised, before it was ultimately abolished in 1948.

Discuss the following with case-law : The Doctrine of common employment.
B.U. Oct. 90
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The doctrine afforded a *good defence* to a master when sued by a servant. A master *was not liable* to his servant for injuries received from any ordinary risk of, or incidental to, the *service, including acts or defaults of a fellow servant in the course of their common employment.* All persons engaged under the *same* business, however *different* in *detail* those purposes may be, were fellow-servants in a common employment, *e.g.,* carpenter doing work in the room of an engine shed and porters moving an engine on a turn-table. Thus, in *Priestly* v. *Fowler* (1837) 3 M. & W. I., the master was *held not liable* for an injury sustained by a servant owing to the breaking down of an overloaded carriage in which the servant was riding on his master's business.

Explain and illustrate : The Doctrine of Common Employment.
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If the person occasioning, and the person suffering, the personal injury were fellow-workmen engaged in a common employment, and under a common master, such a master was *not* responsible for the results of the injury. In other words, a master was *not* liable to one servant for the negligence of another in the same employment. This was known as the *doctrine of common employment.*

Common employment did *not* necessarily imply that both servants were engaged in precisely the *same* or even *similar* acts. All persons engaged under the *same* employer for the purposes of the same business, however different in detail those purpsoes may be, were regarded as fellow-servants in a common employment. The employment had to be *common* in the sense that the safety of one servant, in the ordinary and natural course of things, depended on the care and skill of others. The injured servant and the servant causing the injury had to be engaged in common employment and must be in the service of a common master.

The doctrine of common employment was extended even to a person who was only *temporarily*, or for a particular occasion, in the service of another, or where a person volunteered to assist the servant of another in his work.

DEGG. v. *MIDLAND RLY. CO.* (1857) 1 H & N. 773.— Railway servants were working a turn-table. A stranger, noticing their difficulty in doing so, voluntarily assisted them and, while so assisting, was killed by an engine negligently driven by another railway servant. It was *held* that the company was *not liable.*

Two conditions had to be fulfilled in order that the defence of common employment might be available :

1. Fellow-servants

Firstly, the *servant injured and the servant causing the injury, had to be fellow-servants;* they had to be in the service of a *common employer.* Unless there was a common *master,* there could not be said to be a common *employment.* The term "fellow-servant" included persons who *gratuitously* or *temporarily* assisted a servant in his work.

2. Common employment

Secondly, *the servant had to be engaged in a common employment,* in the sense *that the safety of one servant would, in the ordinary and natural course of things, depend on the care and skill of others.* Thus, the captain of a vessel has been *held* to be in common employment with a seaman on board his ship.

RADCLIFFE v. *RIBBLE,* (1939) A.C. 215.— *A* and *B* were motor drivers employed by defendants to take parties by motor coaches from Liverpool to N. B had been told to return to the defendant's garage, the particular route of his return being left to his own discretion. On the return journey, *B,* for some unknown reason, stopped in a street in Liverpool. *A* happened to be returning by the same route and pulling out to pass *B's* vehicle, he negligently knocked over and injured *B,* who was standing by his own vehicle. *B* filed a suit for damages against the defendants. It was *held* that *A* and *B* were *not* in common employment when the accident took place at Liverpool. *B* was not more interested in the skill of *A* than in that of the drivers of the dozens of other vehicles in whose vicinity he might happen to drive. The risk was the general risk of the highway, and not the specific risk of the fellow-servant's negligence. Therefore, the defendants were liable; they could not rely on the plea of common employment as excluding their liability.

Legal position after the Law Reform (Personal Injuries) Act, 1948

It may be noted that *doctrine* of (or rather the *defence* of) common employment *is now not available,* after the passing of the Law Reform (Personal Injuries) Act, 1948. Under this Act, it is *not* a defence to an employer who is sued in respect of personal injuries *caused by the negligence of a person employed by him,* that the other person was, at the time the injuries were caused, in common employment, with the person injured. Any provision contained in a contract of service or apprenticeship, or in an agreement collateral thereto, including a contract or agreement entered into before the commencement of this Act, is *void* in so far as it would have the effect of excluding or limiting

any liability of the employer in respect of personal injuries caused to the person employed or apprenticed *by the negligence of a person in common employment with him.*

This statute repeals the Employer's Liability Act, 1880. It makes void any provision in a contract of service which attempts to make the doctrine of common employment applicable.

Indian law as to common employment.— According to the Allahabad and the Calcutta High Courts, the doctrine of common employment applies in India; according to the Nagpur and Bombay High Courts it does not. The Privy Council has *held* that it is applicable, but its scope has been reduced by the Indian Employer's Liability Act, 1938. Further, the Personal Injury (Compensation Insurance) Act, 1963, imposes a liability on employers to pay compensation to workmen who sustain personal injuries, and provides for the insurance of employees against such liability. Thus, in actual practice, these two Acts have almost nullified the applicability of the doctrine in India.

Discuss the doctrine of common employment. How is it applicable in India ? B.U. Apr. 97

IV — SERVANT'S LIABILITY TO MASTER

A servant is, no doubt, liable to his master (though not to others) for the consequences of his *non-feasance* or wrongful *omissions.* If damages have been recovered from the master by reason of the servant's negligence in doing the master's work (or in executing his order), such damages can be recovered *by the master from the servant.*

2. OWNER AND INDEPENDENT CONTRACTOR

The *second* instance of vicarious liability is to be found in the case of an *owner* and his *independent contractor.*

State & explain master's liability for the torts of an independent contractor. P.U. Oct. 92

Who is an independent contractor

An independent contractor is one who undertakes to produce a given result *without being, in any way, controlled as to the method by which he attains that result.*

Servant and independent contractor distinguished

The essential distinction between a *servant and an independent contractor* is the existence of the *right to control.* An independent contractor can use his *own discretion* as to the manner in which the work is to be executed, whereas a servant is *under* the *supervision* and *direction* of his master as to the manner in which he is to *execute his work.*

General rule as to independent contractor

The general rule is that, for the acts and omissions of an independent contractor, (*except* those actually *authorised*), his employer is *not liable* for the wrongs of *servants engaged by the contractor* to do the work. He who *controls* the work is answerable for the workman; the *remoter employer,* who does *not* control, is *not* answerable.

Discuss the law relating to vicarious liability of the owner for the torts of an independent contractor. Discuss whether the principle of vicarious liability is justifiable.

Exceptions to the rule

There are, however, *eight important exceptions* to the rule that a person employing an independent contractor is not liable for the contractor's wrongful act. The *employer will thus be liable for the wrongs of an independent contractor in the following eight cases :*

1. Where the thing contracted to be done is itself unlawful

Write a short note on: Liability of an independant contra-

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If the thing contracted to be done is itself unlawful, the employer is liable for the wrong-doing authorised by him. Thus a Gas Company was *held liable* for the negligence of its contractor employed to lay down pipes in the streets, because the Gas Company was not authorised to interfere with the streets. (*Ellis* v. *Sheffield Gas Consumers Co.,* (1863) 2 E. & B. 767)

2. Employer retaining control

Where the employer retains his control over the contractor, *and personally interferes,* so as to make himself a *party* to the act which occasions the damage, the employer becomes liable.

BURGESS v. *GREY,* (1845) 1 C.B. 578 (*Gravel case*).— The defendant employed a contractor to construct a drain. In doing the work, the contractor left a heap of gravel on the road. The defendant was warned by a constable to remove the heap of gravel, and he undertook to cart the gravel away. Meanwhile, the plaintiff, a passer-by, slipped upon the heap of gravel, and was injured. In an action for damages, the defendant pleaded that he was not liable, and that the negligence was that of an independent contractor. The court, however *held* that the defendant, by his own conduct, had *interfered* with the work of the independent contractor, and therefore, be became *liable* for the negligence of the latter.

3. Legal duty

Where a legal or statutory duty is imposed on the employer to carry out a particular work efficiently, and the contractor either *omits or improperly performs* such duty, the employer is liable.

4. Damage to another

The employer is liable where the *thing contracted to be done, though lawful in itself,* is *likely,* in the ordinary course of events, *to damage another's property,* unless preventive means are adopted, and the contractor *omits* to adopt such means.

Thus, in one case, the defendants were *held liable* where the plaintiff was injured by reason of the negligence of a servant of an independent contractor, employed by them to execute certain work upon the highway, in leaving a heap of stones unlighted and unfenced. (*Penny* v. *Wimbledon Urban District Council,* 1899 2 Q.B. 72)

So also, the occupier of a house was *held* liable for personal injuries caused to a passer-by by the fall of a lamp suspended over his door-way, although he had recently employed an independent contractor to repair the lamp. (*Tarry* v. *Asthon,* (1876) 1 Q.B. 314).

5. Implied warranty

The employer is also *liable* where *there is an implied warranty by the employer.* In such a case, the employer is liable for the negligent act of his independent contractor.

Thus, in one case, the defendant got a race-stand erected by competent builders, but in fact it was negligently constructed. It fell and injured the plaintiff who had paid for his seat. It was *held* that the defendant was liable. (*Fancis* v. *Cockrell,* (1870) L.R. 5 Q.B. 184)

6. Incompetent contractor employed

Where the employer entrusts the work to an independent contractor *known to be incompetent, or* fails to give proper instructions to the independent contractor, he *cannot* escape liability for the negligence of the latter. Here, the liability of the employer is more for his *own negligence,* rather than for the negligence of the *contractor.*

7. *The Rule in Rylands* v. *Fletcher*

Under this rule, the employer is, in certain cases involving absolute liability, responsible for the acts of the independent contractor. (This is discussed in Chapter XIX.)

8. Under the provisions of the (English) Workmen's Compensation Act, 1925

In *England*, under the provisions of the Workmen's Compensation Act, 1925, if the 'principal' (as therein defined) employs a contractor, such contractor's servants are able to recover compensation from the principal without prejudice to the principal's right to be indemnified by the contractor, if the contractor is himself liable under the Act.

There are similar provisions in India in Ss. 12 (2) and 13 of the Workmen's Compensation Act, 1923

3. PRINCIPAL AND AGENT

The law attaches liability to a principal for the wrongful act of his agent, on the ground that it is the principal who has selected the agent. This liability is *joint* as well as *several.* The injured party may sue only the principal, *or* only the agent, *or* both.

To make a principal responsible for a wrongful act of his agent, it is necessary to show :

(i) that the act was committed by the agent in the course of his employment, although the principal did not authorise or justify, or participate in the act, or even if he forbade it or disapproved of it; *or*

(ii) if the act was beyond the scope of the agency, that it was expressly authorised by the principal or subsequently ratified by him.

Write a short note on : Liability of a principal.
P.U. Oct. 91

In *DINBAI R. WADIA* v. *FARUKH MOBENDJINA,* (1957) 59 Bom. I.L.R., it was *held* that the test of agency is not physical control, but the *right to control.* When a person does an act with the consent of the principal, and the principal is interested in the performance of the act, the principal would be held liable for the act. The criterion is *not* whether the principal had physical control or not. Even if the principal had the *right* to control, and *not* actual physical control, over the agent in respect of that act, he would be held responsible.

4. COMPANY AND ITS DIRECTORS

Companies are liable for the torts committed by their servants in the course of their employment. But the wrongful act complained of should be *intra vires* and not *ultra vires,* (i.e., it should be within the power of the company) and should be done for the company. Directors are personally responsible for any tort which they themselves commit or direct others to commit, although it may be for the benefit of the company.

5. FIRM AND ITS PARTNERS

The relation of partners *inter se* is that of principal and agent, and each partner is, therefore, liable to third persons for the neglect or fraud of his fellow-partner. The neglect or fraud complained of must have been committed in the ordinary course of the partnership business; and while a partner is acting within the scope of his authority; his copartner's complete innocence is irrelevant. Whether the act of a partner is one done in course of the business of the firm is a question to be determined on the same considerations as those which determine the responsibility of a master for the act of his servants.

CASE— Acting on behalf of a firm, a partner bribed the clerk of the plaintiff (a competitor in the same line of business), and induced him to communicate some secret information with regard to the plaintiff's business, as a result of which the plaintiff sustained a loss. It was *held* that the firm was *liable.* (*Hamlyn* v. *Houston & Co.,* (1903) 1 K.B. 81)

6. GUARDIAN AND WARD

Guardians are *not* personally liable for torts committed by minors under their charge. But they can sue for personal injuries to minors under their charge on their behalf.

C. LIABILITY BY ABETMENT

It has already been noted above that liability for another's wrongful act or omissions arises in *three* ways, *viz.,* — by (1) Ratification; (2) Special relationship; and (3) Abetment. Dealing with the last category, it may be noted that in the law of the torts, those who abet the tortious acts are as much liable as the tort-feasors *themselves.*

A person who procures the act of another is legally responsible for its consequences—

(i) if he knowingly induces that person to commit the wrong for his own ends; *or*

(ii) when the act complained of is within the right of the person actually doing it, but is detrimental to a third party, and the person inducing it procures his object by the use of illegal means directed against such third party.

In cases of unlawful interference with contractual relations, if a person procures a breach of a contract by illegal means or with a malicious intent, he becomes liable to the person who suffers injury thereby.

8

REMEDIES AVAILABLE WITH RESPECT TO A TORT

The remedies available with respect to a tort are of *two* kinds : (a) *Judicial*, and (b) *Extra-judicial.*

Judicial remedies

Remedies are said to be *judicial* when they are granted *by the Court* in a suit filed by the injured party against the wrong-doer. The *Court* then normally awards damages to the injured party. This is the *usual* remedy. The remaining two forms of judicial remedies are the granting of an *injunction* and the *restitution of property.*

Extra-judicial remedies

Extra-judicial remedies are those which an injured party adopts *when he takes the law into his own hands*, as it were, and helps himself in the matter, *e.g. expulsion* of a trespasser, *re-entry* on land, *abatement* of nuisance, etc.

The following is a tabular *analysis* of the remedies available in the law of torts :

- Remedies
  - A—Judicial
    - —Damages
      - —Contemptuous
      - —Nominal
      - —Substantial
      - —Exemplary
    - —Injunction
      - —Interim (or temporary)
      - —Perpetual
      - —Mandatory
      - —Prohibitory
    - —Specific restitution of property
  - B—Extra Judicial
    - —Self defence
    - —Expulsion of trespasser
    - —Re-entry on land
    - —Recaption of goods
    - —Abatement of nuisance
    - —Distress *damage feasant*, etc.

What are the different remedies available for tortuous acts ?
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Explain fully the judicial remedies for torts ?
P. U. Oct. 96

Point out the judicial remedies, and explain the same with reference to leading cases.
P.U. Oct. 91

Discuss in detail the various legal remedies provided under the law of torts.
P.U. Oct. 97

A. JUDICIAL REMEDIES

Judicial remedies which are available for redressing torts fall under *three headings* : 1. Damages, 2. Injunction and 3. Specific restitution of property.

1. LAW AS TO DAMAGES

A right without a remedy is no right at all. Discuss the various legal remedies provided under the law of torts in detail.
P.U. Oct. 93

Legal damage

In ordinary parlance, damage means the *physical effect* of the defendant's act. But *legal* damage, or damage that constitutes *liability in tort*, is neither identical with *actual* damage, nor does it necessarily mean any *pecuniary* loss. Every invasion of a person's legal right or unauthorised interference with his property imports legal damage; that is, although the injured person *may not* suffer any *pecuniary loss* by the wrongful act of the defendant, yet if it is shown that there was a violation of some *legal* right, the law will *presume* damage. This is known as *legal damage.* (This has already been discussed under *'Injuria sine damnum'* in an earlier Chapter.)

General damage

Damage is either *general or special. General damage* is that kind of damage which is *presumed* by the law to flow from the wrong complained of.

Special damage

Special damage means the *actual* and *temporal loss* which has, in fact, occurred. *Special damage* is that which the plaintiff is ordinarily bound to prove, and without which his action will *not* be maintainable. In this class of cases, the law insists upon *proof* of damage *before* giving redress for the violation of the right. Damage in the sense of actual loss is, in such cases, an *ingredient* which goes to make up the *legal* injury and is said to be the *gist* of the action.

Special damages must be actually proved in actions for— 1. Seduction; 2. Slander, 3. Deceit; 4. Conspiracy; 5. Waste; 6. Distress damage feasant; and 7. Nuisance consisting of damage to property.

Damage and damages

Distinguish between "damage" and "damages".
P.U. Oct. 91

The word *'damage'* must not be confused with the word *'damages'.* These two words are *not equivalent terms. Damage* means and includes loss of money, comfort, health, property or the like. *The term 'damages' is not the plural of "damage."* It means the *money compensation* claimed by the injured party and awarded by the Court. In short, 'damage' means the loss inflicted by the wrongful act of the defendant, for which the Court awards pecuniary compensation or 'damages'. In other words, damages constitute the compensation in the form of a sum of money which the Court awards for every injury; but the *'damage'* which every legal injury imports is that which is *supposed* to be *compensated* by this award of *damages.*

Thus, the damage must be the *direct* and *natural* cause of the defendant's act. Thus, in *Scott* v. *Shepherd* (1773 2 W.B.I. 892), the defendant threw a lighted squib at *A.* To protect himself, *A* threw it away, and it fell on *B. B* did the same, with the result that it exploded and blinded the plaintiff. It was *held* that the plaintiff was entitled to succeed.

Similarly, where the defendant ran with an axe after a boy who dashed against the plaintiff's cask of wine which was spilled, it was *held* that the plaintiff could succeed. [See also *Guille* v. *Swan, the balloon case,* discussed below.]

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Remoteness of damage

Explain : Remoteness of damage.
P.U. Apr. 95

As seen above, the damage suffered by the plaintiff must be the *direct* and *natural* cause of the defendant's act. The law will permit no damages to be recovered, except such as are the *natural* and *legal* consequences of a wrongful act. *In jure non remota causa sed proxima spectatur* (In law, the *immediate* and *proximate*, *not* the *remote*, cause must be considered). A man is presumed to intend the *natural*, but *not* the *remote*, consequences of his act.

Discuss : In jure non remote causa sed proxima spectatur.
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Damage is said to be *too remote* when, although arising out of the cause of action, it does *not immediately* and *necessarily flow from* it, or is such which could not have reasonably been foreseen. A man is *not* liable for *all* the consequences of his wrongful act or default. Liability must be founded on the act which is the *immediate* or *direct* cause of the harm or injury which is complained of. Where the *causal connection* between the wrongful act and the injury is not sufficiently *direct*, that is to say, when the two cannot be connected as *cause* and *effect*, there is no liability, for the damage is *too remote*. The rule of law is, that the wrongful act, to render the defendant liable, must be the *causa causans*, or the *proximate cause* of the injury, and *not* merely the *causa sine qua non*, i.e. the indirect (or remote) *cause* of the injury.

Discuss the law relating to "remoteness of damage". Illustrate your answer with leading cases.
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'Causa causans' and *'causa sine qua non'*.—The expression *causa causans* means the real cause or the cause of causes, while the expression *causa sine qua non* means that cause without which, the event or the consequence would not have happened. To take an instance, *A* pushes *B*, who falls upon a stone negligently left by *C*, and is injured thereby. While *A's* pushing *B* is the *causa causans*, i.e., the effective cause or the real cause, the presence of the stone which occasioned the injury, is the *causa sine qua non* or that cause without which the event (i.e. the injury) would *not* have happened.

In the following two cases, damages was *held* to be the *natural* and *probable* consequence of the defendant's act.

VENDENBURG v. *TRUAX, (Chasing with pick-axe case)*—The defendant, quarrelling with the plaintiff's servant, chased him with a pick-axe, and the latter fled into the plaintiff's store, and in running behind the counter for shelter, knocked down a cask of wine whereby the wine was spilt. It was *held* that the defendant was responsible for the loss of the wine.

Discuss the law relating to remoteness of damages.
B.U. Apr. 90

GUILLE v. *SWAN*, (1882) 19 Johns. 381 (*Balloon case*).—The defendant, a balloonist, came down in the plaintiff's garden, whereupon a crowd of people, attracted by the balloon, broke into the garden, and trod down the vegetables and flowers. The Court *held* that the defendant was liable, not only for the damages done by the balloon itself, but also for that which was done by the crowd.

PIGNEY v. *POINTERS TRANSPORT SERVICES LTD.* (1957 2 All E.R. 807).—*P*, an employee of a company was injured in an accident, for which the company was liable to *P* in damages. As a result of this injury, *P* developed anxiety neurosis, and after a year, committed suicide. *P*'s widow sued the company for damages.

The Court *held* that *P*'s widow was *entitled to succeed,* as it could be said that *P*'s death was directly traceable to his injury in the accident for which the company was responsible. Thus, *P's* act of taking his own life could not be said to break the chain of causation, *and the company* could held *was liable in damages.*

Damage when said to be remote

So far as the question of remoteness of damages is concerned, *three further questions* need to be answered :

(i) Is there a breach of legal duty ? Or has the defendant committed a tort ?— This question deals with the *initial liability of the defendant.* There is no dispute that this question must be answered on the basis of the foresight of a *reasonable man.*

(ii) For what consequences or the loss can the plaintiff recover ?— This is the problem of the remoteness of damage, and will be discussed in detail below.

(iii) The third question is : How much compensation can be recovered for consequences or losses which have already been established not *to* be remote ?— This is the problem of the *measure of damages.*

Theories of remoteness of damage

Historically, there have been *two views* regarding the remoteness of damage :

(i) According to the *first view,* consequences are too remote if a *reasonable man would not have foreseen them.* This view was upheld in *Rigby* v. *Hewitt,* (1850 5 Ex. 240).

(ii) The *second view* is that once the defendant is held to be liable for a tort, he is liable *for all its direct consequences,* whether a reasonable man would have foreseen them or not, *i.e.,* if they are directly traceable to the act, and *not* due to the operation of independent intervening causes. This view was first upheld in *Simit* v. *L & S.W. Railway,* (1870 L.R. 6 C.P. 14.) In this case, during a very dry summer, the Railway Company's servants cut the grass and trimmed the hedge bordering the railway line. They left the trims and the cuttings in heaps between the line and the hedge for a fortnight. A fire caused by sparks from a railway engine ignited these heaps and spread over a neighbouring field. From there, a high wind carried the fire across a road to the plaintiff's cottage, situated 200 yards from the spot where the fire began. The cottage was burnt down. The question to be decided by the Court was whether the burning of the cottage was or was not a remote consequence arising out of the faulty act of the defendant Railway Co.'s servants. It was argued, on behalf of the defendants, that no reasonable man could have foreseen the consequence; yet the Court *held* that as the burning of the cottage was the direct consequence of the act of the defendants, the defendants were *liable.*

Discuss : Re Polemis Case.
B.U. Oct. 90
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Write a short note on : Re Polemis.
B.U. Oct. 95

This view (of *Smith* v. *L & S.W. Railway)* was adopted by the Court of Appeal in *Re Polemis and Furness Withy & Co. Ltd.* (1921) 3 K.B. 577). The facts of the case are as follows :

A ship was hired under a charter which exempted both the ship-owners and the charterer from liability for fire. The charterers loaded a quantity of benzine among other cargo. During the voyage, the tins containing benzine leaked, and thus there was a lot of petrol vapour in the hold. At a port of call, the servants of the charterer negligently let a plank drop into the hold while they were shifting the cargo. A rush of flame at once followed, and the ship was totally destroyed. The question here again was, whether the test of a reasonable man being able to foresee, *or* the direct consequences test was to be applied. The Court of Appeal adopted *the direct consequences test*, and *held* the defendants liable for the loss of the ship.

But, in 1933, the House of Lords took the opportunity of reviewing the earlier decision in *Re Polemis* (above), while delivering the judgement in *Liesbosch Dredger* v. *Edision,* (1933) A.C. 449. The facts of the case are :

Due to negligent navigation, the *Edision* sank the dredger, *Liesbosch.* The owners of the dredger were under a contract with the third party to complete a piece of work within a given time. They were not able to buy a substitute for the dredger. Consequently, they were put to a much greater expense in fulfilling the contract which they had entered into with the third party. They sued the owners of the *Edison*, for the market price of the dredger comparable to the *Liesbosch*, and also for extra expenses they had to incur in fulfilling their contractual obligation to the third party. The plea of the plaintiff was that they had to incur extra expenses as a direct consequence of the negligent acts of the defendants. The House of Lords in this case distinguished *Re Polemis* on the ground that the injuries suffered were *not* the *immediate physical consequence* of the negligent acts. In the instant case, the extra expenses had to be incurred by the plaintiffs, *not* on account of the immediate physical consequence of the negligent act, but on account of the intervening financial problems faced by the plaintiff. The plaintiffs could *not* claim for the extra expenses. Thus, the *direct* consequences test of *Re Polemis* was modified by the ruling of *Liesbosch case.*

The rule in Re Polemis was also not followed by the Privy Council in the Wagon Mound case, (1961 A.C. 388). The facts in this case were as follows :

Write a short note on : The Wagon Mound case.
P.U. Apr. 97

The *Wagon Mound*, a vessel chartered by the appellants, was taking in oil in Sydney Port. A large quantity of the oil was allowed to spill into the harbour through the carelessness of the servants of the appellants. The escaped oil was carried away by the wind and the tide to a wharf (about 600 ft. away) owned by the respondents. Soon after the oil had spread itself on the water, the *Wagon Mound* left the harbour. After two days, the oil caught fire, and thereby serious damage was caused to the property of the respondents. The matter went into appeal to the Privy Council, which *held* that the defendants were *not liable*. The Privy Council, in this case, laid down the following *two principles* :

(1) The only test applicable was foreseeability of the damage complained of, which in this case was the damage caused by fire.

(2) The respondents could *not* held liable for unforeseeable damage.

In view of this position, it appears that the direct consequences test laid down in *Re Polemis* is no longer to be followed.

There is, however, some doubt as to the effect of the rule in the *Wagon Mound's case.* In *Salmond's Law of Torts,* the following principles modifying the above rule are laid down :

1. *Y* suffers foreseeable damage as the result of *X*'s activities. *X* is liable for that damage, whether it is a direct or an indirect consequence of his acts.
2. *Y* suffers foreseeable damage as the result of *X's* activities. That damage is much greater in amount than could have been foreseen, but is still in general the kind of damage that could have been foreseen. *X* is liable for it.
3. *Y* suffers foreseeable damage as the result of *X*'s activities (e.g., personal injuries). *Y* also suffers unforeseeable damage as the direct result of those same activities (e.g., he is forced into bankruptcy by reason of his want of means). *Y* can recover the former head of loss, but *not* the latter.
4. *Y* suffers foreseeable damage as the result of *X*'s activities. *Z* also suffers direct but unforeseeable damage as the result of those activities. *X* is liable to *Y*, but *not* to *Z*.

Generally, damages will be excluded as *too remote* in the following *four cases* :

1. Where *not* a necessary result

Where the damage is *neither* the *necessary* nor the *probable* result of the defendant's act, nor is it such as can be shown to have been *in his contemplation* when he committed the act, it can be said to be too remote.

SHARP v. *POWELL* — The defendant's servant, in breach of a Police Act, washed the defendant's van in a street, and allowed the waste water to run down the gutter towards a grating leading to the sewer, about twenty-five yards off. In consequence of the extreme severity of the weather, the grating was obstructed by ice and the water flowed over a portion of the cause way which was ill-paved and uneven and froze there. The plaintiff's horse which being led past the sport, slipped upon the ice and broke its leg. It was *held* that this was a consequence *too* remote to be attributed to the wrongful act of the defendant.

GLOVER v. *LONDON & S.W.RLY.* (1867) 3 Q.B. 25— A railway passenger misplaced his ticket, and could not produce it when demanded by the ticket collector. Thereupon, he was removed from the carriage without any undue force. When so removed, he left his race-glasses in the carriage, and lost them. It was *held* that the loss of the race-glasses was *not* the necessary consequence of the removal of the passenger from the carriage, but was owing to that passenger's negligence or carelessness. The loss was too remote, and the passenger could *not* recover it.

In another case, the defendants found the plaintiff's cow straying in their field and seized it. While the cow was in their custody, it died. The plaintiff sued to recover the value of the cow. It was *held* that the

defendants were *not liable*, because the death of the cow was *not* a natural or probable result of the seizer. (*Mi Taw* v. *Nga Ket*, (1904 U.B.R.1)

2. Plaintiff's own act

Damage will also be said to be too remote if it is caused wholly or principally by the act of the *plaintiff himself*. (See *Glover* v. *London & S.W. Rly.* discussed above.)

3. Wrongful act of third party *(novus actus)*

Where the damage is the *wrongful act* of a third party, such as could *not* naturally be contemplated as likely to spring from the defendant's conduct, it will be considered to be too remote.

4. Interference of a third person

In those cases in which an accident is partly caused by the interference of a *third person*, the defendant will be responsible *only if* it is found that his negligence is the *effective* cause of the accident.

Write a note on : Scott v. *Shepherd.*

B.U. Oct. 92
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SCOTT v. *SHEPHERD* (1773 2 W B1. 892)— The defendant threw a lighted squib into a market house. It fell near a person who threw it away from him. A third person did the same. It fell near the plaintiff, exploded and blinded one of his eyes. The Court *held* that the defendant was *liable.*

Principle for estimating damages *(Measure of damages)*

The expression "measure of damages" means the footing upon which the *quantum* or *amount* of damages to be awarded in a given case may be calculated. The law has *not* prescribed any arithmetical standard to measure damages in a suit under the law of torts; nor can it possibly do so. Thus, the measure *of damage depends* upon a variety of causes, facts and circumstances. Accordingly, damages may rise to almost any amount, *or* they may dwindle down to a very nominal sum.

The assessment of damages is in the *discretion of the Court*, and the actual assessment is based on a consideration of various factors. In cases of seduction, assault, defamation or malicious prosecution, for instance, the position, rank, or feelings of the party injured, as well as of the wrong-doer, must be considered as aggravating or mitigating factors. Moreover, as stated above, the wrong-doer will be liable only for the *direct* consequences of his act, and in no case will *remote* factors be considered in estimating damages. Again, if damage has resulted from two or three causes, as from an act of God *as well as* from a negligent act of party, then the award of damages should be apportioned to compensate only the injury caused by the negligent act.

It must be borne in mind, however, that the same principle that determines the existence of liability also determines the measure of damages to be awarded. The wrong-doer will be liable only for *direct consequences* of his act, and in no case will *remote factors* be considered in estimating damages.

Difference between the measure of damages for breach of contract and for tort

(1) In a tort, the damages claimed are necessarily unliquidated. In a contract, it is possible that parties may fix beforehand the damages payable by one to the other in case of a breach (*i.e.,* liquidated damages).

(2) Vindictive or exemplary damages are recoverable in tort, but generally *not* for a breach of contract.

(3) The rules as to remoteness of damages in tort are different from those in contract. Thus, in tort, a man may be held liable for damages arising from special circumstances of which he had no knowledge. On the other hand, if there are special circumstances under which a contract was made, and they were wholly unknown to the party breaking the contract, he will *not* be liable for damages due solely to those special circumstances. (*Hadley* v. *Baxaendale*, (1854) 9 Ex. 341)

KINDS OF DAMAGES

Damages can be divided into :

I	II	III
1. Contemptuous	General and Special	Prospective &
2. Nominal		Continuing
3. Substantial		
4. Exemplary		

I. 1. Contemptuous (or ignominious) damages

Contemptuous damages are awarded where, *technically,* a legal wrong is committed, but where the circumstances disclosed are such that Court feels that *no action should have been brought.* They are awarded usually in actions of defamation. Where the Court finds that the defendant is at fault, but the plaintiff's conduct and character are such that he does *not* deserve to be compensated, the Court, *in order to vindicate the law,* grants damages, but at the same time reduces them to *such a small or contemptuous amount,* as to indicate its disapproval of the plaintiff's claim or conduct. In such cases, one pence in English Law, or a paisa in Indian Law, may sometimes be awarded. Contemptuous damages are also called "ignominious damages".

2. Nominal damages

Nominal damages are awarded by the Court to the plaintiff, not by way of compensation, but by way of a recognition of some legal right of his which the defendant has infringed, *e.g.,* trespass, invasion of a right of easement, etc.

3. Substantial damages

Substantial damages are a sum of money awarded to the plaintiff as fair and equitable compensation for the injury suffered by him. They are also called *ordinary* or *compensatory* damages. *Such damages are awarded in a great majority of actions in tort.*

4. Exemplary damages

Write a short note on : Exemplary damages.
B.U. Apr. 91

Exemplary damages are awarded in cases where there has been *great injury* by reason of *aggravating* circumstances accompanying the wrong. A heavy amount is awarded as an expression of indignation at the conduct of the defendant, whenever he has shown a conscious disregard of the plaintiff's rights. Thus, exemplary damages may be obtained in cases of *seduction* of a man's daughter with deliberate fraud, or of gross *defamation* actuated by *sheer spite* or *jealousy.* Such damages are intended to offer

solatium to the plaintiff and to serve as a *punishment* to the defendant. The *object* of giving exemplary damages is to make a *public example* of the defendant, in order to *deter* other persons from the commission of a similar act. Exemplary damages are also known as *punitive* or *retributive* damages.

II— General and special damages

Damages may also be *general* or *special*. *General damages* are such as the law will presume to be the natural consequences of the defendant's acts. *Special damages* are such as the law will *not* infer, *unless proved* at the trial. Thus, in false imprisonment, general damages are recoverable for inconvenience, indignity, and discomfort, for the law presumes them, and the defendant will *not* be heard to say that, in fact, none were suffered.

III— Prospective and continuing damages : Rule of double action

Damages resulting from the same cause of action must be recovered *once for all*. More than one suit will *not* lie on the same cause of action. If *A* beats *B*, and breaks *B*'s arm and rib, *B* must sue for injury to *both arm and rib*. He cannot *split* up his actions *into two* : one for damages to his *arm* and another for damages to the *rib*. Damages, when given, are taken to embrace *all* the injurious consequences of the wrongful act, unknown as well as known, which may arise thereafter, as well as those which have arisen, so that the right of action is satisfied by one recovery.

FITTER v. *VEEL*, (1901) 12 Mod. 542— The plaintiff, after recovering damages for battery, discovered that his injuries were more serious than was at first supposed and a surgical operation became necessary. On a second action for additional damages, the Court dismissed the suit as *not maintainable*. The plaintiff had only one cause of action, which had been wholly extinguished by the judgment recovered in the first suit.

Exceptions to the rule of double action.

The rule that more than one action will not lie on the same cause of action admits the following *four important exceptions* :

1. *Where the same act violates two rights*

If the same wrongful act violates two rights, successive suits may be brought in respect of each of them. Thus, two actions can be maintained for one blow which may break *B*'s arm and his watch.

2. *Where the cause of action is continuing one (continuing injury)*

Where the cause of action is a *continuing* one, *separate* actions can be brought for *each* unlawful act causing *fresh damages*. A continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the *same kind* as that for which the action was brought. Thus, in trespass, a fresh cause of action arises every time such act of breach or injury occurs, and it is open to the plaintiff to file a fresh suit every time. So also, in case of a continuing nuisance, successive actions can be brought for every fresh injury. This is, therefore, an exception to the rule mentioned above, namely, that more than one action will not lie on the same cause of action.

BRUNSDEN v. *HUMPHREY*, (1883) 14 Q.B.D. 141.— The plaintiff, a cab-driver, in an action had already recovered compensation for damages done to his cab by collision with the defendant's van. He brought another action in respect of personal injuries suffered by him in consequence of the same accident. The defendant objected to the second suit brought on the same cause of action. The Court *held* that the plaintiff was entitled to do so. When the wrongful act of the defendant has violated *two distinct rights* vested in the plaintiff, a separate action *can* lie to recover the damage suffered in respect of each of these rights. The cab-driver was entitled to bring the second action for his personal injuries, for they were caused by the violation of a different right.

3. *Two distinct acts violating same right*

The third exception to the rule is where the defendant has committed *two distinct acts,* even though in violation of the same right, e.g., if the same libellous statement is published to *two or more persons* at different times, a *separate* action will lie for *each* publication.

4. *Where damage occurs at different times*

Where the tort is actionable only on proof of actual damage, and it produces damage at *different times, e.g.,* by reason of a slander published by *D, P* the person defamed, loses employment with *A*, and, after obtaining employment with *B*, loses that too, *P* has a separate cause of action for *both.*

DAMAGES FOR NERVOUS AND MENTAL SHOCK

Nervous shock

Nervous shock literally means shock of the nerve and brain structures of the body.

Discuss : Damages for mental and nervous shock.
B.U. Apr. 90

An action lies for damages for *illness due to nervous shock* caused *without any physical impact or injury.* The nervous shock may be caused by *words* or *act* of the defendant. It may be the result of immediate bodily fear induced by some accident due to the defendant's negligence *or* of a *false statement* willfully made *or* of intimidation. In such a case, the question is whether the shock and illness are in fact *the natural* and *direct consequences* of the wrongful act or default; if they are, the *illness*, and *not* the *shock*, furnishes the measurable damage.

VICTORIAN RAILWAYS COMMISSIONERS v. *COULTAS* (1888 13 App. Cases 222).— The gate-keeper of a railway company negligently invited the plaintiffs, a husband and his wife, to drive over a level crossing when it was dangerous to do so, and their vehicle was nearly, but not quite, run down by a passing train. The wife fainted and received a serious nervous shock leading to a severe illness. On a suit filed by the plaintiffs for damages, the Court *held* that the damage was *too remote* to be recovered.

However, the ruling in *Victorian Railway's case* has *not* been followed in subsequent cases like *Hambrook* v. *Stokes* and *Schneider* v. *Eisovitch* (discussed below).

WILKINSON v. *DOWNTON*, (1897) 2 Q. B. 57.— The defendant, by way of a practical joke, falsely represented to the plaintiff that her husband had met with a serious accident, whereby both his legs were broken. By reason of this misrepresentation, the plaintiff suffered a violent shock, her hair turned white and her life was for some time in great danger.

The Court *held* that the damages was *not too remote*, and that the damage due to illness could be recovered in an action for fraudulent misrepresentation.

DULIEU v. *WHITE & SONS*, (1901) K.B. 689— Where the wife of a publican who was standing behind the bar suffered severe illness on account of the shock which she sustained at seeing the defendant's horse and cart enter the public bar as a result of the defendant's negligent driving, it was *held* that, in an action of negligence, she could recover damages.

JANVIER v. *SWEENEY*, (1919) 2 K.B. 316 — The defendant, a private detective, after making false statements to the plaintiff, used threats to her, with the result that she became seriously ill. It was *held* that the defendant was liable.

HAMBROOK v. *STOKES*, (1925) 1 K.B. 141— The defendant's servant left a motor lorry at the top of a steep street unattended, with the engine running. The lorry started off by itself and ran violently down the incline. The plaintiff's wife, who had been walking up the street with her children, had just parted with them a little below a point where the street made a bend, when she saw the lorry rushing round the bend towards her. She became very frightened for the safety of her children, who by that time were out of sight round the bend. She was immediately informed by by-standers that a child answering the description of one of hers had been injured. In consequence of her fright and anxiety, she suffered a nervous shock which eventually caused her death. In an action by the husband under the Fatal Accidents Act, it was *held* that, on the assumption that the shock was caused by what the woman saw with her own eyes, as distinguished from what she was told by by-standers, the plaintiff was entitled to recover, notwithstanding that the shock was brought about by fear for her children's safety, and not by fear for her own.

KING v. *PHILLIPS*. (1952) 2 All. E.R. 459— A taxi-driver backed his taxi (without looking behind) and ran into a child who was on a tricycle behind the taxi, causing a minor injury to the child. The child's mother, who was in the house several yards away, heard the scream, and saw from her window that a taxi had backed into the tricycle. In an action by her for the shock suffered, the Court *held* that the taxi-driver was *not liable* for the shock suffered, because he could not reasonably have known that he might cause such injury to the mother of the child.

SCHNEIDER v. *EISOVITCH*, (1960) 2 Q.B. 430 — In this case, *Mr. S* and *Mrs. S* were involved in an accident caused by *Mr. E's* negligent driving. *Mr. S* was killed in the accident and *Mrs. S* was injured and rendered unconscious. After regaining her consciousness, *Mrs. S* was told of the death of her husband, and suffered nervous shock on hearing the news. The Court *held* that she could recover damages for shock as well as for her other injuries.

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Mental shock

By *mental shock* is meant a shock to the moral or intellectual sense. *Formerly*, the trend of judicial thinking was that no suit could be filed for mere *mental* pain or sorrow or any other injury to *feelings* and *emotions*. The view taken was that the law cannot value mental pain or anxiety and cannot pretend to redress the same. It was, therefore, felt that no action would lie for mere *mental* anguish or suffering or *emotional distress*, without *visible and provable illness*, as it was *not* capable of being assessed as measurable damage.

But of late, the trend of judicial decisions is in *favour* of regarding mental shock as actionable, on the principle that mental or nervous shock, if in fact caused by the defendant's negligent act, is as real a damage to the sufferer as a broken limb — less obvious to a layman, but now-a-days equally ascertainable by the physician.

OWENS v. *LIVERPOOL CORPORATION*, (1939) 1 K.B. 394— A funeral procession was going along a road, when a tram car, negligently driven by a servant of the defendants, violently collided with the hearse, damaged the hearse, and caused the coffin to be overturned, with the result that the mourners at the funeral, who were relatives of the dead man, suffered severe mental shock. It was *held* that the mourners were entitled to recover damages for mental shock, in an action brought by them for negligence against the defendants, although there was no apprehension of, or actual injury to, a human being.

[Lords Wright and Porter have however disapproved of the above view in *Bourhili* v. *Young*, (1943) A.C. 92.]

2. INJUNCTION

An *injunction* means an order of the Court (i) restraining a person from doing, continuing or repeating a wrongful act, *or* (ii) enjoining him to do some positive act which will put an end to a wrongful state of things created by him, or which will discharge his legal obligation. In the former case, the injunction is said to be *prohibitory*, whilst in the latter, it is called *mandatory*.

A mandatory injunction is an order requiring the defendant to do some *positive act* for the purpose of putting an end to a wrongful state of affairs created by him, or otherwise in fulfilment of his legal obligation, *e.g.*, an order to pull down a building which he has already erected resulting in an obstruction of the plaintiff's lights.

Likewise, an injunction may be *temporary* (or *interim*), i.e., for a specified period only, as for instance, until the suit is finally disposed of by the Court, or *perpetual*, i.e., for all time.

3. SPECIFIC RESTITUTION OF PROPERTY

The third kind of judicial remedy is the specific restitution of property. It is granted where the plaintiff has been wrongly dispossessed of his land or goods. Thus, a person who is wrongfully dispossessed of immovable property, or of some specific movable property, is entitled to recover such property.

Forms of action in English law

Under the English law, there were three different classes of action—*Real, Personal* and *Mixed.*

In *real* actions, the plaintiff claimed *right* to recover lands, tenements and hereditaments.

In *personal* actions, the plaintiff claimed a debt, or sought to recover a chattel, or claimed damages for injury done to his person or property.

Mixed actions partook of the nature of both.

Personal actions were : Debt, covenant assumpsit, trespass, trepass on the case, detinue, replevin and trover.

Detinue was the form of action for the recovery of specific goods wrongfully detained, or their value, and also damages occasioned by their detention.

Replevin was the action to recover specific goods which had either been wrongfully distrained from the plaintiff or had been wrongfully taken out of his possession.

An action of trover was originally the remedy to recover damages against the person who had found goods and refused to deliver them up on demand to the plaintiff. In course of time, it became the form of action where the plaintiff sought to recover damages from the defendant who had converted the plaintiff's goods to his own use and came to be known as an action of *conversion.*

B. EXTRA-JUDICIAL REMEDIES

Extra-judicial remedies are those which are open to an injured party to adopt, when he *takes the law into his own hands,* so to say, and helps himself in the matter, *e.g.*, expulsion of a trespasser, re-entry on land, abatement of nuisance, etc. Extra-judicial remedies are of the following *five kinds* :

State & explain : Extra-judicial remedies.
P.U. Oct. 92

1. Self-defence

It is lawful for a man to defend his person or property, and to use reasonable force towards another for the purpose. (See also Ss. 96 to 100 of the Indian Penal Code.)

2. Expulsion and re-entry

A person who is entitled to the immediate possession of immovable property, may expel the trespasser therefrom and *re-enter* it, *provided* that the force used by him is *reasonable*, and does *not* transgress the reasonable limits of the occasion.

3. Re-caption

A person entitled to the immediate possession of chattels (*i.e.*, movables) may recover them from any person who has them in his actual possession and detain them, *provided* that such possession was wrongful in its inception.

Re-caption and restitution distinguished

Re-caption of chattels is an *extra-judicial* remedy. The plaintiff may help himself by his own act and strength without recourse to any Court of

justice or the sanction of any judicial declaration of his rights. Specific restitution of property, on the other hand, is a *judicial remedy*, i.e., and remedy by way of an *action at law.*

4. Abatement of nuisance

In cases of nuisance, private or public, under certain circumstances and subject to limitations, the injured party has the right to remove it. (This is discussed in detail in Chapter XIV.)

Discuss : Distress Damage Feasant.
B.U. Apr. 91

5. Distress damage feasant

Where one man's beasts are on *another* man's grounds without licence (*i.e.*, without the owner's permission), and spoil his *corn*, grass, etc., the owner is entitled to *take possession* of the beasts, until satisfaction is made to him for the injury he has sustained. The distress must be taken *at the time the damage is done and while the beasts are on the land.*

Distress damage feasant is thus a remedy by which, if cattle or other things are on a man's land, encumbering it or otherwise doing damage there, he may summarily *seize* them *without legal process*, and *retain* them for the redress of the injury he has sustained.

Write a short note on : Distress damage feasant.
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Anything *animate or inanimate*, which is wrongfully on the land of another and is doing damage, may be distrained for such damage. For instance, greyhounds or ferrets chasing and killing rabbits may be distrained *damage feasant.* The distrainor must, however, supply the distrained animals with sufficient food and water. A *locomotive* was distrained where it was used on a railway line of a company without a certificate of the company as required by a statute.

The right is founded on the *principle of recompense*, which justifies a person in retaining that which occasions injury to his property till amends are made by the owner. The right does *not* give a right of *sale.* It can be exercised only by a person who has a sufficient possession of *land* to *entitle* him to maintain an action of trespass. The distress must be taken *at the time damage is done;* for, if the damage was done *yesterday*, and the distress taken *today*, that would be *illegal.*

It is doubtful if the right of *distress damage feasant* can be said to exist in *India* under the general law. However, there are express enactments which may allow such distress, e.g., the Cattle Trespass Act, which provides for compounding of cattle trespassing and doing damage.

9

JOINT TORT-FEASORS

Definition

When several persons *join* in committing a tort, they become *joint tort-feasors.* All persons who, in the eyes of the law, are responsible for the *same tort,* are deemed *joint* wrong-doers. Of course, there must be some *connection* between the act of one alleged tort-feasor and that of the *other.* As Sargent L.J. put it, "There must be a *concurrence* in the act or acts causing damage, not merely a *coincidence* of separate acts which, by their conjoined effect, cause damage".

Thus, in one case, there was collision between two buses, as a result of which a passenger in one of the buses died. In a suit under the Fatal Accidents Act by the representative of the deceased, it was *held* that the owners of *both* the Bus Companies were *liable.* (*Palghat Coimbatore Transport Co.* v. *Narayanan,* A.I.R. 1939 Mad. 306)

Three propositions as to join tort-feasors

As regards joint tort-feasors, the following *three* propositions may be examined :

1. The *circumstances* under which joint liability arises.
2. *Nature* of tort-feasor's liability.
3. *Contribution* between joint tort-feasors.

1. Circumstances under which joint liability arises

The following are *three principles* on which the liability of joint tort-feasors is based :

(a) Agency

Whenever one person employs, authorises or procures another to commit a tort, the law imputes the wrong to *both* of them, and the principal and the agent are *jointly and individually* responsible for the act of the agent.

ARNEIL v. *PATERSON,* (1913), A.C. 560 — Two dogs, belonging to different owners, acting in concert, attacked a flock of sheep and injured many of them. In an action for damages brought against the owners of the dogs, one of them put in a defence claiming that he was liable for only one half of the damage. It was *held* that, in law, *each* of the dogs occasioned the *whole* of the damage as the result of the two dogs acting together, and that consequently, *each* owner was responsible for the *whole damage.*

(b) Vicarious liability

Where a person commits a tort under circumstances which make another person *vicariously* liable for the wrong, *both* are deemed to be joint tort-feasors. (The law relating to *vicarious liability* has already been discussed in Chapter VII.)

(c) Joint or common action

Write a short note on : Joint tort-feasors.
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Persons who join together in some form of common action become responsible together for the tort which is committed in the course of such action, irrespective of what part each may play, so long as there is concerted action.

2. Nature of joint tort-feasor's liability

The nature of joint tort-feasors' liability is indicated in the following *three* propositions :

(a) The liability of wrong-doers is a *joint* and *several* liability, so that *each* is liable for the *whole* damage. The injured party may sue *any one separately,* or he may sue them *jointly; a decree obtained against them jointly,* may be executed against *any one.* (See *Ameil* v. *Peterson,* discussed above.)

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(b) A *release of one* of several tort-feasors *releases* all the others. The *reason* is that the cause of action, which is one and indivisible, having been released, all persons otherwise liable therefor are, *ipso facto,* released also. This release operates irrespective of the intention of the parties. However, a *mere covenant* not to sue one of the wrong-doers must be distinguished from an *actual release* given to him.

(c) The cause of action as against the wrong-doer being one and indivisible, a judgement obtained against one or more of the wrong-doers will be a *bar* to a *future* action against the *others, even though the judgement may not be satisfied.*

It may be noted that the nature of the tort-feasor's liability has been modified by the Law Reform (Married Women and Tort-feasors) Act, 1935, under which judgement recovered against one joint tort-feasor is *not* a bar to an action against another joint tort-feasor in respect of the *same* damage. However, the sum recoverable by way of damages *cannot* exceed the amount of damages awarded by the first judgement.

3. Contribution between joint tort-feasors

At Common Law, there was *no contribution among joint tort-feasors,* and a tort-feasor who was forced to pay the whole or more than a proportionate share of the damages, had no *claim* against the other or others for their shares. This principle was based on the maxim *ex turpi causa non oritur actio* (no cause arises from an illegal act).

MERRYWEATHER v. *NIXON,* (1873) 8 T.R. 186 — *M* and *N* jointly destroyed the machinery of one *S,* who brought an action against both, and obtained a judgement for £ 840, which he levied wholly on *M. M* brought an action against *N* for contribution of one-half of the amount. It was *held* that *M* could *not* recover.

Thus, the rule in Merryweather v. *Nixon* (above) laid down that the defendant could get neither an *indemnity* for the whole of what he had paid, nor a *contribution* for a part of it; in other words, the rule laid down that there is *no contribution between joint tort-feasors.*

In another interesting English Case, the plaintiff and the defendants were in partnership as highway robbers. The partnership realised about £

2,000 by way of stolen articles. The plaintiff filed a partnership suit for an account of this sum. As may be expected, the Court dismissed the claim as scandalous and impertinent. The Court also fined the Plaintiff's Solicitors £ 50 (each) for contempt. Interestingly enough, at a later date, both the plaintiff and the defendant were convicted by the Court and hanged. (*Everet* v. *Williams,* (1725) (1893) 9 C.Q.R. 197).

Discuss : Rule in Merryweather v. *Nixon*

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Five exceptions to the rule that there is no contribution between wrong-doers.

The application of the above rule came to be limited in course of time only to such cases as revealed *wilful* and *conscious* wrong-doing. Thus, the rule did *not* extend to —

1. Cases of *negligence* or *unintentional breaches* of the law.

2. *Cases of indemnity,* where one man employed another to do acts, *not unlawful* in themselves, for the purpose of *asserting a right.*

3. Cases where one party induced another to do an act which was not legally supportable, and yet which was not clearly in itself a breach of law. The party so inducing would be answerable to the other for the consequences.

4. Admiralty actions in cases of collision. In such actions, the damage caused to a vessel by the collision of another is to be borne equally by the two vessels.

5. Right of contribution between directors or promoters of a Company who are jointly and severally liable for misrepresentations contained in a prospectus. (S. 62, Companies Act, 1956)

Abolition of the rule of Merryweather v. *Nixon*

Finally, the Law Reform (Married Women and Tort-feasors) Act, 1935 abolished the above rule. The Act provides, *inter alia,* as follows :

Explain the principle laid down in : Merryweather v. *Nixon.*

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(i) A tort-feasor may recover contribution from any other tort-feasor, whether joint or otherwise, who is liable in respect of the same tort.

(ii) The amount of contribution recoverable from a tort-feasor shall be just and equitable, having regard to extent of his responsibility for the tort.

(iii) The Court may, in a given case, exempt a joint tort-feasor from liability to contribute.

Whether the rule in Merryweather v. *Nixon applies in India*

There have been several cases in India which have followed the rule in *Merryweather* v. *Nixon.* The rule has been freely applied to cases where the parties knew (or ought to have known) that they were doing a wrongful act.

On the other hand, the High Courts of Nagpur, Calcutta and Allahabad have *held* that the rule *does not apply* in India. According to these Courts, a tort-feasor *may* recover contribution from the other joint tort-feasor, who would, if sued, be liable for the same tort.

It is submitted that the rule in *Merryweather* v. *Nixon,* which is *not* in conformity with equity, justice or good conscience, has already been abolished in England, and has rightly been rejected in several well-considered decisions of the Indian Courts.

10

TRESPASS TO PERSON

Wrongs affecting personal safety and freedom are often styled as "trespass to person". The *four* main forms of trespass to persons are :

1. Assault
2. Battery
3. Mayhem
4. False imprisonment

1. ASSAULT

Definition

An *assault* is the unlawful laying of hands on another, or *an attempt* to do a *corporal* hurt to another, *coupled with present ability* and *intention* to do the act. Thus, the essence of the wrong is *putting a man in present fear of violence,* so that any act fitted to have that effect on a reasonable man would be an assault. But *mere verbal threat* is *not* assault, nor is a threat considering only of *gestures, - unless* there is an *immediate intention* and a *present ability* to carry it out.

Write a short note on : Assault.
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In assault, the *intention* of the offender is an important factor. Thus, if *X* meets his old friend *Y* on the road, and strikes him on his back, saying "Hi ! How's life ?", it is certainly *not assault.* But, if in a heated argument between *X* and *Y, X* attempts to strike *Y,* but is stopped in nick of time by *Z, it would* amount to assault.

As observed by one writer, an unwanted kiss is as much actionable as a blow, although in the former case, the defendant might find it easier to show that he reasonably believed that the recipient of his attention would not object to it.

So also, the threat, "Your money or your life", whether or not it does anything to allay the anxiety of the plaintiff, is an obvious invasion of his rights, and an action for assault *can* be maintained. (*Keefe* v. *State,* 1857, 19 Ark. 190)

Its ingredients

In an action for assault, the plaintiff must prove :

(i) that there was some *gesture* or *preparation* which constituted a *threat of force;*

(ii) that the gesture or preparation was such as to cause a reasonable *apprehension of force; and*

(iii) that there was a *present* ostensible *ability* on the defendant's part to carry out the threat into execution immediately.

It will be seen that there need not be an actual intention or power to use violence; it is enough if the plaintiff reasonably apprehends the danger. Thus, *X* can maintain an action against *Y*, if the latter threateningly points a gun at *X, even though Y* knows (but *X* does not) that the gun is *not loaded.*

PROBLEM.— *A* points a gun at *B,* who thinks that the gun is loaded. In fact, the gun is not loaded, and *A* is aware of this fact. Has *A* committed any offence ?

Ans. — *Yes, A's* pointing a gun at *B* would amount to an assault. (*R.* v. *James,* 1844) 1 C & K 530)

In an *American case,* the defendant levelled a rifle (which was not shown to have been loaded) at the prosecutor, who did not see the defendant until the latter had been practically disarmed. This was *held not* to be assault, since the prosecutor, not knowing of the defendant's conduct, could *not* be said to have been put in fear of his safety. (*State* v. *Barry,* 48 Mont. 598)

STEPHENS v. *MYERS,* (1830, 4 C & P. 349) — In the leading case on this point, the plaintiff was the chairman of a parish meeting. The defendant having been very vociferous, a resolution was passed, carried by a large majority, that he should be turned out. Upon this, the defendant said he would rather pull the chairman out of the chair than be turned out of the room, and immediately advanced with his fist clenched towards the chairman. He was thereupon stopped by the church-warden (who sat next to the chairman) at a time when he was not near enough for any blow he might have meditated to reach the plaintiff, but the witnesses said that it seemed to them that he was advancing with an intention to strike the chairman. The jury fined the plaintiff with one shilling damages.

Tindal, C.J. said in the above case : "It is not every threat, when there is no actual personal violence that constitutes an assault; there must, in all cases, be the *means* of carrying the threat into effect. The question I shall leave to you will be whether the defendant was advancing at the time, in a threatening attitude, to strike the chairman, so that his blow would almost immediately have reached the chairman, if he had not been stopped, then, though he was not *near* enough at the time to have struck him, yet if he was advancing with the intent, I think it amounts to an assault in law. If he was so advancing that, within a second or two of time, he would have reached the plaintiff, it seems to me that it is an assault in law."

READ v. *COKER,* (1853, 13 CB 850).— When the plaintiff refused to leave the defendant's premises, the defendant collected together some of his workmen, who mustered around the plaintiff, tucking up their sleeves and threatened to break his neck if he did not leave. The Court *held* that the plaintiff *could* successfully sue for *assault.*

LATTER v. *BRADDEL,* (1881) 50 L.J.Q.B. 166 — The plaintiff, a housemaid, was suspected by her mistress of being pregnant. A doctor was called by the mistress and the plaintiff submitted to a medical examination, which was accompanied by her sobs and protests. The doctor found that she was *not* pregnant. The plaintiff later sued the mistress and the doctor for assault. Deciding against the plaintiff, the Court

held that there was no evidence of any force or violence, not of any illegal act done or threatened by her mistress. The plaintiff had it entirely in her own power physically to comply or not to comply with her mistress's orders. There was, therefore, no evidence of want of consent (as distinguished from reluctant obedience) on the part of the plaintiff. In the circumstances, she could *not* succeed.

MORRIS v. *MARSDEN,* (1952) All E.R. 925 — In this case, the plaintiff was assaulted by a lunatic. As it was proved that the defendant knew the nature and quality of his tortious act, though he did not know that what he was doing was wrong, it was *held* that the defendant was liable.

In an *American case,* the defendant approached the plaintiff in the hotel dining room, stood with a walking-stick in his arm, and threatened to "whip hell out of" the plaintiff unless the latter signed an apology prepared by the defendant. The defendant was *held* guilty of assault. (*Trogden* v. *Terry,* 172 N.C. 540)

In another *American case,* the facts of which are rather interesting, the plaintiff had invited the defendant to her house one evening saying that her husband would not be home in the evening. Soon after the defendant arrived, he put his arm around the plaintiff. Suddenly, the husband stepped out of an adjoining room and grabbed the defendant. In a suit against the defendant for assault, the Court *held* that *no suit lay,* as the plaintiff's invitation, under the circumstances, carried with it the insinuative suggestion that the defendant's advances would not be offensive. The defendant's conduct had not exceeded the bounds of the invitation, and there was, therefore, no basis for the recovery of damages. (*Kirschbaum* v. *Lowrey,* 174 Minn. 107)

In yet, *another American case,* the defendant (who called himself a "magnetic healer") treated the plaintiff, a young girl of 18, for some nervous trouble at her request and with the sanction of her father. At the defendant's direction, she removed all her clothes, and he then massaged her all over and took other liberties with her body. When charged for assault and battery, it was *held* that, *if* the defendant had done all this in good faith for curing his patient, the suit would fail. However, in this case, he had needlessly caused the girl to expose herself to his view for his evil purposes, to which she submitted because of her ignorance. He was, therefore, guilty of assault and battery. (*Bartell* v. *State,* 106 Wis. 342)

Whether mere words amount to assault

It is to be noted that *mere words* do *not* amount to an assault. However, the words used by a person may give to his gestures such a meaning as may make them amount to an assault. Likewise, such words may even prevent his gestures from being an assault. Thus, in one case, *A* laid his hand on his sword and said to *B,* "If it were not *assize* time, I would not take such language from you", it was *held* that this was *not* an assault. It was indeed *assize* time, and the words showed that *A* did not then and there intend to use violence against *B.* (*Tubarville* v. *Savage,* (1669) 1 Mod. 3)

Similarly, the words "Were you not an old man, I would knock you down" negatives the threatening gesture, and there is, therefore, no assault.

PROBLEM. — *A* abuses *B,* who takes out his sword, and says to *A,* "The next time you use such language, I will kill you." Is *B* guilty of assault ?

Ans. — In this case, although there is a menacing gesture, the words accompanying the gesture would prevent *A* from reasonably apprehending that *B* was, then and there, about to use violence. Therefore, *B is not guilty of assault.* (*A.C. Cama* v. *H.F. Morgan,* 1864 1 C & K 530)

Whether assault amounts to a crime

Assault is also a *criminal* offence, and is punishable under S. 531 of the Indian Penal Code.

2. BATTERY

Write a short note on : Battery.
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Definition

Battery is the *actual striking* of another person or touching him in a rude, angry or insolent manner. It consists in *touching another's person hostilely or against his will,* however, slightly. It is the *actual application of force* to the person of another, done *without justification,* in a *rude, angry, insolent* or *revengeful* manner. In other words, the intentional *application of force* to the person of another *without* lawful justification, however *trivial* the amount or nature of the *force* may be, constitutes the wrong of battery; for instance, the least *touching* of a man in anger is *battery.* Thus, spitting on one's face, or cutting another's hair without his consent, or snatching a paper from another's hand, or removing his hat, would be instances of battery. Likewise, carelessly firing a gun and hitting another, would also be battery.

Write a short note on : Cole v. *Turner.*
P. U. Oct. 91

In *Cole* v. *Turner* (1704 6 Mod. 149), *HOLT C.J.* remarked as follows : "*Firstly,* the least touching of another in anger is a battery. *Secondly,* if two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it will be no battery. *Thirdly,* if any of them uses violence against the other, to force his way in a rude, inordinate manner, it will be a battery."

In order to constitute the tort of battery, it is *not essential* that the plaintiff should be conscious of the contact at the time it occurs. Interest in personal integrity is, in any case, entitled to protection, although the plaintiff is asleep, or is under an anaesthetic, or otherwise unaware of what is going on. As rightly observed, the girl who is kissed in her sleep is likely to be affronted quite as much (and perhaps, more) when she later discovers it, as when she knows it at the time it takes place.

COWARD v. *BADDELEY,* (1859) 4 H. & N. 478—A bystander touched a fireman on the arm to attract his attention to another part of a building where a fire was raging. On a suit filed by the fireman for battery, the Court *held* that the bystander was *not liable* for battery. In such a case, the defence of *de minimis non curat lex* is available to the defendant. The law does not take account of trifles.

In one case, the plaintiff had purchased a ticket for a seat at a cinema show. However, he was forcibly turned out of his seat under the directions of the theatre manager, who was under the *mistaken belief* that the

Define and distinguish between assault and battery. Discuss the various justifications provided under the law for the same.
P. U. Apr. 93

plaintiff had not paid for the seat. The Court *held* that the plaintiff was entitled to recover substantial damages. The purchaser of a ticket at a theatre has a right to stay and witness the whole performance, provided he behaves himself and complies with the theatre's rules. (*Hurst* v. *Theatre Ltd.*, (1915) 1 K.B. 1)

PROBLEM.— Being irritated by a painful injection administered to *X* by Dr. *A*, he spat on the face of Dr. *A*. Has he committed any tort ?

Ans.— *Yes,* spitting on the face of another amounts to battery in the eyes of law. *X* will, therefore, be liable to pay damages to Dr. *A* for this tort. [*The Queen* v. *Cotesworth,* (1704) 6 Mod. 172]

Ingredients

In an action for battery the plaintiff must prove :

1. The *use of force* to him, either to his body, *e.g.,* slapping or pushing, or by bringing an object into contact with his body *e.g.,* throwing water on him; and

2. That the use of force was *intentional.* Thus, touching a man merely to call his attention, or jostling one another in a crowd, is *not battery.*

Battery, like assault, is a criminal offence also. (See S. 350 of the Indian Penal Code.)

Discuss the ingredients of assault and battery, and distinguish between the two.
B. Y. Apr. 95
Apr. 96

Assault and battery distinguished

As an American writer once observed, *assault and battery go together like ham and eggs.* However, assault and battery may be distinguished as follows : In both, *motion is necessary,* but while the *application of unlawful force* to another constitutes battery, an action which puts another in instant *fear* of unlawful force, though *no force may be actually applied,* would amount to assault. In other words, *physical contact* is necessary in battery; whereas in assault, *mere fear* of physical violence is enough.

Write a short note on : Assault and Battery.
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Thus, assault may be described as *"inchoate battery".* Battery in fact, includes assault. Where the wrongful act falls *short of actual physical contact,* but causes a reasonable *apprehension* that the party threatening intends *immediately* to *offer violence,* it is an assault, *e.g.*, if *A* lifts up his cane (or his fist) in a threatening manner at *B.*

Define and distinguish between assault and battery.
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Winfield, in an interesting example, has said that pulling away a chair, when a person is about to sit on it, is *probably* an *assault* till the moment the person reaches the floor (for as long as he is falling, he reasonably expects to get hurt). But as soon as he comes into contact with the floor, it will be *battery.* Similarly, to throw water at a person is *assault,* but if any drops fall on him, it would be *battery.*

Explain the ingredients and defences for an action of assault and battery.
B. U. Apr. 93

Defences to an action for assault and battery

Assault and battery may be justified in the following *eight* cases :

Discuss the torts of assualt and battery.
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1. Self-defence : *Son assault demesne*

Define and distinguish between assault and battery. Explain the various justifications provided under the law for the same.
P. U. Oct. 95

Self-defence or defence of one's *wife* or *husband,* children, parents or one's master, is always permissible. Self-defence is technically known as *"son assault demesne",* which means that the act complained of was the effect of the *plaintiff's own attack.*

But the use of force in self-defence is *not* justifiable *unless* it conforms to *two general conditions — viz.,* that (i) it was *necessary,* and (ii) it was

not disproportionate to the evil to be prevented. For instance, hitting a man a light blow with a little stick on the shoulder is not good reason for him to draw a sword and cut and hew the other.

2. Defence of one's property

If one enters the house of another with force and violence, in defence of the possession of the *house* or *goods* and *chattels,* the owner is justified in turning him out.

3. To prevent a forcible entry or seizure of chattels

The rightful owner (or his servant by his command) may justify an assault in order to re-possess himself of land or goods which are wrongfully in the possession of another, or to prevent a forcible entry into his land or premises, no unnecessary violence being used.

4. In exercise of parental or quasi-parental authority

Force may be used for the chastisement or correction of a pupil, child, apprentice, *provided* the force is not excessive or unreasonable A husband, as such, has, however, no corresponding power over his wife.

5. Leave and licence

A man *cannot* complain of harm to which he has exposed himself *with knowledge,* and *of his free will, e.g.,* boxing, fencing, hockey, foot-ball, etc.

6. Preservation of public peace

A person who disturbs a public worship or meeting may be removed *by using reasonable force.* However, the force used should *not* be more than what is necessary.

7. Legal process

Assault may be justified on the ground that it was committed in *serving* any *legal process,* including a search warrant, under any law.

8. Misadventure (inevitable accident)

Inevitable accident is a good defence for a trespass to person, if the act is *lawful* in itself, and is done in a *reasonable* and *careful* manner. If, however, the act is done in a *negligent* manner, inevitable accident *cannot* be pleaded.

TIMOTHY v. *SIMPSON,* (1885) 1 CR. M & R. 757 — A shopkeeper had marked prices on his goods and a customer entered and insisted on having the goods. Now, in law, the shopkeeper is *not* bound to sell goods at the marked prices, as there is merely and *invitation to offer.* Therefore, if the customer refuses to leave the shop, necessary force *may be used* to remove him.

3. MAYHEM

Definition

Among the personal injuries *not* causing the *death* of the person, the most serious is what is known as *"mayhem",* or *"maim".* An action for this tort is maintainable when a person has been *deprived of any fighting limb.* Where it is *not a fighting limb* which a person has been deprived of, then the action would *not* be for mayhem, but only for *battery.* It has been held that loss of teeth, hands, legs, finger (or even castrating) would give rise to

an action for mayhem, while the cutting of the *ears* or the *nose* would amount to *disfigurement,* and *not* the loss of a *fighting* limb, and would therefore, give rise only to an action for battery.

It will, therefore, be seen that the only test of a mayhem is *hurt* on any part of a man's body, whereby he is rendered *less able* in *fighting* or *defending* himself or in annoying his adversary.

Write a short note on : Mayhem.
B. U. Oct. '93
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General points to be noted regarding assault, battery and mayhem

The following points may be noted regarding the plaintiff's right in assault, battery and mayhem :

1. In all the above three wrongs, an action will lie *without proof of actual damage,* as they violate the right of person. It may also be noted that assault, battery and mayhem are *criminal offences* as well. The plaintiff can *sue* in tort, as well as *prosecute* the wrong-doer under the Indian Penal Code.

2. Prosecution of the wrong-doer is not a bar to a civil action filed against him for the tort.

3. The conviction for assault, battery or mayhem can be no evidence in a civil suit for damages.

4. A plea of guilty in a criminal Court *may,* but a verdict of conviction *cannot,* be considered in evidence in a civil Court.

4. FALSE IMPRISONMENT

Define false imprisonment. What are its essentials ?
P. U. Oct. 97

Definition

False imprisonment (also sometimes called *false arrest,* in American law) has been defined as the *total restraint of the liberty,* unreasonable *for however short a time, without lawful justification.* It consists in the imposition of a *total restraint* for some period, *however short,* upon the liberty of another, without lawful and sufficient cause or excuse. Such a restraint may be either *physical or by a mere show of authority.*

Winfield defines false imprisonment as the *infliction of bodily restraint which is not expressly or impliedly authorised by the law.*

The deprivation of the plaintiff's liberty must be *complete,* that is to say, the restraint must be such as to limit his freedom of motion in *all* directions. It is *no* imprisonment if a person is prevented from going in *one or more* of several directions in which he has a right to go, so long as it is open to him to go, as far as he pleases, in *some other direction.*

Write a short note on : False imprisonment.
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Define false imprisonment. What should the plaintiff prove in order to succeed in a suit for false imprisonment ?
P.U. Apr. 94

In the leading case of *Bird* v. *Jones,* (1845), 7 Q.B. 742, 744) Coleride J. said : "A prison may have its boundary, large or narrow, visible and tangible, or though real, still in the conception only; it may itself be movable or fixed; but a boundary it must have; and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him, except by prison breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom; it is one part of the definition of freedom to be able to go withersoever one pleases; but imprisonment is something more than the mere loss of this power : it includes the notion of restraint within some limits defined by a will or power exterior to our own."

As pointed out by *Winfield,* both the terms *"false"* and *"imprisonment"* are rather misleading. *False* does not necessarily signify *fallacious* or *mendacious;* rather, it is used in the less common sense of *erroneous* or *wrong.* Similarly, this tort can be committed without the *"imprisonment"* of a person in the commonly understood sense of the term. Thus, if a Professor locks up his students in the class-room after the usual lecture hours, or if a man is restrained from leaving his own house, it would amount to the tort of *false imprisonment.*

Ingredients

In an action for false imprisonment, the plaintiff must prove the following *two* things :

1. A complete deprivation of liberty

In order to succeed, the plaintiff *need not prove an actual imprisonment* in the sense of imprisonment in a jail. He must prove, however, that there is a *complete deprivation of his liberty.* Thus, no action lies where the plaintiff is unlawfully prevented from going in a *particular* direction.

Write a short note on : Bird v. Jones.
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BIRD v. *JONES,* (1845 7 Q.B. 742).— A portion of a bridge, generally used as footway, was appropriated for seats to view a boat-race. The plaintiff insisted upon passing along the part so appropriated and attempted to climb over the enclosure. The defendant pulled him back, but the plaintiff succeeded in climbing over. Two policemen were then stationed by the defendant to prevent him from passing onwards in the direction in which he wished to go. The plaintiff was told to go back into the carriageway and proceed to the other side of the bridge, if he pleased. He refused to do so and remained where he was obstructed for about half an hour. The Court *held* that this was *no* imprisonment.

HERD v. *WEARDALE,* (1915 A.C. 67) — A miner descended a coal mine at 9.30 a.m. for the purpose of working therein. He was entitled to be raised to the surface at the conclusion of his shift at 4 p.m. On arriving at the bottom of the mine, he was ordered to do certain work which he wrongfully refused to do; and at 11 a.m. he requested to be taken to the surface in a lift. His employers refused to permit him to use the lift until 1.30 p.m., although it had been available for the carriage of men to the surface from 1.10 p.m. and in consequence he was detained in the mine against his will for twenty minutes. In an action for damages for false imprisonment, it was *held* that, on the principle of *violenti non fit injuria,* the action could *not* be maintained.

MAHARANI OF NABBA v. *PROVINCE OF MADRAS,* (1942 Mad. 696) — In this case, a Sub-Inspector, misunderstanding a message sent to him, prevented the Maharani of Nabba from boarding a train, and also posted two policemen to prevent her car from being taken out of the railway compound. In a suit filed on these facts, it was *held* that there was *no false imprisonment,* because she was not restrained or confined; only the liberty to go in the conveyance in which she wished to go was affected.

JOHN v. *LEWIS CO. LTD.* v. *TIMS,* (1952) A.C. 676 — A house detective arrested a suspected shop-lifter, and detained her, whilst the manager's authority to prosecute was being obtained. The suspect was then handed over to the police to be brought before a magistrate. The charge was, however, withdrawn later on. The Court *held* that there was

no false imprisonment, as the suspect had, in the circumstances, been brought before a magistrate within a reasonable time.

It is *not necessary* to prove that there is an *actual* physical restraint. There is an imprisonment where a man threatens or declares his intention of arresting another with a show of authority to which the other submits.

Thus, in *Merring* v. *Graham White Aviation Co. Ltd.,* (1919) 122 L.T. 44, the plaintiff who was suspected of theft, was asked by two aviation officers to accompany them to the defendant company's office where he was kept under guard. It was *held* that the defendant company was liable for false imprisonment.

ROBINSON v. *BALMAIN NEW FERRY CO. LTD.,* (1910) A.C. 295 — The plaintiff, who intended to cross a harbour on the defendant's ferry, paid one penny to enter the defendant's wharf. Between the wharf and the street was a barrier with two turnstiles and a notice stating that a penny must be paid on entering or leaving the wharf, whether or not the passenger had used to ferry. Thus, the practice of the defendants was to collect fares on one side of the harbour only. The plaintiff, who had already gone in from the entry turnstile, discovered that he would have to wait for 20 minutes for the next steamer, and therefore, went to the exit turnstile, so that he could go away. When he refused to pay a penny at the turnstile, he was prevented, for some time, from forcing his way out by two of the defendant's officers. The plaintiff sued for damages for assault and false imprisonment.

The Privy Council *held* that the plaintiff could *not succeed.* The Court observed that there was no complaint that there was any excessive violence; nor was there any false imprisonment at all. The plaintiff was merely called upon to leave the wharf in a manner in which he had contracted to leave it. The payment of a penny was a fair condition, and the defendants were entitled to resist a forcible passage through the turnstile.

2. The detention must be unlawful

Secondly, the detention must be *unlawful.* Thus, if the detention is made in pursuance of powers vested in the defendant *by law,* no action lies.

The *period* for which the detention continues is *immaterial.* But, for an action to lie, the detention must be by the *defendant* or by *his* orders.

It has also been held that in the case of false imprisonment, it is *not* necessary for the plaintiff to prove malice of negligence on the part of the defendant. It is sufficient if he proves that the false imprisonment was carried out by the defendant, and if the defendant cannot establish sufficient justification, he would be liable. (*Garikipati Ramayya* v. *Araza Bikshan,* A.I.R. 1979 A.P. 31)

Should the plaintiff be aware of the imprisonment ?

An interesting question that arises in this connection is : Can a man be said to have imprisoned, if he was not aware of the fact ? For example, suppose *A*'s door is locked up (from outside) whilst he is asleep — and opened before he wakes up; would this amount to false imprisonment ? The Court of Appeal in England has *held* (in *Merring* v. *Graham White Aviation Co. Ltd.,* discussed above) that a man may be imprisoned, without even knowing it. Lord Atkin, in his judgement, observed : "A person can be imprisoned while he is asleep, while he is in a state of drunkenness, while he is unconscious, and while he is a lunatic."

It is interesting to note that in the U.S.A., the *American Restatement of the Law of Torts* lays down that before there can be any liability for false imprisonment, the person confined (a) should be conscious of the confinement, *or* (b) should be harmed by such confinement.

Discuss the law relating to false imprisonment and distinguish between false imprisonment and malicious prosecution.
B. U. Oct. 93

Wrongfully obtaining Court's order of imprisonment

It may be noted that an action for false imprisonment does *not* lie for wrongfully obtaining an *order or judgement for imprisonment* from a *Court of Justice,* though erroneous, irregular, and without jurisdiction. The *reason* is that in trespass, a man is liable only for the acts of *himself* or his *agent,* and a *Court* is no man's agent, but acts in its own judicial discretion. Thus, two persons being before a Magistrate, one makes a charge against the other, where upon the Magistrate orders the person charged to be detained until the matter can be investigated. The person making the charge will *not* be liable in tort.

Damages

In a suit for false imprisonment, the plaintiff is entitled to compensation for his loss of time, for physical discomfort or inconvenience, and for any resulting physical illness or injury to his health. Since the injury is often also mental, he may also be entitled to damages for his mental suffering, humiliation, and the like.

False imprisonment **distinguished from** *assault*

In most cases, in false imprisonment, there is assault also, but not necessarily so. Locking a man up in a room in which he already is by his own act, amounts to false imprisonment, but is *not* assault. In other words, the element of *force* which is *always* present in the tort of *assault, may* or *may not* be present in false imprisonment.

Defences to an action for false imprisonment

To avoid liability in a suit for false imprisonment, the defendant must show that his action was *justifiable.* In other words, he must show either —

(i) that he acted under a lawfully executed *warrant* issued by a competent tribunal; *or*

(ii) that his act was one of those which are justified without a warrant.

Right to arrest

The law gives certain persons the right to arrest. The right to arrest without a warrant differs according as the person arresting is a *private person or a police officer.*

A private person may arrest without a warrant — (i) one whom he reasonably suspects to have committed, and who has actually committed, a felony; and (ii) one whom he sees committing, or about to commit, a breach of public peace.

A police officer may arrest without a warrant — (i) any one whom he suspects to have committed a felony; (ii) in order to prevent a breach of the peace, or whenever a breach of the peace has been committed in his presence; and (iii) under certain statutes.

11

WRONGS AFFECTING REPUTATION : DEFAMATION

Defamation is a tort affecting a man's reputation. It takes two forms : Libel and Slander.

LIBEL

Definition

A libel is a *publication* of a *false* and *defamatory* statement, in some *permanent form*, tending to injure the *reputation* of another person, *without* lawful *justification* or excuse.

Ingredients

In order to establish the tort of libel, the following *three conditions* must be satisfied :

1. The statement must be false

The falsity of the statement is presumed in the plaintiff's favcur. The plaintiff need *not* prove it to be false, and the burden will be on the defendant to prove that it is true.

2. It must be in a permanent form

The statement may be in writing, printing or even conveyed by means of a cinema film or a gramophone record. Thus, Princess Irina of Russia succeeded in a suit filed by her against the Metro-Goldwyn-Mayer Pictures in whose film entitled "Rasputin the Mad Monk" she was represented (as Princess Natasha) as having been seduced by Rasputin. (See *Youssoupoff* v. *Metro Goldwyn Mayer Pictures Ltd.*, below.)

3. It must be defamatory

[See "Requisites of Defamation" below.]

Libel, actionable *per se*

Libel is, in all cases, actionable *per se*, *i.e., without proof of actual damage*. When the statement is made in a *permanent* form, the law *presumes* that, of necessity, the person defamed *has suffered damage.*

Cases

MONSON v. *TUSSAUDS*, (1894) 1 Q.B. 671 — The exhibition of a wax effigy of a person who has been tried for murder and acquitted, in company with the effigy or notorious criminals, may be defamatory, because this shows that although not found guilty, he was a criminal in fact.

GARBETT v. *HAYELL*, (1943) 2 All E.R. 359— The defendants published in their magazine on a left hand page a photograph of the plaintiff carrying on his business of an outdoor photographer, in which he

was depicted with his camera and showing pictures to two women. On the opposite page was a photograph of a naked woman. Commencing under the first photograph and ending under the second were words stating that for an extra payment a customer could have a photograph like that of the naked woman. The plaintiff brought an action for libel claiming that the juxtaposition of the photographs and the letter-press thereunder implied that he dealt in indecent pictures. It was *held* that the photographs and the lettering were arranged in such a manner as to be capable of a defamatory meaning, and were in fact defamatory of the plaintiff.

MITHA v. *NUSSERVANJI* (1941) 43 Bom. L.R. 631— The defendant published in a newspaper about a lady, who was an instructress in physical culture and dancing, and who also ran an industrial institution for poor Parsi girls, that she was unfit to carry on her profession and that by carrying it on, she would be in a position to ruin the future of the girls taking their training in her classes. It was *held* that it was gross libel.

YOUSSOUPOFF v. *METRO GOLDWYN MAYER PICTURES LTD.*, (1934) 50 T.L.R. 581— The defendant produced and exhibited a film in which a woman of good character and social position was represented as having been forcibly ravished by a man of a very bad character. Circumstantial details in the picture pointed to the plaintiff as the wronged woman, and several other acquaintances believed that the film referred to her. When the plaintiff sued the defendants in damages for defamation, she succeeded without proof of special damage. The film constituted a libel, and the plaintiff was likely to be shunned by society.

SLANDER

Definition

A slander is a *false* and *defamatory verbal* or *oral* statement in some *transitory form*, tending to *injure* the *reputation* of another, *without* lawful justification or *excuse*. By reputation is meant the opinion of the world in general.

It may be noted that slander is *not* actionable without proof of *special damage, i.e.*, it is *not actionable per se*, except in the *five cases* mentioned below.

Ingredients of slander

Write a short note on : Slander.
B. U. Oct. 93
P.U. Oct. 96

The following are the *six* ingredients of slander :

(1) The *matter* complained of must be *defamatory*. A matter is defamatory when it lowers the plaintiff in the esteem of others or causes him or her to be shunned by society. Thus, to say that *Z* is suffering from *leprosy* is defamatory, but *not* when *Z* is said to be suffering from *small-pox*. (See below, under "Accusation of a virulent disease".) It is also *defamatory* when it exposes the plaintiff to hatred, contempt, ridicule or obloquy. It is equally so when the statement tends to injure him in his profession or calling. Thus, calling a lawyer a dunce or ignorant of the law is defamation. [See "Requisites of Defamation", below.]

(2) It must be *false*, and must *not* be *privileged* or in the nature of a fair *bona fide* comment.

(3) It must *refer* to the *plaintiff*.

(4) It must be *published.*

(5) It must be *published* by the *defendant.*

(6) There must be *special* damage to the plaintiff, *except* in the five cases (see below), where special damage is not required to be proved.

How far special damage is requisite in slander

As seen above, slander is *not actionable per se.* Except in the *five important cases* mentioned below, slander is actionable *only on proof of special damage.* Mere loss of reputation is *not* sufficient to constitute an action for *spoken words*; there must be *loss of some material advantage* — some loss which is *pecuniary,* or at any rate *capable* of being estimated *in money.*

Discuss the circumstances in which slander is actionable per se. B.U. Oct. 94

Slander when actionable *per se*

In the following *five cases,* however, *slander* is actionable *per se, i.e.,* special damage to the plaintiff need not be proved :

1. Accusation of criminal offence

Slander is actionable *per se,* if the words charge the plaintiff with the *commission of a criminal offence* punishable *corporally* and *not by fine only, e.g.,* murder, robbery, theft, arson, etc. Thus, if *X* falsely says that *Z* was convicted of breach of a parking rule under the Motor Vehicles Act, it is no defamation, but not so, if the charge is one of rape.

2. Accusation of virulent disease

Slander is likewise actionable *per se* if the words contain an imputation of a *contagious disease of a particular kind.* Venereal disease and leprosy come within the rule; small-pox, however, does *not.* The imputation must be that the plaintiff was suffering from the disease *at the time the words were spoken,* and *not* at some time in the *past.*

Thus, where the defendant told others that his son-in-law was suffering from venereal disease, it was *held* that the son-in-law could succeed, even though he was unable to prove special damage. (*Blood-wroth* v. *Gray,* 1844 7 Man. & G. 334)

3. Imputation against office, profession or trade

Slander is actionable *per se* where the words are spoken of the plaintiff *in relation to his office, profession or trade, e.g.* to accuse a barrister or medical man of incapacity or of infamous practices *in the discharge of his professional duties.* It may be noted that the defamatory words, although calculated to injure a person in his office, profession or trade, but *not* relating to his *conduct* therein, are *not actionable per se. Thus,* it is *not* actionable *per se* to make an imputation of immorality against the headmaster of a school in his *private* capacity and *without* any relation to his *position* : *Jones* v. *Jones,* (1916) 2 A.C. 481. Similarly, where a physician was accused of adultery, but the accusation was *not* connected with anything done by him in his *professional* capacity, it was *held not* to be *actionable per se* : *Ayer* v. *Craven,* (1834) 2 A. & E. 2.

Thus, it is *not* defamatory, without proof of actual damage, to say that a gas company clerk has been seen with prostitutes, because he still might be a satisfactory clerk, *or* that a stenographer does not pay her bills, since she might nevertheless be good at her stenography, and so on.

Thus, during a conversation, *A* says to *B* that *C*, an architect, is of immoral character. Can *B* sue *A* ? — No, *unless C* proves special damage. When the defendant makes an imputation against the plaintiff *in the way of his business* or *office,* slander is actionable *per se.* Such is not the case here.

4. Unchastity in woman or girl

English law

At common law, words imputing chastity to a woman were *not* actionable, without proof of special damage. However, by virtue of the Slander of Woman Act, 1891, words imputing *unchastity* or *adultery* to *any woman* or *girl* are actionable *per se* in England. Thus, even to call a woman a 'lesbian' amounts to defamation. (*Kerr* v. *Kennedy,* (1642) 1 K.B. 409)

Define defamation outline the distinction between libel and slander, and discuss how far it is relevant in India.

P.U. Oct. 97

Indian law as to imputation of unchastity

The Calcutta High Court has *held* (in a case arising in the town of Calcutta) that words imputing unchastity to a woman are *not* actionable in the absence of proof of special damage. However, in a case which arose in the *mofussil* of Calcutta, the same High Court *held* that such an imputation *was* actionable without proof of special damage. The Madras High Court has, however, *held* that such a suit is maintainable without proof of special damage. The Bombay High Court has *held* that though Parsis are governed by Common Law, yet words imputing adultery to a Parsi married woman *are* actionable without proof of special damage, as adultery is an offence under the Penal Code. (*Hirabai* v. *Dinshaw,* (1962) 28 Bom. L.R. 1334)

5. Aspersion on caste

The trend of modern Indian decisions is that to say of a high caste woman that she belongs to a *lower caste* is defamatory, not only of *her,* but also of her *husband,* he having married to a woman of a lower caste. Such an allegation is actionable *without* proof of special damage. (*Gaya* v. *Mahabir,* (1926) 1 Luck. 386)

Distinguish between libel and slander. What should the plaintiff prove to succeed in a suit for libel ?

P.U. Apr. 96

Slander and libel distinguished

The following are *seven important points of distinction* between libel and slander :

1. Written, oral

Libel is defamation in a written permanent form, normally addressed to the eye; slander is defamation in an oral, transient form, normally addressed to the *ear.* Defamation through a parrot would thus be slander.

2. Permanent, transient

Libel is defamation in a *permanent* form, whether exhibited to the eye, as in the case of a statue, effigy, caricature and the like, or only to the ear, as the case of a phonographic record; *slander is defamation* in a *transient* form, whether audible, as in spoken words, or visible, as in the case of gesture.

What is defamation ? Distinguish libel from slander.

B. U. Oct. 94

3. Tort, crime

In England, libel is both a *civil wrong and a criminal offence,* whereas slander is a *civil wrong only.* Spoken words may, however, fall within the

criminal law, if they *are blasphemous, seditious* or *obscene,* or if they amount to a solicitation to commit a crime or a contempt of Court; but there is *no crime of slander in the English law. In India, however,* slander is *both a tort and a crime.*

Distinguish between libel and slander. What are the general defences available in a suit for defamation ?
B. U. Apr. 90

4. Whether actionable *per se*

Libel is actionable *per se, whilst slander is not* (*except* in the five cases discussed above).

5. Presence of malice

Libel shows *greater deliberation,* and raises a suggestion of malice; *slander* may be uttered in the *heat of the moment* and under a *sudden provocation.*

6. As to publisher

The actual *publisher* of a *libel* may be an innocent person, and therefore, not liable; whereas in every case of publication of a *slander,* the publisher acts consciously and voluntarily, and must necessarily be guilty.

Define the tort of defamation, and explain the distinction between libel and slander.
B.U. Apr. 95
Apr. 96

7. Limitation

Under the English law, an action of *libel* is barred after *six* years, whilst that of slander is time-barred after *two* years. In India, the period of limitation is *one year* for both libel and slander.

Defamation by radio or television

Defamation by *radio* and *television* has not yet been considered extensively by the Courts, and is a matter of judicial conflict of opinion. In some cases, it has been *held* to be *libel* and in some others, *slander,* and in others to be libel if the broadcaster reads from the script, but slander if he does not. One American Court has even coined the word *"defamacast"* to avoid calling it by either name.

REQUISITES OF DEFAMATION

As seen above, *defamation* is a generic term covering both libel and slander. The *four requisites common to both* are as follows :

Discuss the ingradients of the tort of defamation.
B. U. Oct. 90
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1. The statement must be defamatory

A statement will be defamatory if it (i) exposes the plaintiff to *hatred, contempt, ridicule or obloquy, or* (ii) tends to *injure* him in his *profession* or *trade, or* (iii) causes him to be *shunned* or *avoided* by his neighbours or by members of the society.

What is a defamatory statement ? Discuss the various defences available to the defendant in an action for defamation.
B. U. Apr. 91

Defamation is thus an invasion of one's reputation and good name. Defamation is that which tends to injure one's *"reputation"* in the popular sense, to diminish the esteem, respect, goodwill or confidence in which a person is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him.

State and explain the conditions of liability in defamation.
P. U. Apr. 92

Drawing on American law, it can be said that *in the absence of special circumstances* which add another meaning to the words, it is *not defamatory* to say that a man is dead, *or* that he is over-cautious with his money, or that he has led an eventful life, or that he has no permanent address, or that he is a labour agitator. However, it would be *defamatory* to say that a person is immoral and unchaste, *or* that he refuses to pay his just debts, *or* is having "wife-trouble" and is about to be divorced, *or* that he is a "skunk" or a "bastard", and so on.

Humour can also be made an instrument of defamation. It is, of course, possible that humour may be understood by all who hear or read it as good-natured fun, not to be taken seriously or in any defamatory sense. But when it carries a sting and causes adverse, rather than sympathetic, merriment, it may become defamatory. Thus, a speech made after dinner may be understood by all present as a harmless after-dinner (— and perhaps, after a few rounds of drinks —) joke. However, if it is published in a newspaper the next day, and reaches those who do not understand the comments out of their context, it may amount to a libel.

Intention or motive how far material

Where the words are defamatory, the question of *intention* or *motive* with which they are used is *quite immaterial.* Good faith or ignorance of the defamatory nature of the statement is *no defence,* for a man *utters defamatory statements at his peril.* Liability for libel does *not* depend on the *intention* of the defamer, but on the *fact* of defamation. In an action for defamation, the falsity of the charge is *presumed* in the plaintiff's favour. The burden of proof that the words are false does *not* lie upon the plaintiff.

NEWSTEAD v. *LONDON EXPRESS, ETC.,* (1940) 1 K.B. 377.— A newspaper published an account of a trial for bigamy and referred to the prisoner as "Harold Newstead, thirty-year old Camberwell man". The account was true as regards a Camberwell barman of that name, but was not true as regards the plaintiff, Harold Newstead, aged about thirty, who assisted his father in a business at Camberwell. In an action by the plaintiff against the proprietors of the newspaper, it was *held* that, assuming the words complained of were capable of a meaning defamatory of the plaintiff, the fact that they were true of another person did *not* afford a good defence to the defendants. Proof of intention may, however, be material on the question of *damages.* Thus, in this case, the jury awarded to the plaintiff, damages of one-fourth pence only.

Write a short note on : Innuendo.
B. U. Apr. 97
Oct. 97
P.U. Oct. 92

'Innuendo'

Sometimes defamation is not *apparent* or *prima facie* clear. It is often *couched in subtle language.* Words which are *not* defamatory in the *ordinary* sense may, nevertheless, convey a defamatory meaning owing to the *particular circumstances in which they are spoken.* When a statement is thus *prima facie innocent,* but the plaintiff alleges that it has a *defamatory significance,* he must, in his pleadings, set forth the *circumstances* which make it actionable. In technical language, he must prove an *innuendo.* By *innuendo* is meant this explanatory statement that, though the words were not libellous in their *ordinary* meaning, they had, in fact, a *specified libellous meaning in the circumstances of the case.* Thus if *X* says — "*Mr. Z* is a very honest man. He never stole my watch", the statement is defamatory. The *innuendo* or the *underlying* (or real) meaning is that *Z* did, in fact, *steal* the watch, he being *dishonest.* The following cases will clarify this point.

Write a short note on : Cassidy v. Daily Mirror.
P. U. Oct. 96

CASSIDY v. *DAILY MIRROR,* (1929) 2 K.B. 33 — The defendants published in a newspaper a photograph of one *M. C,* and a *Miss X,* together with the words *"Mr. M.C.,* the racehorse owner. and *Miss X,* whose engagement has been announced." In an action by the plaintiff, the wife of *M.C.,* it was *held* that the publication was capable of conveying a

meaning defamatory of the plaintiff, *viz.,* that she was not the lawful wife of *M.C.,* and was living with him in immoral cohabitation.

CAPITAL AND COUNTIES BANK v. *HENTY,* (1882) 7 App. Cases, 741. — The defendants, *H & Sons,* having had a dispute with one of the branch managers of the plaintiff bank, sent a circular notice to their own customers — *"H. & Son* hereby give notice that they will not receive in payment cheques drawn on any of the branches of C. & C. Bank". The circular was followed by a run on the bank and it suffered loss. In an action brought by the bank, alleging that the notice was libellous, inasmuch as it amounted to an imputation of insolvency, it was *held* that the natural meaning of the words was *not* libellous, and the inference suggested by the *innuendo* to the effect that the plaintiffs were insolvent was *not* the inference which reasonable persons would draw. Hence, the circular was *not libellous.*

Indian case — X made a tom-tom in the following words : *"Y's* goods are being sold by public auction." *Y* sued *X* on the ground that these words suggested an *innuendo that Y* was insolvent. It was *held* that *X* was *not liable,* as there was no suggestion that the goods were being sold because the owner of the goods did not pay his debts.

BYRNE v. *DEAN,* (1937) 1 K.B. 818 — In this case, the plaintiff was suspected of having informed the police that there were unauthorised gambling machines on the premises of a club. Subsequently, an anonymous iampoon was pinned on the club's notice-board, with the following lines :

"But he who gave the game away,

May he burn in hell and rue all day."

The Court *held* that this was *not defamatory.* The members of the club would not be "right-thinking" if an attempt to suppress crime lowered a person in their estimation.

American Cases

In one *interesting case,* a retail clothing store, in order to promote its sales, mailed a series of post-cards to its prospective customers, one of which was *Mr. X.* The post-card, written in feminine handwriting read as follows :

"Please call W. Abash 1943, and ask for Carolyn." According to *Mr. X,* when his wife read the card, she concluded that he was having a clandestine love affair, and left him (when actually, Carolyn was only the name of one of the sales employees in charge). In a suit by *Mr. X* against the store, it was *held* that *Mr. X* could *not* succeed, as the words could *not* reasonably be construed to have a salacious meaning. (*Ferry* v. *Moskin Stores,* 249 S.W. 2d 812)

In *another interesting case,* the defendant accused the female plaintiff of being a *prostitute* and called her a *vagabond.* Thereupon, the plaintiff's brother, who had promised to give her funds to migrate to Australia, retracted his promise till the truth or falsity of the defendant's charges was established. The Court *held* that special damage was shown, since the plaintiff could *not* get the expected financial assistance (which she otherwise would have received), and she was, therefore, entitled to succeed. (*Corrosan* v. *Corcoran,* 7 C.L. 272)

In *yet another interesting case,* the defendant (who was a portrait painter) was employed by a person to paint his portrait. Upon completion, the customer refused to accept and pay for the portrait on the ground that the job was not done well. Thereupon, the defendant painted a pair of asses' ears on the portrait, and put it up for sale. The Court *held* that there was an actionable libel. (*In Re Francis Mezzora,* 2. N.Y. City Hall Recorded, 113)

2. The statement must refer to the plaintiff

The second requisite of defamation (whether libel or slander) is that the statement alleged to be defamatory must refer to the *plaintiff.* In every action of defamation, the plaintiff must prove that the statement refers to *him.* It is, however, not necessary to show that the defendant *intended it to refer to the plaintiff.* The question in each case is not whether the defendant *intended* any such reference, but whether any person to whom the statement was published reasonably thought that the *plaintiff* was the person referred to. The question is *not* who was *meant,* but rather who was *hit.* In other words, the question is *not what the defendant really intended* in his heart, *but what the words,* taken with the relevant circumstances and fairly construed, *mean.*

E. HOULTON & CO., v. JONES, (1910) A.C. 20.— The appellants, in their newspaper, published an article in which one "Artemus Jones" described as a churchwarden, was accused of living with a mistress in France. The article was written as a fiction, and the writer of the article and the owners of the newspaper were ignorant of the existence of any person who bore that name. Unfortunately, however, the name so chosen was that of a real person, an English barrister and journalist (who was not a churchwarden), and those who knew him supposed the article to refer to him. It was *held* by a majority of the House of Lords, that the defendants were *liable*, notwithstanding *the absence of any intention to defame* the plaintiff.

In *T.Y.R. IYER v. MOHIDEEN,* (1972) A.I.R. MAD. 398, the Madras High Court has *held* that the rule laid down by the majority judgement in *Houlton's Case* (above) is *not* in accordance with justice, equity and good conscience, and is therefore, *not* applicable to India.

[See also *NEWSTEAD v. LONDON NEWSPAPER LTD.,* (1940) 1 K.B. 377, discussed above.]

The rule, that it is no defence to an action for libel or slander to show the absence of any intention to defame, is now modified in England by the Defamation Act, 1952. According to this Act, if a person, who has published words alleged to be defamatory of another person, claims that the words were published by him innocently in relation to that other person, he may make an offer of amends. In such a case, he will *not be liable.*

HAYWARD v. THOMPSON & OTHERS, (1981 3 W.L.R. 470). — The plaintiff sued the editor, the correspondent and publishers of "The Sunday Telegraph" for an article which connected the plaintiff to an alleged murder plot. The plaintiff was not named in the article, which referred to him as "a wealthy benefactor of the Liberal party", (The plaintiff was, in fact, a wealthy philanthropist, who had given more than two million pounds to the

Liberal party.) In a subsequent article published by the same newspaper, he was named and it was stated that the Police wanted to interview him. The defendants having made no apologies for the publications, the plaintiff sued them for damages.

Awarding £ 50,000 as damages, the Court *held* that the first article was defamatory, and was understood by many to be aimed at the plaintiff. Moreover, the second article could be looked at to see whom the first article referred to. In the circumstances, one award for both the consecutive publications could be made in favour of the plaintiff.

3. The statement must be published

"A man's reputation is the estimate in which others hold him, and not the opinion which he has of himself." Discuss.
B.U. Oct. 94
Oct. 96

"Publication" means *making known* the matter to some person *other* than the plaintiff. It is *publication,* and not the mere *speaking* or *writing* of defamatory words, which is the gist of the wrong of defamation. Thus, no action can be maintained for libel or slander, *unless there is a publication.* No civil action, therefore, lies if the defamatory words are communicated *only to the person spoken of,* because that cannot injure his *reputation,* though it may injure *his self-esteem.* There must be communication to at least a *third* person. In short, publication of a defamatory statement means the making known of the statement to any person *other* than the person defamed. Communication to a *single* individual may, therefore, constitute *publication.* It may be noted that publication *need not be intentional.* It may be *negligent as well.*

Although the *English rule* provides that every sale or delivery of a newspaper is a distinct publication, the majority of *American Courts* have preferred the "single publication" rule, under which an entire edition of a newspaper or book is treated as only *one* publication, and the plaintiff is permitted to plead and prove merely a general distribution of the libel, and show the extent of the circulation for the purpose of calculating the quantum of damages.

In the *State of California* (in U.S.A.), there is a law which provides that in any suit for libel through a newspaper or a slander by a radio broadcast, the plaintiff is entitled to recover only special damages, *unless* he has demanded a correction, and such correction has not been published or broadcasted. (The constitutional validity of this rule was upheld in *Warner* v. *Southern California Associated Newspaper,* 35 Cal. 2 d. 121.)

The following are a few instances of publication — 1. Defamatory matter transmitted in telegrams or post-cards ; 2. Letters *usually* opened by the plaintiff's clerks; 3. Defamatory open pictures or films.

In one case, the defendant sent a registered notice to the plaintiff at his home address. This was written in the Urdu script and contained certain defamatory allegations against him. The plaintiff, not being conversant with the Urdu script, asked another person to read it out, which the latter did, in the presence of some other persons. The Court *held* that since it was neither pleaded nor proved that the defendant had written it, knowing the plaintiff did not understand Urdu and would have to get it read by someone else, the defendant was *not liable.* (*Mahender Ram* v. *Harnandan Prasad,* A.I.R. 1958 Pat. 445)

4. The statement must be false

Lastly, the defamatory statement must be *false.* No civil action lies for the publication of a defamatory statement which is *true.* The plaintiff need *not* prove that it is false; *falsity of a defamatory statement is presumed in favour of the plaintiff,* and the burden is thrown on the *defendant* to prove that it is *true.* Truth is an *absolute defence* to an action for defamation.

DEFENCES

Define defamation. What are the various defences for the tort of defamation ?
P.U. Oct. 94
Apr. 95

There are *three* defences available to a defendant in an action for defamation : 1. Justification (or Truth), 2. Fair and *bona fide* comment, and 3. Privilege.

1. Justification (or Truth)

It is a *complete defence* to an action for libel or slander that the words complained of are *true* in substance and in fact, for the law will not permit a man to recover damages in respect of an injury to a character which he does not, or ought not to, possess.

Discuss the defences available in an action for defamation.
B. U. Oct. 93
Apr. 94

It is immaterial in law that the defendant made a defamatory statement without knowing of its truth, as long as it turns out to be true when made. If the statement is true, the publisher's purpose or motive is irrelevant.

Mere belief in the truth of the statement, however, is *no* defence, for, a man attacks the reputation of another at his own peril, and mistake, howsoever innocent or inevitable, can be of *no* help.

In one case, a suit for damages was filed against the printer and the publisher for having printed a defamatory news item under the caption "Theft of elephants' tusks". The defendants took the plea of justification by truth, and the Kerala High Court ruled in favour of the defendants, adding that the plea of justification by truth is a well-established defence in India in a suit for defamation. (*N. Achuthan v. The Deshabhimani Printing & Publishing House,* A.I.R. 1986 Ker. 41)

A libel, which is also a crime, has a tendency to provoke a breach of the public peace, and the more so, when it reflects the truth. And, therefore, it is said : *"The greater the truth, the greater the libel."* So, in India, under Exception 1 to S. 499, Indian Penal Code, and in England under the Libel Act, 1943, the accused is required to prove not only that the statement complained of was *true,* but also that it was *made in public interest.*

2. Fair and bona fide comment

Discuss the ingredients of the tort of defamation. What are the defences available in an action for defamation.
B.U. Oct. 95
P.U. Apr. 97

The second defence or justification to an action for defamation is that of *fair* and *bona fide comment.* A fair and *bona fide* comment on matter of *public interest* does not attract any liability, however severe it may be in its terms, *unless* it is written *intemperately* and *maliciously.* The word 'fair' in the expression 'fair comment' embraces the meaning of 'honest' and also of 'relevant'. The views expressed must be *honest* and such as can fairly be called *criticism.* But the comment, in order to be fair, must be based upon *true* facts. If the facts are *misstated,* the defence of fair comment is of *no* avail.

Moreover, the comment must be *bona fide,* and must *not* be made a *cloak* for *malice. Legitimate criticism is not a tort.* If it is no more than fair,

honest, independent, bold, even exaggerated criticism, then the verdict will be for the defendant. Mere exaggeration, or even gross exaggeration, would *not* make the comment unfair.

Liberty of criticism must be allowed, or one would neither have purity of taste nor of morals. The words published must be — (i) fairly relevant to some matter of public interest; (ii) they must be the expression of an *opinion,* and not the allegation of a fact; (iii) they must not exceed the limits of fair comment; and (iv) they must not be published *maliciously.*

Matters of public interest are — (i) affairs of State, public acts of ministers and officers of State; (ii) the administration of justice; (iii) public institutions and local authorities; (iv) theatres, concerts and other public entertainments; (v) other appeals to the public, etc.

A writer in a public paper may comment on the conduct of a public man in the strongest terms, but if he imputes *dishonesty,* he must be prepared to *justify* it. The privilege does *not* extend to *calumnious* remarks on the *private* character of the individual. The defence cannot be sustained if the facts on which the comment purports to be made do not exist.

A journalist like any other citizen, has the right to comment fairly, and if necessary, severely, on a matter of public interest, *provided* the allegations of facts he has made are accurate and truthful, however defamatory they may be otherwise. Since his right to comment on matters of public interest is recognised by law, the journalist obviously owes an obligation to the public to have his facts right. Where the journalist himself makes an investigation, he must be sure that all his facts are accurate and true, so that if challenged, he would be able to prove the same. Public interests are better served that way. (*Rustom K. Karanjia* v. *Krishnaraj,* 72 Bom. L. R. '94)

Rolled up plea

In a civil action of defamation, the plea that words complained of are true in substance and in fact, is a good justification which can be pleaded by the defendant. Similarly, that the alleged material is in the nature of fair and *bona fide* comment is also a defence. Sometimes, a plea that, in so far as the words complained of consist of allegations of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment made *bona fide,* is advanced as a defence. Such a plea is known as a *rolled-up plea.* Salmond, however, observes that "it is a plea of fair comment only."

3. Privilege

The third defence is that of *privilege.* When a person stands in such a relation to the facts of the case that he is justified in saying or writing what would be slanderous or libellous in the case of anyone *else,* he is said to *have a privilege,* and the *occasion* on which the privilege is exercised is known as a *'privileged occasion'.*

Define defamation. Discuss in detail absolute privilege and qualified privilege.
P. U. Apr. 93

Privileged occasion

There may be circumstances under which it is *right* that one should speak about another, and state fully and freely what he honestly believes to be the *truth* as to his *character* and *conduct.* Such circumstances are deemed in law to constitute a *privileged occasion.*

It has been observed that an occasion is *privileged* only if it can be fairly stated that the person who has made the communication has a *duty* or an interest in *making* it, and the person to whom it has been made has a corresponding *duty* or *interest* in *receiving* it. Only if these two factors co-exist, an occasion can be said to be *"privileged occasion."* (*Dr. Daniel* v. *K.N. Krishna Iyer,* A.I.R. 1982 Ker. 95)

Enumerate and discuss various types of privileges available as a defence in an action for defamation. P.U. Oct. 95

Privileged occasions are of *two* kinds : (i) those that confer *absolute privilege,* and (ii) those that confer only *qualified privilege.*

(a) Absolute privilege

A statement is *absolutely privileged* when *no* action lies for it, even though it is *false, defamatory* and made with *express malice.* Absolute privilege arises when, on grounds of *public* policy, a man should speak out his mind freely and without fear of consequences. No action lies in such cases, however false the statement may be. The existence of *malice* is entirely *irrelevant* in these cases.

Absolute privilege attaches to the following *four* kinds of proceedings :

1. Parliamentary proceedings

No action lies for statements made by members of either House of Parliament *in their places in the House,* however injurious they may be to the interest of third persons. But this privilege does *not* extend to anything said *outside* the House.

Write a short note on : Absolute privilege. P.U. Apr. 95

CHURCH OF SCIENTOLOGY v. *JOHNSON SMITH,* (1972) 1 ALL E.R. 378 — The plaintiffs sued the defendant who was a member of Parliament, for alleged defamatory remarks made by the defendant during a television interview. The defendant claimed the defences of *fair comment* and *privilege.* The plaintiffs, in reply to his argument, alleged that the statement was made maliciously, and in support, sought to adduce evidence of what the defendant had done and said in Parliament on the same issue. It was *held* that what was done or said in Parliament cannot be examined outside Parliament, and therefore, the evidence sought to be given had to be excluded.

2. Judicial proceeding

Every statement made in the course of judicial proceedings is absolutely privileged. "The authorities establish beyond all question that no action of libel or slander lies, whether against a judge, counsel, witnesses or parties, for words written or spoken in the course of any proceedings before any Court recognised by law, and this is so though the words were written or spoken maliciously without any justification or excuse and from personal ill-will and anger against the person defamed."

The privilege extends to all *pleadings* and *affidavits,* and to all statements made by an advocate, counsel, solicitor or the party in person, no matter how false, malicious or irrelevant the words complained of may be. So also, every statement made by a *witness* in the box is absolutely privileged, even if it is volunteered, *provided* that it is *relevant* to the enquiry before the Court; no privilege, however, attaches to a matter wholly *unconnected* with the matters in issue and made entirely to serve the witness's *own* ends.

It should be noted that although no action lies against a witness for false statements made by him in the witness-box, a criminal prosecution will lie for *perjury* if the witness intentionally gives false evidence.

In a *case* decided by the Calcutta High Court, the interesting question before the Court was as follows : Whether the immunity which a lawyer enjoys in a judicial proceedings is also available to him as regards a statement made by him on behalf of his clients in the course of an *arbitration proceedings* ? The Court observed that, on the one hand, public policy demands that lawyers and advocates must be given full freedom for the vindication of the rights of their clients. On the other hand, however, a lawyer is not like a loose cannon which inflicts any discriminatory damage whenever he announces that he is acting within his professional capacity. A balance is, therefore, to be struck, and it was *held* by the Court that if, on such occasions, the lawyer is acting in his professional capacity on the instructions of his clients, then his statements *cannot* amount to defamation, *unless* express malice is pleaded and established. (*Majumdar* v. *Ghosh & Co.*, A.I.R. 1979 Cal. 68)

3. Military and naval proceedings

All acts done in the honest exercise of military or naval authority, reports made in the course of military or naval duty and statements, whether false or malicious, made before a military or naval Court-martial, are absolutely privileged.

4. State proceedings

Communications relating to affairs of State made by one officer of State to another *in the course of duty are* also absolutely privileged on the ground of *public policy.*

(b) Qualified privilege

In the case of a qualified privilege, no suit will lie upon a statement, even though it is false and defamatory, *unless the plaintiff proves express malice.*

The following are the *three* chief instances of qualified privilege :

Write a short note on : Qualified privilege.
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1. Statement made in performance of a duty

The circumstances of a case may be such as to cast on the defendant the *duty* of making the communication to a third party. This duty may be *legal, social or moral.* Communications made pursuant to a duty owned to society relate to the character of servants, confidential and private matters and information as to crime, etc.

It is *not* sufficient to attract the protection of qualified privilege that the subject-matter is one of general public interest. The person or the newspaper who wants to communicate to the general public must also have a *duty* to communicate, and the person to whom the communication is made must have a corresponding duty or interest to receive it. The principle on which the privilege is based is that such communications are protected for the common convenience and welfare of the society.

Thus, in *Winstanely* v. *Bampton*, (1943) 1 K.B. 319, a letter was written by the creditor of a junior officer to his commanding officer to secure payment of a debt. It was *held* that the occasion was privileged.

WHITE v. *J. AND F. ETC.,* (1939) 2 K.B. 827 — *C,* a director of the defendant company, said of the plaintiff : "What have you done with the money, White ? You are £ 120 short." These words were overheard by *T,* a co-employee of the plaintiff, who happened to be in a celler below the room in which the statement was made. Later, *C* said to the plaintiff, in the presence of *P,* another employee : "You understand on what conditions I am dismissing you. You find £ 120 short and I will give you your week's money." In an action for slander based on these statements, it was argued that the occasion was privileged.

It was *held,* decreeing the suit in plaintiff's favour, that in order to constitute a privileged occasion, the person to whom the defamatory statement is published must be a person who has an interest or a duty, legal, social or moral, to receive it, and where a statement is made to the plaintiff, as here, in the presence of a third person, the occasion is *not privileged, unless* the third person has such an interest or duty. Neither *T* nor *P* had such interest or duty. *C* was, therefore, *liable.*

BOXSIUS v. *GOLBERT,* (1894) 1. Q.B. 842 — A solicitor, under the instructions from his client, dictated to his typist, a letter addressed to *B,* containing defamatory statements about *B.* The letter was press-copied by another clerk. The question arose whether *B* could sue the solicitor for defamation.

It was *held,* that the privilege protecting a business communication made on a privileged occasion covers "all incidents of its transmission and treatment which are in accordance with the reasonable and usual course of business." Thus, the publication to his clerks by the solicitor is covered by a qualified privilege, and therefore, *B cannot* sue the solicitor for defamation.

2. Statement made in protection of common interest

Every communication made *bona fide* upon any subject matter *with the object of protecting one's interest common to the writer or speaker and the person to whom it is made, is* privileged. Thus, a master warning his servants against undesirable companions, is protected by his interest in their honesty. Similarly, complaints of a landlord concerning disreputable sub-tenants, communications between partners or joint owners furthering or defending common interests, are privileged.

3. Fair and accurate reports

(i) *Reports of judicial proceedings.* — The reports must be fair and a substantially correct account of what took place in the Court. 'Report' must be distinguished from 'comment'. If they are mixed, there is no privilege.

(ii) *Extracts or abstracts from report of parliamentary proceedings* — Under the Parliamentary Papers Act, 1840, extracts or abstracts from reports ordered by Parliament to be published possess qualified privilege.

(iii) *Fair reports of parliamentary proceedings* — A fair and accurate report of any proceedings or debate in either House of Parliament, or in Legislature of States or in any Committee of such Parliament or Legislature, is privileged, even though it contains matter defamatory of an individual.

If the subject of such proceedings is of the public interest, legitimate criticism, made in a newspaper, is also protected.

(iv) *Reports of quasi-judicial proceedings* — True, accurate, fair and *bona fide* reports of the proceedings published by quasi-judicial bodies enjoy a qualified privilege. Speeches made at meetings of local or any other bodies are also privileged.

Absolute and qualified privilege distinguished

The following are the *four* points of distinction between absolute and qualified privilege :

1. Express malice

Absolute privilege is not affected by the presence of *express malice.* A *qualified privilege,* however, is a privilege which is *rebuttable by proof of express malice* on the part of the defendant. The plaintiff must prove that the defendant was actuated by malice.

2. As to occasion

In the case of *absolute privilege,* it is the occasion which is privileged, and when once the nature of the occasion is shown, it follows, as a necessary inference, that every communication on that occasion is protected. But, in the case of *qualified privilege, the defendant cannot prove privilege until he has shown how the occasion was used.* It is *not* enough to have an interest or a duty in making a communication; the interest or duty must be shown to exist in making the communication complained of.

3. As to enquiry

In a case of *qualified privilege,* the person making a statement is not exempt from *enquiry* altogether, but the question of liability will be determined by consideration of *malice* or otherwise on his part.

4. Whether rebuttable

Lastly, a qualified privilege is a privilege *rebuttable* by proof of *express malice* on the part of the defendant, whereas cases of *absolute privilege* are protected in *all* circumstances, *independently* of the presence of good or bad faith.

GENERAL TOPICS

Defamation of deceased persons

It is *not* a tort to defame the dead. But a criminal prosecution can lie for defaming the dead *if it would have amounted to defamation if the deceased were alive, and* if it is capable of hurting the feelings of his *living* relatives.

When does defamation of a class of persons become actionable ?
P. U. Apr. 92

Defamation of a class

If a libel is made in the name of a class, a particular individual can bring an action, *only if he can show that is applied to himself.* Thus, if a man wrote that all lawyers were thieves, no particular lawyer could sue him, *unless* there was something to point to that *particular* individual.

In an *American case*, a statement made in the presence of third persons that "one of you has stolen the dress" was *held not* to be a slander of either of the three women to whom the statement was addressed. (*Wright* v. *Rosenbaum,* 344, S.W. 2d 228)

Whether a corporation can sue for defamation

A corporation, being a fictitious person, cannot in the nature of things, be brought into hatred, ridicule or contempt by any manner of falsehood. When a libel has been made against a corporation, it is, in fact, the *individuals* composing it, and *not* the *corporation* in its aggregate capacity, whose reputation has been injured. A corporation, therefore, *cannot sue for defamation affecting personal reputation* only. It is the *individual members* only who have a cause of action.

Thus, in *Mayor of Manchester* v. *Williams,* (1891) 1 Q.B. 94, the plaintiff corporation failed to recover damages in respect of a statement containing charges of corrupt practices in the administration of municipal affairs, for such statements did not injuriously affect the reputation of the corporation as such.

But a corporation *can* sue for defamation *when it affects its business and property,* even though the charge is levelled against individual members. In order that a corporation may sue for defamation, *two conditions* must exist : (i) The statement must be of such a nature that it would be defamatory if directed against an individual. (ii) It must be of such a nature that its tendency is to cause *actual damage* to the corporation in respect of its *property* and *business.*

Thus, in *South Hetton Coal* v. *North-Eastern News Association,* (1894) 1 Q.B. 133, the plaintiff company recovered damages in respect of statements charging it with failing to provide decent and sanitary accommodation for its workmen and their families, for such statements were calculated to injure it in the way of its business.

Defamation by or to husband and wife

According to the doctrine that husband and wife are *one in the eyes of the law,* communication of a defamatory matter concerning a *third* person by a *husband* to his *wife,* or by a *wife* to her *husband,* does *not* constitute publication.

But where defamatory matter concerning a *husband* is *published* to his *wife* by a *third* person, or defamatory matter concerning the *wife* is published to her *husband,* the husband and wife are regarded as *distinct* and *different* persons, and an action *can* be maintained.

According to the Madras High Court, a husband cannot maintain a suit for defamatory words imputing unchastity to his wife. However, according to the Calcutta High Court, he can.

Repetition of defamatory matter

Every *repetition* of a defamatory matter is a *new publication* and a distinct cause of action. A man who receives from the hands of another a libel on any person is *not* justified in *publishing it. Tale-bearers are as bad as tale-makers.*

When slanderous words are not actionable *per se,* but damage arises from the *repetition,* the originator will not be liable, except— (i) where the originator *authorised* or *intended* the repetition; *or* (ii) when the repetition was the natural and probable consequence of his act, *or* (iii) where there was a moral obligation on the person in whose presence the slander was uttered to repeat it.

Liability of news-vendor— A street news-vendor is *not* supposed to know the contents of the newspaper, he sells. Ordinarily, therefore he is *not liable.* But it is otherwise where, with a view to attract customers, he shouts the libellous matter contained in the newspaper.

Remedies for defamation

A *suit for damages* is the commonest form of remedy in cases of defamation. Further, the publication of defamatory matter may also be restrained *by an injunction* under the provisions of the Specific Relief Act, 1963.

As defamation is also a *crime,* the wrong-doer can also be punished under the Indian Penal Code.

Aggravating circumstances

For the *aggravation* of damages, the plaintiff must prove aggravating circumstances, *e.g.,* malice, gross recklessness, violence of language, or a wantonly harmful imputation calculated to outrage feelings and to cause mental pain to the plaintiff, excessive publicity, repetition of libel, publishing fresh libels before or after the suit, refusal or neglect to retract or apologise, conduct of the defendant during the trial of the action, etc.

In one case, a Municipal Council, out of ill-will and malice, served a notice of distraint warrant on a practising Advocate, and seized his furniture and books. The Court *held* that he was entitled to substantial damages, although no evidence was adduced as regards the damages suffered by him. (*G. Sreedharamurthy* v. *Bellary Municipal Council,* A.I.R. 1928 Kar. 287)

Mitigating circumstances

For the *mitigation* of damages, the defendant must prove mitigating circumstances, *e.g., apology* by the defendant at the earliest opportunity, facts showing *absence of malice* or of gross *negligence,* like an inadvertent publication, *innocent* repetition of a libel, mentioning the name of the informant, retaliation by defendant, plaintiff being in the habit of libelling the defendant, provocation by the plaintiff, bad reputation of the plaintiff, etc.

Apology

English Law.—This is a good defence in English Law under the Libel Act, 1843, and the Defamation Act, 1952.

Indian Law.—If an apology is tendered by the defendant and accepted by the plaintiff, the former can resist the plaintiff's suit for defamation. However, publishing a contradiction and expressing regret over the mistake does *not,* by itself, amount to an apology.

12

TORTS TO DOMESTIC RELATIONS

Torts in respect of *domestic* relations are :

1. Torts to *marital* rights
2. Torts to *parental* rights
3. Torts to a *master's* rights

1. TORTS TO MARITAL RIGHTS

A violation of *marital* rights can take place in the following *three* ways :

1. Abduction or *taking away* a man's wife.
2. *Adultery.*
3. Causing physical *injuries* to a man's wife.

1. Abduction

The Common Law gives a husband a right of action against any person who takes away his wife by *force* or *fraud.* Similarly, he can sue anyone who *persuades* or *entices* the wife to live away from him without sufficient cause. The *gist* of the action is the *loss of consortium of the wife, which* term implies an exclusive right, against an invader, to her *affection, companionship,* and *aid. Per quod consortium amisit* (whereby he had lost the benefit of her society) is the ground of action in all such suits.

A *wife* has similarly a right of action for deprivation of her *husband's society.* The right of *consortium* is a *mutual* right of *husband and wife*, and if anyone violates it, either the *husband* or the *wife* can sue for that wrong.

2. Adultery

In the medieval period, adultery was actionable by means of a writ of trespass *vi et armis*, the action being known as the action for criminal conversation. But this action has been abolished by the Divorce and Matrimonial Causes Act, 1957. To-day, in respect of adultery, a husband has a claim for *damages* under the said Act, against the wrong-doer. The claim may be made either in a petition for dissolution of the marriage, for judicial separation, *or* in a petition presented only to claim damages. But, a *wife* cannot bring an action against the wrong-doer for damages solely in respect of *adultery* committed with her *husband.*

3. Causing physical injuries to a wife

The Common Law allows a husband to bring an action for *physical* injury caused to his wife. If, by maltreatment, the husband is deprived, for any time, of the company and assistance of his wife, the Common Law gives him a separate remedy by an action or for damages for such maltreatment. The *wife* can sue for *injury* caused to *her* and the *husband* for the *loss* of her *society* and *service (consortium et servitum).* These two actions may be brought separately *or* together.

Where the injuries result in the *death* of the wife, the husband can claim compensation under the Fatal Accidents Act. The gist of the action being loss of society and services, it follows that a husband, whose wife was living *separately* from him, will *not* be entitled to damages.

2. TORTS TO PARENTAL RIGHTS

A parent has a right to the *custody, control* and *services* of his or her children. The right is vested in him or her, *not* in the capacity as a *parent*, but in the capacity as the employer of the child. The fiction of *service* is the *foundation* of the capacity. A person *in loco parentis* (*i.e.*, in the position of a parent) has a similar right of action. Proof of *living under the father's roof* is ordinarily sufficient evidence of *service.*

Seduction of a daughter or child

In the case of *female servants*, the *employer*, and in the case of *female children,* the *father or guardian,* has a right of action for seduction, that is, for the *debauching* of such servant or child.

Essentials of an action for seduction

Write a short note on : Seduction.
P. U. Oct. 93

To support an action for seduction, two things are necessary : (i) Proof of actual service of *some* kind, however slight, at the *date of seduction*, and (ii) The child or servant must have been *rendered ill* and *incapable of rendering service in consequence of the seduction.*

Explain the ingredients of seduction.
B. U. Apr. 97

In the case of *parents*, the action is based upon a *bare* fiction of *service*, and in the case of a *master*, upon an actual *contract of service.* Loss of service must be distinctly *alleged* and *proved* by the plaintiff.

A girl *under* twenty-one years will be presumed to be in the service of her *father* or *guardian whenever she is not actually in the employment of another.* Thus, in the leading case of *Terry* v. *Hutchinson*, (1868) L.R. 3 Q.B. 599, it was *held* that the plaintiff could maintain an action for the seduction of his daughter, who was seduced in a railway train while on her way home from employment from which she had been dismissed.

A daughter does *not* cease to be in her father's service because she is away on a visit, nor because she is employed elsewhere for part of the day only, so that during the remainder of the day she is free to render service to her father.

But if she is in the service of another, service with the father is not presumed merely from minor household services such as might be given on a visit.

Where the daughter, whether of full age or not, is, at the time of the seduction, *actually in another man's service,* so that no part of her services was at her *parent's* disposal, the parent has *no* ground of action, for the foundation of the action is *not* the *seduction* itself, but the loss of service of the daughter, in which the parent is supposed to have a legal right or interest.

PROBLEM.— *X*, the daughter of *Y*, was acting as housekeeper to *D*. *X* was a minor at the time. Whilst in service, she was seduced by *C*. At the time of seduction, she had no intention of returning to her father's house; but after seduction, she went to her father's house and was maintained by him. Can *Y*, the father, successfully sue *C* for seduction ?

Ans.— No. The daughter *X* was in *D*'s service at the time of seduction.

In the case of a parent and a *major* daughter, the basis of the suit filed by the parent is the loss of *de facto* service. If the daughter is a *major*, then the father must prove some *actual* service, though the acts of service rendered may be *slight*. The service may be quite *trivial* in value, and yet it will *suffice* for an action in tort. Any participation in household affairs or performance of *trivial* domestic duties will afford *sufficient* evidence of service to support an action; *even making tea* has been *held* to be an *act of service.*

A person standing in the relation of *loco parentis*, or a putative father, *even though he is not married to the girl's* mother, can recover damages for an injury of this nature.

BEETHAM v. *JAMES*, (1937) 2 K.B. 527.— In an action for the seduction of the plaintiff's daughter aged 22, it was admitted in cross-examination that the plaintiff and the girl's mother were not married. They had, however, lived together as man and wife for many years. The girl lived with the plaintiff and her mother, and although she was out working during the day, she assisted the plaintiff and her mother in the household duties.

The Court *held* that any person standing in *loco parentis* can recover in an action for seduction; thus the plaintiff succeeded, even though he and the girl's mother were not married. And, if, as here, loss of service is proved, it is immaterial whether the child is or is not of full age.

A married woman had separated from her husband and was living with her father, acting as his servant. It was *held* that the father *could* maintain an action against a person by whom she was debauched.

It may be noted that *no action* can be maintained by the woman in respect of her *own seduction*, for the foundation of the action is the relationship of *master* and *servant*. So also, a *mother* cannot herself maintain an action, if the seduction took place *during her husband's lifetime*, as her right is merged in that of her husband according to the Common Law.

Damages how assessed

In an action by the father for seduction of his daughter, damages are *usually exemplary*. They are not restricted to loss of service only, but the father is entitled to compensation for his distress and anxiety of mind, for the *disgrace* and *dishonour* which he and his daughter are subjected to, for the loss of the society of his daughter, and for expense of maintaining a bastard child. The social position of the parties concerned is also to be considered. The means of the defendant ought *not* to be inquired into, and this factor would *not* affect the amount of damages. It is an aggravation that the seduction was effected under the guise of honourable addresses.

Where the plaintiff is the master of the person seduced, the measure of damages is the *actual pecuniary loss* to him.

3. TORTS TO A MASTER'S RIGHTS

At Common Law, a master has a right of action against any one who deprives him of the *services* of his servant by—

(i) *injuring* or *imprisoning* him so as to prevent performance of service by the servant; *or*

(ii) inducing the servant to *leave* the master's service wrongfully, *i.e.,* before the expiry of the stipulated period.

In addition to the above, a master may sue for loss of service caused by the seduction of a female servant. The relationship of master and servant must have existed *both* at the time of seduction *and* at the time of the illness causing the loss of service.

Seduction of female servants

In a master's action for seduction of his female servants, the following *three* things must be proved :

(i) That contractual service of some kind was rendered by the servant at the time of seduction.

(ii) That the servant was incapacitated from rendering service in consequence of the seduction.

Usually, the incapacity (referred to above) results from pregnancy and confinement. But it is sufficient even if the servant is taken ill because she is mentally upset. Where, however, the seduction takes place before the relation of the master and the servant was established, the master would have no cause of action. Where the servant is at the time in the service of two different masters, each may sue in respect of the seduction.

(iii) That the plaintiff suffered a *special damage* by reason of the injury inflicted on the servant.

The word "seduces" appears also in the Bombay Children Act, 1948. The Bombay High Court has interpreted it as meaning to lead a girl astray in conduct or to draw away a girl from the right course of action. It would also include inducement to indulge in immoral behaviour. (*Narasappa* v. *The State.* 75 B.L.R. 221)

13

WRONGS AFFECTING STATUS

Under the head "injury to status", fall cases of infractions of the right to membership of a *social club* or association, of the right of membership of a particular *caste* or *religious communion,* of the right to *exclusive office, dignity* or *title,* of the right of *worship* in particular places, etc.

The following *four* torts are discussed below :

1. Expulsion from membership of a *club* or *association.*
2. Expulsion from *caste.*
3. Invasion of right to an *exclusive office or title.*
4. Exclusion from *worship.*

1. Expulsion from membership of a club or association

In the case of a social club or an association which is open to membership on certain conditions, and which gives its members certain privileges and amenities, the law notionally vests a right of property in each member, and treats any wrongful expulsion from membership of the club or association as a subsidiary form of infraction of the right of property itself.

Persons or bodies of persons in positions of quasi-judicial authority are required to act in consonance with the principles of *natural justice* and in accordance with the rules regarding the regulation of the affairs of such club or association. Therefore, where a member of a club is *wrongfully expelled,* he can sue for damages for the injury to his status as a member of the club.

2. Expulsion from caste

In India, great importance is attached to cases of excommuncation from the caste for caste offences. In regard to this matter, it may be observed that the Caste *Panchayats* are invested with certain rights of inquiring into and punishing offences by any of the members against the sanctity of the caste regulations. The membership of a caste is regarded as a privilege, and expulsion therefrom (except for proper reasons) is an actionable wrong.

It may also be mentioned that the requirement *in English law* with regard to clubs, namely, that the association must have some property, *does not apply in Indian law,* so that though the caste, as such, may *not* be possessed of any property or other amenity, the plaintiff may sue for having been wrongfully excommunicated from the caste. Such wrongful expulsion or exclusion from the caste communion furnishes a cause of action in itself, though it may also constitute an actionable libel in a particular case.

3. Invasion of right to an exclusive office or title

The invasion of an exclusive right to an office or dignity, to which emoluments are attached, will also be a ground for an action. A suit for a declaration of the plaintiff's right to a religious office can lie, although no emoluments are attached to it. No action will, however, lie to vindicate a right, not to an *office,* but to a *mere dignity* unconnected with any fees, profits or emoluments.

Use of a title by a peeress after dissolution of marriage is *not* such an invasion or disturbance of the right to dignity as to entitle the holder of the title to maintain an action for *injunction. (Cowley (Earl)* v. *Cowley (Countess),* discussed earlier, in Chapter 2)

4. Exclusion from worship

Every person has the right to worship at the public places of worship for the use of people belonging to his particular religious persuasion. And the law recognises, protects and enforces such a right, as a civil right falling within the cognizance of a Court of Law, as distinguished from a privilege pertaining to the autonomy of a caste or polity.

14

TORTS RELATING TO IMMOVABLE PROPERTY

Torts affecting immovable property fall into the following *seven* categories :

1. Trespass
2. Trespass *ab initio*
3. Dispossession
4. Injury to reversionary rights
5. Waste
6. Damage to natural rights and easements
7. Nuisance.

1. TRESPASS

Definition

Trespass to land is an *unwarrantable entry* upon the land of another, or any direct and immediate *act of interference with the possession of such land.* To constitute the wrong of trespass, neither *force,* not *unlawful intention,* nor *actual damage,* nor *breaking* of any enclosure, is necessary. *Every invasion of private property, be it ever so minute, is a trespass.*

Moreover, trespass is *actionable per se, i.e., actual damage need not be proved* to sustain the action. In other words, it is immaterial whether there has been any *actual damage* or not. Thus, driving a nail into another's wall, or shooting over his field or land, are instances of trespass to land.

A public road is to be used only for passage. A person using it for any *other* purpose, say for loitering, commits trespass. (*Harrions* v. *Duke of Rutland,* (1893) 1 Q.B. 142)

In *Hickman* v. *Maisey,* (1900) 1 Q.B. 752, a trainer of racehorses had agreed with the plaintiff for the use of some of his land for the training and trial of race-horses. A view of the land so used could be obtained from the highway on the plaintiff's land. The defendant, a proprietor of a publication which gave accounts of doings of race-horses in training, walked backwards and forwards on a portion of the highway on the plaintiff's land about 15 yards in length for an hour and a half watching and taking notes of trials of race-horses on the plaintiff's land. In an action for trespass, it was *held* that the defendant had exceeded the ordinary and reasonable user of the highway to which the public were entitled, and was, therefore, *liable for trespass.*

Trespass to land is a *continuing wrong* which lasts so long as the injury to the land continues, and gives rise to actions *de die in diem* (*i.e.*, from day to day) so long as it lasts. Thus, if a man throws a heap of stones, or builds a wall on his neighbour's land, and leaves it there, the right to sue him will continue *from day to day*, until the thing is removed. A *continuation* of every trespass is, in law, a *new trespass*. Trespass to land is also an *offence* under the Indian Penal Code (S. 441).

In a *case* decided by the Bombay High Court, the *interesting question* facing the Court was as follows : If a tenant of a building (which has a compound) parks his car in that compound, would it amount to trespass ? Answering this question in the *negative*, Vadiya J. observed as follows :

> "I have looked into all the books on the Law of Torts, which are available, and I called upon the Learned Advocates to find out any authority under the Law of Torts where the parking of cars in a compound of a building by the tenants of the building was held to be a trespass or an invasion to the right to property. Neither could they cite any authority, nor could I find any to support the proposition that the parking of a car in the compound of a building by the tenant of a flat in the building would be a trespass on the part of the tenant."

In the circumstances, it was *held* that no trespass was committed by the tenant. (*Madhav Kudwa* v. *Madhadas Vallabhdas*, A.I.R. 1979 Bom. 49)

Explain what is meant by trespass to land. How is it committed ? What are the various legal remedies provided under the law of torts ?
P. U. Oct. 93

Trespass to land may be committed in one of the following *three* ways :

1. Trespass by wrongful entry

The most common form of trespass is a wrongful *personal* entry by the defendant on the plaintiff's *land*. The slightest crossing of the boundary is sufficient, as for instance, putting one's hand through another's window, *or* sitting on a fence.

2. Trespass by remaining on the land

A person who has *lawfully entered* on the land in the possession of another commits a trespass, if he remains there *after* his right of entry has *ceased*. Thus, a person who has entered by leave or licence of the occupier will be liable as a trespasser if, *after request*, he *fails to leave* the premises.

3. Trespass by placing things on the land

It is a trespass to cause any physical object to cross the boundary of the plaintiff's land, or even to come into physical contact with plaintiff's land, even though there may be no crossing of the boundary. For instance, throwing a stone upon the plaintiff's land, or piling rubbish against his wall, would technically amount to trespass.

In an action for trespass, the plaintiff must prove the following *two* things :

(i) That he was in *actual possession* of the land at the time of trespass; he must have *effective possession*, and *not mere user.* It is immaterial whether his possession *is rightful* or *wrongful.*

(ii) That there was direct *interference* with the possession of his land, though there is no need to prove actual *damage*, since trespass is actionable *per se.*

Trespass by animals

Trespass by a man's cattle, sheep, poultry, etc., is similar to trespass committed by the owner himself. Such a person will be responsible for the trespass and consequential damage caused by his animal — *unless* he can prove that the neighbour was under a duty to fence his land, and had failed to do so.

Ellis v. *Loftus Iron Co.*. (1874 L. R. 10 C.P. 10) — The defendant's horse injured the plaintiff's mare by biting and kicking her through a fence belonging to the defendant. It was *held* that this constituted a trespass, for which the defendant was *liable.*

Plaintiff's remedies

A person whose land is trespassed upon has one of the following remedies :

1. He may bring an *action* against the wrong-doer; *or*

2. He may *forcibly defend* his possession, or *forcibly eject* him; *or*

3. He may *obtain* an *injunction* to restrain a continuing or a threatened trespass.

Aerial trespass

Write a short note on : Aerial trespass.
P. U. Apr. 91

Under the Indian Aircraft Act, S. 17, no suit can be instituted in respect of trespass or nuisance by reason only of the flight of aircraft over any property at a height above the ground which having regard to wind, weather, and all circumstances of the case, is reasonable, or by reason only of the ordinary incidents of such flight. But whoever wilfully flies so as to cause damage to person or property may be punished with imprisonment for six months or a fine of Rs. 1,000, or with both. In view of this Act, there is no civil liability, *unless* the plaintiff establishes intention or negligence on the part of the person causing the damage.

DEFENCES

What are the defences available to a defendant in an action for trespass ?
B.U. Oct. 97

The following are the *nine* defences that are available to a defendant in an action for trespass :

1. Prescription

A defendant may plead that he was *justified* by reason of prescription, as by showing a right of *common*, or a right of *way* over the land, enjoyed for a period of *twelve years or more.*

2. Leave and licence

A licence only makes an act lawful which, without such permission, would be unlawful. It is a voluntary suspension of the licensor's right to treat certain acts as wrongful, *e.g.*, to hunt on his land, or to come into his house. Licence may be (i) *express*, as in the case of a guest in a house, or of a person who purchases a ticket to attend a cinema, *or* (ii) *implied*, as in the case of a customer entering a shop, or of a person who is habitually allowed to use the plaintiff's land as a short-cut.

Thus, where the plaintiff had purchased a ticket for a cinema, but was turned out of the cinema house forcibly, under a mistaken impression that he had not bought a ticket, it was *held* that substantial damages ought to be awarded to the plaintiff. (*Hurst* v. *Picture Theatres Ltd.,* (1915) 1 K.B. 1)

3. Authority of law

Authority of law is a good defence in the following *three* cases :

(a) Execution of legal process

Entry under legal process is justifiable. Persons who execute legal process, like a warrant of arrest, attachment, or search, are protected by the warrant from liability in respect of the acts authorised by it. But they can claim this immunity *only* if (i) the warrant is *not illegal* on the face of it; (ii) they do not *exceed the authority* given by it; *and* (iii) they *conform* to the mode of *procedure* prescribed by law.

SEMAYNE v. *GRESHAM*, (1604) 5 Coke 91— *B* and *G* lived together in a house at Blackfairs as joint tenants. *B* contracted heavy debts, and one of his creditors was Semayne to whom he acknowledged his debt in a recognisance. *B* died, and *G* became the owner of the house by right of survivorship. *B*'s goods being in the house, Semayne accompanied the Sheriff and they set off for Blackfairs. But when they came to the house, *G* shut the door on their faces, whereby the execution was disturbed. In an action brought by Semayne, it was *held* that *G* had done nothing wrong in locking the front door, and that, when the King is a party, the house-holder must be requested to open the door before the Sheriff can break his way in.

(b) Distress

Distress is the remedy for the satisfaction of a demand, which consists in the *taking of a personal chattel from the possession* of the defaulter as a *pledge* for the required perfomance. It is the usual remedy for *recovery of rent.*

(c) Distress damage feasant

Distress damage feasant is a remedy by which, if cattle or other things are on a man's land, *encumbering* it or otherwise doing *damage* there, he may summarily *seize* them and *retain* them as a *pledge* for the *redress* of the injury he has sustained. Anything animate or inanimate which is *wrongfully* on the land of another, and is doing damage, may be distrained for such damage.

Discuss : Distress Damage Feasant. B. U. Apr. 91

This right of *English law* is founded on the principle of *recompense.* It can be exercised by a person who has sufficient possession of land to entitle him to maintain an action of trespass. It does *not*, however,

give any right of sale. The distress must be taken *at the time when the damage is done;* if the damage was done *yesterday,* and the distress taken *today,* it would be *illegal.* One may distrain in the night; but a distress for rent can be made during the day only. *Distress damage feasant* is *not* allowed against a party having any colour of right.

SORREL v. *PAGET,* (1949) 2 All E.R. 609 — The plaintiff's heifer strayed into the defendant's field, who impounded it and demanded money when the plaintiff came to claim it. The heifer died. The plaintiff claimed compensation for conversion of the heifer. It was *held* that the defendant was *not liable,* as he had a right to distrain the heifer *damage feasant.*

In India, the right of *distress damage feasant* does *not* exist. However, the Cattle Trespass Act makes a provision regarding the impounding of cattle doing damage.

(This topic is also discussed in Chapter VIII.)

"The right to enjoy one's immovable property is an absolute right. However, this right is some times violated by trespass." Point out the various modes of committing trespass, and discuss the various defences provided for the same.
P.U. Oct. 94

4. Act of public necessity

Entry on the land of another person, without his consent, is justifiable on the ground of public necessity, *e.g.,* putting out a fire for public safety, defence of the realm, etc.

5. Self-defence

A trespass may be excused as having been done in *self-defence* or in defence of man's *goods, chattels* or *animals.* Force used in self-defence must be *reasonable, i.e.,* it must be necessary for the purpose and *proportionate* to the evil to be prevented. If a person has actual possession of goods, and another wrongfully attempts to take the same from him, he is *justified* in using *such force as is necessary for the purpose of defending his own possession.* Under these circumstances, self-defence is a valid plea in an action for trespass.

6. Re-entry on land

An owner who has been wrongfully dispossessed may re-enter on his land, and, if he does so, he *cannot* be sued for trespass by the person who has been wrongfully there.

7. Re-taking of goods and chattels (re-caption)

If a person takes away the goods of another upon his own land, he gives to the owner of them an implied licence to enter for the purpose of re-caption. Similarly, if the goods are on the land of another in pursuance of a felonious act of a third person, the entry will be justifiable. But it will be otherwise, if the goods or chattels are on the land of another owing to some *negligent* or *wrongful* act of the *owner himself.*

8. Abatement of nuisance

An occupier of land may, *after previous notice,* enter upon another's adjoining land for the purpose of *removing a nuisance* upon it.

Abatement, that is removal, of the nuisance by the party injured, must be (i) peaceable; (ii) without danger of life or limb; *and* (iii) after

notice to remove the same, if it is necessary to enter another's land to abate a nuisance, or where the nuisance is a dwelling house in actual occupation, *unless* it is unsafe to wait.

Thus, the occupier of land may cut off the overhanging branches of his neighbour's trees, or even roots which have spread from these trees into his own land. But he *cannot* cut the branches if the tree stands on the lands of both parties. (The law as to abatement will be discussed under 'Nuisance' below.)

9. Special property or easement

A person who enjoys an easement may enter upon the servient tenement in order to do necessary repairs.

Jŭs tertii, **no defence**

Jus tertii means the right of a *third* person. Where a person, who is *prima facie* liable to another, sets up a defence that *the paramount title is vested in a third person,* he is said to set up the defence of *jus tertii. This defence is of no avail in trespass.*

Discuss trespass and trespass ab initio, with case law.
B. U. Apr. 91

This topic is discussed in Chapter XV. For the present, it is sufficient to say that in an action for trespass, the wrong doer *cannot* set up the plea of *jus tertii, i.e., that the plaintiff himself had no right of possession over the land where the trespass took place.*

2. TRESPASS *AB INITIO*

Write a short note on : Trespass ab initio.
B. U. Oct. 90
Oct. 93
P. U. Apr. 93
Oct. 96
Oct. 97

Definition

When a person *enters* upon the land of another *by authority of law* and is *subsequently* guilty of an *abuse* of his authority *by an act of misfeasance*, his misconduct *relates back*, so as to make his *original* entry *tortious*, *and* he is liable in damages, *not only* for the entry *itself, but also* for *subsequent* acts. When, in an entry, authority or licence is given to any one by the law and he abuses it, he becomes a trespasser *'ab initio'*, that is to say, the authority or justification is not only terminated, but is treated as if it has *never existed.* For example, the law gives authority to a person to enter into a common inn, but if a person, who enters the inn, steals anything, the law *presumes* that he entered for that very purpose, and holds him liable for the *original entry* itself.

What is trespass ? Distinguish between trespass and trespass ab initio.
B.U. Oct. 95
Apr. 96

Conditions

The following *two conditions must* be satisfied before applying the doctrine of trespass *ab initio* :

1. Authority must be given by law

The authority abused must have been given by *law*, and *not by an individual.* When a person, who has entered by *consent* or *licence* of the owner, subsequently abuses that licence, he is, no doubt, liable for that *abuse*, but *not* as a *trespasser ab initio.*

2. Subsequent act must be a misfeasance

The subsequent abuse must amount to a *positive wrongful act or misfeasance,* as opposed to a mere *omission* or *non-feasance.*

A mere non-feasance does not amount to such an abuse as to render a man a trespasser 'ab initio'. Thus, in the *Six Carpenters' Case* (below) it was *held* that a man was *not liable* as a trespasser *ab initio* by reason of his *refusal* to pay for food and wine consumed at an inn.

Write a short note on : Vaux v. Newman. P.U. Oct. 94

Write a short note on : The six carpenters' case. B. U. Oct. 92

SIX CARPENTERS' CASE. *(VAUX* v. *NEWMAN)* (1610) 1 Sm. L.C. 134 — The proprietor of an inn brought an action for trespass against six carpenters, who having entered the inn, ordered a quart of wine, drank it, and refused to pay for it. The question was, whether in such circumstances, their failure to pay for the wine could be treated as a *misfeasance,* which would make their original entry into the inn unlawful as a trespass. It was observed that *"not doing cannot make the party who has authority or licence by the law, a trespasser ab initio, because not doing is no trespass.... So, in the case at* Bar, for the denying to pay for it is no trespass, and therefore, they *cannot* be trespassers *ab initio."*

This *leading case lays down three points. (i)* That if a man abuses an authority given to him by *law,* he becomes a trespasser *ab initio, (ii)* That in an action of trespass, if the authority be pleaded, the subsequent abuse can be argued. *(iii)* That a mere *non-feasance* does *not* amount to such an abuse as renders a man a trespasser *ab initio.*

ELIAS v. *PASMORE,* (1934) 2 K.B. 164 — In order to effect the arrest of a person, the defendants, being police-officers, entered the plaintiff's premises. While there, they seized and carried away documents found on the premises. Amongst the documents, there were some which constituted evidence on the trial of the person arrested, but there were others which did not so constitute, and were subsequently returned. In an action for trespass, it was *held* that the defendants were only trespassers *ab initio* as to the documents that were seized and returned, but were *not liable* for any damages in respect of the entry on the premises for the purpose of arrest.

3. DISPOSSESSION

Write a short note on : Dispossession. P. U. Apr. 91

Definition

Dispossession or *ouster* is wrongfully taking possession of *land* from its rightful owner. An owner is said to be dispossessed of his land where, by the act of the defendant, he has been deprived altogether of his *dominion over the land* or the *receipts of its profits.*

Remedy

The party dispossessed can bring an action of *ejectment* to recover possession of the land.

In India, S. 6 of the *Specific Relief Act* allows a person who is dispossessed, otherwise than in due course of law, to sue for recovery of possession, irrespective of any question of title, provided he files a suit within a period of six months. Under this section, even a person in wrongful possession can sue the real owner, provided he was dispossessed otherwise than in due course of law.

Defences

The defences to such suits are mainly *two-fold* : (i) that the defendant has a better title than the plaintiff; and (ii) that the defendant having held the immovable property or enjoyed the interest for twelve years and upwards, the plaintiff's title has thereby become extinguished, and the defendant has acquired a good title (i.e., the defence of *prescription*).

Discuss in detail what is dispossession. P. U. Oct. 91

The defence of *jus tertii* (i. e. that the legal right vests in a third person) *cannot* be set up in cases between —

(a) landlord and tenant; and

(b) licensor and licensee.

4. INJURY TO REVERSIONARY RIGHTS

Injuries to reversionary interests are done either by *strangers* or by *tenants*. The owner of a life-interest will *not* be allowed to destroy, consume or impair the *corpus* of the subject-matter, so as to injure the rights of the remainderman.

5. WASTE

Definition

Where a person *who is entitled only to remain in possession of immovable property,* does *unlawful damage* to such property, to the *detriment of the reversionary interest of the owner*, he is said to commit *waste*. Conversion of land from *one species to another,* as for example, turning *arable land* into *pasture-land*, is waste. Questions of waste generally arise between a tenant for life and those in remainder, or between landlord and tenant.

Kinds of waste

Waste is of *two* kinds :

(a) Voluntary waste

Voluntary waste is a tort of *commission.* It consists in actively doing something which alters the nature of the property to the prejudice of the reversion.

(b) Permissive waste

Permissive waste is a tort of *omission* only. It consists of a mere passive act, *e.g., allowing* a house to go to ruin by reason of non-repair. In the absence of an express covenant to the effect, neither a tenant for life nor a tenant at will is liable for *permissive* waste.

6. DAMAGE TO NATURAL RIGHTS AND EASEMENTS

A person is not only entitled to remain in undisturbed possession of his immovable property, but he has certain *other* rights pertaining to the enjoyment of the property. Such rights which are necessary to the enjoyment of immovable property (and interference with which is actionable) may be classified as follows :

1. Right to support.
2. Right to water.

3. Right to free access of light.
4. Right to air.
5. Right of way.
6. Right of privacy.
7. Right of prospect.
8. Right of common.
9. *Profits a prendre.*

There are certain natural rights and easements attached to every land. The most important natural rights and easements, the invasion of which is treated as wrong, are (i) right to support, (ii) right of water, (iii) right to light, (iv) right to air, and (v) right of way. Consequently, there is a *corresponding duty* on the owners of neighbouring lands *not* to interfere with these rights.

A man can use his land in any way he chooses, but *not* so as to infringe the legal rights of others. Every owner of land has a natural right to undisturbed support from subjacent or adjacent soil belonging to another. The co-relative duty is on the part of every owner *not* to cause a subsidence of the land above or adjacent to his by any act done on his own land. Subject to this condition, he can do what he likes on his own land; he may dig trenches or mines, or he may cut and carry away earth or minerals from it. Similar is the case of other natural rights and easements.

A man *cannot* increase the liabilities of his neighbour by applying his own property to special use, whether for business or for pleasure. The person who, for his own purpose, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, he is *prima facie answerable* for all the damage which is the natural consequence of its escape. But if the escape is due to an act of God, he is *not liable.*

Subject to all these and other restrictions, a man can use his land in *any* way he chooses.

1. Right to support

Right to support may be of (1) land by land; (2) buildings by land; and (3) buildings by buildings.

(1) *Rights to support of land by land.*— Every piece of land is entitled to a natural right to support from the adjacent or subjacent land. The former is called the right of *lateral* support, and the latter, the right of *vertical* support.

Every proprietor of land is entitled to such an amount of lateral support from the adjoining land of his neighbour as is necessary to sustain his own land in its natural state, not being weighted by walls or buildings. This is a natural right, the invasion of which is treated as a wrong. But a right of support in extension of the natural right may be acquired by prescription or grant. The right of lateral support is not an absolute right, and its infringement is not a cause of action without appreciable damage.

(2) *Right to support of buildings by land.*— This right may also be of two kind : (i) *lateral* support of buildings by adjacent soil, and (ii) *vertical* support of buildings by subjacent soil.

(3) *Right to support of buildings by buildings.*— The right to support for one building from an adjoining building is *not* a natural right. However, it may be acquired by grant or prescription.

It may, however, be noted that the mere fact of contiguity of buildings imposes an obligation on the owner to use care and skill in removing one building, so as not to damage the other, even though no right to support has been acquired.

2. Right to water

Infringement of rights to water may be divided into the following *three* classes :

(1) *Wrongful obstruction of water.*— Every owner or occupier of riparian land (*i.e.*, land by which a stream passes) has a natural right entitling him to the continued undiminished flow of a natural stream, subject only to reasonable use by others for the purpose of their riparian property. The owner of the source has no higher rights.

Obstruction by any person for a purpose *unconnected* with the use of riparian land is actionable *per se* by any riparian owner who is affected. A riparian owner may acquire this right by prescription or grant, but strangers can only use such water by statutory authority.

CHASEMORE v. *RICHARDS* (1859 7 H.L.C. 349)— A landowner and a mill-owner who had, for more than sixty years, enjoyed the use of a stream which was chiefly supplied by percolating underground water, lost the use of the stream after an adjoining owner had dug on his own ground, an extensive well for the purpose of supplying water to the inhabitants of the district, many of whom had no title as landowners to the use of the water. In an action brought by the landowner, it was *held* that the principles regulating the rights of owners of land in respect of water flowing in known and defined channels, whether upon or below the surface of the ground, do *not* apply to underground water, which merely percolates through the strata in known channels, and the plaintiff had *no right of action.*

(2) *Wrongful pollution of water.*— The pollution of underground water is on a different footing, and is actionable as a nuisance. No one has the right to pollute the water percolating under his own land by an underground channel into another's land, so as to poison the water which that other has a right to use.

BALLARD v. *TOMLINSON* (1885 29 Ch. D. 115) — *A* and *B*, two neighbours, each possessed a deep well on his own land. *A* directed sewerage into his well, in consequence whereof *B*'s well became polluted by underground percolation as it was on a lower level. When *B* sued *A*, it was *held* that allowing sewage to escape into another's property is an actionable wrong, and *A* would, therefore, be *liable.*

(3) *Wrongful obstruction of a stream.*— Obstruction in the bed of a stream may cause diminution of supply to lower riparian owners or excessive supply to opposite or upper owners. It is only such obstruction that constitutes an actionable wrong. An obstruction which has no such effect is *not* actionable.

3. Right to light

An owner of ancient lights is entitled to sufficient light according to the ordinary notions of mankind, for the comfortable use and enjoyment of his house, if it is a dwelling house, or for the beneficial use and occupation thereof, if it is a warehouse, a shop or other place of business.

The right to light is a right to be protected against a particular form of nuisance. It may be acquired :

(a) By a grant, or covenant, — express or implied;

(b) By prescription; *or*

(c) By a reservation at the time of the sale of the servient tenement.

To constitute an actionable obstruction of ancient lights, there must be a substantial deprivation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind, and in case of business premises, to prevent the plaintiff from carrying on his business as beneficially as before.

The Rule of 45 degrees.— A building does *not*, in the eye of law, constitute a material obstruction when its elevation subtends an angle not exceeding 45 degrees at the base of the light alleged to be obstructed, or in other words, when the height of the wall or obstruction which is built opposite the "ancient lights" is not greater than the distance between it and the "ancient lights".

This rule is not applicable in every case, but is used as *prima facie* evidence. Though not a positive rule of law, it is a circumstance which the Courts have taken into consideration in India.

Explain the principle laid down in : Colls v. *Home & Colonial Stores.*
P. U. Apr. 91
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In one leading case on the point, the appellant proposed to build a forty-two feet high building on a street. A suit was filed against him on the ground that this would obstruct the light of the respondents, who carried on their business across the street. The Court found that the proposed building would *not* materially interfere with access to the light of any of the respondent's windows, except two. It was also shown that even despite this, the respondent's premises would still be sufficiently lighted for all ordinary purposes as a place of business. No action, therefore, lay for the alleged nuisance. (*Colls* v. *Home and Colonial Stores Ltd.,* (1904) A.C. 179)

4. Right to air

The right to the access of air is an easement which can be acquired only by *grant or prescription.* In order to render the defendant's obstruction actionable, there must be proof that the plaintiff is likely to suffer danger to health. The plaintiff can claim no more air than what is sufficient for sanitary purposes. The right to the purity of air is not violated, *unless* the annoyance is such as materially interferes with the ordinary comforts of human existence.

5. Right of way

A right to way over the land of another is *not* a natural right. It may be acquired by (i) grant, (ii) immemorial custom, (iii) necessity, or (iv) prescription.

6. Right of privacy

Invasion of privacy by opening a window is *not* an act of which the English law takes cognizance as a wrongful act. A right to undisturbed privacy is *not* recognized by the English law.

In India, however, a right to privacy may be acquired by grant or permission or by virtue of a local custom. The right of privacy does not arise from prescription, but is a creation of custom. Such an easement, founded as it is on the oriental custom of secluding females, is of much importance in India.

The Bombay High Court has *held* that, in accordance with the usage of Gujarat, an invasion of privacy is an actionable wrong. Therefore, a man may not open new doors or windows in his house, or make any new apertures, or enlarge old ones, in a way which will enable him to overlook those portions of his neighbour's premises which are ordinarily secluded from observation, and so intrude upon his privacy.

This right of privacy has been recognized in Gujarat, Uttar Pradesh, and the Punjab, but *not* in the Presidencies of Calcutta and Madras, where it has been *held* that such a right cannot exist, at any rate, independently of prescription or grant, or express local usage. Privacy is *not* an inherent right of property like a right to ancient lights and air. The Patna High Court has also adopted the same view.

7. Right of prospect

The law does *not* recognize a view of prospect from a house as a right in the nature of an easement which can belong to anybody as of right, and no period of enjoyment will give a person a right of action against another who, on his own land, erects a structure or plants trees, which obstruct the view or prospect of another.

8. Right of common

Right of common is a right which one person, who is *not* the owner, has of taking some part of the natural produce of land belonging to another (*e.g.,* right of pasture or right of fishery.) Disturbance of a right of common is an actionable wrong. Thus, there is a disturbance of common, when the owner of a land prevents one having a right of pasture, or a right of taking or digging quarry on that land.

9. Profits à prendre

Under English law, a *profit à prendre* is a right to take away something from another's land. Thus, the right to dig for and carry away minerals from another's land, or the right to fish in another's pond and carry away and consume the fish, would be termed as *profits à prendre* under English law. However, these would fall under the general category of "*easements*" under Indian law.

Profits à prendre are usually classified into the following *three categories :*

(a) Right of common.— This is a right, which a person who is not the owner of land, has to take away some part of the natural produce of that land, like grass, leaves, fishes, etc.

(b) Right of ferry.— This is an incorporeal right to carry passengers and goods across a river from one place to another, *e.g.,* from one village to another.

(c) Right of market.— In the olden days, it was considered to be a great benefit to give a right of holding a market in a town or village. It was equally important to prevent persons from disturbing the market or from selling goods on market days in their own houses. *In England,* such a right arose by immemorial enjoyment or prescription.

In India, however, the Calcutta High Court has *held* that there is no such thing as a market franchise; nor can such a right be acquired by prescription. (*Hem Chandra Chaudhary* v. *Krishna Sardar,* (1920) 47 Cal. 1079)

7. NUISANCE

Definition

The word 'nuisance' is derived from the French word *nuire* and the Latin word *nocere,* meaning 'to do *hurt* or to *annoy.*' Nuisance has been defined to be *anything done to the hurt or annoyance of the lands, tenements or hereditament of another, and not amounting to a trespass.* Blackstone describes a "nuisance" *(nocumentum)* as something that "worketh hurt, inconvenience, or damage."

Nuisances are of two kinds : 1. *Public* (also known as *'general* or *common' nuisance*) and 2. *Private.*

1. PUBLIC (OR COMMON) NUISANCE

Definition

Write a short **note** *on : Public* **Nuisance** **B. U. Oct. 93**

Public nuisance is "an act or omission which causes any *common* injury, danger or annoyance to the *public,* or 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 sue any public right" : Sec. 268, Indian Penal Code. Thus, keeping a common gaming-house, or a disorderly inn, obstructing a highway, or making it dangerous for traffic, would come within the category of public nuisance.

Define nuisance. State what is necessary for the plaintiff to prove in an action for nuisance. Discuss the valid defences provided under the law. P. U. Apr. 93

Public nuisances consist not only of those acts which *interefere* with definite *public* rights (such as the right to use a public thoroughfare), but also of nuisance which *endangers the health, safety or comfort of the public generally,* such as noise or the escape of noxious vapours, gases, fumes, or any deleterious thing affecting the health of the neighbourhood.

Explain : Public nuisance. P.U. Apr. 96

The Gujarat High Court examined the scope of the tort of nuisance in a suit where the plaintiffs alleged that some scenes in the Hindi film *'Jai Santoshi Ma',* would hurt the religious feelings of devout Hindus, and cause annoyance and offence to them. After observing that 'nuisance' is a word which is not capable of an exact definition, the Court *held* that to make nuisance an actionable tort, it is essential that the following *two* must co-exist, namely :

(a) wrongful act; and

(b) damage or loss or inconvenience or annoyance caused by such act to another.

It was *held* that the second element alone *cannot* give rise to a tort, and therefore, the plaintiff's suit was dismissed. *(Ushaben Trivedi & Another* v. *Bhagyalaxmi Chitra Mandir & Others,* A.I.R. 1978 Guj. 13).

In *Ushaben Trivedi's case* (above), commencing on the *nature* of the annoyance or inconvenience, which is an essential ingredient of the tort of nuisance, the Court observed as follows :

> "Inconvenience or annoyance or discomfort to be considered must be more than mere delicacy or fastidiousness 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."

SOLTAU v. DE *HELD,* (1851) 2 Sim N.S. 133.— In this case, nuisance was regarding *noise.* The plaintiff resided in a house next to a Roman Catholic chapel of which the defendant was the priest, and chapel bell rung at all hours of day and night. It was *held* that *it was a public nuisance,* and inasmuch as it proved *particularly* obnoxious to the plaintiff, and satisfied the requirements for a suit by a private individual for public nuisance, it became, so far as the plaintiff was concerned, a private nuisance, and the plaintiff *was held entitled to an injunction.*

Write a short note on : Soltau v. De Held.
B. U. Oct. 90

HARROLD v. *WATNEY,* (1898) 2 Q.B. 320.— The plaintiff, a child of four years, scrambled up a defective fence abutting a highway and was injured by the fall of the fence. It was *held* that the defendant was liable, inasmuch as it was the most natural thing for children to get upon fences adjoining a highway.

WARE v. *GARSTON,* (1944), 1 K.B. 30.— A motor cyclist at night ran into the back of a trailer which was attached to a stationary lorry standing on the road. The trailer and the lorry were unattended and no rear lights were switched on The Court *held* that the lorry and trailer caused obstruction, and therefore constituted an actionable nuisance.

DYMOND v. *PEARCE,* (1972) 2 W.L.R. 633.— Leaving a motor lorry on the highway for a considerable period for the convenience of the driver was *held,* in this case, to constitute a nuisance by obstruction, which is actionable if such obstruction causes damage to a member of the public.

LEANSE v. *EGERTON,* (1945) 1 K.B. 323.— The plaintiff, while walking on a highway, was injured by a window glass in an occupied house of the defendant. The house was damaged in an air-raid and the defendant did not know of its condition, though he *could* have known if he had been diligent. It was *held* that the window was a nuisance, and therefore, the defendant was *liable.*

PROBLEM. — 1. The Plaintiff resided in a house next to the temple of which the defendant was the *poojari.* The temple bell kept ringing all hours of the day and night, causing annoyance to the plaintiff. Is the defendant liable ?

Ans. — Yes. This is a public nuisance. The Plaintiff will be entitled to an injunction against the Defendant, on the authority or *Soltau* v. *De Held,* above.

2. A Municipality planted some trees on the road-side and provided spiked iron guards for protection thereof. The guards were visible at night with normal street lighting. However, on account of blackout restrictions, the street lights were dimmed, and as a result, a pedestrian dashed against the guards and injured himself. Is the Municipality liable to the pedestrian for the injuries sustained by him ?

Ans.— The Municipality is *liable.* It is *bound* to take the necessary measures to prevent such accidents.

No nuisances, if act is authorised by law

No action will, however, lie in respect of any damage which is the necessary result of an *act authorised by statute, unless* the authority is permissive, or the harm is avoidable and is due to negligence in doing the authorised act, or the authority conferred by the statute is not exercised *bona fide.*

The authority to make and work a railway passing is derived under a statute. The injuries due to noise and vibration are the natural consequence of the running of the trains without any negligence on the part of the Railway Company. Hence, an action is *not* maintainable, *unless* it is shown that the noise and vibrations could have been avoided or lessened.

DWYER v. *MANSFIELD,* (1946) 1 K.B. 437.— The defendant, a shopkeeper, had a licence to sell vegetables and fruits. At a time when there was a scarcity of potatoes, he sold only 1 lb. per ration book. Queuses of customers at the defendant's shop formed which, at times, extended in the highway in front of neighbouring shops. In an action by the keepers of those shops against the defendant, the Judge found that neither nuisance nor damage to the plaintiffs had been proved. It was also *held* that, even if a nuisance had been established, since the defendant, in distributing food essential for the public, had been carrying on his business in a normal and proper way, without doing anything unreasonable or unnecessary, the defendant could *not* be said to have created the nuisance.

Distinguish between private and public nuisance. When can an individual have a right of action in respect of a public nuisance ?
B.U. Oct. 95
Oct. 96
P.U. Oct. 94

Suit by a private individual for public nuisance

Ordinarily, a *private* individual *cannot* sue for a *public* nuisance. To enable a *private* individual to bring an action for damages in respect of a *public* nuisance, he must satisfy the following *three conditions :*

1. Special damage

Firstly, the plaintiff must prove that he has suffered a *particular* injury to himself, *beyond that suffered by the rest of the public.* If the alleged nuisance is, for instance, the obstruction of a *highway,* it is *not* enough for him to show that he suffers the *same* inconvenience in the use of the highway as *other* people do. He must show that he has suffered some damage *more* than what the general body of public had to suffer.

The Allahabad High Court has *held* that the term "special damage" indicates damage to a party, in contradiction to damage caused to the public at large. In that case, it was shown that a large quantity of dust from a neighbouring brick powdering mill entered a doctor's consulting room, and a visible thin red coating on clothes resulted, and also that

dust is a public hazard injuring the health of human beings. The Court *held* that the doctor had succeeded in proving "special damages" and decreed the suit in his favour. (*Dr. R. B. Singh* v. *Babulal*, A.I.R. 1982 All. 285)

2. Injury must be direct

Secondly, the plaintiff must show that such injury is *direct,* and not merely *consequential,* as where one way is obstructed, but another is left open. In such a case, the private and particular injury is not sufficiently *direct* to give rise to a cause of action.

3. Injury must be substantial

Lastly, such an injury should be of a *substantial nature, i.e.,* not fleeting or evanescent. Therefore, in order to entitle a person to maintain an action for damages caused by that which is a public nuisance, the damage must be *particular, direct and substantial.* The *object* of this rule is to avoid multiplicity of litigation. Thus, the constant ringing of bells near a dwelling place is public nuisance, and if it interferes with the comfort of a tenant, he will be said to suffer *special damage;* and an action for *public nuisance* can lie at the instance of the tenant who is a *private individual. (See Soltau* v. *De Held,* above.)

Remedies for public nuisance

The appropriate remedies for a public nuisance are two (1) Civil and (2) Criminal.

1. Civil — The Attorney-General in England can sue in respect of a public nuisance.

In India, under Sections 91 and 93, Civil Procedure Code, the Advocate-General in a Presidency town, and the Collectors outside such towns, have the same powers as the Attorney-General in England has with respect to a public nuisance.

2. Criminal — Ch. XIV of the Indian Penal Code and Ss. 133 to 143, Criminal Procedure Code, prescribe the appropriate remedies in this respect.

2. PRIVATE NUISANCE

Definition

Write a short note on : Private nuisance. P.U. Oct. 96

A *private nuisance* is some unauthorised use of a man's own property, *causing damage* to the *property* of another, or some *unauthorised interference* with the *property* or *proprietary rights* of another, causing damage, but *not* amounting to trespass. Private nuisance includes obstruction to light and air, wrongful escape of foul gas, or noise, water, filth, germs, etc. Thus, in *Ware* v. *Garston,* (1944) A.C. 30, it was *held* that if anything is likely to cause an accident through being an obstruction to those who are using the highway, and an accident results, there is an actionable nuisance.

THOMPSON-SCHEWAB v. *COSTAKI*, (1956) 1. W.L.R. 335.— A house-holder residing in a respectable residential street, complained that two women were in the habit of picking up men in neighbouring streets and bringing them to the house next door for the purposes of prostitution. The Court *held* that such activities could constitute *actionable nuisance.*

Kinds of private nuisance

Generally speaking, the wrongs of private nuisance fall under *two* broad classes : (i) Those causing damage to property, and (ii) Those causing physical discomfort.

(i) Damage to property

In the case of damage to property, any sensible injury would be sufficient to support an action. In consideration whether an act is a nuisance, not only the thing done, but also the surrounding circumstances, must be taken into account. As observed in *Sturges* v. *Bridgman,* (1879) 11. Ch. D. 852, "What could be a nuisance in one locality might not be so in another." It was further observed in this case that whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances. For example, where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in particular and an established manner, the trade or manufacture so carried on in that locality is *not* a private nuisance. But, where no right by prescription exists to carry on a particular trade, the fact that the locality is one where similar trades were carried on will *not* be a good defence in an action for damages in respect of injury to property. The right to carry on a particular trade does *not* authorise the committal of nuisance, in the absence of proof that the trade could not be carried on otherwise.

HOLLYWOOD v. *EMMETT,* (1936), 2 K.B. 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, 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 against *B* for injunction. It was *held* that *A* was entitled to the injunction. No proprietor can create noise on his own land to the annoyance of others.

(ii) Physical discomfort

In the case of physical discomfort, the act complained of must be— (i) in excess of the natural and ordinary course of enjoyment of the property and (ii) materially interfering with the ordinary comfort of human existence. As observed in *St. Hellens Smelting Co.* v. *Tipping* (1865) 11 H.L.C. 642, "If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there might arise much discomfort from the trade carried on in that shop."

The damage must be substantial, and everything must be looked at from a reasonable point of view. The law does *not* regard trifling and small inconveniences, but only takes account of sensible inconvenience and injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected.

PROBLEM

A erected a flour-mill only at a distance of 8 or 9 feet from the house of *B*, did not pay attention to *B*'s complaint which he had made at the very inception of the working of *A*'s flour-mill, and did not introduce a silencer in the engine or build the walls round his mills so high that the noise reaching *B*'s house would have been reduced to the minimum or would have been only an occasional inconvenience to him. *B* wants to sue *A* for nuisance caused by the abnormal noise produced by the flour-mill. Advise *B*.

Ans.— Yes. He will succeed.

REMEDIES

Three remedies are available to a person for nuisance namely— 1. Abatement, 2. Damages, and 3. Injunction.

1. Abatement

Abatement means the *removal* of a nuisance *by the party injured.* The removal must be *peaceable and without danger* to life or limb; and, if it is necessary to *enter* another's land or property, *prior notice* should be given. Nuisance by a *positive act of commission* may be abated *without* notice, but *not* nuisance due to *omission.* A *private* individual *cannot* abate a *public* nuisance, *except* under the three circumstances already discussed above.

PROBLEMS : 1. A mango tree on land of *P* largely overhangs on the land of *S*. *S*, without giving any notice to *P*, cuts off the overhanging branches of the tree. *P* sues *S* for damages. Will he succeed ?

Ans.— A nuisance may be abated, *i.e.,* removed by the person affected by it. Where the nuisance can be removed without entry on the wrong-doer's land, as by cutting off the overhanging branches, no notice is necessary. Therefore, *P* is not entitled to sue *S* for damages; *P* will *not* succeed.

2. The branches of *Y*'s neighbour's apple tree are overhanging on *Y*'s land, and the roots have spread into it so that *Y* can grow almost nothing underneath it. Advise *Y* whether he may safely (i) cut down the branches; (ii) sever the roots; (iii) for either purpose, walk upon *X*'s land, or put his hand over the boundary; (iv) burn the wood and eat any apples on the branches cut down.

Ans.— (i) Yes; (ii) Yes; (iii) Yes, after notice; (iv) No. *Y* would have to pay the price of the apples.

3. *N* erects an aerial mast in his garden. Owing to a very high wind, the mast is blown down across the roof of *N*'s house. As a result, a tile is dislodged and falls upon *M*, a policeman who is on his beat on the footpath in front of *N*'s house, and a portion of the ceiling collapses, upon a bed in which *H*, a guest of *N*, is sleeping. Serious injuries are inflicted on both *M* and *H*. Is *N* liable to either of them ?

Ans.— *N* is *not* liable to *M* or *H*. No one is liable for *vis major* (act of God).

2. Damages

The second remedy for nuisance is damages.

It has been *held* that what is important in cases of nuisance is *not* whether the defendant is using his own property reasonably, but whether injury is caused to his neighbour. The *measure of damage* will be the diminution of value of the plaintiff's property as a direct result of the defendant's nuisance.

It must be remembered that for every day that the nuisance continues, a fresh cause of action arises, for which further damages may be recovered.

3. Injunction

In order to obtain an injunction, it must be shown that the injury complained of as present or impending is such as, by reason of its gravity, or its permanent character, or both, *cannot* be adequately compensated in *damages.*

The Allahabad High Court has *held* that if in a noisy locality, substantial addition to the noise is introduced at the defendant's premises by some machines in a flour-mill, which materially affects the physical comfort of the plaintiff, a permanent injunction against the defendant *can* be granted by the Court. *(Radhey Shiam* v. *Gur Prasad Sarma,* A.I.R. 1978 All. 86)

Public and private nuisance distinguished

There are *five points of distinction* between public and private nuisance:

1. Nature of the right violated

A *public* or *common* nuisance affects the public at large or some considerable *portion* thereof, whilst a *private* nuisance affects only person *one* or a *determinate body* of persons. In other words, while a *public* nuisance is an offence against *public right, safety* or *convenience,* a *private* nuisance is a violation of a *private* right of a person to the comfortable occupation of property.

2. Who can sue

Public nuisance does *not* create a *civil* cause of action for *any* person. An action *cannot* be maintained by a *private* individual in his *own* name in respect of a *public* nuisance, *except* under the three circumstances mentioned above. Private nuisance, on the other hand, is actionable at the suit of *any* person in possession of land who is injured by reason thereof.

What is nuisance ? Distinguish between private and public nuisance.
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3. Acquisition of right to continue nuisance

While no length of time can legalise a *public nuisance,* a right to create or continue private nuisance *may* be acquired by prescription.

4. Abatement

While a *private* nuisance *may be abated* by the person *injuriously* affected thereby, a *public* nuisance *cannot* be so abated by him.

5. Remedies available

An action for damages lies in respect of a *private* nuisance, but *not* in respect of a *public nuisance, unless* the plaintiff has sustained

special damages. In case of a *public* nuisance, the action generally is for *declaration* and *injunction.*

Distinction between *trespass* and *nuisance*

(i) Trespass is an injury to possession itself. Nuisance is an injury to some right accessory to possession.

(ii) Trespass is actionable *per se*, while nuisance (*except* in the case of nuisance consisting of injuries to servitudes) is actionable only on proof of actual damage.

Thus, trespass and nuisance are mutually exclusive. But they may overlap when the injury is to possession as well as to some right accessory to possession, *e.g.*, trespass of cattle, discharge of noxious matter into a stream and ultimately on another's land.

LAW AS TO NUISANCE GENERALLY

General provisions of the law which are *common to both* kinds of nuisance, public *and* private, will now be discussed.

Who can sue for nuisance

For nuisance of a *temporary* character, the actual occupiers of the property can file a suit. If the injured property is in the occupation of tenants, the landlord or reversioner has no right of action, *unless* the nuisance is of a *permanent* character and necessarily inflicts *lasting damage to the inheritance.* So long as the tenants stay and endure the nuisance, they are the only persons who can complain. A person who has no interest in the property or no right of occupation *cannot* maintain an action.

In the case of a public nuisance, the Attorney-General in England and the Advocate-General or Collector in India can maintain a suit.

Who is liable for nuisance

The following persons are liable for a nuisance :

1. He who actually *creates* a nuisance is liable for it. But the occupier of premises is under a duty of care to see that no nuisance is created or maintained on his property.

2. In general, it is only a *person* who is *in actual occupation* of the premises who can be sued for a nuisance emanating from the premises.

3. *Prima facie*, it is the *tenant* who *alone* will be liable. But in the following cases, the *landlord will be liable concurrently with the tenant* :

(i) When the landlord has, prior to the lease, created a nuisance by a *positive* act of *misfeasance* (*e.g.*, building so as to obstruct ancient lights).

(ii) When he has expressly or impliedly *authorised* the tenant to *continue* the nuisance.

(iii) When the nuisance is due to a breach by the landlord of his own covenants to do the *repairs.*

What must the plaintiff prove in an action for nuisance ?

In an action for nuisance, the plaintiff must prove :

(a) Actual damage

That the plaintiff has suffered actual damage.— In order to succeed in an action for *nuisance*, the plaintiff must prove that he has suffered *actual* damage for nuisance; unlike trespass, it is *not* actionable *per se.* The damage must be *actual,* not merely *prospective*, for example, a noisy factory is no nuisance to the owner of an adjoining building plot, *unless and until he builds* upon it. The damage must be either (i) a physical injury to the plaintiff's property, *or* (ii) a substantial interference with his beneficial user of it, not merely according to elegant or dainty modes of living, but according to plain, sober and simple notions of life.

In a *case* decided by the Court of Appeal in England, the plaintiff's father had a leasehold in a house. The roots of a lime tree planted in the pavement in front of the house by the Borough Council encroached on the land, causing subsidence undermining the foundations of the house. The father then transferred the house to the plaintiff, and the question before the Court was whether the plaintiff was entitled to recover, as damages, the cost of remedying the damage caused to the house before it was transferred to him.

On these facts, the Court, giving judgement in favour of the plaintiff, *held* that the encroachment of the roots was a continuing actionable nuisance, and that, in such cases, the person in possession of the property can recover the loss incurred by him in remedying the damage caused by the nuisance, whether the damage occurred before *or* after he acquired the land. In the circumstances, it was *held that* the plaintiff could recover the *total cost* of remedying the damage caused by the roots of the tree. (*Masters* v. *Brent London Borough Council*, 1978, 1 Q. B. 841)

(b) Damages must be substantial

That the damage is substantial, and not merely trifling or fanciful.— Thus, where the nuisance complained of consist of damage to property, the damage must be proved to be of an *appreciable magnitude* and apparent to persons of ordinary intelligence, and not something discoverable only by *scientific tests.*

Similarly, when the action is based on personal discomfort, the damage must *not* be trifling. In such a case, it is sufficient if the plaintiff proves that he has suffered *sensible* discomfort and annoyance, having regard to the standards of reasonable people and to the character of the neighbourhood; "what would be a nuisance in Belgrave Square would not necessarily be in Bermondsey."

(c) Possessory interest of plaintiff

That the plaintiff has a possessory interest in the premises affected by the nuisance.—. Ordinarily, the *actual occupier* of premises can *alone* bring an action for a nuisance. The landlord or reversioner can sue *only* if the injury complained of is of such a nature as to affect the estate *permanently*, *e.g.,* for permanent depreciation of the property, or obstruction of light by building, but *not* for personal discomfort by noise, smell or pollution of air.

DEFENCES

The following are the *three* valid defences to an action for nuisance:

1. Grant

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

2. Prescription

A special defence available in the case of nuisance is *prescription.* The right to continue a private nuisance may be acquired as an easement of prescription, if it has been peaceably and openly enjoyed as an easement and as of right, without interruption and for 20 years.

STURGES v. *CRIDGMAN,* (1879) 11 Ch. D. 852.— For more than 20 years, *A* had used a certain heavy machinery for his business. *B,* a neighbour and a physician, constructed a consulting room adjoining *A*'s house and then found himself seriously inconvenienced by the noise of *A*'s machinery. *B* brought an action against *A* for abatement of 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.

3. Statutory authority

When a statute has authorised the doing of a particular act, or the user 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.

In *Vaughan* v. *Taff Vale Rly. Co.* (1860) 5 H. & N. 679, the defendants who had authority by statute to use locomotive engines on their railway, were *held not liable* for a fire caused by the escape of sparks from one of their engines, as they had taken all reasonable measures to prevent the escape of sparks. On the other hand, it is quite clear that liability for a nuisance *cannot* be avoided where the act authorised by statute is done *negligently.*

In a suit for nuisance, the following *cannot* be pleaded as a defence :

(a) It is no defence to show that the plaintiff himself came to the nuisance. Thus, if a man knowingly purchases an estate in close proximity to a smelting works, his remedy for nuisance created by fumes issuing therefrom is *not* affected.

(b) In the case of a *continuing* nuisance, it is no defence to show that all possible care and skill were 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.

(c) 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.

(d) It is no defence that the defendant's operations do *not* alone amount to a nuisance— *e.g.,* that other factories also contribute to the smoke complained of.

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TORTS RELATING TO MOVABLE PROPERTY

Torts affecting *movable* property fall into the following *four* categories :

1. Trespass to goods
2. Trespass *ab initio*
3. Detention (or *Detinue*)
4. Conversion (or *Trover*).

1. TRESPASS TO GOODS

Definition

The tort of trespass to goods takes place wherever there has been an *actual taking of,* or direct and immediate damage to, another person's *goods*. In other words, *trespass to goods (trespass de bonis asporatis)* is an unlawful disturbance of the possession of the goods by *seizure* or *removal*, or by a direct act causing *damage* to the goods (for instance, removing a tyre from a motor-cycle, or scratching the hood of a car). An action for trespass will also lie for taking or injuring docile and tame animals. It is immaterial whether the injury is caused by the defendant or by an *animal* belonging to him.

Write a short note on : Trespass to goods.
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Its forms

Trespass to goods may assume either of the following *two* forms :

1. *Taking the thing away from the plaintiff's possession.* This is called "asportation". This would also amount to the crime of *theft* or *larceny*, if a dishonest intent was present; it would be *robbery*, if it was forcible.

2. *Direct application of force, e.g.* killing or injuring an animal, or defacing a work of art. Damage is *not* essential, and even the slightest application of force, like touching, is wrongful.

Its essentials

In order to succeed in a suit for trespass to goods, the plaintiff must prove :

1. That he was in *possession*, actual or constructive, of the goods. There is constructive possession of goods in all cases where there is a legal right to possess.

2. That his possession has been wrongfully disturbed. The fact that the trespass was unintentional is no ground of defence.

Joint-owner's right

A joint-owner can maintain an action of trespass against his *co-owner*, if the latter has done some act inconsistent with the joint-ownership, *except* when (1) the chattels have been completely destroyed; *and* (2) there has been a sale of the chattels in *market overt* (i.e., open market).

FORMS OF ACTION FOR RECOVERING GOODS

The forms of action for recovering goods (in England) are *three* : 1. Replevin, 2. Trover, and 3. Detinue.

1. Replevin

Replevin was a form of *action* for the *recovery of specific goods* which had either been wrongfully *distrained* or taken for rent or by way of *distress damage feasant.* It did *not* lie to recover goods in which the plaintiff alleged merely that he had a right of property, *or* which had been delivered under a contract.

2. Trover

An action of *trover* was originally the remedy of the plaintiff to recover *damages* against the person who had *found* goods and *refused to deliver* them up on demand to the plaintiff. In course of time, it became the form of action where the plaintiff sought to recover damages from the defendant who had converted the plaintiff's goods to his own use, and came to be known as an action of *conversion.*

To maintain an action of trover, the plaintiff had to prove either an absolute or a special property in the goods in question and also a right to their possession. The action of trover was founded on the *property* in the goods, the action of trespass, on their *possession.* In trover, damages alone could be recovered.

3. Detinue

Detinue was the form of action for the recovery of specific goods wrongfully *detained* from the plaintiff by the defendant, or their value, and also *damages* occasioned by their detention.

Detinue is the wrongful detention of the possession of a chattel. It does *not* matter *how* the possession of the chattel was acquired. In an action for detinue, the plaintiff must prove :

(i) that he is entitled to possession of the chattel; *and*

(ii) that the defendant detained it after demand had been made for its restoration.

(See under the head *"Detinue"*, below.)

DEFENCES TO AN ACTION FOR TRESPASS TO GOODS

The following are *six defences* to an action of trespass to goods :

1. Self-defence or defence of property

If a person has *actual* possession of the goods, and another person wrongfully attempts to take the same from him, he is justified in using such *force* as is *necessary* for the purpose of *defending* his own possession.

2. Exercise of one's absolute or relative rights

If a person is exercising his rights, he *cannot* be made liable for trespass to goods. Thus, seizing goods of another under a lawful distress for rent or *damage feasant,* is lawful.

3. Obedience to a legal authority

Obedience to a legal authority is also a good defence, as for instance, when goods are taken under a due process of law.

4. Negligent or wrongful act of plaintiff himself

If a person places his horse or cart so as to obstruct the right of way, it may be removed, even by applying force for the purpose.

5. Recaption

Recaption means the re-taking by a lawful owner, of goods of which he has been wrongfully deprived. The owner may justify an assault in order to repossess himself of them.

6. *Jus tertii*

When a person who is *prima facie* liable to another, on being sued by him, sets up a defence that the *paramount title is vested in a third person,* he is said to set up the defence of *jus tertii* (right of third person). Such would be the case if *A* trespasses on the land of *Y*, and when sued by the latter, sets up the defence that *Y* himself has wrongfully obtained that land, the real owner being another person, *X*.

Write a short note on : Jus tertii.
P. U. Oct. 92

The general rule is that a wrong-doer *cannot* set up the *jus tertii*,— the right of possession outstanding in some *third* person, as against the fact of possession in the *plaintiff*. If the defendant justifies his trespass on the land of the true owner, and thereby sets up *just tertii*, such authority is traversable by the plaintiff, in which case the defendant must prove that such authority *was* given in *fact.*

The defence of *just tertii* can be set up against a plaintiff who has himself neither *actual* nor *constructive* possession of the chattels at the time of trespass.

***Jus tertii* in suit for ejectment**

There is no uniformity of opinion on the question whether *jus tertii* is or is not a good defence to an action of ejectment, but in the following *two* cases it *cannot be set up at all, viz.*—

(a) Landlord and tenant.— The landlord need *not* prove his *title*, but only the termination of the tenancy. Neither the tenant nor any one claiming under him can dispute the landlord's *title.*

(b) Licensees.— A licensee *cannot* dispute the title of the *persons who licensed him.* There is no distinction between the case of a tenant and that of a common licensee.

Case.— The plaintiff was the owner of some homing and racing pigeons. One day, when he released them, they went on the defendant's land and began to feed on his peas. To protect the peas, the defendant shot at them, killing four and wounding one. The plaintiff sued for damages. It was *held* that it could not be shown that shooting was the

only way to protect the peas, and as the defendant had acted unreasonable (in shooting down the pigeons), *he was liable.* (*Hampass* v. *Darby*, (1948) 2 All. E.R. 474)

2. TRESPASS *AB INITIO*

This is similar to trespass *ab initio* relating to *immoveable* property, which has been discussed in the last Chapter.

A person who *lawfully* takes a *chattel*, but afterwards abuses or wastes it, renders himself liable as a trespasser *ab initio*. The plaintiff must show — (i) that he was in possession (actual or constructive) of the goods; *and* (ii) that his possession has been wrongfully disturbed.

Thus, if a bailiff takes a horse which is a stray horse (which he had power to do), but later uses it for his own purposes, he will be a trespasser *ab initio.*

3. DETENTION (DETINUE)

Detention (detinue) is the adverse *withholding* of the *goods* of another. The remedy for this tort in English law is an *action in detinue.* It lies for the *specific recovery of chattels wrongfuly detained* from the person entitled to their possession, and also for the *damages* occasioned by the wrongful detainer. The injury complained of is neither the *taking* nor the *misuse* and *appropriation* of the goods, but *only* the *detention.* The plaintiff must have a *special and general property* and a right to the *immediate* possession.

Write a short note on : Detention.
P. U. Apr. 91
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Detinue was the form of action for the recovery of specific goods wrongfully *detained* from the plaintiff by the defendant, or their value, and also damages occasioned by their detention.

The plaintiff must prove that he is *entitled* to possession of the goods, and that he *demanded* the goods from the defendant, but the defendant *refused* to deliver them and detained them. A *lien* on the goods by the defendant is a *good answer.*

4. CONVERSION (TROVER)

Definition

Conversion is the wrongful *taking* or *using* or *destroying* of the goods, or an exercise of *dominion* over them *inconsistent* with the *title* of the owner.

WHAT CONSTITUTES CONVERSION

Explain : Conversion.
P.U. Oct. 95

In a *case* decided by the Orissa High Court, it was observed that there are *three distinct methods* by which one can commit conversion, *viz.*—

(a) by wrongfully *taking* a chattel;

(b) by wrongfully *detaining* a chattel; and

(c) by wrongfully *disposing of* a chattel.

Write a short note on : Conversion
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The Court observed that in the *first case*, the wrong-doer acquires a possession which is wrongful *ab initio.* In the *second case*, he acquires possession rightfully, but retains the chattel wrongfully. In the *third case*, he neither takes it wrongfully nor retains it, but so acts that it is lost to the true owner. (*Paramananda* v. *Bora Behera*, A.I.R. 1978 Ori. 114)

Although the above case refers to only *three* ways of committing conversion, there are actually *six* ways by which an act of conversion may be committed, namely :

Discuss in detail what is conversion.
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1. When the property is wrongfully taken

Thus, if a person sees branches of a tree overhanging his land and breaks them and eats the fruits thereof, he would be guilty of conversion.

What are the modes in which the tort of conversion can be committed ?
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The taking need not be with the intention of acquiring a *full* ownership. It is enough if any interest is claimed *inconsistent with the right of the person entitled.* The taking may be merely *constructive,* but *a taking which is unaccompanied by an intention to exercise permanent or temporary dominion is not conversion.*

Define conversion. What are the various modes of committing conversion ? Are there any defences for conversion provided under the law of torts ?
B.U. Apr. 94

There is no conversion without assumption of ownership. Thus, there is no conversion (i) by a bailee who loses the property *through negligence, or* (ii) by a person who refuses to hand over the property to the plaintiff on the ground that he has *doubts about his title and wishes to investigate the position.*

It is to be remembered that if there is *no taking*, there can be *no conversion.*

FOULDES v. *WILLOUGHBY*, (1841) M. & W. 540.— *A* goes on board a ferry boat with two horses. The boatman wrongfully refuses to carry the horses, and tells *A* that he must leave the horses behind on the shore. *A* refuses to do so. The boatman thereupon takes the horses from *A* and puts them on the shore. *A* remains on board the boat and is conveyed across the river. The question arises whether *A* had any right of action against the boatman.

In these circumstances, the boatman had recognised *A*'s right by his conduct. Therefore, there is no conversion. But the boatman's act, *unless* he could justify it in some way, amounts to *trespass.*

(This case is discussed again, while noting the difference between conversion and trespass, later in this Chapter.)

HOLLINS v. *FOWLER*, (1875) L.R. 7, H.L. 757.— *A*, who has fraudulently got goods from *B*, delivers them to *C*, a warehouseman, for safe custody. *B*, on being informed of the fraud, sets out in search of *A* to get back the goods. *A* absconds, but *B* learns that the goods are deposited with *C*. *B* demands the goods from *C*, but *C* has already in the meantime returned the same to *A*. *B* sues *C* for conversion.

Here, *C* is *not liable* for conversion. He simply restored the goods *bona fide* to their owner.

2. When the property is wrongfully parted with

Define conversion. How is it committed ? Are there any defences provided under the law of torts ? If so, discuss.
P. U. Oct. 93

If a man hands over goods to another, so as to give him some right over the property itself, whether as owner or *dominius protempor*, it amounts to conversion. Misdelivery by a carrier will amount to conversion. So also, a bailee, who pledges the goods to a third person, commits conversion.

Dicuss the tort of conversion. What are the defences available in such an action ?
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3. When the property is wrongfully sold

A wrongful *sale* of goods is also conversion. In *market overt*, the property passes to the purchaser by sale, which is, therefore, equivalent to physical destruction.

SETON v. *LAFONE*, (1887) 10 Q.B.D. 68.— *A* deposited goods with *B*, a warehouseman for safe custody. *B*'s servants subsequently delivered them by mistake to *C*. *B*, in ignorance of this fact, represented to *D*, that he was still in possession of these goods on behalf of *A*, whereupon *D* purchased them from *A* and demanded delivery from *B*.

The Court *held* that where the defendant has made some negligent misrepresentation with respect to his title to the goods, and the plaintiff has acted upon it and has thereupon suffered damage, the defendant is *estopped* from denying that he had committed conversion. Thus, *B* is estopped from denying that he had the goods, and he is liable to *D* for conversion by refusing to deliver them.

4. When the property is wrongfully detained

Conversion may be committed by *detention* if the detention is *adverse* to the right of the person *entitled* to possession, e.g., where a bailee refuses to return the chattel to his bailor on demand. The essence of this form of conversion is *refusal* on demand. An unqualified refusal is always conclusive evidence of conversion, though not a qualified, reasonable and justifiable refusal.

ARMORY v. *DELAMIRIE*, (1721) 1 Str. 505.— The plaintiff, a chimney-sweeper boy, found a valuable jewel. He took it to the defendant, a goldsmith, to ascertain its value. The defendant, taking advantage of the boy's simplicity, told him it was worthless and offered him three half-pence for it, which the lad declined and demanded back the jewel. The defendant refused and the plaintiff sued him. The Court *held* that the plaintiff was entitled to succeed. Though the finder of a chattel does not, by such finding, acquire an absolute property or ownership, yet he has *such* a property as will enable him to keep it against *all but the rightful owner;* consequently, he may sue for its value any wrong-doer who has wrongfully converted it. *The finder of goods has a good title against all except the true owner.*

5. When the property is wrongfully destroyed

Every wilful and wrongful *destruction* of a chattel, or wilful or wrongful *damage* to it, whereby the owner is deprived of the use of it in its original state, is a conversion, *e.g.*; taking away the wine from a cask and filling the cask with water.

6. Where there is denial of the lawful owner's right

There may be conversion of goods, even though the defendant has never been in physical possession of such goods, *if his act amount to an absolute denial and repudiation of the plaintiff's rights.*

In all the above six cases, the defendant's ignorance of the unauthorised character of his act *cannot* always be relied upon as a defence.

REMEDIES

The following are the *three remedies* open to a person whose goods are wrongfully converted :

1. Recaption

A person entitled to possession of goods of which he has been wrongfully deprived may *retake* them wherever he finds them, using *reasonable force,* if necessary.

2. Order for restoration of property

It is in the discretion of the Court whether an order for restoration of property will be made, and it may properly be refused if the defendant has increased the value of the property by his labour.

3. Suit for damages

If the chattel has not been restored, the plaintiff is entitled to its full value and damages.

Essentials of a suit for conversion

To maintain an action for conversion, the plaintiffs should have a *right of property* in the thing converted and also a right of possession. It is to be noted that the person in actual *possession* (or entitled, at the time of the conversion, to the actual possession) of a chattel can maintain an action for conversion, for the action is *not* founded upon a right of *ownership, but* upon the fact of *possession.* Therefore, in an action for conversion, the plaintiff has to prove (i) that he was either in possession, *or* had immediate right to the possession of the chattel, *and* (ii) that the defendant deprived the plaintiff of the possession *or* the right or dominion over it.

Defence to an action for conversion

The following *five defences* are available to the defendant in an action for conversion :

1. *Lien,* either general or particular.

2. Right of *stoppage in transit.* This defence may arise out of a contract, or under a statute, *e.g.,* the Sale of Goods Act.

What are the defences available in conversion ? P... Apr. 9...

3. *Denial of plaintiff's right to property,* where the plaintiff sues relying on this right only.

4. *Sale in market overt.* In the case of a sale in *market overt,* the purchaser cannot be sued for conversion, though the seller can be. (In India, the position will be governed by Sections 27-30 of the Sales of Goods Act.)

5. *Distress, i.e.,* that the goods were taken under distress *or* in execution of a decree.

'Conversion' and 'trespass' distinguished

Conversion *resembles* trespass in that the action is based on the right of *immediate possession,* and *not* on the right of *ownership,* and that a *mere possessor* can sue the wrong-doer, *unless* the latter has a *better* title or right to be in possession.

The followihg are the *three points of distinction* between conversion and trespass :

1. As to right to possess

Conversion is *wider* than trespass, because in an action for conversion, the plaintiff need *not* prove *actual possession,* but can sue if he had an *immediate right to possess.* Trespass is a wrong to *possession,* and cannot, therefore, be committed *by the actual possessor.* But an actual possessor can be *sued* in conversion by the person who has the immediate right to possess. Thus, a purchaser who has paid the price, but has not yet obtained possession, can sue his vendor for conversion.

2. As to intention to possess

To damage or meddle with the chattel of another, but *without* intending to exercise an *adverse* possession over it, is a trespass. A conversion is a breach, made adversely in the continuity of the owner's dominion over his goods, though the goods may *not* be damaged.

3. As to gist of the action

The gist of the action in *trespass* is the *force* and direct *injury* inflicted; in *conversion,* it is the *deprivation of the use.*

The distinction between trespass to goods and conversion is well brought out by the case of *Fouldes* v. *Willoughby,* already discussed above. In that case, the plaintiff embarked upon the defendant's ferry boat with two horses, and paid for their passage. The defendant wrongfully refused to carry the horses and requested the plaintiff to put them ashore. The plaintiff refused to comply with this request, whereupon the defendant turned the horses loose on the landing place; the plaintiff remained on board and was carried across the river.

It was *held* that the defendant's act in taking the horses was wrongful and actionable as a trespass, but in the absence of evidence of any *intention* on the part of the defendant to *assert any right or dominion over plaintiff's property,* there was *no* conversion. In order to constitute a conversion, the taking need not be with the intention of acquiring *full ownership.* The sole test of an actionable conversion are a dealing with goods in a manner inconsistent with the right of the true owner, and an intention in so doing to negative the true owner's right, or to assert a right inconsistent therewith.

'Detinue', 'trespass' and 'conversion' distinguished

1. As to their nature

Conversion (*i.e.,* trover) was defined by Atkin, J. in *Lancashire and Yorkshire Rly. Co.* v. *MacNicoll,* (1918) 88 L.J.K.B. 600, as "a dealing in goods in a manner inconsistent with the right of the true owner, *provided that* there is also an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right." In short, conversion is an interference with the plaintiff's *possession* or *right to possess,* together with an intention to *exercise dominion* over the goods.

Detinue consists in the act of wrongfully *withholding* goods from the plaintiff, in whatever way they may have come into the defendant's possession. In effect, the tort is continued by a wrongful *refusal* to *return* the plaintiff's goods on demand.

Trespass to *goods* is constituted by any direct act of interference with the goods in the plaintiff's possession.

2. As to their scope

Conversion covers most of the sphere of *detinue* and *trespass,* and thus in most cases, wrongful *detention* and *trespass* will *also* constitute a *conversion.* But in certain cases, an action of conversion will *not* lie. Thus, if a bailee negligently loses goods or allows them to be destroyed, he is liable in detinue, since it is by his fault that he is unable to restore the goods; but he is *not* liable in conversion, since there is no act of wilful interference, *i.e.,* no positive act of misfeasance, which is the essence of the action of conversion; nor is there any intention to deny the plaintiff's rights.

Many acts which amount to trespass *also* amount to a conversion, but in certain cases, there may be a trespass, but *no* conversion. Thus, a mere simple asportation (removal) of a chattel, *unaccompanied by an intention of exercise acts of dominion over it,* is a trespass, but *not* conversion. Further, mere damage to goods in the plaintiff's possession, falling short of actual destruction, is a trespass, but *not* a conversion.

Subject to these exceptions, a suit for conversion will lie wherever one for detinue or trespass will lie. It is necessary to draw a distinction between these torts, since the measure of damage in trespass and conversion differs.

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NEGLIGENCE

The tort of *negligence* is a *tort* which can be committed with respect to both, person *and* property.

What is negligence

Discuss the ingredients of the tort of negligence, with the help of illustrative cases.
B. U. Apr. 91

Negligence may be defined as the breach of a duty, caused by the *omission* to do something which a reasonable man (guided by those considerations which ordinarily regulate the conduct of human affairs) would do — *or doing* something which a prudent and reasonable man would *not* do. In other words, negligence may arise from *non-feasance or* from *misfeasance.*

An action for negligence proceeds upon the idea of an *obligation* or *duty* on the part of the defendant to *use care,* a breach whereof results in the plaintiff's injury. It is *not necessary* that the duty neglected should have arisen out of a *contract* between the plaintiff and the defendant. However, the duty may arise by a statute or otherwise; and if it is neglected, and it results in an injury to the plaintiff, he has a right to sue for damages.

There cannot be a liability for negligence, *unless* there is a *breach* of some *duty.* Hence, no case of actionable negligence will arise unless the duty to be careful exists. Thus, the *idea of negligence and duty are strictly correlative,* and *there is no such thing as negligence in the abstract;* negligence is simply neglect of some care which one is *bound by law* to exercise towards another.

"The law takes no cognisance of carelessness, where there is no duty to take care." Discuss the statement in the light of decided cases.
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Austin defines negligence thus — "In case of negligence, a party performs not an act to which he is obliged; he breaks a positive duty." *Actionable negligence* consists in the neglect of the use of the ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property.

"It is the duty of a man not to do that which will injure the houses of another to which he is near. If a man is driving on Salisbury plain, and no other person is near him, he is at liberty to drive as fast and as recklessly as he pleases. But if he sees another carriage coming near to him, immediately a duty arises *not* to drive in such a way as is likely to cause an injury to that other carriage."

Thus, if a man walks across a crowd of people, carrying sharp-edged tools in his hand, he is under a duty to ensure that he does no injury to those around him. He will have to be more careful than a man who merely carries an umbrella (even though this is nearly as bad in crowded cities today). — And, of course, the man with the umbrella would have to be more careful than a man who carries nothing at all.

The concept of duty of care

DONOGHUE v. *STEVENSON* (The snail-in-the-bottle-case). A fundamental principle of the English law of negligence was affirmed by the *House of Lords* in a majority judgement in a leading case, *Donoghue* v. *Stevenson* (1932 A.C. 562).

In that case, the Plaintiff accompanied by a friend, went to a cafe in Paisley for refreshments. They ordered two slices of ice-cream and a bottle of ginger-beer. Each slab of ice-cream was placed in a tumbler over which was then poured part of the contents of the ginger-beer. This ginger-beer was served in a stoppered bottle of dark opaque glass, and had been manufactured by the defendant, Stevenson. After the plaintiff had finished some of the ice-cream, her friend attempted to replenish the glass by pouring into it the remains of the contents of the bottle. As she was doing this, the remains of a decomposed snail (which had apparently found its way into the bottle at the factory) floated out. It was the plaintiff's case that as a result of the nauseating sight of the snail and the impurities of the ginger-beer which she had already consumed, she suffered from shock and severe gastro-interitis.

Write a short note on : Donoghue v. Stevenson.
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A majority of the House of Lords *held* that Stevenson owed her a duty to take care that the bottle did not contain any noxious matter, and that he would be liable if that duty was not performed.

During the course of judgement, Lord Atkin re-defined the concept of duty of care. He observed : "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour ? The answer seems to be — persons who *are so closely and directly affected by my act, that I ought reasonably to have then in contemplation,* as being so affected when, I am directing my mind to the acts or omissions which are called in question."

Write a short note on : Duty of care.
B.U. Oct. 95

The following passage from the judgement of *Lord Atkin* is also interesting :

> "If your Lordships accept the view that this pleading discloses a relevant cause of action, you will be affirming the proposition that, under the Scots and English law alike, a manufacture, of products, which he sells in such a form as to show that he intends them to reach the consumer in the form in which they left him, owes a duty to the consumer to take reasonable care."

It is clear that, in the above case, there was no *contractual duty* on the part of manufacturer towards the Plaintiff. However, the learned Lords who gave a *dissenting judgement* in this case seem to have been influenced by the fallacy that *because* there was no contractual liability, *therefore,* the manufacturer was not liable in tort also. This fallacy died a hard death in *Donoghue's case,* and was finally buried by the Privy Council four years later in *Grant* v. *Australian Knitting Mills Ltd.,* (1936 A.C. 85)

When does the duty to take care arise in negligence ? What are the rules determining the existence of the duty to take care ? Explain with reference to leading cases.
P. U. Oct. '92

Thus, the same facts may give rise to both a *contractual* as well as a *tortious* liability. However, in such cases, it is wrong to assume that just because *A* is bound by a contract to *B* therefore, the harm resulting from *A*'s breach of that contract to *C,* a third party, can never give rise to a liability in tort on *A*'s part to *C.*

Lord Atkin's judgement in *Donoghue* v. *Stevenson* has laid down certain important principles, which have been followed in several subsequent cases. Thus, in *Home Office* v. *Dorset Yacht Co. Ltd.*, (1970 A.C. 1004), *Lord Reid* observed as follows :

> *'Donoghue* v. *Stevenson* may be regarded as a milestone, and the well-known passage in Lord Atkin's speech should, I think, be regarded as a statement of principle."

Standard of degree of care

"The liability for negligence is based upon a general public sentiment of moral wrong-doing, for which the offender must pay." Discuss the statement with special reference to Donghuve v. Stevenson.
B.U. Oct. 95

The standard by which one can determine whether a person has been guilty of negligence is the *conduct of a prudent man* in the particular situation. The amount of care may vary to the greatest extent, while the standard itself remains the same. The prudent man is the man who has acquired the skill to do the act which he undertakes. If a man has not acquired the skill to do a particular act he undertakes, then he is imprudent, *however careful he may be,* and however great his skill may be in other things. The question to be raised with regard to a man's conduct brought in question is, whether a *prudent* or *careful* or *diligent* man of his calling or business or skill would have undertaken to do the things in question, supposing the party to have exercised due care in executing the work undertaken.

The *degree of care* which a man is required to use in a particular situation *varies with the obviousness of the risk.* If the danger of doing injury to the person or property of another by the pursuance of a certain line of conduct is great, more care is necessary. If the danger is slight, only a small amount of care is required. Thus, owners of occupiers of real property must not act in such a way as to cause injury to the person or property of others. The care that will be required of them will be the care that an ordinary prudent man is bound to exercise. But, persons who profess to have special skill, or who have voluntarily undertaken a higher degree of duty, are bound to exercise more care than an ordinary prudent man.

What is meant by negligence ? What standards are applied to determine the question of negligence ? Discuss with reference to any leading case.
P.U. Oct. 96

Essentials of a suit for negligence

The burden of proving negligence is on the part of the plaintiff who alleges it.

In order to succeed in an action for negligence, the plaintiff must prove the following *five* things :

1. That the defendant was under a legal duty to exercise due care and skill, — as there cannot be any liability for negligence *unless* there is a breach of some legal *duty*.
2. That the duty was towards the plaintiff.
3. That, in the circumstances of the case, the defendant failed to perform that duty, *i.e.* the duty to exercise due care and skill.
4. That the breach of such duty was the *causa causans, i.e.* the *direct and proximate cause, of the damage* complained of. If the causal connection between the negligent act and the damage is *not* direct, the damage is *too remote*, for which there is *no* remedy at law.

5. That the *damage was caused* on account of this breach of duty.

In *PHILIPS INDIA LTD.* v. *KUNJU PUNNU* (1974 B.L.R. 337), the Bombay High Court has laid down that in an action for negligence against a doctor, the plaintiff has to prove *three things, viz.*—

(i) that the doctor was under a duty to take reasonable care towards the plaintiff, to avoid the damage complained of, or not to cause damage to the patient by failure to use reasonable care ;

(ii) that there was a breach of such duty on the part of the doctor; *and*

(iii) that such breach of duty was the real cause of the damage complained of, and such damage was reasonably foreseeable.

"The law of negligence concerns itself with carelessness only when there is a legal duty to take care." Discuss.
B. U. Apr. 94

RAILWAY LEVEL CROSSINGS. — In a normal situation, a person can assume, from the fact that the gates of railway level crossing are open, that there is no danger in crossing the railway track at such level crossing. When, therefore, a car or a truck is hit by a passing train, the fact that the gates of the crossing were open at the time of the accident is *prima facie* evidence of negligence on the part of the Railway Administration. Moreover, there is no law which requires the driver of a vehicle to take precautions to ascertain whether a train is approaching, even though the gates are open. (*Mata Prasad* v. *Union of India,* A.I.R. 1978 All. 303)

It may be observed that the above observation proceeds on the assumption that the Railway crossing is a *manned* crossing. At an *unmanned crossing,* the driver of a vehicle would be under a duty to take proper precautions.

"In the absence of legal duty to take care, negligence has no legal consequences." Discuss.
P.U. Oct. 97

VICTORIAN RAILWAYS COMMISSIONERS v. *COULTAS* (1888 13 App. Cases 222). — The gate-keeper of a railway company negligently invited the plaintiffs, a husband and his wife, to drive over a level crossing when it was dangerous to do so, and their buggy was nearly, but not quite, run down by passing train. The wife fainted and received a serious nervous shock, leading to a severe illness. On a suit filed by the plaintiff's for damages, the Court *held* that the damage was *too remote* to be recovered.

(However, the ruling in *Victorian Railways' case* has *not* been followed in subsequent cases like *Hambrook* v. *Strokes* and *King* v. *Phillips.*)

Burden of proof of negligence

As a rule, the onus of proving negligence is on the *plaintiff.* He must not merely establish the facts of the defendant's *negligence* and of his own *damage,* but must *show that the one was the effect of the other.*

First, where there is *no contract,* the plaintiff must prove facts inconsistent with due diligence on the defendant's part. Where the balance is even as to which party is in fault, the one who relies on the negligence of the other is bound to turn the scale.

Secondly, where *there* is a *contract* or personal undertaking, the *plaintiff must* prove such *contract* or undertaking, and *also injury* to *himself.* The mere fact of an injury happening, if unexplained, is evidence of negligence. It is for the defendant to prove that he himself was exercising due care.

Thirdly, under certain circumstances, the *mere happening of an accident* will afford *prima facie* evidence that it was the result of not taking due care; *res ipsa loquitur* (the thing speaks for itself). This is so when —

(i) the injurious agency was under the management or control of the defendant; *and*

(ii) the accident is such as, in the ordinary course of things, does *not* happen if those who have the management use proper care.

Thus, in cases involving *res ipsa loquitur* (see below), there is a presumption of negligence, and it is for the defendant to rebut it.

CASES

A few illustrative cases of negligence are given below. There is no scarcity of case-law on this topic — and only the *more important ones* will be covered, as they illustrate the underlying principles of this tort.

Cases where the Defendant was held *liable*

AUSTIN v. *GREAT WESTERN RLY.,* (1867) 2 Q.B. 442.— *A,* carrying in her arm *B,* her son (over three years old and subsequently liable to pay half-fare), took a ticket for herself, but not for *B.* Due to negligence of the Railway company, an accident occurred to the train, and *B* was injured. When *A* took her ticket, no inquiry had been made by the servants on the Railway Company as to *B*'s age, and there was no intention on *A's* part of defraud the Railway Company. *B* brought a suit for damages against the Railway Company.

The Court *held* that any passenger who has been injured by the negligence of a railway company can sue them in tort, if they have invited or knowingly permitted him to enter the train, whether or not there is also a contract for carriage between him and the company. Thus, *B* was entitled to recover damages from the Railway Company, for he had been accepted as a passenger.

MANCHESTER CORPORATION v. *MARKLAND,* (1936) A.C. 360.— The Manchester Corporation's service water-pipe in a road burst, and caused a pool of water to form on the road. The water lay unheeded for three days. On the third day, a frost occurred, the water froze, and on the ice so formed, a motor-car skidded, and knocked down and killed a man. The Corporation was not informed until after this accident that the service pipe had burst. In an action by the widow of the deceased under the Fatal Accidents Act, 1846, against the owner of the motor-car and the Corporation it was *held,* exonerating the owner of the motor-car, that the Corporation was *liable* in not having taken prompt steps to attend to the leak, and thus preventing the road from being dangerous to traffic.

CARMARTHENSHIRE COUNTY COUNCIL v. *LEWIS* (1955), 1 All. E.R. 565. — A small boy, aged about four years, who was a pupil at a nursery school conducted by the City Council, was dressed up to go for a walk with one of the school mistresses. The mistress left him unattended in the class-room, whilst she went out to get ready herself. Whilst out of the classroom, she met another child, who had cut himself, and she bandaged him. During her absence of about ten minutes, the boy got out of the class-room and left the school compound through an unlocked gate and entered a busy highway. A lorry, which was passing on the highway, in order to save the child, swerved, and in doing so, it struck a telegraph pole, as a result of which, the lorry-driver was killed. His widow brought an action in which the question was whether there was any negligence on the part of (i) the school mistress, and (ii) the school authorities.

The House of Lords *held* that, in the circumstances of the case, there was no negligence on the part of the school mistress. The Court *further held* that the school authorities were, however, guilty of negligence towards the deceased, as the presence of a small boy, wandering outside the school premises on a busy highway, at a time when he was in the care of the school authorities, indicated lack of reasonable precautions on the part of the authorities.

DANN v. *HAMILTON*, (1939) 1 K.B. 509. — The plaintiff, knowing that the driver of a motor-car was under the influence of drink, and that consequently the chances of accident were thereby substantially increased, nevertheless, being under no compulsion either of necessity or otherwise, chose to travel by the car. She was injured in an accident caused by the drunkenness of the driver, in which accident, the driver was killed. In an action against the personal representative of the driver, the defendant raised the defence of *volenti non fit injuria.* It was *held* that, except perhaps in extreme cases, the maxim did *not* apply to the tort of negligence, so as to preclude from remedy, a person who had knowingly and voluntarily accepted the risk which might arise from the driver of a car being under the influence of drink, and had been injured in consequence, and that the plaintiff was entitled to recover, the case not being one of the extreme type referred to.

[Note : 1. In *Dann* v. *Hamilton*, the contributory negligence of the plaintiff (which is discussed later in this Chapter) was *not* pleaded in defence. In a subsequent case, *NETTLESHIP* v. *WESTON* (1971 2 Q.B. 691), it was observed that a passenger going with a drunken driver *may be unable to sue, because he is aiding and abetting the offence.*

2. *Dann* v. *Hamilton* was also *not followed* by the High Court of Australia in *Insurance Commissioner* v. *Joyce* (1948 77 C.L.R. 39).]

STANSBELE v. *TROMAN,* (1948) 2 K.B. 48.— A decorator was engaged to carry out decorations in a house. The decorator left the house without locking the doors as the inmates were out. During his absence, a thief entered the house and stole some property, the value of which the householder claimed from the decorator. The Court *held* that the decorator was *liable,* as he had committed a breach of his duty.

BARNETT v. *PACKER & Co.* (1940), 3 All E.R. 575:— The defendants were manufacturers of sweets. A box of sweets manufactured by them was sold to a middleman, who in turn supplied it to the plaintiff. When the plaintiff was putting the sweets in a displaying tray, his finger was injured by a piece of wire in one of the sweets. In a suit filed by the plaintiff, the Court *held* that the defendants were clearly negligent and were, therefore, *liable.*

DAVIES v. *LIVERPOOL CORPN.,* (1949) 2 All E.R. 175.— As the plaintiff was boarding a tram-car belonging to the defendant corporation, an unauthorised person gave the starting signal. The car started, and the plaintiff fell and was injured. The conductor was not, at that time, on the platform, which was his proper place.

It was *held* that the defendants were *liable,* as the conductor was negligent in not remaining on the platform. He should have foreseen that *any* unauthorised person might start the tram.

FOSTER v. *GILINGHAM CORPORATION,* (1942) All E.R. 304.— A crater created by a bomb had been fenced by a local authority, and lamps were placed around it. A strong wind blew out these lamps and the man on night duty failed to turn up that night. A cyclist collided with this unit barrier and sustained injuries.

It was *held* that the local authorities were liable, because if they had kept an obstruction on the road, it was their duty to keep it lighted at night.

FARRUGIA v. *GRANT WESTERN RAILWAY,* (1947) 2 All E.R. 565. — A truck of the defendant company was carrying a large, tall container. The driver tried to go under a low bridge and the container was thrown off the lorry, injuring the plaintiff who was running behind the lorry. The company contended that it was not liable — (i) because the plaintiff was trespassing on the highway, and (ii) because they could not possibly have known of his presence there.

It was *held* that the defendant company was carrying a potential source of danger, and owed a duty of care to anyone who might be on the highway, whether lawfully or unlawfully.

RAMESH KUMAR NAYAK v. *UNION OF INDIA* (A.I.R. 1994 Ori. 279).— In this case, it was *held* that the inaction of the postal authorities to maintain the compound wall of a Post Office in good condition, can be said to be an act of negligence. The Court, therefore, *held* that the person who sustained injuries due to the collapse of the wall would be entitled to compensation.

KILARIMAMMI & OTHERS, v. *BARIUM CHEMICALS LTD.,* (A.I.R. 1979 A.P. 75). — In this case, a driver of a jeep parked it on the street, and went to a tailor's shop, leaving the ignition key in the jeep. Thereafter, *B,* who was waiting in the jeep, and who was not authorised to drive it, started the jeep and caused a serious accident. The Court *held* that the negligent act of the driver in leaving behind the ignition key was the *real and effective cause of the accident,* and since this act was done in the course of employment, the employer of the driver was answerable.

SHIVKAR MOTASINGH v. *RAMNARESH MUNSINGH & OTHERS* (A.I.R. 1978 Guj. 115). — In this case, a boy of about 12 years of age was drowned at a school picnic party and a suit for damages for negligence was filed against (i) the two teachers who had accompanied the 60 boys for the picnic; (ii) the headmaster of the school; and (iii) the Municipal Corporation, which ran the school. The picnic-spot was at a place on the bank of the river *Sabarmati*, and after reaching the spot, the picnic party took food. Thereafter, the two teachers (who were in charge of the picnic party) began eating, when they heard of noise from the river-side, and rushed there. Two boys who were in the river water were rescued by a fisherman, but the third was drowned.

On the above facts, the Court *held* that, in such a case, the *test* to be applied is the test of what a reasonably careful parent would have done in like circumstances. Of course, this test would apply only to an extent, as a parent who takes his boys to such a picnic-spot may ordinarily have to look after two (*or* three, *or* four) boys, whereas here, two teachers were in charge of 60 boys. However, as river water is always an allurement for young boys, and excessive enthusiasm would prove a trap, a greater degree of supervision became necessary. Moreover, the danger could have been foreseen. Thus, reasonable care required that the two teachers ought not to have started taking their food together, and one of them could have supervised the boys' movements. The Court, therefore, *held* —

(i) that the *two teachers* were *guilty of negligence ;*

(ii) *that the Head-master* was *not liable,* as all that he did was to permit the picnic party to be taken out, and this, by itself, can never constitute negligence; and

(iii) that the *Municipal Corporation,* in its capacity as the employer, was *vicariously liable* for damages arising out of this incident.

Cases where the Defendant was held *not liable*

ROBINSON v. *POST OFFICE,* (1974) 1 W.L.R. 1176. — In this case, an employee of the Post Office slipped because of oil on a ladder, and sustained a wound on his left shin. Eight hours later, his doctor gave him an injection of anti-tentanus serum (ATS), but did not follow the accepted procedure of a test-dose. The plaintiff showed no immediate reaction, but nine days later, he developed encephalitis, which resulted in brain damage and permanent partial disability. He filed a suit against *both* the Post Office *and* the doctor, claiming that his injuries and illness were due to the negligence of either or both of them. *The Court dismissed the plaintiff's claim against the doctor holding that the post office was wholly liable.* The Court observed that although the doctor had been negligent in the procedure adopted for applying the test-dose, that negligence had not caused or contributed to the encephalitis.

DICKSON v. *REUTER,* (1877) 3 C.P.D. 1. — *A* sent a telegram to *B* for the shipment of certain goods. The telegraph company, by mistake, delivered the telegram to *C. C,* acting on the telegram sent the goods to *A. A* refused to accept the goods, stating that he had ordered the goods not from *C,* but from *B. C* sued telegraph company for damages for the loss suffered by him.

It was *held* that *C* had *no cause of action against* the company, for the company did not owe any duty of care to *C,* and no legal right of *C* could, therefore, be said to have been infringed.

CAMINER v. *NORTHERN, ETC.,* (1949) 2 K.B. 64. — The defendants owned a 130 year old elm tree, which, to all appearance was free from danger. A gust of wind uprooted it, and it fell on plaintiff's car and damaged it. It was subsequently known that the tree had diseased roots. It was *held* that the defendant could *not* be held liable, since no one knew anything about the dangerous tendency of the tree.

HALL v. *BROOKLANDS AUTO RACING CLUB.,* (1933) 1 K.B. 205. — The plaintiff, who was a spectator, and who had paid for his admission to the defendant's premises, was injured by a racing car. No such accident had occurred in the previous twenty-six years. The defendants were *held* not liable. They were *not* insurers against accidents which could not reasonably be expected to happen.

(The defence of *volenti non fit injuria* would also be available in such cases.)

BOLTON v. *STONE,* (1915) A.C. 850.— The plaintiff was on a road opposite a cricket pitch which was properly fenced. Occasionally, balls did cross over the fence. One ball hit the plaintiff, who sustained an injury. It was *held* that the defendant club was *not* liable.

TINSLEY v. *DUDLEY,* (1951) 2 K.B. 18. — The plaintiff went in a public house for refreshment, leaving his motor-cycle in the compound. The motor-cycle was stolen. It was *held* that the defendant was *not* liable, as he could not be called an insurer of this customer's goods. The Court observed that although the plaintiff was an invitee, the defendant was under no duty to protect the plaintiff's goods from the risk of theft by third parties. Further, as the motor-cycle had not been delivered into the possession of the defendant, and as the defendant was not aware that it had been brought into his premises, he did *not* become a bailee in respect of the motor-cycle. He was, therefore, *not liable* for its loss as a bailee also.

SAFDAR HUSAIN v. *UNION OF INDIA,* (A.I.R. 1978 All. 53). — In this case *A,* a Head Clerk of Northern Railway, who was entrusted with the additional functions of the Chief Booking Clerk, kept the cash-on-hand, amounting to Rs. 10,510, in an iron safe in his office room, placed the key of the safe in a hidden place inside a wooden *almirah* and locked it with his own lock. After the back door of the office was bolted from inside. *A* locked the outer door and went home. On returning to duty the next day, he found that the *almirah* lock had been broken open and the entire cash was gone. The question was whether *A* could be said to be guilty of negligence.

The Court *held,* in the above circumstances, that the railway authorities had *not* provided any place for keeping the key of the safe by its employees when they went home, and that *A*'s act in keeping the safe-key in hidden place in a locked *almirah* rather than in his personal

custody, according to the consistent practice of Chief Booking Clerks, did *not* amount to gross negligence, so as to render him liable for the loss of the cash. In fact, *A* had exercised all the care which was expected to a prudent and reasonable person in the circumstances.

P. PEARL (EXPORTERS) LTD. v. *CAMDEN LONDON BOROUGH COUNCIL,* (1983) 3 W.L.R. 769. — In this English *case,* the defendants had a broken lock on the front door of their premises. During a week-end, thieves entered the defendant's premises and through them, entered the neighbouring premises of the plaintiffs, whose garments they stole. The Court *held* that the defendants did not owe a duty of care to their neighbours, and were, therefore, *not liable* for acts of an independent third party (*i.e.,* the thieves).

Negligence of doctors

The Kerala High Court awarded damages amounting to Rs. 1,60,000 against a surgeon for performing an operation on a 24-year old girl (who ultimately died) under crude and primitive conditions and without even administering local anesthesia. (*Joseph* v. *Dr. George Moonjely,* A.I.R. 1994 Ker. 289)

The Rajasthan High Court has *held* that, in a case against a doctor for damages, if the plaintiff shows that the doctor was in fact negligent, but fails to prove that any loss or injury was caused to him by such negligence, he *cannot* be awarded any damages, and his claim will be dismissed. (*Sidhraj Dhadda* v. *State of Rajasthan,* A.I.R. 1994 Raj. 68)

RES IPSA LOQUITUR

The rule that in action of negligence, the plaintiff must affirmatively prove negligence may cause hardship in cases where the plaintiff can prove the *accident, but cannot* show *how* it happened, the fact being solely outside his knowledge and *within the knowledge of the defendant* who causes it. In such cases, it is sufficient for the plaintiff to prove the *accident* and nothing more, — for there is a presumption of negligence according to the maxim, *"Res ipsa loquitur"* (the thing speaks for itself). Such a presumption arises when the cause of the mischief was apparently under the control of the defendant or his servants. The accident itself constitutes reasonable evidence of negligence in the particular circumstances.

The application of the maxim *"Res ipsa loquitur"* has been explained thus : "Where the thing is shown to be under the management of the defendant or his servants, *and the accident in such as, in the ordinary course of things, does not happen, if* those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the *defendant* that the accident arose from want of care."

In *Byrne* v. *Boadle,* (1863) 2 H & C. 722, the plaintiff was passing along the street and when he came near the defendant's shop, was injured by the fall of a barrel of flour which rolled out of a window on the second floor. There was no evidence on the part of the plaintiff as to *how* the accident happened, beyond the facts that, while on the road, he was knocked down by the barrel, became unconscious and

was injured. It was *held,* that the accident *alone* was *prima facie* evidence of negligence and Pollock, C.B., thus observed : "..... A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witness from the warehouse to prove negligence seems to me preposterous. So in building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be *prima facie* evidence of negligence." It is, therefore, for the *defendant* to *rebut* the *presumption* of negligence.

Write a short note on : Res ipsa loquitur.
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Thus, if a *hammer* falls out of a window, it could be a case of somebody's negligence, or even mischief. But it is *not* a case of *res ipsa loquitur,* because it is not unusual for small things to so fall out.

But suppose a *chair,* or a *cupboard* or a *table* falls out of a window. Surely such articles never fall, or should fall, like that. This very fact is *itself* clear evidence of somebody's gross *negligence* - the fact speaks for itself - *res ipsa loquitur.*

The principal requirement for the application of the maxim is that the mere fact of the accident having happened should tell its own story and raise the inference of negligence, so as to establish a *prima facie* case against the defendant. The story must be clear and umambiguous, and if it tells one of half a dozen possible stories, the maxim *cannot be* applied.

Thus, the following are the *three essential requirements* of the application of the maxim :

(i) The thing causing the damage must be under the control of the defendant or his servants.

Discuss the principle of : Res ipsa loquitur.
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(ii) The accident must be such as would *not,* in the ordinary course of things, have happened without negligence.

(iii) There must be no evidence of the actual cause of the accident.

A classic exposition of the maxim is found in the judgement of Sir William Erle C.J. in the leading English case, *Scott* v. *London & St. Katherine Docks Co.* (1865 3 H & C 596), where it was observed as follows :

> "There must be reasonable evidence of negligence, but where the thing is shown to be under the management of the defendant or his servant, and the accident in such as in the ordinary course of things does *not* happen if those who have the management used proper care, it affords reasonable evidence, in the absence of any explanation by the defendant, that the accident arose from want of care."

In one *case,* where a bus knocked down the plaintiff (who was seated near his shop), it was argued, on behalf of the owner of the bus that there was a latent defect in the vehicle, and that the brakes had suddenly failed and the steering wheel had also gone out of order. The Court observed that notwithstanding the maxim, *res ipsa loquitur,* it is open to a defendant, in a given case, to establish that there was no lack of reasonable care on his part, even though he cannot explain exactly as to how the accident took place. However, the presumption

cannot be rebutted merely by proving latent defects in the vehicle, as the sudden failure of the brakes and the steering wheel can also be due to carelessness on the defendant's part to keep the vehicle in a proper state of repairs. As the defendant had not further proved that all necessary steps were taken for the proper maintenance and up-keep of the vehicle, it was *held* that the plaintiff was entitled to claim damages from the defendant. (*Amina Begam* v. *Ram Prakash,* A.I.R. 1978 All. 526)

VISHNU v. *B.B. & C.I.R.,* 25 Bom. L.R. 881. — *A* travels in a second class compartment of a train of a railway company. The compartment carries a ladder, to reach the upper berths. The ladder, when not in use is kept underneath one of the lower berths. On the occasion in question, some one folds the ladder and keeps it in a rack near the ceiling of the compartment. After an hour's journey, the ladder falls on *A*'s head and causes him injury. *A* sues the railway company for damages.

It would be *held,* in such a case, that this is *not* a case of *res ipsa loquitur.* It cannot seriously be contended that it was the company's duty to see that there was no dangerous article in the rack when the train started.

In one English case, a black-board of a class-room slipped down and fell, injuring one of the students. It was *held* that the mere fall of the black-board was *not* evidence of the teacher's negligence. (*Crisp* v. *Thomas,* (1891) 63. L.T. 756)

The observations of Morris L.J. in *Roe* v. *Minister of Health* (1954 2. Q.B. 66) are interesting. He observed :

> "The maxim possesses no magic quality. Nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin. When used on behalf of a plaintiff, it is generally a short way of saying. " I admit that the facts and circumstances which I have proved establish a *prima facie* case of negligence against the defendant." There are certain happenings that do not normally occur in the absence of negligence, and upon proof of these, a Court will probably hold that there is a case to answer."

The doctrine of *res ipsa loquitur* was applied in a case (*The National Small Industries* v. *Bishambhar Nath,* A.I.R. 1979 All. 35), where combustible material was stored in rooms which were in the exclusive control and supervision of the defendants. It was also shown that only the workers of the defendants had access to those rooms, and that they were in the habit of smoking cigarettes and *bidis* inside the premises during working hours. One day, a fire broke out, causing substantial damage to the building (which was a hundred years old). Applying the doctrine, the Court *held* that, having regard to the common course of natural events and human conduct, it could be presumed that the fire must have been caused because of some negligent act of the defendants or its employees. The Court observed :

> "The rule of evidence, as applied in the case, is fully reflected in the well-established doctrine of *res ipsa loquitur,* which has, in connection with proof of negligence, been consistently followed in this country."

DEFENCES TO AN ACTION FOR NEGLIGENCE

What are the essentials of negligence ? What defences are available in an action for negligence ?
P.U. Apr. 95

The following *three* defences can be raised in an action for negligence, *viz.* (A) *Vis major;* (B) Inevitable accident, and (C) Contributory negligence of the plaintiff.

(A) Vis Major Act of God.

Vis Major (*or act of God*) is such a direct, violent, sudden, and irresistible act of *nature* as could not, by any amount of human foresight, have been foreseen, or, if foreseen, could not, by any amount of human care and skill, have been *resisted.* Thus, acts which are occasioned by the elementary forces of nature, *unconnected with the agency of man or* other cause, will come under the category of acts of God, *e.g.* storm, tempest, lightning, extraordinary fall of rain, extraordinary high tide, extraordinary severe frost, etc.

NIOCHLS v. *MARSLAND,* L.R. 2. Ex. Div. 1. — The defendant had a series of artificial lakes on his land, in the construction or maintenance of which there had been no negligence. Owing to a most unusual fall of rain, so great that it could not have been reasonably anticipated, some of the reservoirs burst and carried away four country barges. It was *held* that the defendant was *not liable,* inasmuch as the water escaped by an *act of God.*

SLATER v. *WORTHINGTON ETC.,* (1941) 1 K.B. 488 — Owing to the extraordinary severe snow-storms, snow and ice had accumulated on the roof of the defendant's premises. No steps were taken to remove the snow or to warn the public of its presence. The plaintiff, while standing on the pavement outside the premises and looking through the window of the defendant's shop, was injured by a fall of snow which had accumulated on the roof. The snow could have been removed from the roof, but this was not done. She claimed damages, alleging nuisance, or alternatively, negligence.

It was *held* that the accumulation of snow constituted a public nuisance of which, in view of the severity of the storms, the defendants must be deemed to have had knowledge; that there was a duty on the part of the defendants to safeguard members of the public using the pavement from the danger occasioned by the snow; and that as they failed to abate the nuisance, they were *liable* both in nuisance and negligence; and that the plea that the storms were acts of God was no defence, as it was the snow, and not the storms, which directly caused the injury.

Define & distinguish "Act of God" and "Inevitable accident" as defences available in tort.
P. U. Oct. '92

CROSSLEY v. *RAWLINSON,* (1982) 1 W.L.R. 369. — The defendant's truck caught fire owing to his negligence, and a patrolman (who was about 100 yards away) grabbed a fire extinguisher and rushed towards the truck. In doing so, he stumbled on a concealed hole on the pathway and injured himself. In a suit by the patrolman against the defendant, the Court *held* that although the fire was caused by the defendant's negligence, the plaintiff's injury was caused by an accident which was not reasonably foreseeable, and therefore, the plaintiff could *not* succeed.

(B) Inevitable accident

The second defence in an action for negligence is that of *inevitable accident.* Thus, *A* is lying drunk on a roadway. *B* approaches in a motor-car round a bend in the road, but just before he reaches the point at which, under ordinary circumstances, he would first see *A,* sheet of newspaper is blown by the wind against his windscreen and materially obscures his view. He runs over *A,* and injures him. Here, *A cannot* succeed, it being a case of *inevitable accident* or misfortune.

CLEGHORN v. *OLDHAM,* (1927) W.N. 147 — *X* was on a golf course as a spectator, and *Y,* who was not striking the ball in a game of golf, but was merely demonstrating a stroke to *X's* brother, negligently struck *X* in the face with the golf club. In a suit by *X* against *Y* for damages, *Y* contended that by going to the golf course, *X* took the risk of such an accident.

It was *held* that *X* was entitled to damages. This is *not* a case of sport or a game, but a regular business.

(C) Contributory negligence of the plaintiff

The *third* defence to an action for negligence is that of the *contributory negligence* of the plaintiff himself.

Discuss the various principles upon which the doctrine of contributory negligence is founded.
B.U. Apr. 97

Definition

Contributory negligence is *negligence* in *not avoiding the consequence arising from the negligence of some other person, when means and opportunity are afforded to do so.* It is the *non-exercise* by the *plaintiff* of such ordinary care, diligence, and skill as would have *avoided* the consequence of the *defendant's negligence.* The law takes into consideration any act or conduct, of the party *injured* or *wronged,* which may have *immediately contributed to that result.* Where such conduct can be proved, the party is considered in law to be the author of his *own* wrong, and it is *fatal* to any action on his part based on the injury. This doctrine is based on the maxims, *volenti not fit injuria* and *in jure non remota causa sed proxima spectatur.* (Both these maxims have been explained in earlier Chapters.)

Thus, a man who keeps his hand outside the window of a railway coach or hangs perilously on the foot-board, knowing the risk in either case, is only inviting the injury, and *cannot* claim damages against the Railway Company.

Whilst the plaintiff was crossing a railway line, a servant of the Railway Company in charge of the crossing shouted a warning to him. Owing to his deafness, the plaintiff was unable to hear the warning, and was consequently injured.

The Court *held* that this amounted to contributory negligence of the plaintiff. (*Shelton* v. *L. & W. Rly.,* (1876) 36 L.J.C.P. 249)

Its principles

The principles of contributory negligence may be summarized as follows :

Discuss fully the defence of contributory negligence with illustrated cases.
B. U. Apr. 90

1. Wherever the *immediate, proximate* or *decisive* cause of the damage is the *plaintiff's own negligence* or want of care and caution, so that, but for such negligence or want of ordinary care and caution on his part, the misfortune would *not* have happened, he is *not* entitled to recover.

Write a short note on : Shelton v. x & W Rly.
B.U. Apr. 97

2. The plaintiff, however, is *not disentitled* to recover, *unless* it is shown (i) that one might, by the *exercise of ordinary care,* have *avoided* the consequences of the defendant's negligence; *or* (ii) that the defendant *could not avoid the consequences* of the plaintiff's negligence by exercise of ordinary care. The question therefore will be : Which of the parties had it *last* in his power to avert the disaster ?

Write a short note on : Contributory negligence.
B. U. Oct. 90
P. U. Oct. 93
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3. If there has been as much *want of reasonable care on the plaintiff's* part as on the *defendant's*, the plaintiff *cannot* sue the defendant.

Burden of proving contributory negligence

The onus of proving affirmatively that there was contributory negligence on the part of the person injured rests, in the first instance, upon the defendant, and in absence of evidence tending to that conclusion, the plaintiff is not bound to prove its non-existence. If the Court finds itself unable to discover to what extent the negligence of the plaintiff or that of the defendant contributed to bring about the accident, the defendant is entitled to succeed, for *in pari delicto potior est conditio defendantis.*

A few decided cases on the doctrine of contributory negligence are given below.

What is meant by contributory negligence ? Discuss the doctrine briefly, and state the exceptions, if any.
B.U. Oct. 94
Apr. 96

GREAT CENTRAL RLY. v. *BATES* (1921) 3 K.B. 578. — A police constable, seeing the door of the defendant's warehouse open after dark, and in order to see that everything was right, and in the execution of his duty, entered the warehouse and injured himself by falling into an unfenced sawpit inside.

It was *held* that he had no legal right to enter, being neither a licensee nor an invitee, but that even assuming he had, the defendant was under no duty to make the place safe for him or to warn him of the danger.

Discuss : Principle of contributory negligence.
P.U. Oct. 94

KERRY v. *KEIGHLEY ELECTRIC ENG. CO.,* (1940) 3 All E.R. 399.— The plaintiff stepped from a lift to the landing of an upper flat, remained for a few seconds on that landing during which the lift door closed, and then according to his own evidence, while keeping his back to the lift, stretched his hand backwards, opened the lift door and stepped backwards through it. The lift was not there, and, in consequence, he fell down the shaft and sustained injuries, in respect of which he sued the defendants, the engineers responsible for the installation and maintenance of the lift, for negligence in its construction and maintenance.

What is contributory negligence ? What are the basic principles that determine the existence of contributory negligence ?
P.U. Oct. 95

It was *held* that the plaintiff was *not* entitled to assume that, because the door opened, the lift would be in place; and, therefore, on his own evidence, he had been guilty of contributory negligence in stepping backwards through the lift door. He was, therefore, *not* entitled to recover.

HANSRAJ v. *TRAM CO.*, 35 Bom. 478.— *A*, in attempting to board *moving* tram car of the Tram-way Company, set his foot on the footboard which was loose and not firmly fixed. *A*'s foot slipped, and as he also failed to get a firm grip of the hand-bar, he fell down and sustained injuries. *A* sued the Company for damage for negligence.

It was *held* that *A* could *not* recover any damages. If *A* had attempted to board the tram-car, while *not* in motion, the condition of the foot-board would not have affected him. As the tram-car was in motion, *A* could not get a firm grip of the hand-bar. It was his own negligent act in boarding a moving car which was the cause of the accident. Hence, the Tram-way Company was *not liable.*

WESTWOOD & ANOTHER v. *THE POST OFFICE* (1973) 3 W.L.R. 287.— In this case, in the office premises of a telephone exchange, there was a lift motor room, with a notice stating that only an authorised attendant was permitted to enter that room. However, the employees of the telephone exchange were in the habit of going on its flat roof for recreation. *W*, a technical officer, was fatally injured by reason of a trap door in the floor of the room giving way.

In the circumstances, the Court *held* that this practice of the employees (of going on the roof) was known to the post office, and was not objected to by them. Further, the terms of the notice of the door of the room had not been such as to suggest that there was any danger in the room. Further, the fact that the man was a trespasser had no bearing on what he might or might not reasonably foresee as possibly causing him hurt. If at all, *W* was guilty of disobedience, but *not* of negligence, and he was therefore, not guilty of any contributory negligence.

THE MUNICIPAL BOARD v. *BRAHM KISHORE* (A.I.R. 1978 All. 168.)— In this case, the plaintiff, while returning from his club on a bicycle, fell into a ditch at about 6.15 p.m. The municipality had dug this ditch for repairing a culvert, and there was no light or danger signal or barricade or other caution notice. In a suit filed by the plaintiff (who had sustained considerable injuries), the Municipality contended that it was not liable under the doctrine of contributory negligence, as the plaintiff's cycle had no lamp on it. Rejecting this argument, it was *held* that the benefit of the defence of contributory negligence was *not* available to the Municipality, which had failed to carry out its statutory duties. Moreover, an ordinary bicycle lamp would not radiate enough light to any considerable distance. The benefit of the doctrine of contributory negligence was therefore, *not* available to the Municipality.

GUJARAT STATE ROAD TRANSPORT v. *KESHAVLAL SOMNATH PANCHAL*, A.I.R. 1981 Guj. 205.— The Gujarat High Court has *held* that an injured passenger who had sat in a bus with the arm resting on the window, and the elbow protruding about six inches from the window *cannot* be said to be guilty of contributory negligence, when a truck came from the opposite side and struck the elbow, fracturing it in the process. The slight protrusion of a passenger's arm out of a window is a common occurrence, and is not a thing which is obviously fraught with danger. In fact, it was the duty of the truck driver to so manoeuvre his own vehicle that it did not touch either the bus or any part of a passenger's arm which may be resting on the window.

Contributory negligence is, however, *no defence* in the following *five* cases :

1. Where rightful acts are assumed

Contributory negligence is *not* a good defence in cases where the plaintiff is not bound to take such care as the defendant contends, but has a right to assume that the defendant has done all things rightly and carefully.

GEE v. *METROPOLITAN RLY. CO.*, (1873) 8 Q.B. 161.— In this case, the plaintiff, in company with his brother, was travelling by an underground railway. When the train was in motion, he got up for the purpose of looking out of the window, in order to point out some object to his brother. In doing so, he placed his hand against a bar which went across the carriage window, when the door immediately flew open, and he fell out and was injured.

It was *held* that the plaintiff could recover, although he could easily have avoided the accident by the simple precaution of examining the door handle; he was, however, not bound to take that precaution, but was entitled to assume that the company's servants had done their duty by fastening the door.

BUTTERFIELD v. *FORRESTER*, (1809) 11 East 60.— The defendant wrongfully obstructed a street by placing a pole across it. The plaintiff was riding home at dusk when there was sufficient light to notice the obstruction, but galloping at high speed, he came into collision with the pole and was injured.

It was *held* that he had no cause of action. Notwithstanding the defendant's negligence, the plaintiff might have avoided the accident by the use of due care.

2. Where defendant had later opportunity

Contributory negligence of the plaintiff is no defence if the defendant had a *later opportunity* than the plaintiff of avoiding the accident by reasonable care.

DAVIS v. *MANN*, (1842) 10 M. & W. 546, 549.— The plaintiff had negligently left his donkey with its legs tied in a narrow lane, and the defendant, who came with his wagon at a fast pace negligently ran over the donkey. It was *held* that the plaintiff was entitled to his remedy, notwithstanding any negligence on his part, isasmuch as the accident might have been avoided by the exercise of ordinary care on the part of the driver, *e.g.*, by going at such a pace as would be likely to avoid the mischief. "Although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man may justify the driving over goods left on a public highway, or even over a man lying asleep there, or purposely running against a carriage going on the wrong side of the road.'

Explain the rule laid down in : Davis v. *Mann.*
B. U. Apr. 97
Oct. 97
P. U. Oct. 92
Apr. 95

3. Doctrine of alternative danger

Write a short note on : Doctrine of alternative danger.
P. U. Apr. 92

The third exception to the rule of contributory negligence is, what is known as the *"doctrine of alternative danger."* Where the defendant has

placed the plaintiff in a situation of *extreme peril*, he cannot set up the defence of contributory negligence, merely because the plaintiff, acting under a reasonable apprehension of danger and in a reasonable and prudent way, has adopted a perilous way of escape.

Thus, in *Jones* v. *Boyce*, (1 Stark 493), the defendant, a coach driver, was *held* liable for injuries suffered by the plaintiff who jumped out of the coach when, by reason of the defendant's negligent driving, an accident seemed imminent, for the defendant had placed the plaintiff "in such a situation as obliged him to adopt the alternative of a dangerous leap or to remain at certain peril," In such cases, it is immaterial whether the plaintiff has acted, not for his own preservation, but instinctively for the preservation of another - *e.g.*, a wife for her husband : *Brandon* v. *Osborne, Garrette and Co.*, (1924), 1 K.B. 548.

BRANDON v. *OSBORNE.*— Owing to the negligence of defendant's workmen, broken glass fell on the plaintiff's husband. She was standing under cover, but immediately seized her husband and tried to pull him to safety. In so doing, she injured her leg. It was *held* that there was no contributory negligence.

Choice of evils

The doctrine of alternative danger or choice or risks is an exception to the rule that the contributory negligence of the plaintiff would debar him from recovering damages from the defendant. Though the plaintiff might have in fact contributed to the injury to himself, yet, if he had been placed *in a perilous situation by the defendant's negligence*, and being so placed, he was *obliged to choose between two apparent dangers and chose one, with the result that he was injured,* in such circumstances, the plaintiff would be entitled to recover. The defendant can escape liability only by proving that the plaintiff had acted with less than average prudence and care.

RIDLEY v. *MOBILE RLY. CO.*, (1905) 86 S.W. Rep. 606.— An engine belonging to company *A* was passing a level crossing without giving a whistle. *B*, seeing a child on the level crossing in imminent danger of being run over by the engine, rushed in and saved the child; but in doing so, fell down and one of his legs was cut off.

The Court *held* that the law allows a person some liberty of action to save another in a position of great peril, and fixes the responsibility for harm on the original wrong-doer, who caused the peril, as here, by passing a level crossing without giving a whistle. The law has so high a regard for human life, that it will not impute negligence, *unless* the act is clearly rash and negligent. Therefore, *B* can successfully claim damages from *A*.

4. Maritime law

The doctrine of contributory negligence is also *not* applicable to Maritime Law. It is the duty of seamen to observe the regulations for the prevention of collisions at sea. When a collision takes place as a result of the negligence of the crew of two vessels, under the Maritime Conventions Act, the liability is apportioned in proportion to the degree of negligence. When such degrees of negligence cannot be proved, the liability is apportioned equally.

5. Children

The doctrine of contributory negligence also does *not* apply to cases involving *children.*

CONTRIBUTORY NEGLIGENCE OF CHILDREN

As the doctrine of contributory negligence does *not* generally apply to children, it is *no* defence to say that the *child itself* was negligent, for negligence is a state of *mind*, and children are *not* expected to have sufficient intelligence to judge as quickly as an adult. The rule as to contributory negligence will not inflexibly apply in cases where young children are concerned. The defence of contributory negligence is more difficult to make out against a *child* than against an *adult*. The plaintiff who is a child will *not* be disentitled to relief, merely because he or she has failed to show as much care as a person of mature age. Allowance must be made for lack of experience and infirmity of judgement in children. The rule seems to be that an infant *can* recover, *although* the infant's own *conduct contributed to the injury*, if the defendant is shown to have failed in his duty to the infant.

Of course, if the child is proved to have sufficient maturity of understanding, his own contributory negligence may go against him. Thus, the Madras High Court has *held*, in *M, and S.M. Railway Co. Ltd.* v. *Jayammal*, (1924) 48 Mad. 417, where a girl of seven years was knocked down by an engine while she was crossing the railway line after passing through a wicket gate, that the proximate cause of the accident was the negligence of the girl in not looking out for a passing engine, when she was crossing the line and that she was *capable of appreciating danger* and was *old enough to* have a sense of *discrimination;* she was therefore guilty of contributory negligence.

Explain the principle laid down in : Lynch v. Nurdin. P. U. Apr. '91

LYNCH v. *NURDIN*, (1841) 1 Q.B. 29.— The defendant left his cart and horse unattended in a street where some boys were playing. The plaintiff, a boy, was climbing into the cart, while another pulled the bridle, the horse moved on, and the plaintiff fell down under the wheel of the cart and was injured. The Court *held* that the defendant was *liable.*

GLASGOW CORPORATION v. *TAYLOR*, (1922) A.C. 44.— In this *leading English case,* the Corporation maintained a public garden wherein there were shrubs, containing berries, which looked luscious and attractive, but were in fact poisonous. The plaintiff's son, a child of seven, entered the garden and ate one of the fruits and died. The defendants were *held liable*, as they placed an allurement within the reach of the child, without any fencing or warning as to its poisonous character.

COATES v. *RAWTENSTALL*, (1937) 3 All E.R. 602.— The defendants maintained a children's recreation ground, which, among other amusements, included a children's slide. The plaintiff, an infant, aged four years, attended by a boy aged fourteen, while sliding, collided with a chain, which had been improperly fixed, and was seriously injured. The chain was required for the purpose of preventing the use of the slide on Sundays, and was kept padlocked to a pole when not required. It was found that the attendant in charge had

negligently failed to secure the chain to the pole, whereby some other child was able to remove it and fix it across. In an action for damages, the defendants pleaded that recreation ground was meant for children of school-going age only, and the plaintiff was a trespasser.

The Court *held* that the plaintiff was accompanied by a competent guardian and was, therefore, a licensee. The injuries to the plaintiff were caused by a danger which was known to the defendants. Therefore, the defendants were *liable*.

YACHUK v. *OLIVER*, (1949) A.C. 386.— By an untrue statement, a boy aged nine years, who was accompanied by his brother aged seven, prevailed on an employee of the defendant company to sell him a small quantity of petrol. The employee had doubts as to propriety of the sale, for, before the two children were beyond recall, he informed the assistant manager and asked him to confirm that he had acted rightly. The children wanted the petrol for use in a game in which they enacted a Red Indian scene they had witnessed in a film. In the result, the boy was seriously burnt.

It was *held* that, in view of the fact that the boy's story was such as to arouse, rather than to allay, suspicion in the mind of a reasonable man, the fact that he told a lie to obtain the petrol, could *not* help the defendants. The court *also held* that the defendants' employee, having given an explosive substance to a boy who had limited knowledge of the likelihood of an explosion and its possible effect, and the boy having done that which a child of his age might be expected to do, the defendants could *not* also avail themselves of the defence of contributory negligence. The Court observed that the employee's negligence contributed to cause the injuries suffered by the boy, and it was impossible to say that a new cause had intervened so as to relieve the defendants from all responsibility for the serious consequences which followed their wrongful act.

DOCTRINE OF IDENTIFICATION

The doctrine of identification can be explained thus : *Where a child is in the actual custody of an adult at the time of the accident,* the contributory negligence of the adult *will disentitle the child from recovering damages,* because the child is so identified with the adult that *his* negligence would amount to the negligence of the child. So, a *special application of the doctrine of identification* is to be met with where an *infant*, who is incapable of taking care of himself and is in charge of an adult, suffers injury owing to the negligence of the *third person, as well as the* contributory negligence of the *custodian.*

Explain the doctrine of identification.
P. U. Apr. 91

At one time, it was thought that the contributory negligence of an adult *having actual custody of a child at the time of the accident* would be a *bar* to an action by the child against the other party whose negligence helped to bring about the accident. In *Waite* v. *N.E. Rly.*, (1858) E.B. & E. 719, a child of five under the control of its grand-mother was injured by a train owing to the contributory negligence of the grandmother. It was *held* that the child had to be identified with its grand-mother, and so had no right of action against the company.

But the doctrine of identification laid down in this case has been *overruled* since the decision in *Mills* v. *Armstrong* (below).

MILLS v. *ARMSTRONG*, (1888) 13 App. Cas. 1.— An infant, four years old, was crossing a road under the care of his grand-father. He was struck by a motor omnibus and received permanent injuries to his left hand. The infant sued the Omnibus Company for damages sustained by him through the negligent driving of the omnibus belonging to the Company. The jury found that the accident occurred through the negligence of the driver of the omnibus and the contributory negligence of the grand-father. It was *held* that, nevertheless, the infant *could* recover damages.

In another case, *Oliver* v. *Birmingham and Midland Motor Omnibus Co. Ltd.*, (1913) 1 K.B. 35, Macanghten J. Said, "If the accident was due solely to the negligence of the person in whose care he was, there seems to be doubt that he could recover from the person. If the accident was due solely to the third person, there is no doubt he could recover compensation from the third person. It would indeed seem very odd that if the accident was due to the combined negligence of both, he should be without remedy."

In short, where a child is *in the actual custody of an adult at the time of the accident*, the contributory negligence of the adult will *not* disentitle the child from recovering damages.

Law Reform (Contributory Negligence) Act, 1945

Is the defendant absolutely excused from the tortious liability of negligence if contributory negligence is set up as a defence and proved? Also discuss the exceptions to contributory negligence.
B. U. Oct. 93

In England, the doctrine of contributory negligence has been abolished by the Law Reform (Contributory Negligence) Act of 1945, which lays down that if any person suffers damage as the result partly of his *own* fault and partly of the fault of any *other* person or persons, a claim for damages will *not* be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof are to be *reduced* to such extent as the Court thinks just and equitable, having regard to the claimant's share in the responsibility for the damage. The Act does not alter the existing law as to determining whether or not there has been contributory negligence; it only alters the law as to the damages recoverable where contributory negligence is established. The Act provides that any defence arising under a contract is unaffected. The Act is also extended to the Workman's Compensation Acts of 1925-1948, subject to certain conditions.

At common law, if there was contributory negligence on the part of the plaintiff, he could *not* recover at all. But the Law Reform (Contributory Negligence) Act, 1945, allows him to recover; but the amount of damages is reduced in proportion to his responsibility for the damage.

A husband, who sues for damages caused to him by reason of injuries negligently inflicted on his wife, sues in his own right, and the fact that the wife was guilty of contributory negligence *neither* defeats his claim at common law, *nor* causes any diminution of his damages under the Law Reform (Contributory Negligence) Act, 1945.

17

TORTS OF MALICIOUS ABUSE OF LEGAL PROCESS

The torts of malicious abuse of legal process can be divided under the following *four* heads :

1. Malicious *Criminal* Prosecution
2. Malicious *Civil* Proceedings
3. Malicious *Arrest*
4. *Maintenance* and *Champerty.*

1. MALICIOUS CRIMINAL PROSECUTION

Definition

Malicious criminal prosecution may be defined as the institution, against an *innocent* person, of *unsuccessful criminal, bankruptcy, or liquidation proceedings, without reasonable and probable cause*, and in a malicious spirit, i.e., from an indirect and improper motive, and *not* in furtherance of justice, and which causes damage to the plaintiff in person, pocket or reputation.

Write a short note on : Abuse of legal process.
P. U. Oct. 93

ITS ESSENTIALS

In an action for malicious criminal prosecution, the plaintiff will have to fulfil the following *five* conditions :

Explain : Malicious prosecution.
P.U. Oct. 95
Apr. 96

1. Prosecution

The plaintiff has to prove that he was *prosecuted* by the defendant on a *criminal* charge or in *bankruptcy* or *liquidation* proceedings.

It has been *held*, in an English case, that if *A* makes a false complaint to a judicial officer, and *B* is taken into custody under the orders of the judicial officer, *A* would be *liable* in damages *for malicious prosecution, but not for false imprisonment.* (*Austin* v. *Dowling*, 1870 L. R. 5 CP 534)

The Courts in India have, however, *held* that if a person gets another person arrested by the police on the basis of a false complaint, he is *liable for damages for false imprisonment.* (*Gouri Prasad Dey* v. *Chartered Bank*, 1925 ILR 52 Cal. 615; *Sakik Khan* v. *Taffazal Khan*, 1939 43 CWN 1080)

2. Termination of proceedings in plaintiff's favour

What is abuse of legal process ?
P. U. Apr. 91

No action for malicious prosecution lies until the prosecution or other proceeding has terminated *in favour* of the person complaining of it. There need not have been an *acquittal on the merits;* it is enough if the prosecution has been *discontinued*, or if the accused has been *discharged,* or if a conviction has been *quashed* for some defect in the proceedings, or if the order granting sanction to prosecute is set aside on appeal.

3. No reasonable and probable cause

The third requirement is that the defendant, in so prosecuting, acted *without reasonable and probable cause.* If there are reasonable grounds for the defendant's instituting the proceedings, he would *not* be liable, *even if his motive was improper.* There must be an *honest* and *reasonable* belief in the guilt of the accused; *mere suspicion* is not enough.

Write a short note on : Abrath v. N. E. Rly. Co.
P.U. Apr. 94

ABRATH v. *NORTH-EASTERN RLY. CO.*, (1886) 11 App. Cas. 247.— *M* had recovered from the defendant railway company large sums as compensation for personal injuries in respect of a railway collision. Subsequently, the railway got some information that the injuries of *M* were *not* caused by the collision, but were artificially caused by Dr. *A* (the plaintiff), the surgeon of *M.* The railway made inquiries and, with legal advice, prosecuted *A* for conspiracy, but he was acquitted. In an action brought by *A* for malicious prosecution against the railway, it was *held* that the defendants were *not liable,* as they *did* take *reasonable* care to inform themselves of the true facts, and they *honestly* believed in the case. It was the plaintiff's duty to show absence of reasonable cause, and the defendants were, therefore, *not liable.*

Define Macilious criminal prosecution. How does tortious liability arise for malicious criminal prosecution ?
P.U. Apr. 97

The Calcutta High Court has reiterated that in a suit for malicious prosecution, the *onus* of establishing the absence of reasonable and probable cause in launching the criminal prosecution lies on the plaintiff. The only fact that the criminal proceeding (based on a complaint lodged by the defendant) ultimately resulted in the acquittal of the plaintiff does *not* allow the Court to draw a presumption of absence of reasonable and probable cause to lodge the complaint. (*Sachindra Nath Choudhary* v. *Labangalata Sarkar and Others,* A.I.R. 1980 Cal. 121)

The same view was also expressed by the Gujarat High Court in a case where *A* agreed to sell his house to *B*, and the latter paid the earnest money. *A* had not disclosed that the house was burdened with mortgages, and on coming to know about these mortgages, *B* filed a criminal case against *A*, wherein *A* was ultimately discharged. On the question whether the prosecution of *A* was malicious, the Court *held* that in order to bring home the charge of malicious prosecution and to sustain a suit for damages, the plaintiff must establish that the prosecution was *not* commenced *bona fide,* but only with a view to harass the plaintiff. In the circumstances, it was *held* that *A*'s suit was *not maintainable.* (*Bhogilal Saoghani v. Dr. Ranpura,* A.I.R. 1979 Guj. 200)

4. Malicious intent

The next requirement is that the prosecution was instituted with a *malicious intention, i.e.*, from an *indirect* and *improper* motive, and *not* in furtherance of justice. The *gist* of the action of malicious prosecution is *malice* or *improper motive.* Malice is *not* to be *inferred* from the *absence of reasonable cause;* the two must *unite* to create liability. Malice, in this connection must be express malice, *i.e.,* malice in fact.

It may be noted that *malicious prosecution is one of those few wrongs where improper or wrongful motive is essential to constitute liability.* No action will lie for the institution of legal proceedings, however destitute of reasonable and probable cause, *unless* they are instituted maliciously.

There may be malice either in *commencing* a prosecution *or* in *continuing* one which was honestly begun. A prosecution, though at the outset not malicious, may nevertheless so *become in any of the stages* through which it has to pass, if the malicious prosecutor, having acquired positive knowledge of the innocence of the accused, goes on with the prosecution. So, a prosecution which is *honestly* begun may, due to the *subsequent* conduct of the prosecutor, become *malicious.*

5. Damage

The last requirement is that the plaintiff has suffered *damage* as a result thereof. The plaintiff must prove that he has suffered in person, reputation or pocket, when the proceedings are those *other* than criminal, *e.g.,* bankruptcy proceedings.

GENERAL TOPICS

Liability of a corporation for malicious prosecution

A corporation is liable for torts committed by its agent or servant to the same extent as a principal is liable for the torts of his agent, or an employer for the torts of his servant, *provided* that the tort is committed in the course of doing an act which is within the scope of the powers of the corporation. It may thus be liable for assault, false imprisonment, trespass, conversion, libel or negligence.

It was thought, *at one time*, that a corporation could *not* be held liable for wrongs involving malice or fraud, on the ground that to support an action for such a wrong, it must be shown that the wrong-doer was actuated by a motive in his mind and that "a corporation has no mind". But, it is *now* well-settled that a corporation acts throught its officers, and can become liable for wrongs even of malice and fraud. A corporation, therefore, may be sued for malicious prosecution or for deceit.

'Malicious prosecution' and 'false imprisonment' distinguished

There are *four* points of distinction between malicious persecution and false imprisonment.

1. *Definitions*

Malicious prosecution is wrongfully *setting the criminal law in motion;* false imprisonment is wrongfully *restraining the personal liberty* of the plaintiff.

2. *Ministerial or judicial officer set in motion*

Distinguish between 'Malicious Prosecution' and 'False Imprisonment'.
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In false imprisonment, the personal liberty of the plaintiff is wrongfully restrained by a *private individual, either personally or by setting a ministerial officer* in motion, while in malicious prosecution, the arrest is secured *under judicial sanction.* The question whether a person is liable for false imprisonment or malicious prosecution often turns upon the question whether the defendant has set a *ministerial or judicial officer in motion.*

Explain the principle laid down in : Austin v. Dowling.
P. U. Apr. 91

This distinction was pointed out in *Austin* v. *Dowling,* (1870) L.R. 5 C.P. 534, 540 thus : "The distinction between false imprisonment and malicious prosecution is well-illustrated by the case where parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment because he does not set a *ministerial* officer in motion, but a *judicial* officer. The opinion and the judgement of a judicial officer are interposed between the charge and the imprisonment."

Discuss the law relating to false imprisonment, and distinguish between false imprisonment and malicious prosecution.
B. U. Oct. 92

3. As to malice

Malice is an *essential ingredient* in an action for malicious prosecution, but *not* in that of false imprisonment; in an action for false imprisonment, it is *not necessary* for the plaintiff to prove that the defendant was actuated by malice.

4. As to onus of proof

In false imprisonment, the *onus lies on the defendant to plead and prove affirmatively* the existence of reasonable and probable cause as his justification, whereas in an action for malicious prosecution, the *plaintiff must allege and prove its* non-existence.

2. MALICIOUS CIVIL PROCEEDINGS

Though an action for damages for malicious *criminal* prosecution is competent in law, the law does *not* recognize an action for a malicious institution of a *civil* suit. An action will *not* lie for maliciously, and without reasonable and probable cause, instituting an *ordinary civil suit.* But in respect of a false and vexatious claim, the Court can, under S. 35A of the Civil Procedure Code, award *compensatory costs.*

But there *are* certain civil proceedings in which a party's reputation is at stake, and the law allows an action for damages where such civil proceedings are initiated *maliciously.* Thus, damage to reputation is presumed in the following *three cases* :

1. Where the plaintiff is sought to be adjudged a *bankrupt,* and proceedings for *bankruptcy* are taken against him, and ultimately such proceedings are *dismissed*, the law allows an action for malicious bankruptcy proceedings.

2. Similarly, an action lies for instituting proceedings maliciously and without reasonable cause for declaring a person to be *lunatic.*

3. Again, the law allows an action for filing an application maliciously and without reasonable cause for *winding up or liquidation of an incorporated company.*

The Bombay High Court has *held* (in *G.G. Shivale* v. *B.J. Raisoni*, A.I.R. 1981 Bom. 170) that in order to succeed in establishing malicious abuse of civil proceedings, the plaintiff must prove the following *three* things :

(a) *Firstly*, malice must be proved.

(b) *Secondly*, the plaintiff must prove that the defendant had acted without reasonable and probable cause, and the earlier proceedings had terminated in his favour.

(c) *Lastly*, he must also prove that such civil proceedings interfered with his liberty or property or adversely affected his reputation.

The plaintiff's suit in the above case was dismissed, and the Court was heard to observe : "One seldom comes across an action (in torts) for malicious civil proceedings."

3. MALICIOUS ARREST

Definition

Explain the tort of malicious arrest.
P. U. Apr. 91

Malicious arrest is *wilfully putting the law* in motion to effect the arrest of another, under civil process, *without reasonable and probable cause.* It is *not* actionable, *unless* it involves interference with personal *liberty.*

Write a short note on : Malicious arrest.
P.U. Oct. 97

The plaintiff must show—

(i) that the original action, out of which the injury arose, was *decided in his favour;*

(ii) that the arrest was *procured maliciously and without reasonable and probable cause; and*

(iii) that the damage or injury sustained was something other than an injury that has been, or might have been, compensated for by an award of the costs of the suit, that is, he has *suffered from a collateral wrong.*

If a person sets the process of a Court in motion and the wrong person is arrested, he is only responsible if he has obtained such process *fraudulently* and *improperly.* If he truly states the facts and the judge thereupon does an erroneous act, he is *not liable.*

4. MAINTENANCE AND CHAMPERTY

Definition

Maintenance is the officious *intermeddling* in an action (*i.e.* a suit), by supporting it with money or otherwise, by a *third* person i.e., *not* a party to a suit, in which he himself has *no legal interest,* to enable the person to prosecute or defend it. Where a person agrees to maintain a suit in which he has no interest, the proceeding is known as *maintenance;* where he *bargains for a share of the result* to be ultimately decreed in a suit in consideration of assisting its maintenance, it is known as *champerty.* Both these agreements are declared unlawful in England, on account of the illegality of their object, as they tend to encourage litigation which is *not bona fide,* but *speculative.*

Explain the doctrine of maintenance.
P. U. Oct. 91

It will be noted that all cases of champerty are also cases of maintenance, but the converse is not necessarily so. Lord Abinger observes : "The law of maintenance is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others to bring actions or to take defence which they have no right to make." It should be noted that the person maintaining the

suit acts through *spite*. *Malice* is of the *essence of the action*. The law, it is said, presumes or implies malice in all cases of maintenance on proof of officious assistance. But this presumption may be rebutted by the defendant by showing—

1. That he had a *common interest* in the action with the party maintained, *e.g.* master for a servant or *vice versa*, brothers, kinsmen, etc., *or*

2. That he was implied — (i) by motives of charity, *bona fide* believing that the person maintained was poor and was harassed by a rich person (though the charity may be misguided and the action groundless), or (ii) by religious sympathy.

Write a short note on : Maintenance and champerty.
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BRADLAUGH v. *NEWDEGATE*, (1883) 11 Q.B.D. 1.— Charles Bradlaugh was elected a member of Parliament and took his seat and voted on a motion without taking the prescribed oath. A penalty was proved by the statute for cases where persons without taking the oath participated in the proceedings. The defendant instigated and assisted another to file a suit against the plaintiff for recovery of the statutory penalty. The plaintiff filed an action for maintenance against the defendant. It was *held* that the action *was* maintainable.

INDIAN LAW.— The English Law of maintenance and champerty is *not* in force in India. In a Privy Council case *Bhagwat Dayal Singh* v. *Devi Dayal Sahu*, their Lordships *held that* "an agreement champertous according to English law is *not* necessarily void in India; *it must be against public policy to render it void here.*"

In India, a *fair* contract to share the result of the action, if successful in consideration of providing the means of carrying it on, is *not* void, as it is *not* contrary to public policy. But, if it is found to be *exortionate and unconscionable* or if it is made, *not* with the *bona fide* object of *assisting* a claim, but for the purpose of *gambling in litigation*, or of *injuring or oppressing others by abetting and encouraging unrighteous suits*, it is *void*.

18

TORTS OF INJURIOUS FALSEHOOD

Torts of injurious falsehood fall under the following *four* categories :

1. Fraud or deceit
2. Slander of *title*
3. Slander of *goods*
4. Action of *passing-off,* i.e. infringement of trade-marks, patents and copyrights.

1. FRAUD OR DECEIT

PASLEY v. *FREEMAN,* (1789) 3 T.R. 51. — The tort of deceit was first recognised in *Pasley* v. *Freeman* (1789 3 T.R. 51), where it was laid down that this tort has the following *four* elements :

Explain and illustrate the tort of deceit.
B. U. Apr. 91
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(1) There must be a false representation of fact.

(2) The representation must be made with the knowledge of its falsehood.

(3) It must be made with the intention that it should be acted on by the plaintiff, or by a class of persons which includes the plaintiff, in the matter which resulted in damage to him.

(4) It must be proved that the plaintiff has acted upon the false statement, and has sustained damage by so doing.

'Fraud' (deceit) defined

Fraud has been defined as "a *false* representation of a *fact* made *with the knowledge of its falsehood,* or *without* belief in its truth, or a reckless statement, whether it be true or false, with intent to *induce* a person to *act* in reliance upon it, with the result that the person *acts* on it *and suffers damage."*

In order to sustain an action for deceit, the plaintiff must prove the following *four* **requirements of this tort :**

What facts are to be satisfied in order to maintain an action for deceit ? Illustrate any leading cases on the subject.
P.U. Apr. 96
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1. False representation

A representation, in order to be fraudulent, must be a representation which is *untrue in fact.* There must be an *active* attempt to deceive by a statement which is *false* in *fact* and *fraudulent* in *intent.* Again, it must be representation of *fact,* and must not be a mere *expression of opinion.*

Ordinarily, mere *non-disclosure* of a fact does *not* amount to a fraud, but there are certain *exceptional cases* where *non-disclosure will amount to fraud.* Thus, where there is a *duty to disclose,* active *concealment* will amount to fraud. This duty may arise in several ways :

(i) a duty which a person owes to the world at large, such as not to leave a loaded gun in a public place; *or* (ii) a duty arising out of *fiduciary relationship* between the parties; *or* (iii) a duty arising out of the *nature of the contract,* as when it is *uberrimae fidei.*

In the leading case of *PASLEY* v. *FREEMAN,* (1789) 3 T.R. 51, the plaintiff was dealing in cochineal, and had a large stock on hand, which he was anxious to dispose of. The defendant approached the plaintiff saying that he knew Mr. *F,* who would purchase the cochineal. When the plaintiff inquired, "Is he a respectable and substantial person ?" The defendant replied, "Certainly, he is", knowing full well that Mr. *F* was actually insolvent. On the faith of this representation, the plaintiff delivered 16 bags of cochineal, worth about £ 3,000 on credit. When the plaintiff learnt that he could not recover his money from Mr. *F,* as the latter was insolvent, he filed a suit against the defendant for making a false representation to him, whereby he had suffered the loss. The Court *held* that the defendant was liable to the plaintiff, to the extent the latter had suffered in consequence of the false statement of the former as to the credit and character of Mr. *F.*

2. Knowledge of its falsity

Secondly, the plaintiff must prove that the defendant *either* knew that the statement was false, *or* made it *without belief in its truth,* or was *reckless,* whether it was true or not. Consequently, if a man makes a false statement, *honestly believing it to be true,* he *cannot* be rendered liable in an action for deceit. In the leading case of *Derry* v. *Peek,* (below), the House of Lords definitely laid down that a statement made with *honest* belief in its *truth* could *not* render the maker liable in an action for damages for deceit.

Explain the various ingredients of deceit, with special reference to the facts and principles laid down in Darry v. *Peek.*
B. U. Oct. 93

DERRY v. *PEEK,* (1889 14 A.C. 337). — The defendants were directors of a tramway company which had power, by a special Act, to run tramways and, with the consent of the Board of Trade, to use steam power to move the carriages. As the plans of the company had already been approved by the Board of Trade before the Act was passed, the directors *assumed* that the consent of the Board to use steam power, which had to be obtained *after* the Act was *passed,* would be given *as a matter of course,* and issued a Prospectus containing a statement that the company had the right to use steam power. The Board of Trade, however, subsequently refused their consent, and the company was wound up. The plaintiff, a shareholder, sued the directors for damages for the loss caused by his taking shares on the faith of the false statement in the Prospectus. The Court *held* that though the statement in the Prospectus was in some respects *careless,* it was made with an *honest belief* in its *truth.* The defendants were, therefore, *not liable* in an action for deceit.

Write a short note on : Deery v. *Peek*
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It may be noted that, under the current privisions of the Companies Act, both in India and in England, the Directors of a company *would be lible* in such a case.

Exceptions to the rule in *Derry* v. *Peek*

Discuss the rule in Derry v. *Peek. When is it not applied ?*
B. U. Apr. 86

The rule in *Derry* v. *Peek* is subject to the following *seven* exceptions :

(a) *Contractual duty.* — When there is a contractual relation between the plaintiff and the defendant, which involves a contractual duty to use care, *the rule does not apply.*

(b) *Fiduciary relationship.* — Where there is a breach of special duty, whether arising from the fiduciary relationship of the parties or the special circumstances of the case, the defendant will be liable.

Discuss the rule in Derry v. Peek, and explain the various exceptions to that rule.
B. U. Apr. 90

(c) *Warranty of authority.* — Every person who purports to act as an agent of another is deemed in law to have entered into an implied contract of warranty of authority with any person who contracts or otherwise deals with him on reliance of his authority.

(d) *Estoppel.* — When a person has, by his statement, intentionally caused another person to believe a thing to be true and to act upon such belief, he is *not* allowed to deny its truth.

(e) *Where Directors of a Company issue a Prospectus.* (Thus, although *Derry* v. *Peek* was decided with reference to directors issuing a Prospectus, due to subsequent changes in the law, the law laid down therein is no more applicable to directors of a company.)

Discuss fully the rule in Derry v. Peek.
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(f) Where there is *statutory duty* to give correct information.

(g) Where a statement is made in relation to *property of* a dangerous character.

3. Plaintiff to act upon it

The *third* requirement is that the plaintiff must prove that the defendant made it *with intent* that the plaintiff should *act* upon it.

In one English case, the defendant had sold a gun to the plaintiff, for the use of himself and his son, representing that the gun was made by a well-known maker, and was therefore, quite safe. When the son used the gun, it exploded in his hand. In a suit filed by the son against the defendant, the Court *held* that the defendant was liable to the son, not on the warranty (as there was no contract between the son and the defendant), but for deceit. (*Langride* v. *Lery* (1837) 2 M. & W. 519)

It may be noted that the decision in the above case turns on the fact that the representation was made with a view that the plaintiff (i.e. the son) should be one of the persons acting upon it. Therefore, if the injured person was a mere stranger, who had found the gun lying idle in the house and fired it, and had been hurt thereby, the decision of the Court would *not* have been the same.

4. Damage to plaintiff

Lastly, the plaintiff must prove that the plaintiff *acted* in *reliance* on the statement *and suffered damage* in consequence. No action will lie for a false statement *unless* the plaintiff, in fact, *relies* upon it. A mere *attempt* to deceive is *not* actionable. This is expressed in the epigram, *"Deceit which does not deceive is not fraud."*

The gist of the action is *fraud as well as damage.* Fraud *without* damage, or damage *without* fraud, will *not* be a good ground for a successful suit; but where *both* concur, an action *will* lie.

WARD v. *HOBBS,* (1877) 3 Q.B.D. 150. — The defendant sent for sale to a public market, pigs which were to his knowledge infected with a contagious disease. They were exposed for the sale subject to a condition that no warranty would be given and that no compensation would be made in respect of any defects. The plaintiff bought the pigs and put them with other pigs which became infected. Some of the pigs bought as well as some of the other pigs died of the disease. The plaintiff sued to recover damages for the loss he had sustained. The Court *held* that the defendant was *not liable*, for he had not represented that the pigs were free from disease.

DENTON v. *GREAT NORTHERN RLY.,* (1856) 5 E. & B. 860. — A train which had been discontinued was announced as still running in the current time-table of a railway company. A person relying on it missed an appointment and incurred loss.

The Court *held* that the railway company was *liable* for misrepresentation, however innocent.

GEORGE v. *SKIVINGTON,* (1869) L.R. Ex. 1 (Injurious hair-wash case). — A husband bought from the defendant a chemical compound professed to be fit for washing hair. He gave it to his wife, whose hair was literally washed away, and who was injured by the wash. It was *held* that the defendant was *liable.*

2. SLANDER OF TITLE

The second kind of tort of injurious falsehood is that of *slander of title.*

Write a short note on : Slander of title.
P. U. Apr. 93
Oct. 94

Definition

Slander of title may be defined as a *false, malicious* statement in writing, printing, or by word of mouth, *injurious* to any person's *title* to property, whether movable or immovable, *and causing special damage* to such person.

To sustain an action for slander of title, the plaintiff must prove —

1. That the statement, whether oral or written, is *false.* It is for the *plaintiff* to prove it to be *false,* not for the *defendant* to prove it to be *true.*

2. That there was a *publication* of the false statement.

3. That the statement was made *mala fide* and was *malicious,* that is, with intent to *injure* the plaintiff, or with some indirect or dishonest motive.

4. That the words have the effect of defeating *his title to property, i.e.* that the statement is calculated to disparage his property or business.

5. The *special damage* has resulted from the slander. The special damage must always be such as naturally or reasonably arises from the use of the words.

'Slander of title' and 'defamation' distinguished

The following are the points of *similarity* and *difference* between an action for slander of title and an action for defamation :

1. In the former, the words are not defamatory; they do not disparage the plaintiff's *moral character,* or his solvency, skill, business capacity, etc. They merely attack *something* or his *title* to a thing.

2. In both, the words are equally *actionable,* whether written or spoken.

3. Special damage must, in both cases, be proved.

4. In both, there is no presumption that the words are untrue; the *onus* lies on the *plaintiff* to prove them *untrue.*

5. Malice is not presumed, and the plaintiff must give some *prima facie* evidence that the defendant acted maliciously, or at all events, without lawful occasion on reasonable cause.

6. A right of action for defamatory words lies with the person defamed; but his action survives to an executor, to the extent that any damage can be shown to the estate of the deceased.

3. SLANDER OF GOODS
(Trade Libel)

Write a short note on : Slander of goods.
P. U. Oct. 91

Definition

Slander of goods consists of a false statement, disparaging a man's *goods,* published *maliciously,* and causing him *special* damage. This is also known as *"trade libel".*

To maintain an action for slander of goods, it is necessary to prove the following five points :

1. That the defendant *disparaged* the plaintiff's goods.

2. That such disparagement was *false.*

3. That there was *publication* of such disparagement. It may be in writing, printing, or by word of mouth.

4. That the disparagement was made *maliciously, i.e.,* in bad faith, out of a corrupt or wrong motive, or some motive other than a *bona fide* claim of right.

5. That *special damage* has resulted thereby.

WHITE v. *MELLIN* (1885) A.C. 154. — In this case, the defendant was charged with having made a statement that his food for infants was more nutritious than any preparation yet offered in the market. The Court *held* that his statement would not support a cause of action, since it was merely a piece of *puffery* intended more to promote the sale of the defendant's than to disparage the plaintiff's food.

JAY'S LTD. v. *GEOBI,* (1933) 102 L.J. Ch. 130. — *A* was the manageress of Jay Ltd., a firm dealing in ladies' clothes. For many years, *A* was known to customers as Miss Jay. *A* after leaving service of Jay Ltd. started a rival establishment in the name of Miss Jay. Jay Ltd sued *A* for deceptive use of their trade name.

The Court *held,* dismissing the suit, that a surname is *not* a man's legal property, and if a man is called by some name other than his real name, he may acquire his second name by reputation. He cannot be restrained from using it honestly. In the given case, *A* had acquired the name "Miss Jay" by reputation and was entitled to trade under it so long as she acted honestly, even though the similarity of the name to that of the plaintiff might occasionally lead to the goods of the one being mistaken for those of the other.

4. PASSING-OFF

Write a short note on : Passing-off. P. U. Oct. 92

Definition

"Passing– off" means *false representation* tending to *deceive purchasers* into a belief that the goods which the defendant is selling are really the plaintiff's.

Its essentials

In an action for passing-off, the plaintiff must establish that the goods sold under his label and get-up had a reputation in the market as being goods manufactured or sold by *him,* of which the label and get-up were *distinctive* and *well-known* in the particular market, and that the label and get-up of the defendant on his *goods* of a *similar* character are a *colourable imitation* of the plaintiff's, and thus likely to *mislead* the public into a belief that the *defendant's* goods are those of the *plaintiff.*

Remedies for passing-off

The remedies in an action for passing-off are :

1. An injunction, *and*

2. *Either* (i) damages, or (ii) an account of profits, at the plaintiff's option. But neither damages nor accounts will be given for innocent user before actual notice of the plaintiff's right.

Under the head of "passing-off", one may discuss the law as to the infringement of another's — 1. Trade-mark; 2. Trade name; 3. Patent right and 4. Copyright.

1. Trade-mark

Definition. — A *mark* used for denoting the *goods* are the *manufacture* or *merchandise* of a *particular person* is called a *trade-mark.*

A *trade-mark* is defined as a "mark used, or proposed to be used, upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of such trade-mark, by virtue of manufacture, selection, certification, dealing with, or offering for sale. The term "mark" is defined as including any device, brand, label, ticket, name, signature, word, letter, numerical, or any combination thereof.

The use of a mark so *similar* as to lead or be likely to lead purchasers to buy the goods marked therein *under the impression that they are the goods of the original manufacturer* whose registered trade mark they bear, is an infringement of that mark.

It is only when the use of the mark *deceives,* or is reasonably *likely* to *deceive,* the public, that it can be interfered with or prevented. It is *not* enough to show a mere *possibility* of deception. There must be a reasonable probability or purchasers being *deceived.* The test is the *impression like to be produced on the casual and unwary customers.* Actual physical resemblance of the two marks is *not* necessary. It is enough if one of the designs is an obvious imitation of the other. For the purpose of a civil remedy, the invasion exists nonetheless, though the false trade-mark is used *unwittingly* or *innocently.*

In addition to the above, the plaintiff, if he claims damages, must either prove the damages he has sustained by reason of the infringement of the trade-mark on the part of the defendant *or* the profits, which the defendant has made by his wrongful act. He can also prove loss of custom if he claims special damage.

On the other hand, if he brings in a suit for injunction, he has to prove that the infringement of the trade-mark is likely to deceive, though it is not necessary to prove that somebody in fact has been deceived.

'Trade-mark' and 'property-mark' distinguished

A property-mark is a mark which denotes the *ownership* to goods. The distinction between a trade-mark and property-mark is that former denotes the *manufacture or quality* of the goods to which it is attached, and the latter denotes their *ownership;* or more briefly, the former concerns the goods themselves, whilst the latter concerns their *proprietor.*

In order to succeed in an action for piracy of trade-mark, the plaintiff must prove—

(i) that the defendant has *used* a mark similar to the plaintiff's trade-mark.

(ii) that such similar mark *leads,* or is likely to lead, purchasers to buy the goods marked therewith under the impression that they are the goods of the original manufacturer whose mark they bear; *and*

(iii) that there is also a reasonable probability of the purchaser being deceived.

Defences

The chief defences to an action for infringement of a trade-mark are:– (i) Denial of plaintiff's title to the trade-mark. (ii) Concurrent right in defendant to use the mark. (iii) Non-registration of the mark. (iv) Denial of infringement as a fact. (v) Estoppel of plaintiff. (vi) Acquiescence of plaintiff.

In India, the Trade and Merchandise Marks Act, 1958, now regulates the infringement of trade-marks. All marks which are trade-marks can be registered under the Act. Unregistered trade-marks are *not* protected in "passing-off" actions.

2. Trade name

A trade name may be either the name of the manufacturer of goods or some name by which the manufactured goods have become generally

known. The wrong consists in any other person selling goods of his own, in such a way as to lead the public to suppose that they are purchasing someone else's goods. The *principle is that* nobody has any right to *represent his goods as the goods of somebody else.* But where a trade name is merely *descriptive* of the article, whether originally a descriptive name or not, and does *not* designate *manufacture* by any particular firm, it cannot any longer be exclusively retained by the original maker, but may be adopted by any other trader.

PROBLEM. — *The plaintiff had for some years made belting and sold it as "Camel Hair Belting", a name which had come to mean in the Trade the plaintiff's belting and nothing else. The defendant began to sell belting made of the yarn of camel's hair, and stamped it "Camel Hair Belting" so as to be likely to mislead purchasers into the belief that it was the plaintiff's belting endeavouring thus to pass off his goods as the plaintiff's. What is the remedy of the plaintiff ?*

Ans. — In this case the plaintiff is entitled to injunction restraining the defendant from using the word 'Camel Hair' as a trade name. (*Reddaway* v. *Banham,* (1986) A.C. 199)

3. Patent-right

Patent-right is a privilege granted by the State to the *first* inventor of any *new* manufacture or invention, that he and his licensees have the *sole* right of *making* and *selling* such manufacture or invention.

This branch of the law has been codified, and the rights of a person who is responsible for a new invention are protected by statute both in English and in Indian Law.

A person who has registered a patent gets the exclusive right to make, use, or sell the patented invention for a period of *fourteen years.* Any person, who whether with or without the knowledge of the existence of the patent-right, infringes the same, may be restrained by injunction, and if he knowingly infringes the patent, he will be liable also for damages.

4. Copyright

Copyright is the sole and exclusive liberty of printing, or otherwise multiplying copies of any book. This right now exists under Copyright Acts. A copyright exists in books, letters, dramatic work, musical works and works of art.

For an intellectual work to be *capable* of protection as a copyright, it is necessary that :

Write a short note on : Copyright.
B. U. Oct. 93

(i) It must be *innocent.* There can be no copyright in any work of an irreligious, immoral, libelous or obscene character.

(ii) It must be of *value.*

(iii) It must be *original.* A very small degree of originality is sufficient to constitute a person an author.

The plaintiff must take out his title to the copyright, and he must prove that there has been an infringement of the copyright. A person who commits literary larceny may be proceeded against by a *civil* action or *criminal* proceedings.

19

WRONGS OF ABSOLUTE LIABILITY

Definition

Wrongs of absolute liability impose a kind of liability which is somewhat peculiar in that a person becomes liable *without there being any fault on his part.* That is why it is called *absolute liability. Here, the wrong arises from the breach of an absolute duty.* An *absolute duty* may be defined as a duty which renders a man liable *without any fault of his, irrespective* of any consideration of *intention* or *negligence* on his part. It is *absolute*, meaning thereby, that it is *not necessary* for the injured party to prove any *intention* or *negligence* on the part of the injuring party, and no amount of care and caution expended by the latter to prevent the damage done to the former will *excuse* him.

Discuss fully the Rule of Absolute liability, with exceptions, if any.
B.U. Apr. 95
Apr. 96
Oct. 97

Under this head, the following *five classes of torts* will be considered, *viz.*—

1. Cases relating to escape of dangerous *things.*
2. Cases relating to escape of *animals.*
3. Cases relating to the use of *things* in their nature *specially dangerous*, e. g., fire, loaded firearms, explosives, poisonous drugs, etc.
4. Cases relating to *dangerous premises.*
5. Persons professing skill.

1. ESCAPE OF DANGEROUS THINGS

Sic utere tuo ut alienum non laedas

Duscuss : Principle of absolute liability.
P.U. Oct. 94

The owner or occupier of land may lawfully use it for any purpose, for which it might, in the ordinary course of the employment of land, be used. And for such *natural uses of* land, an owner will *not*, in the absence of negligence, be liable, though damage results to the neighbour. But for any *non-natural user,* such as the introduction on to the land of something which, in *the natural condition of the land, is not upon it,* he is liable if damage results to his neighbour.

Discuss Sic utere tuo ut alienum non laedas.
P. U. Apr. 92

The strict principle of law is — *sic utere tuo ut alienum non laedas (everyone must so use his own as not to do damage to another).* When this maxim is applied to *landed* property, it is *necessary for the plaintiff* to show, *not only* that he has *sustained damage,* but that *the defendant* has caused it *by going beyond* what is *necessary in order to enable* him to have the *natural use of his own land.*

"Where persons possess or use dangerous things, they are bound to exercise more than ordinary care in their control of them, and in any case, to keep them safe at their peril." Discuss.
B. U. Oct. 90

Rylands v. Fletcher (the reservoir case) fully establishes the principle 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 *he is prima facie* answerable for *all the*

damage which is the natural consequence of its escape. This is the established law, whether the things so brought be beasts or water, or filth or stench, or electricity, or a traction engine, or a motor-car. It is *immaterial whether* the person *is* or is *not aware* of the danger at the time when he brings and uses them. This liability *exists whether the land is or is not owned* by the person responsible for the bringing upon it and use of the dangerous substances.

The most *important* case on the point is that of *Rylands* v. *Fletcher*, (1868) L.R. 3 H.K. 330.

RYLANDS v. *FLETCHER*

Facts of the case

Explain fully the principle of absolute liability, with special reference to Rylands v. Fletcher.
B.U. Oct. 94

Fletcher was working in coal mine under a lease. On the neighbouring land, Rylands desired to erect a reservoir for storing water, and for this purpose, he employed a competent independent contractor whose workmen, while excavating the soil, discovered some disused shafts and passages communicating with old workings and the mine in the adjoining land. The shafts and passages had been filled with loose earth and rubbish. The contractor did not take the trouble to pack these shafts and passages with earth, so as to bear pressure of water in the reservoir, when filled. Shortly after the construction of the reservoir, whilst it was partly filled with water, the vertical shafts gave way and burst downwards. The consequence was that the water flooded the old passages and also the plaintiff's mine, so that the mine could not be worked. The plaintiff sued for damages. No negligence on the part of the defendant was proved. The only question was whether the defendant would be liable for the negligence of the independent contractor who was admittedly a competent engineer. The Court *held* that the question of negligence was quite immaterial. The defendant, in bringing water into the reservoir, was bound to keep it there *at his peril*; and was, therefore, *liable*.

State the facts of Rylands v. Fletcher, and explain the principle laid down therein.
B.U. Oct. 95

PROBLEM.— *A* is the owner of a house adjacent to a factory, the machinery of which has, by its vibrations, weakened and caused cracks to appear in the ceiling of *A*'s drawing-room. While *A* is showing *B*, a prospective purchaser, over the house, the ceiling falls and injures both *A* and *B*. Has *A* any remedy against the owner of the factory ? Has *B* any remedy (i) against the owner of the factory, (ii) against *A* ?

Ans.—(i) The vibration is a dangerous force, for the escape of which the owner of the factory is liable to *A* on the principle of *Rylands* v. *Fletcher*.

(ii) The right to sue is not limited to an adjoining occupier. A guest or an invitee upon the adjoining property also has a good cause of action : *Shiffman* v. *Order of St. John*, (1936) All E.R. 567. Therefore, *B* also, who is *A*'s invitee, may sue the owner of the factory for damages. *A*, the occupier of the house, has failed in his duty to warn *B*, his invitee, of the unusual danger of which *A* knew, or ought to have known, and therefore, *B* may also sue *A* for damages.

RULE IN RYLANDS v. FLETCHER

(Also known as "the wild beast theory")

A person who, for his own purpose, brings on his land and collects and keeps there, anything likely to do mischief if it escapes, *must keep it in at his peril*, and if he does *not* do so, is *prima facie* answerable for all the damage which is the *natural consequence* of its escape. This is known as *the rule in Rylands* v. *Fletcher*. In other words, if a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbours, he does so *at his own risk.* If it does escape and causes damage, he is responsible, *however careful he may have been and whatever precautions he may have taken to prevent the damage.*

Discuss fully the Rule of strict Liability, laid down in the leading case, Rylands v. Fletcher. Give exceptions to the rule, if any.
B. U. Apr. 94

The rule in *Rylands* v. *Fletcher* is the most important of those cases where a man acts *at his peril* and is the *insurer* of *the* safety of his neighbours against accidental harm. Here, the duty is *not* merely the general *negative* duty to *refrain from* active injury, but a *positive* duty to *guard and protect one's neighbours*, lest they suffer harm by reason of dangerous things artificially brought on one's land — and the duty is *absolute because it is independent of any negligence on the part of the defendant or his servants.*

Write a short note on : Rylands v. Fletcher.
B. U. Oct. 92
Oct. 93
P.U. Apr. 97

The strict liability under the rule in *Rylands* v. *Fletcher* is based on the following *two conditions* :

(a) *Firstly*, there should be an escape from the land of something likely to do mischief if it escapes. The escape, for the purpose of applying the proposition in *Rylands* v. *Fletcher,* means escape from a place of which the defendant has occupation of or control over land to a place which is outside his occupation or control.

READ v. *LYONS*, (1947) A.C. 146.— The plaintiff, while performing her duties as inspectoress of the Ministry of Supply, was injured by an explosion in the defendant's munition factory. The plaintiff neither alleged nor proved negligence on the defendant's part. She maintained that her claim could come under the strict liability rule in *Rylands* v. *Fletcher*. The House of Lords *rejected* the plea on the ground that the accident took place within the factory of the defendant, and that there was *no escape from the land of the defendant of something likely to do mischief if it escapes.*

(b) *Secondly,* there should be some non-natural use of land. This means that land should be brought under some special use, bringing with it increased danger to others, and must not merely be the ordinary use of the land, or such a use as is proper for the general benefit of the community. Thus, bringing water into a cistern in a house is natural use, but *not* water stored in bulk, or water for industrial purposes.

PROBLEMS. — 1. A tree, which did not impede the highway, fell down recently on a road, killing the driver and one of the occupants of a motor-bus belonging to a cinema company, which happened to be passing by it. The personal representatives of the two men who are killed, and the cinema company, intend filing an action for damages against the owner of the tree. Will they succeed ? Will it make any difference if the tree actually impeded the highway ?

Explain the rule in Rylands v. Fletcher. What are the exceptions to the rule ?
B. U. Apr. 91

Ans. — The rule in *Rylands* v. *Fletcher* is confined to dangerous things *per se.* A tree is *not* a dangerous thing by itself. In the given problem, the owner of the tree is *not liable,* as the tree did not impede the highway; nor was it known to him to be in a dangerous condition; see *Noble* v. *Harrison,* (1926) 2 K.B. 332. If the tree actually impeded the highway, the owner would have been liable.

Explain the rule laid down in Rylands v. *Fletcher.*
P. U. Oct. 93

2. The defendants carried on the business of bone manufacturers on the premises near the plaintiff's farm. For the purpose of their business, the defendants had on the premises large quantities of bones, and due to that, a large number of rats assembled there. The rats made their way from the defendant's premises on the plaintiff's land, ate his corn, causing substantial loss to the plaintiff, in respect of which the plaintiff claimed damages from the defendants. Will the plaintiff succeed ?

Ans. — The defendants are *not liable,* as the rats were not accumulated on the land. There is no cause of action against them. (*Steam* v. *Prentice Bros. Ltd.* (1919) 1 K.B. 399)

3. The defendant kept a number of bee-hives, much to the annoyance of all his neighbours. One day, he *smoked* the hives in order to remove honey, without warning the plaintiff, his neighbour, who was tackling his horse. The bees, irritated by smoking operations, swarmed on to the plaintiff's land. The plaintiff's horse, in turn irritated by the bees, became violent, dragged the plaintiff and threw him on the ground, causing serious injuries. The plaintiff, in turn, irritated by all this, sued the defendant. Will he succeed ?

Ans. — Anyone who keeps bee-hives does so at his own peril, and is responsible for all consequent injuries done to his neighbours. Hence, in this case, the plaintiff will succeed.

INDIAN LAW.— It has been *held* in several cases that the principle of *Rylands* v. *Fletcher* applies in India. Thus, when the owner of land had penned back the water of a stream by erecting a *bund* upon his land, so as to inundate the land of his neighbour, without the latter's permission, it was *held* that the owner was *liable.*

AMERICAN LAW. — Under American law, the rule in *Rylands* v. *Fletcher* has *not* been followed to the full extent of all its implications. In fact, at the very outset, its authority was impaired by the decision in *Brown* v. *Collins* (16 Am. Rep. 372) and subsequent decisions. However, in the so-called "blasting cases", an absolute liability, without regard to default, has uniformly been imposed by the American Courts, whenever there has been an actual invasion of property by rocks, debris and the like.

State the facts and principles laid down in Rylands v. *Fletcher. State the exceptions to these principles.*
B.U. Apr. 96

FIVE EXCEPTIONS TO THE RULE *IN RYLANDS* v. *FLETCHER*

The following are *five important exceptions* to the principle laid down in *Rylands* v. *Fletcher.*

1. *Vis Major* or act of God

The rule in *Rylands* v. *Fletcher* does *not* apply when the escape is due to *vis major* or the operation of some superior force beyond reasonable expectation or human control.

Point out the exceptions to the principle laid down in Rylands v. Fletcher. P. U. Apr. 91

An act of God (*vis major*) is defined to be such a direct, violent, sudden and irresistible act of nature, as could not, by any amount of ability, have been foreseen, or if foreseen, could not, by any amount of human care and skill, have been resisted. Thus, those acts which are occasioned by elementary forces of nature, unconnected with the agency of man or other cause, will come under the category of acts of God, *e.g.* storm, tempest, lightning, extraordinary fall of rain, extraordinary high tide, extraordinary severe frost, etc. In order that a phenomenon should fall within the operation of the rule of law with regard to an act of God, it is *not necessary* that it should be unique *or* that it should happen for the first time; it is enough to show that it is extraordinary, and such as could *not* reasonably be anticipated.

NICHOLAS v. *MARSLAND,* (1875), L.R. Ex. 225. — The defendant possessed certain artificial pools formed by damming a natural stream. The dams were properly constructed and adequate for all ordinary occasions. A violent storm, described by witnesses as the heaviest within human memory, broke them, and the rush of water destroyed certain barges downstream.

It was *held* that the defendant was *not liable,* as there was no negligence on the part of anyone, and the accident was due directly to an *act of God.*

GREENOCK v. *CALEDONIAN RLY.,* (1917) A.C. 556. — A municipal authority, in laying out a path, constructed a concrete padding-pond for children in the bed of a stream, thereby altering the course of the stream and obstructing the natural flow of water therefrom. Owing to a rainfall of extraordinary violence, the stream overflowed at the pond, and a great volume of water, which would have been carried off by the stream in its natural course without mischief, poured down a public street into the down and damaged the property of the railway company.

It was *held* that the municipality was *liable* for the damage. They could have made sufficient allowance for such extraordinary rain, and therefore, the defence of *vis major* was *not* available.

PROBLEM. — The plaintiff owned paddy lands adjoining a stream, which served as the only outlet of the excess water collected in his paddy lands. The State, in pursuance of the "grow-more food" campaign, constructed a dam in the stream, for storing water to be used for irrigation purposes. It was proved that the plaintiff had agreed to the construction of the dam, and that, along with other agriculturists, the plaintiff too was benefited by the dam. As a result of unusually heavy rainfall in a particular year, the whole of the excess water collected in the dam could not be easily let out through the sluices provided in the dam, and the paddy crop in the plaintiff's land was kept submerged for a few days and the plaintiff was prevented from raising other cultivation during that year. The plaintiff sued the State for damages. The State pleaded *vis major and volenti non fit injuria.* How would this case be decided ?

Ans.— The plaintiff will *not succeed,* as the defences of *vis major, volenti non fit injuria and common benefit* are available to the State. (The defence of *common benefit* is discussed below.)

2. Wrongful or malicious act of a stranger

The rule is also *not* applicable where the damage is due to the *wrongful or malicious* act of a *stranger.* Thus, in *Richards* v. *Lothian* (1913) A.C. 263, the occupier of an upper storey was *held not liable* for damage to those below, due to water escaping from a lavatory by the deliberate act of a *third* person. If, however, the act of the stranger is such that it ought to have been anticipated and guarded against, the defendant will be *liable* for failure to take reasonable care.

The efficacy of this exception has, however, been watered down by the observations of the Supreme Court in *M. C. Mehta* v. *Union of India,* below.

Explain the rule laid down in : M. C. Mehta v. Union of India. P. U. Oct. 92

M. C. METHA v. *UNION OF INDIA* (1987 1 SCC 395). — This case arose out of the compensation applications filed against Shriram Foods and Fertilizers for the harm suffered by the victims on account of the leakage of *Oleum Gas* from one of their plants. Although the Supreme Court ordered that the matter may be investigated by the ordinary Courts of the land, it did evolve *new principles of tortious liability, not even recognised by English Courts.*

The Supreme Court observed, in the above case, that any enterprise which is engaged in a hazardous or inherently dangerous industry owes a *strict, absolute* and *non-delegable duty,* and if any harm results, the unit has an absolute liability to pay compensation for the loss. The exceptions to the rule of *Rylands* v. *Fletcher* have no application in such a case, and the enterprise *cannot* escape liability by pleading than an act of a stranger (or sabotage) was the real cause of the damage. The Court further observed that the *measure of compensation* should be correlated to the *magnitude and capacity of the enterprise,* so that such compensation can have a *deterrent* effect.

(See also the *BHOPAL GAS LEAK DISASTER CASE* in Appendix 1.)

3. Plaintiff's own fault

The rule also does *not* apply where the escape is due to the *plaintiff's own fault.*

4. Common benefit

The rule does *not* apply where the escape is due to artificial works maintained *with the plaintiff's consent* and for the *common benefit of the plaintiff and the defendant.*

Thus, in one case, the defendant, a landlord, maintained a rain-water box, both for his own benefit and that of the plaintiff, the tenant. Rats chewed away at the box, and the consequent leakage damaged the plaintiff's goods. It was *held* that the defendant was *not liable.* (*Carstairs* v. *Taylor,* (1871), L.R. 6 Ex. 217)

5. Statutory authority

The last exception to the rule in *Rylands* v. *Fletcher* is where the defendant is *empowered* or *authorised* or *required under the law* or a *statute* to accumulate, keep or collect the dangerous thing, which

escapes and causes mischief and injury to the plaintiff. Persons *empowered by statute* to bring or keep upon their land, a dangerous substance are *not liable* in the absence of negligence or an express provision in the statute to the contrary for the damage caused by its escape.

The *leading case* on the topic is *Green* v. *Chelsea Water Works Co.*, (1894) 70 L.T. 547. The defendants were authorised by statute to store water for the purpose of supply to the city. Owing to some accidental cause, the water escaped and caused injury to the plaintiff. The defendants were sought to be made liable on the principle of *Rylands* v. *Fletcher.* But the Court *held* that where the accumulation of water by the defendants was *not* for their *own* purposes, and where they had been *authorised by the statute* to accumulate and keep it, they would *not* be responsible for *any* escape, *unless* it was traceable to the defendant's own *negligence.* In other words, the liability is *not* an absolute liability within the meaning of the rule in *Rylands* v. *Fletcher.*

Thus, in short, persons empowered by a statute to bring or keep upon their land a dangerous substance are *not liable* (in the absence of *negligence* or an express provision in the *statute* to the contrary) for damage caused by its escape.

Statutory authority is, however, of two kinds : (i) *absolute* and (ii) *discretionary.* The former confers *absolute immunity* for the consequences of acts which would otherwise amount to torts. The latter must be exercised with due care and with due regard to the rights of others.

2. ESCAPE OF ANIMALS

Write a short note on : The Scienter Rule.
B. U. Oct. 97
P. U. Apr. 92

The second kind of tort of absolute liability relates to escape of animals. Now, animals are of *two* kinds — (i) those that are of a *dangerous character* (animals *feroe naturoe*) which a person must keep *at his peril, e.g.* a lion, a bear, a wolf, an ape, an elephant; and (ii) those *not* of a *dangerous nature* (animals *monsuetoe naturoe*), *e.g.,* dogs, horses, rams, bulls and other domestic animals.

The *Scienter* Rule

Discuss the Scienter Rule.
B.U. Apr. 97

In the case of domestic animals (i.e., animals *monsuetoe naturoe*) the plaintiff should prove *scienter* or *knowledge* of the dangerous propensity of the animal. *Unless* he proves that the defendant had such knowledge, he will *not* be successful. On the other hand, in an action for injury done by animals of a dangerous character (i.e., animals *feroe natuore*) the plaintiff need *not* plead or prove that the defendant had any such knowledge. In *May* v. *Burdett* (1846 9 Q.B. 101), the defendant was *held liable* for keeping a monkey which bit the plaintiff, on the ground that the monkey is an animal of dangerous character.

When would a person be liable for an injury caused to another by an animal in his possession or control ? Discuss with reference to case laws.
P. U. Oct. 92

A person who keeps a *savage animal* is bound to keep it under control, so as to prevent it from indulging in its propensities and inflicting injuries. If the animal escapes and hurts any one, the owner becomes liable in an action for the damage *without any averment of negligence or default* in the securing or taking care of it. The gist of the action is the *keeping* of the animal after the knowledge of its mischievous propensities.

In regard to animals which are *not* of a dangerous nature, the owner is liable for their trespass and consequent damage, *but not* for other injuries, *unless* proof of *scienter is given* as to the propensity of the animal itself to do the act in question.

HUDSON v. *ROBERTS,* (1851) 6 Ex. 697. — The owner of a bull knew of its tendency to attack anything which was red in colour. He was, therefore, *held liable* to a person wearing red, whom the bull attacked in the street.

As regards *trespass,* there is a distinction between animals which, from their *natural tendency* to stray, require to be *restrained* and those which are *not* usually kept confined. Owners of dogs and cats are *not* responsible for their trespass. As regards other injuries, *knowledge* of the defendant that the animal was prone to injure mankind must be established and, for this, a *single instance* of the ferocity of such an animal is *sufficient notice.* Such knowledge may be either personally possessed by the defendant, or may have been brought to his notice impliedly by the knowledge of someone whose business connected him with the animal. When the cause of action is an injury which has been inflicted by a dog on cattle and sheep, no evidence of *scienter* need be established, and damages are recoverable by the owner of the injured animals.

PROBLEMS. — 1. A country pony was tethered in a stable adjoining the highway and, being insecurely fastened, escaped. It was a quiet animal with no vicious propensities, but injured a pedestrian. The pedestrian sued the owner for damages. Discuss the chances of the pedestrian's success.

Ans. — The vicious nature of the pony was not known. The pedestrian will *not* succeed.

2. The defendant parked his saloon motor-car in a street and left his dog inside. The dog had always been quiet and docile. As the plaintiff was walking past the car, the dog, which had been barking and jumping about the car, smashed the glass panel, and a splinter entered the plaintiff's left eye, and the eye had to be removed. In an action for damages, will the plaintiff succeed against the defendant ?

Ans. — In this case, the plaintiff *cannot* recover, as a car with a dog inside it, is *not,* in itself, dangerous, and there was no negligence on the part of the defendant. (*Fardon* v. *High Court Revington,* (1932) 48 T.L.R. 215)

3. *A* was riding a bicycle on a highway on the footpath on which were some fowls belonging to *B.* As *A* got abreast the fowls, a dog belonging to *C* frightened the fowls, one of which flew into the spokes of the machine causing it to upset, whereby *A* suffered personal injury and the bicycle was damaged. *A* sues *B* to recover damages.

Ans. — Here, *A* is *not* entitled to damages for the following reasons: (i) *First,* fowls are *not* by nature dangerous, so as to cast any special duty on their owner as regards the safety of others. (ii)

Secondly, the cows were frightened by a dog belonging to *C,* a stranger. This is no fault of *B,* the owner of the fowl. (iii) *Thirdly,* the owner of an animal is *not,* in the absence of negligence, liable for the damage done by the animal *straying from or into a highway.*

Thus, in *Health Garages* v. *Hodges,* (1961) 2 C.B. 370, it was *held* that a motor cyclist, who suffered personal injuries by reason of the defendant's sheep wandering on the highway could *not* recover damages. But, there is liability where a man is guilty of negligence in allowing an animal of dangerous propensities to be on the highway in circumstances under which it is likely to do harm : *Turner* v. *Coats* (1917) 1 K.B. 670.

4. A circus lion escapes and injures a small child. Can the circus management be made liable in damages ?

Ans. — Yes. He who keeps savage animal like a lion does so at his own peril. Such a person is bound to keep it in control, and ensure that it does *not* inflict any injury on any person. The management of the circus will, therefore, be *liable* in damages to the child for the injuries caused to him.

3. USE OF THINGS NATURALLY DANGEROUS

The third tort of absolute liability takes place when a person uses things which are, by their nature, dangerous, such as fire, fire-arms, gas, etc. Each of these dangerous goods, *viz.,* fire, fire-arms, fire-works and explosive materials, poisonous drugs, gas and machinery, are briefly discussed below.

1. 'Domestic' fire

A man is *not* liable for damage caused by *domestic fire,* that is, a fire which began in his house or in his land, — *provided* it originated by accident and without negligence. But, if a fire is negligently lighted or kept by a person or his servant, he will be liable for any injury thereby occassioned to his neighbour.

2. 'Non-domestic' fire

Every person who lights a fire for *non-domestic* purposes is clothed with a *heavy responsibility* to his neighbours as regards the lighting, safe-keeping, and spreading of such fire. He must keep the fire in his land *at his peril.* Thus, where the legislature has sanctioned the use of locomotives, there is no liability for injury caused by sparks flowing from them. But, if there is no such sanction, a railway company will be liable for injury caused by sparks, even though there is no negligence.

3. Fire-arms

Loaded fire-arms are regarded as highly dangerous things, and persons dealing with them are answerable for the damage done by their explosion, *even if* they have taken apparently sufficient precaution. The liability is absolute, and in dealing with an instrument of this kind, the only caution that will be held adequate in point of law is to deprive it of its dangerous character altogether.

Explain the principle laid down in : Dixon v. Bell.
P. U. Oct. 91
Oct. 97

DIXON v. *BELL,* (1816) 5 M. & S. 198. — The defendant, having left a loaded gun with another man, sent a young girl to fetch it, with a message to the man in whose custody it was to remove the priming,

which the latter, as he thought, did, but as is turned out, did *not* do effectively. The girl loitered on the errand, and thinking that the gun would not go off, pointed it in sport at the plaintiff's child and drew the trigger. The gun went off and the child was wounded. It was *held* that the defendant was liable, though he had used sufficient care; for it was incumbent on him who, by charging the gun, had made it capable of doing mischief, to render it safe and harmless. The gun ought to have been so left as to be out of all reach of doing harm. (The intervening negligence of the other person was no defence.)

BURFITT v. *A. & E. KILLE,* (1939) 2 K.B. 743.— The defendants, proprietors of a toy and fancy goods shop, sold a "safety pistol" and fifty blank cartridges to *A,* a boy twelve years of age. In playing with the pistol, *A* fired it and injured his playmate, *B,* a boy about ten years of age. The cause of the accident was that the pistol had become foul. It was *held* that the pistol and cartridges formed a dangerous combination in the hands of *A,* and that the defendants, having chosen to sell the pistol and cartridges, could *not* be heard to say that they did not know that they might become dangerous in *A*'s hands. Therefore, they were liable to *B* in damages.

4. Explosives

Persons are bound to use the greatest care in the use of fire-works and other highly explosive material, or materials otherwise dangerous or destructive. The law, having regard for human life and safety, demands great care from owners and controllers of dangerous goods.

5. Poisonous drugs

Similarly, persons dealing with poisonous drugs are bound to exercise more than ordinary care, as the mischief which is likely to occur for want of such care is extremely dangerous to the public.

THOMAS v. *WINCHESTER,* 6 N. Y. 397.— The defendant, a compounding chemist, put extract of belladonna, a posion into a jar labelled "Extract of Dandelion", which is a harmless drug, and sold it as extract of dandelion to a retail druggist. The latter, believing the substance to be what it purported to be, sold it, upon the prescription of a physician, to the plaintiff. The plaintiff suffered serious injury in consequence. It was *held* that the defendant was *liable.* The defendant was a dealer in poisonous drugs. The death or great harm to some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label. The existence or non-existence of a contract between the wholesale chemist and the ultimate consumer was immaterial.

GEORGE v. *SKIVINGTON,* (1869) L.R. 5 Ex. 1.— The defendant sold a bottle of hair-wash to the plaintiff's husband. The plaintiff used the hair-wash, and owing to the existence of some injurious ingredients, the plaintiff was injured and she sued for damages. The Court *held* the defendant *liable,* as there was negligence in the preparation of the hair-wash. As the goods sold where of a dangerous character, there was liability on the defendant, independent of any contract.

6. Gas

All persons dealing with gas are bound to exercise the greatest care, for they are using a material difficult to manage, and of a very dangerous character, for it is explosive and poisonous.

In *M. C. Mehta* v. *Union of India* (discussed above), the Supreme Court has observed that there is absolute liability in all cases where there is injury on account of escape of gas, (Oleum Gas, in that case.)

A reference may also be made to the Bhopal gas leak tragedy (involving escape of *methyal isocyanate* (MIC) gas grom Union Carbide's plant) discussed in Appendix I.

7. Machinery

Persons employing machinery are also bound to provide reasonably safe machines. There are several Acts of the Legislature requiring persons using dangerous machinery to take proper precautions.

Liability of manufacturer

Ordinarily, a manufacturer of goods will be liable, if in their preparation, there is gross negligence.

GRANT v. *AUSTRALIAN KNITTING MILLS,* (1939) A.C. 85.— The plaintiff contracted dermatitis as the result of wearing a woolen garment which, when purchased from the retailers, was in a defective condition owing to the presence of excess sulphites which, it was found, had been negligently left in it in the process of manufacture. The presence of the deleterious chemical was a hidden and latent defect, and could not be detected by an examination that could reasonably be made. The garment was made by the manufacturers for the purpose of being worn exactly as it was worn in fact by the plaintiff. It was *held* that there was a duty to take care as between the manufacturers and the plaintiff, for the breach of which the manufacturers were liable.

Write a short note on : Grant v. *Australian Knitting Mills.*
P.U. Oct. 97

The plaintiff suffered through drinking a bottle of gingerbeer, manufactured by the defendants, which a friend had bought from a retailer and given to her. The bottle contained the remains of a snail which, since the bottle was opaque were undiscoverable until most of the contents had been consumed. It was *held* that the defendants were *liable;* they owed a duty of care that snails did not enter their bottles during manufacture : *Donoghue* v. Stevenson, (1932) A.C. 562.

4. CASES RELATING TO DANGEROUS PREMISES

An occupier's liability in respect of his premises at common law may be summarised thus :

Occupier's liability in respect of an entrant —

1. Who has entered in pursuance of a contract
2. Who has entered *without* contractual relationship.

As of right
By permission
Without permission *i.e.,* trespasser.

As invitee
As licensee

Discuss the rights & liabilities of the owner and occupier of land against visitors.
B. U. Oct. 93

Now, occupiers of premises have certain duties and liabilities towards certain types of persons. They vary according to the persons who may be —

1. Persons entering as of right.
2. Invitees, *i.e.*—
   (*a*) persons entering by *express* invitation.
   (*b*) Persons entering by *limplied* invitation.
3. Trespassers.
4. Licensees.
5. Passer-by.

LIABILITIES OF OCCUPIERS OF PREMISES AT COMMON LAW

1. Persons entering as of right

A person who enters the premises as of right *e.g.,* as a bailiff, or a Corporation official to collect taxes, or a bill collector, or a policeman, is entitled to have the premises made safe for him, and not merely to be warned of the danger.

Explain and illustrate the liability of an occupier of premises towards persons visiting the premises.
B. U. Oct. 90
Apr. 91

Thus, *X* buys a dilapidated house, and employs *Y* to repair it. *Y* negligently omits to repair the kitchen floor, which is rotten. *X* then lets the house to *Z.* During *Z*'s tenancy, while *Z,* Mrs. *Z* and a visitor are having dinner, the kitchen floor collapses, and all three are injured. Have they or any of them any remedy against *X* or *Y* or both ?

Here, apart from contract, the *owner,* as opposed to the *occupier* of the premises, owes no duty to make them safe for using them, and such a duty assumed by contract is owing only to the other party to the contract. No other person can show both *damnum* and *injuria* in himself : *Cavalier* v. *Pope*, (1906) A.C. 428. Therefore, *Z*, Mrs. *Z* and the visitor, or any of them have no remedy against either *X* or *Y.* (*NOTE.*— The decision in this case has, however, been *reversed* by the Occupiers' Liability Act, 1957, discussed later in the Chapter.)

2. An invitee

Who is an invitee

An invitee is a person who enters upon the invitation of the occupier, for the purpose of some business or matter which concerns the occupier. The term does *not* include an *employee.* An invitee is a person who is invited into the premises by the occupier for some purpose or business. *There must be a common interest between the invitor and the invitee.* A typical example of an invitee is a customer who enters a shop, for the permission granted to him to enter is not a mere matter of grace, but is in the material interest of the shop-keeper.

(a) Person entering by express invitation

Where persons enter the premises *on an express invitation,* the duty of the occupier is that he should *warn* such a person of the

dangers which are known to him, or which, with reasonable diligence, he could have discovered.

(b) Implied invitation

Where a person enters on an *implied* invitation from the occupier of the building, the extent of the duty is the same, *viz.,* to warn him of all latent defects or dangers of which the occupier actually knows, or of which he would have known, had he acted reasonably and prudently.

CATES v. *MONGINI BROS.* (1917) 19 Bom. L.R. 778. — A lady was having tea in a restaurant under an electric fan which the waiter stopped at her request. The fan thereupon fell on her and caused her injuries. The cause of the fall was a latent defect in the metal of the suspension rod. The lady sues the owner of the restaurant.

Here, the lady is an invitee. She is entitled to expect use of reasonable care on her own part for her own safety. The invitor, the owner of the restaurant, should, on his part, take reasonable care to prevent damage being caused to her from unusual danger, which he knows or ought to know. But, the invitor is not liable for injuries from *dangers which are not discoverable by the exercise of reasonable care.* In this case, the cause of the fall was a *latent defect* in the metal of the suspension rod, which could *not* have been discovered by reasonable care or skill on the part of the owner of the restaurant, the invitor. Under these circumstances, the lady will *not* succeed.

WEIGALL v. *WESTMINSTER HOSPITAL,* (1936) 52 T.L.R. 301. — The plaintiff, the mother of a patient, occupying for payment, a private ward in hospital, desired to consult one of its honorary surgeons, with whom she had a personal contact for the treatment of her son. He invited her to a small room, the floor of which was highly polished. She trod on a mat, which slid aiong the floor beneath her foot, so that she fell and suffered personal injury. She sued to hold the hospital authorities liable. The Court *held* that the plaintiff *could* recover damages.

INDERMAUR v. *DAMES,* (1866) L.R. 1 C.P. 274. — The defendant was a sugar refiner, and in his place of business, a patentee had fitted a patent gas-fitter to be paid for by the defendant on demonstration that the use of the fitter effected certain savings. The plaintiff, a journeyman gas-fitter, entered the premises of the defendant to test the gas regulator and collect the money. On the defendant's premises, there was a shaft, 4 feet square and 29 feet deep, used for lifting sugar bags; and the shaft was left unfenced and open. Without want of reasonable care on his part, the plaintiff fell into this open shaft and was injured. It was *held* that the defendant was *liable* on the ground that there was a trap.

STOWELL v. *RAILWAY EXECUTIVE,* (1949) 2 K.B. 519. — The plaintiff slipped on a patch of oil on a railway platform. He was looking out for his family, who were due to arrive by train. The Court *held* that he was an inviteee, and that the railway company was liable, as the patch of oil was an "unusual danger" in the circumstances.

BLACKMAN v. RAILWAY EXECUTIVE, (1951) A.C. 737. — In this case, when the defendant railway company's foreman noticed a patch of oil on the station premises, he ordered sawdust to be spread on it, and shouted a warning to the passengers. The plaintiff, who did not hear the foreman, slipped on the oil before the sawdust could be put on it. The Court *held* that the plaintiff could *not* recover, as the defendants had taken reasonable care.

PROBLEMS.—1. The plaintiff was shopping in the defendant's shop at a time when there were only few customers there, and she slipped on a piece of a vegetable matter, fell down and was injured. She sued the shop-keeper. Will she succeed ?

Ans.— She will succeed, because she is an invitee.

2. *X,* intending to travel, went to the railway station of B & Co. The night was very foggy and the lamps on the platform did not show through the fog. While walking along the platform, *X* fell on the rails and was injured. Can *X* recover damages from B & Co. ?

Ans.— *X can* recover damages.

3. Trespassers

A trespasser is a person who enters into another's property without any right or permission. The *general* rule is that *there is no duty of care towards such a person.* He who enters wrongfully, does so *at his own risk* in all respects. The occupier has no duty to take reasonable care for the trespasser's protection, or even to protect him from concealed danger. He is liable *only* where the injury is due to some *wilful* act involving something *more* than the absence of reasonable care. There must be some *act* done with the *deliberate intention of doing harm to the trespasser,* or at least some act done with *reckless disregard of the presence of the trespasser.* Thus, he must avoid endangering the safety of a trespasser by *concealed dangers* in the nature of *trap,* or such as would be likely to punish him in a *cruel manner.*

In short, trespassers can expect no care or warning from the occupier with regard to a dangerous state of the premises. But, the occupier must not *intentionally* create *dangers* for them, as by setting *traps* for them. And if he knows of their presence, he is under a duty *not* to harm them *by his own negligence.*

PROBLEM.— *A* and *B* trespassed on *C*'s land. Thereupon, *C*'s ferocious and powerful dog set upon them and mauled *A. B,* in attempting to climb over the compound wall, was lacerated by pieces of broken glass fixed therein. Both *A* and *B* sued *C* for their respective injuries. Advice *C.*

Ans.— The occupier's duty to a trespasser is two-fold : (i) not to cause deliberate injury to him; and (ii) not to injure him by some act done with reckless disregard for his safety and with knowledge of his presence. Thus, it is not lawful to defend one's land by means of dangerous traps. It is lawful, however, to protect it from trespass by reasonably necessary means, as by means of pieces of broken glass

upon the top of a wall or by a dog accustomed to bite people. *A* and *B* are trespassers, and the source of danger created on *C*'s land is nothing more than a reasonable mean of protecting it from trespass. Therefore, *C* is *not liable* in damages to *A* and *B* for their respective injuries.

Law as to juvenile trespassers (i. e. childern)

In cases of trespass, there can be no difference in the case of children and adults, because if there is no duty to take care, that cannot vary according to the age of the trespasser : *Robert Addie* v. *Dumbreak,* (1929) A.C. 358 (376).

But in the case of children,—

(i) a licence may be more easily inferred than in the case of adults, from the occupier's conduct in failing to take reasonably effective steps to prevent the entry of the former; and

(ii) the defence of contributory negligence or consent may be harder to establish against a child than against an adult.

If children are trespassers, the only duty of the landowner is *not to injure them intentionally* or to put *dangerous traps for* them. He is under no liability if, in trespassing, they injure themselves on objects legitimately on his land. To make a landowner liable for injury to children on his land, it must be proved that he *expressly or impliedly invited them to* his land, and *either* did an *act* which caused damage with *knowledge* that it might injure them, *or knowingly* permitted the existence on his land of a *hidden danger or trap.* If the owner of any premises, on which dangerous and alluring things are placed, gives leave to boys of a mischievous and intermeddling age, or to children of such tender years as to be quite unable to take care of themselves, to enter upon the premises, he will be responsible for any injury the boys or children may sustain.

GLASGOW CORPORATION v. *TAYLOR,* (1922) 1 A.C. 44.— The plaintiff brought an action against the defendants, the Corporation of Glasgow, for damages for the death of his son who died as the result of eating the berries of a poisonous shrub growing in their botanic gardens which were open to the public. The gardens were much frequented by children, and were accessible, by a gate which could be easily opened by young children. The plaintiff's son with some other children, entered the garden and ate some of the berries, which presented a tempting appearance to children. The defendants knew that the berries were a deadly posion, but took no precaution to warn children of the danger of picking the berries *or* to prevent them from doing so. It was *held* that the defendants were *liable.*

MOURTON v. *POULTER,* (1930) 2 K.B. 185.— A piece of land adjoining a highway was unfenced, and used as playground by children without any licence from the owner. The defendant was engaged by the owner to fell a large elm tree. On the day on which the tree was expected to fall, there were many children on the land and they were

driven away more than once. When the last root was cut and at the moment when the tree was expected to fall, no further warning was given, and the plaintiff, a boy of ten years, was injured. In an action by the plaintiff, it was *held* that the defendant owed a duty, even to a trespasser, *not* to do any act, which would alter the condition of the land and might injure him without giving him warning, and therefore, he was *liable.*

Write a short note on : Bird v. Holbrook. P.U. Oct. 95

BIRD v. *HOLBROOK,* (1828) 4 Bing. 628.— The defendant placed a spring-gun in his garden to protect it from thieves and trespassers. The plaintiff, a boy, trespassed into the garden to recapture a fowl which had strayed there. While so trespassing, he was injured by the discharge of the gun. The Court *held* that the defendant was *liable.*

4. Licensees

A licensee is a person who enters on premises under a licence from the occupier, either express or implied. In the case of *licensees* and *guests,* the care required is :

1. To *caution them* against any *known insecurity or hidden danger* which is *not of a readily discoverable character, and of which, he was aware, but the other party* was ignorant. (In other words, he must not *lead them into a trap.*)

2. Not to *alter the character* of the place— (i) by placing on it *dangerous obstructions; or* (ii) by affecting the *condition of the property,* whereby the danger is increased without notice.

FAIRMAN v. *PERPETUAL, ETC.,* (1923) A.C. 74.— The defendants owned a block of flats, which they let to various tenants, the defendants keeping possession and control of the common staircase giving access to the flats. The stairs were made of cement reinforced by iron bars, embedded in the cement and running along the whole length. Owing to the wearing away of the cement, in some cases, irregular depressions were scooped out behind the iron bars. The plaintiff, who stayed with her sister in a flat of which the sister's husband was the tenant, whilst descending the stairs, caught her heel in a depression so formed and fell and was injured. In an action for damages against the defendants, it was *held* that the defendants were *not liable,* as the only duty owed by the defendants to the plaintiff was not to expose her to a concealed danger or trap, but the depression which caused the plaintiff to fall was obvious and could have been seen by her if she looked properly.

This case has established the rule that the occupier is *not* bound to make the premises safe for use by a licensee; licensees must be content to take them as they are. Nevertheless, there *is* an obligation to warn them of any concealed danger known to the occupier.

COOKE v. *MIDLAND GREAT WESTERN RLY. CO.,* (1909) A.C. 229. — The defendant railway company had tacitly allowed children to enter upon the railway premises, and to amuse themselves by moving a turntable. It was *held* that the company was liable for injuries suffered by the children, and that the duty in such cases was not merely to *give notice* of the danger, but of taking due care to *avoid it.*

ASHDOWN v. *SAMUEL WILLIAMS & SONS LTD.* (1957) 1 Q.B. 409. — The defendants, who were occupiers of railway sidings, had posted notices that all persons going across the tracks would be doing so at their own risk. *A* was knocked down by a truck shunted negligently by the defendants. The Court *held* that *A* could *not* recover. Although *A* was a licensee, the notices were sufficient to absolve the defendants from liability for negligence.

ELLIS v. *FULHAM BOROUGH COUNCIL* (1938) 1 K.B. 212. — The defendant Council maintained a paddling pool in a public park of children. Loads of sand were put at the side of the pool to give the appearance of a sea-side. Some of the land had silted or been pushed under the water. The son of a rate-payer, while paddling, stepped upon a piece of glass buried in the sand, and cut his toe. The pool was raked every morning and the accident happened almost immediately after the pool had been racked out by an official of the defendants. It was *held* that the boy was in the position of a licensee, and the defendants were *liable*, as they knew that there was a possible danger to children paddling in the pool through articles in the pool and took measures to remove such articles but that such measures were inadequate.

PROBLEMS.— 1. *D* gave permission to *Y* to cross his yard, which was traversed by several routes. In a part of the yard was a hole which *D* usually covered. One night, *D* uncovered it, and *Y* who was unprepared for the hole being uncovered, took the same route as usual, and sustained damage as a result of falling into the hole. Can *Y* successfully sue *D* for damages ?

Ans. — *Y* is a liscensee. The occupier is bound to warn the licensee against any concealed danger actually known to the occupier. *D,* the occupier, had failed to do so. Therefore, *Y* can successfully sue *D* for damages : *Blyth* v. *Topham,* (1607) Cro. Jac. 158.

2. The plaintiff bought a ticket for admission to the stand of a race-course, entitling him to remain there throughout the races. In breach of this agreement, the occupiers of the race-course ordered him to leave the premises while the races were going on, and on his refusal to leave, they ordered and procured his forcible expulsion by their servant, the defendant. Discuss the rights of the parties.

Ans. — These are the facts in *Wood* v. *Leadbitter,* (1845) 13 M. & W. 838, in which it was *held* that no action would lie. Although the licence has been revoked improperly and in breach of contract, its revocation was nonetheless effectual. The plaintiff was a *trespasser,* and could *not* successfully sue the defendant for assault.

3. The plaintiff, a policeman on patrol duty, seeing one of the sliding doors of the defendant's warehouse open at midnight, went in to see that everything was right, and was injured by falling into unfenced sawpit. The plaintiff claims from the defendants. Discuss.

Ans. — In *Great General Rly. Co.* v. *Bates,* (1921) 3 K.B. 578, on similar facts, it was contended that the plaintiff was a licensee, since

the door was open and he went on duty as a policeman to see whether everything was all right. But the Court *held* that the plaintiff was a *trespasser* to whom the defendants owed no duty. Therefore, the plaintiff, in this case also, will *not succeed.*

5. Passer-by

In regard to persons lawfully passing by the premises, the duty of the owner of the premises extends to guarding against what may happen just beyond the premises, on the road, or other place where they may lawfully be. It is incumbent upon the owner to show that he used reasonable care and diligence which he was bound to use.

MORRISON v. *THE MAYOR* (1917) 2 K.B. 561. — A municipality planted some trees on the roadside and provided spiked iron guards for protection thereof. The guards were visible at night with normal street lighting. However, on account of blackout restrictions, the street lights were dimmed and as a result a pedestrian dashed against the guards and injured himself. Is the Municipality liable to the pedestrian for the injuries sustained by him ?

It was *held* that the Municipality would be *liable* to the pedestrian for the injuries sustained by him, on the ground that it was bound to take measures to remove the danger which resulted from the altered conditions due to the absence of sufficient lights.

THE OCCUPIER'S LIABILITY ACT, 1957

The liability of an occupier of dangerous permises has, to some extent, been modified by the Occupier's Liability Act, 1957.

The Act reduces the categories of visitors to two : *lawful visitors* and *trespassers*. An occupier of premises owes the same duty, "the common duty of care", to all his lawful visitors (whether licensees or invitees), except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors, by agreement or otherwise. The common duty of care is defined as duty to take such care as in all the circumstances of the case is reasonable to see that the visitors will be *reasonably safe* in using the premises for the purpose for which he is permitted or invited to be there.

The duty — the common duty of care — does *not* impose on the occupier any obligation to a visitor in respect of risks voluntarily undertaken by the visitor. The Act thus affirms the principle of *"Volenti non fit injuria".*

PROBLEM — The defendants owned and operated a narrow gauge railway, 2 ½ miles long, which passed through a tunnel, sixty-six yards in length. For many years, local residents had habitually used the railway track as a pathway providing a short-cut to a village, and the practice has been acquiesced in by the defendants. While walking through the tunnel, the plaintiff was struck by a train and injured, and he claimed damages. The defendants contended that the plaintiff was a licensee to the track and relied on the maximum *volenti non fit injuria.* How would this case be decided ?

Ans. — As the plaintiff is not a child, even under the Occupiers' Liability Act, the doctrine of *volenti non fit injuria* is applicable. Therefore, the defendants are *not liable.* However, a contrary opinion was given by the Court in *Bengal-Nagpur Railway Co. Ltd.* v. *Taraprasad Mati,* (1927) 48 C.L.J. 45.

In that case, the Court observed that if people are in the habit of crossing the railway line at place which is not a level crossing, the railway company must take reasonable precautions in the use of the spot, even though there is no right of way there.

The Act, however, does *not* affect the liability of occupiers in relation to a *trespasser.* So far as children are concerned, the Occupier's Liability Act provides that in assessing the common duty of care, an occupier must be prepared for children to be less careful than adults. Many dangers which would be open and obvious to the adult may be concealed and secret traps for the child.

Level crossing

Railway companies are bound by statutes to shut the gates of level crossing while a train is approaching. If they omit to do so, they invite persons to cross the line, and thereby put them off their guard, and are liable for the injuries which ensue. The plaintiff must allege and prove, not merely that the company was negligent, but that its negligence caused or materially contributed to the injury.

DAYASHANKAR v. *B.B. & C.I. Rly.,* (1913) A.I.R. All. 740. — *A,* who was travelling in his car at a speed of seven miles an hour, finding the gates of a railway level crossing open, tried to cross the rails and while doing so, a railway engine collided against his car and damaged it. *A* sued the railway company for damages.

The Court *held* that the gates of the railway level crossing being left open, there was an invitation to all persons to cross the line, and therefore, the railway company is *liable* in damages. *A* will succeed.

Invitation to alight

An invitation to alight on the stopping of train, without any warning of danger to a passenger, who is in such a position that he cannot alight without danger, such danger *not* being visible or apparent, amounts to negligence on the part of the railway company. Again, if a person, thinking, on the train stopping, that it has arrived at his station, and that he should, therefore, alight, does so, and by reason of its having overshort the platform, he is injured, the company will be *liable.*

5. PERSONS PROCESSING SKILL

Where persons hold themselves out to be persons of skill, they are bound to conduct themselves in a skilful manner. To all such persons, the maxim *spondes peritiamarits* (if your position implies skill, you must use it) applies. Thus, the following persons belong to this class :

1. Directors of companies
2. Inn-keepers
3. Solicitiors

4. Bankers
5. Carriers
6. Doctors
7. Manufacturers

1. Directors

Directors of companies are persons holding themselves out as capable of *directing complicated* affairs, and *inviting persons* to trust their *money to the company which they direct.* They are, therefore, bound to show *more than ordinary care towards the shareholders.* They must show diligence which good men of business are accustomed to show.

2. Inn-keepers

An inn-keeper is a keeper of a *common inn for the lodging and entertainment* of travellers and passengers, their horses and attendants, for a *reasonable compensation.* A person who keeps a *private boarding and lodging* house is *not an inn-keeper.*

In an old English case, *Calye's case* (1584 Coke Rep. IV 32), it was *held* that —

- That an inn-keeper is *liable* for the safety of the goods which are brought into the inn. It is no excuse for the inn-keeper that he delivered the key of the room to the guest, and that he had left the door of the room open.
- That if an inn-keeper, at the request of his guest, sends his horse to pasture, and the horse is stolen, the inn-keeper is *not liable* for the loss.

An inn-keeper is *bound to provide lodging* for all at a reasonable price if he has accommodation. He must guard their goods with *proper diligence.* He is not liable, for instance, if the guest's friend or servant steals or carries away the goods.

The liability of *an inn-keeper with respect to the personal safety* of his guest is less onerous, as he does not insure the personal safety of his guest.

BREWSTER v. *DRENNAN,* (1945) 2 All. E.R. 705. — The plaintiff was a guest at a small hotel owned by the defendant. The door of her room was not fitted with a lock, and when she mentioned this to the defendant, she was assured that it would be quite safe for her to leave her belongings in the room. Whilst the plaintiff had gone out, her valuable fur-cap, which she had left in the room, was stolen. In a suit filed by the plaintiff, it was *held* that the loss of the fur-cap was not due to the plaintiff's failure to take the ordinary care which a prudent person would take, and the plaintiff was, therefore, entitled to recover damages for her loss.

ORCHARD v. *BUSH & CO.,* (1898) 2, Q.B. 284. — The plaintiff went into the dining room of a hotel in Liverpool, owned by the defendants, and put his overcoat in a place where coats were ordinarily kept in that room. On finishing his meal, he discovered that his coat

was missing. In a suit filed by him against the defendants, it was *held* that there was *not* sufficient evidence to establish the relationship of inn-keeper and guest between the defendants and the plaintiff, so as to make them liable for the loss of the coat, without proof of negligence on their part.

CARPENTER v. *HAYMARKET HOTEL LTD.* (1931) 1 K.B. 364. — A husband and his wife engaged a room in the defendant's hotel. The wife put her diamond ring (which she was wearing) in their suit-case. which was latched, but not locked. When they went for dinner, the husband locked the room, and took the key with him. After dinner, they came back to the room. After a while, they went out for a dance, locking the room once again, and left the key at the hotel desk. When they returned late in the night, the porter gave them the key, and they went to the room. In the morning, it was discovered that the ring was missing from the suit-case. There was a *notice in the room* that all valuable articles should be deposited at the office. In a suit by the wife, it was *held* that she had taken *reasonable care* of the ring, and the fact that she had not deposited the ring with the office in compliance with the notice did not imply that she had retained its protection in her own hands. The defendants were, therefore, *liable.*

3. Solicitors

A solicitor is a person of skill and knowledge, and great care is expected of him in matters entrusted of him; as such, *ordinary* neglect is a ground of liability in his case. Thus, he is *liable* for the loss of his client's case due to his ignorance or non-observance, of the rules of practice of the Court, as when he allows his client's claim to be barred by limitation.

4. Bankers

Bankers are expected to be acquainted with the signatures of their customers and are bound to exhibit skill in detecting forgeries. They will, therefore, be *liable* for negligence in paying forged cheques of their customers. But, if such a forgery is the result of the neglect of the customer himself, and the Bank pays the money *bona fide,* the Bank will *not* be *liable* for such loss to the customer.

5. Carriers

Carriers of goods

A *carrier of goods* is called a *common carrier,* when he *undertakes to carry goods* of *all* persons for a suitable hire. On payment of such hire, he is bound to carry all goods entrusted to him for carriage with utmost care from the time of receiving them till delivery. And if he is a carrier by water, he must provide *sea-worthy vessels* manned by proper officers and crew.

His liability.— The liability of a common carrier is that of an *insurer of goods, i.e.,* he is answerable for all loss or damage to the goods, even though not due to any negligence on his part. But he is saved from liability if the loss of damage has been caused by an act of God, King's enemies or by any vice or defect *inherent in the goods carried.* This exception is, however, subject to any contract to the contrary.

Carriers of passengers

Carriers of passengers, either by land or water, are bound to provide road-worthy vehicles or sea-worthy vessels equipped with careful and proper staff.

Their liability. — Such carriers are bound to carry all persons who offer to pay, and cannot refuse *except* for want of accommodation. Their liability extends only to convey them *safely as far as* human care and foresight can go. This liability can be avoided by a special contract to the contrary.

Thus, an elephant belonging to the plaintiff, while being carried by the Railway Company's servant, under a contract between the plaintiff and defendant company, fell out of the railway wagon without any apparent cause, and was killed. The plaintiff claims damages from the defendant company for the loss of the animal. Here, the animal fell out through sheer accident. The company had done nothing wrong or negligent, and was therefore, *held not liable.*

6. Doctors

Every person who enters into a learned profession undertakes to bring to its exercise such care and skill as is becoming for one belonging to that profession. A physician or a surgeon does *not* undertake that he will perform a cure, but he undertakes to employ a fair, reasonable and competent degree of skill. If, therefore, he fails to display this degree of skill, he would be *liable.*

In one Indian case, it has been observed that if a doctor makes a wrong diagnosis, and thereby causes injury to his patient, he can be made *liable* in an action for negligence. However, a mistaken diagnosis is not necessarily a negligent diagnosis; nor would it, by itself, imply absence of reasonable skill and care on the part of the doctor. (*Dr. J.N. Shrivastava* v. *Rambiharilal,* A.I.R. 1982 M.P. 132)

The Kerala High Court has awarded damages of Rs. 1,60,000 against a surgeon for performing an operation on a 26-year old girl, who ultimately died, under crude and primitive conditions, and without even administering local anesthesia. (*Joseph* v. *Dr. George Moonjely,* A.I.R. 1994 Ker. 289)

The Rajasthan High Court has *held* that, in a case against a doctor for damages, if the plaintiff shows that the doctor was in fact negligent, but fails to prove that any loss or injury was caused to him by such negligence, he *cannot* be awarded any damages. (*Sidhraj Dhadda* v. *State of Rajasthan,* A.I.R. 1994 Raj. 68)

[Both the above cases have also been referred to in an earlier Chapter.]

7. Manufacturers

A manufacturer of an article of food, medicine or the like sold by him to a distributor, in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from any defects likely to cause injury to health.

(See also under the heading, *"Liability of manufacturer"*, discussed earlier in this Chapter.)

DEFENCES TO AN ACTION FOR A WRONG OF ABSOLUTE LIABILITY

Where the defendant becomes *prima facie* liable, it would be open to him to plead any of those defences usually available in cases of absolute liability, namely :

The plaintiff, a guest at the defendant's inn, put his motorcar in the inn garage, which was open on one side. In consequence of an unusually severe frost water in the engine froze and damaged it. Is the defendant liable ? [Ans.–Inn-keeper is not an insurer of goods. Defendant is not liable. Winkworth v. Raven, (1931) 1 K.B. 652.]

1. Plaintiff's contributory negligence

The defendant may plead *contributory* negligence on the part of the plaintiff. In case involving injury by an animal, he may plead and prove that the plaintiff *irritated* the animal which caused the damage, and thus *invited* the trouble upon *himself.*

2. Plaintiff, a trespasser

Or again, the defendant may prove that the plaintiff was a trespasser, to whom the defendant owed no duty.

3. Plaintiff undertook risk

Similarly, the plea of *volenti non fit injuria,* i.e., the plaintiff, *knowing* the risk, undertook the job, may be put forward. For instance, a person who undertakes to be the keeper of a savage dog, if injured by the animal, *cannot* sue the master. So also, there is no duty to licensees beyond merely warning them; if thereafter, they choose to run the risk, there is no liability.

Act of a third party

Again, if the harm to the plaintiff was due to the wrongful act of a *third person,* as in the case of a stranger letting an animal loose or inciting it to do mischief, the defendant would *not* be liable. In principle (since the mere act of keeping a dangerous animal is not a tort) an owner who has taken reasonable care to keep his animal safe should not be responsible merely because a stranger has provided it with an opportunity of mischief, as by unchaining it. The owner's servants, or those lawfully on his premises, are *not* strangers, under this rule.

5. Act of God

Further, it appears that where the escape of an animal is brought about by an act of God, no action will lie in respect of damage done by the animal. This is based on the analogy of the rule in *Rylands* v. *Fletcher,* although this was doubted by Bramwell, B, in *Nichols* v. *Marsland* (L.R. 10 Ex. 260), where he said *obiter* : "If a man kept a tiger and lightning broke its chain and got it loose and did mischief, I am by no means sure that the man would be liable." It is to be noted, however, there is no direct authority on the point.

20

TORTS AFFECTING CONTRACTUAL AND BUSINESS RELATIONS

Torts affecting contractual and business relations are *two* :

1. Procuring a breach of contract.
2. Conspiracy.

1. PROCURING A BREACH OF CONTRACT

It is an actionable wrong to induce a person to commit a breach of a contract which he has entered into with another person; thus, it is a violation of a legal right to interfere with contractual relations recognized by law, if there is no sufficient cause for the interference.

Ingredients

In an action for this tort, the plaintiff must prove—

(i) that there was a *valid* and *subsisting contract* between himself and a third party; and (ii) that the defendant procured a breach thereof *knowingly* and *unjustifiably*. Since damage is readily presumed, proof of *special* damage is *not essential* to enable the plaintiff to succeed.

The Bombay High Court has observed that for succeeding in a suit for damages in such cases, it is imperative for the plaintiff to prove that the defendant acted in such a manner that the plaintiff was thereby prevented from performing his contract. (*G.G. Shivale* v. *B.J. Raisoni*, A.I.R. 1981 Bom. 170)

LUMLEY v. *GYE*, (1853) 2 E. & R. 216.— In this case, it was *held* that a manager of a theatre was entitled to recover damages in an action of tort for the act of the manager of another theatre, in inducing Miss *W* to break her contract to act at the plaintiff's theatre for three months. The rule is *not* confined to contracts of *personal* service only, but is applicable to contracts of *all* kinds.

QUINN v. *LE ATHEM*, (1901) AC 495.— *A*, without just cause or excuse, induced *B*'s workmen to discontinue their work in breach of their contract with *B*. *A* did this, prompted by a good motive to do good to both, *B* and *B*'s workmen. It was *held* that, nonetheless. *A* was *liable*, inasmuch as the procurement of a breach of contract without just cause was a tort, and therefore, actionable.

It must also be noted in this connection that procuring a breach of contract is actionable; but no action lies for procuring another to *refuse* to perform a contract with the plaintiff, even if it be done maliciously, *provided that wrongful* means are not used. Such an action is *damnum sine injuria*, though it may interfere with the plaintiff's trade or business.

Moreover, though inducing a breach of contract is an actionable tort, no action will lie for the inducement of a breach of a contract which is null and void, *e.g.*, a wagering contract : *Joe Lee* v. *Lord Dalmeny*, (1927) 1 Ch. 300.

Write a short note on : Allen v. *Flood.* P. U. Oct. 97

ALLEN v. *FLOOD*, (1898) A.C. 1.— The plaintiffs were engaged by G.I. Co. to work on a ship from day to day. The defendant Allen, an official of the trade union of iron workers, who were also engaged to work on the same ship, informed the G.I. Co., that the Company should dismiss the plaintiffs, who were non-union men; if not, the men of his union would cease to work, whereupon the Company discharged the plaintiffs, but such discharge did *not* amount to a breach of contract, inasmuch as the plaintiffs were engaged from day to day. Therefore, the question for decision was whether the defendants were liable for maliciously injuring the plaintiffs by inducing their employers to do something which it was lawful for employees to do (*viz.*, to refuse to enter into contract with plaintiffs). It was *held* that no action lay. Merely to induce another to *refrain* from *entering* into a contract is *not* in itself an actionable wrong, though the motive may be malicious.

2. CONSPIRACY

Definition

Conspiracy, which is both a *tort* and a *crime*, can be defined as under :

When two or more persons, without lawful justification, combine for the purpose of wilfully causing damage to the plaintiff, and actual damage results therefrom, they commit the tort of *conspiracy*.

The following are the ingredients of the tort of conspiracy :

(i) There must be a *combination* to two or more persons.

(ii) It must be *without lawful justification.*

(iii) It must be for the *purpose of wilfully causing damage* to the plaintiff.

(iv) *Actual damage* must result from such combination.

The law regarding conspiracy has been subject to certain changes. The historical evolution of the above definition of the tort of conspiracy, which is based on the decision of the House of Lords in *Crofter Hand Woven Haris Tweed* v. *Veitch* (1942, A.C. 435) is given below. *Five cases* on this subject will give a summary of this topic.

The history of the law of conspiracy begins with the decision of the House of Lords in *Mogul Steamship Co.* v. *McGregor, Gow and Co.*, (1892) A.C. 25. The facts of the case are the following :

The defendants were firms of shipowners trading between China and Europe. With a view to obtaining for themselves a monopoly of the tea trade, they formed themselves into an association, and offered a rebate of five per cent to all merchants and shippers in China who shipped their tea exclusively in vessels belonging to members of the association. The plaintiffs, who were competitors, suffered loss by reason of price cutting and the other operations of the association, and therefore, sued the defendants.

The Court *held* that the plaintiffs could *not* succeed, since the acts were not unlawful in themselves, and were done by and for the defendants in their trade competition. The defendants had done nothing which would have been unlawful if done by a single trader in his own sole interest, and that their action did not become unlawful by reason of being undertaken in concert with several persons, for a common interest. They were *not liable*, because, *firstly*, they combined only to advance their trade interest, and *secondly*, they did not adopt any illegal means like fraud or molestation.

The next case is *Allen* v. *Flood*, (1898), A.D. 1 :

The plaintiffs were ship-wrights engaged by G.I. Co. to work on a ship from day to day. The defendant Allen, an official of the trade union of iron workers, who were also engaged to work on the same ship, informed the G.I. Co., that the Company should dismiss the plaintiffs, who were non-union men; if not, the men of his union would cease to work, whereupon the Company discharged the plaintiffs, but such discharge did *not* amount to a breach of contract, inasmuch as the plaintiffs were engaged from day to day. Therefore, the question for decision was whether the defendants were liable for maliciously injuring the plaintiffs by inducing their employers to do something which it was lawful for the employers to do (*viz.*, to refuse to enter into a contract with plaintiffs). It was *held* that no action lay. Merely to induce another to refrain from *entering* into a contract is *not*, in itself, an actionable wrong, though the motive may be malicious.

The facts of the *third* case are :

Write a short note on : Queen v. *Leathem.* P. U. Apr. 95

QUINN v. *LEATHEM*, (1901), A.C. 495. — The plaintiff was a butcher employing non-union men. The defendants, who were officials of the union, demanded the dismissal of the men, and on the plaintiff's refusal, they forced one of his best customers to stop taking supplies from him by threats to withdraw union men from the customer. The Court *held* that the defendants were *liable* to the plaintiff for the damage incurred.

The *fourth* case in the series is the following :

SORRELL v. *SMITH*, (1925) A.C. 700. — Defendants, a union of newspaper owners, threatened to cut off the supply of papers to *A*, a wholesaler, if he continued to supply to the plaintiff, a retailer, who had transferred his custom from *B* to *A* at the instigation of his own association of retail agents in pursuance of their policy. The Court *held* that it was a case of conflicting trade interests of two associations, and the plaintiff had no cause of action. The defendants acted solely to protect their trade, and *not* from spite or a desire to injure the plaintiff. They had acted only with a view to advancing their own interest, and had not committed or threatened to commit any wrong against the plaintiff.

Finally, in *Crofter Hand Woven Haris Tweed Co. Ltd.* v. *Veitch* (1942 A.C. 435), the House of Lords answered the question whether an act, which was otherwise lawful, could become a tort of conspiracy by combination alone. The facts of the case are :

The production of Haris Tweed is an industry of the Isle of Lewis. Originally, the yarn of the cloth was hand-spun from wool by the crofter of Lewis, and was wholly produced in the Isle. By 1930, hand-spinning of wool had become commercially impracticable, and henceforth many of the weavers in Lewis imported yarn from the mainland. Five mill-owners in Lewis, nevertheless, spun yarn woven by the crofters. These mill-owners alleged that cloth woven in Lewis from the mainland yarn could be sold much more cheaply than cloth made from yarn spun in Lewis. It was, therefore, in their interest to get a minimum price fixed for the cloth. Of the work-people in their mills, 90 per cent were members of the Transport and General Workers Union, of which the Lewis dockers were also members. The union, with the object of getting work-people in the mills to be members of the union and of increasing their wages, approached the mill-owners, who replied that they could not raise wages because of the competition of the crofters who wove yarn imported from the mainland. The union officials then put an embargo on the import of yarn, by ordering the Lewis dockers not to handle such yarn. They obeyed (without breaking any contract,) and thus injured the trade of seven small producers of tweed, who used imported yarn and who sued the union officials for conspiracy.

The House of Lords *held* that they were *not liable* because the real purpose of their embargo was to benefit members of the union. The actual decision was based upon the ratio decidendi of *Sorrell* v. *Smith*.

Sorrell v. *Smith*, (the former case) had laid down *two* principles :— (1) A combination of two or more persons wilfully to injure a man in his trade is unlawful, and, if it results in damage to him, is actionable. (2) If the real purpose of the combination is *not* to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues, *provided that* the purpose is not effected by unlawful means, such as violence or threat or fraud. A threat to effect a purpose which is in itself lawful gives no right to action to the person thereby injured. The distinction between the two is that in case of the former class, there is just cause or excuse for the action taken.

In *Crofter Hand Woven Haris Tweed* v. *Veitch* (above), Lord Simon L.C. observes that "the above two propositions are not exhaustive. It is possible to imagine a combination the purpose of which does not fall within either of these two classes, *e.g.*, a combination to demonstrate the power of those combining to dictate policy or to prove themselves masters in a given situation. Unless the real and predominant purpose is to advance the defendant's lawful interests in a matter where the defendants honestly believe that those interests would directly suffer if the action taken against the plaintiff was not taken, a combination wilfully to damage a man in his trade is unlawful."

PROBLEMS

1. The plaintiff betrothed his son to *X*. Sometime after the betrothal, *X*'s father got her married to the defendant. Thereupon, the plaintiff and his son sued the defendant and his two sisters to recover damages

alleging that they had conspired together to procure the breach of the contract of marriage. Will the plaintiff and his son succeed ?

Ans.— *No*, the plaintiff and his son will *not succeed*, if it is shown that the defendant did not know of the betrothal before the marriage and if the alleged conspiracy is not proved. (See *Khimji Vasanji* v. *Narsi Dhanji*, (1914) 17 B.L.R. 225)

2. The plaintiffs, who were the owners of a ballroom, decided to exclude coloured persons from their ballroom. The Musicians' Union thereupon gave a notice to the plaintiffs that the members of the Union would not be allowed to perform in the ballroom. The Union had many coloured members in whose interest it was that the colour bar should be lawfully opposed. The plaintiffs applied to the Court for an injunction to restrain the defendants from persuading their members not to perform at the ballroom, as such an action would amount to conspiracy. Will Court issue such an injunction ?

Ans.— *No*, the injunction would be refused, because the purpose of the defendants is lawful, namely, to protect the interests of its members. There is, therefore, *no actionable conspiracy* committed by the defendants. (*Scala Ballroom Ltd.* v. *Radcliffe,* 3 All. E.R. 220)

3. The plaintiff was planning to perform as an actor at a theatre. The defendants maliciously conspired to prevent him from acquiring fame in their performance, and in furtherance of the conspiracy, hired persons who came to the plaintiff's performance, and hissed and hooted and groaned and yelled at him, so as to compel him to desist from the performance, thereby causing the plaintiff to lose his engagement. Can the plaintiff successfully sue the defendants ?

Ans. — *Yes,* the plaintiff has a good cause of action against the defendants, as it is a case of *actionable conspiracy*. (*Gregory* v. *Duke of Brunswick,* (1844) 6 M. & G. 205)

21

TORTS FOUNDED ON CONTRACT

So far, only torts *independent of a contract* have been discussed. However, a tort may also out of a contract, and the law on the point is briefly discussed in this Chapter.

Difference between torts independent of contract and torts arising out of contract

Discuss torts founded on contract. Explain the law relating to torts founded on contracts.
B.U. Apr. 90

There are certain torts which arise out of the breach of a contract, which may be in the nature of either an express promise or an implied promise. Such torts give rise to an action *ex-contractu. The main difference between a tort arising out of a contract and a tort independent of a contract is that in the former case, privity between the parties is absolutely necessary to support an action; in the latter case, no privity is necessary, as it is the breach of a right in rem.*

In English law, the different between them has been mostly historical. But, at the same time, it must also be noted that even in the case of a tort arising out of a contract, there may be a tort independent of a contract. For example, if a physician agrees with *X;* to treat *X's* child, and if he is negligent in performing his duty, he commits a tort arising out of a contract against *X;* but so far as the child is concerned, it will have a right of action against the physician though there is no privity between him and the child. This is a case of a tort independent of a contract. privity between him and the child. This is a case of a tort indepedent of a contract.

A tort may airse out of contract in two ways :

(a) By the defendant's negligence

What do you understand by torts founded on contract ? Explain the circumstances in which a cause of action will arise in such cases.
B. U. Oct. 96

When a person, who is under a contractual duty to do a particular act, does that act negligently, thereby causing damage to the other party to the contract, the aggrieved party may sue in tort.

(b) By the defendant's fraud

Similarly, when a party to a contract commits fraud in performing his duty under the contract, and injures the other party, the latter may sue him in tort.

In both these cases, the sufferer may sue the other party either in tort in contract.

The class of injuries which lie on the border-line between contract and tort may be divided into two categories :

1. Alternative form of remedy on the same cause of action

Where the same state of facts shows, not only a breach of contract, but also a breach of a common law duty, a party to the contract may sue, at his election, on the contract or in tort. Thus, for

negligence or unskillfulness, a carrier, a solicitor or a sugeon, may be liable in tort or in contract. But, a stranger to the contract can only sue in tort.

2. Concurrent causes of action

Here, three types of cases may be discussed, namely :

(a) Cases where it is doubtful whether a contract has been formed, and the same act is a breach of contract, if any, and is at all events, a tort.

DENTON v. G.N. RLY. CO., (1856) 5 E. & B. 860. - In this case, an intending passenger was held to have a remedy for damage sustained by acting on an erroneous announcement in the current time-table of the Railway Company, on the ground of its being a false representation.

(b) Cases where *A* can sue *B* for a tort, though the same facts may give him a cause of action against *C* in contract.

AUSTIN v. W. RLY. CO., (1876) L.R. 2 Q.B. 442. - The plaintiff, young child just above the age upto which children are entitled to travel free, was being carried by his mother who took a ticket only for herself. When plaintiff's mother took her ticket, no question was asked as to the plaintiff's age, and there was no intention on the part of the mother to defraud the defendants. In an action by the plaintiff for injury due to the negligence of the defendants, it was held that the railway company was liable either (a) on an entire contract to carry the mother and the child which operated in favour of each, or (b) *independently of contract,* because the child was accepted as a passenger, and this cast a duty on the company to carry him safely; such a passenger is, in the absence of fraud, in the position of using the company's property by invitation.

Write a short note on : Torts based on contract.
B. U. Oct. 97

FOULKES v. METROPOLITAN DISTRICT RLY. CO. (1880) 5 C.P.D. 157. - The plaintiff purchased a return-ticket at the station belonging to the S.W. Rly., and on his return journey to that station he was carried in a train belonging to another company, viz., M.D. Rly. Co., (the defendants) who had running powers on S.W. Rly. Co., under an agreement for divison of profits with the later. While alighting carriage being unsuitable to the height of the platform at the station. It was held that the defendant company was *liable,* even though the plaintiff's contract was with S.W. Rly. Co. alone, solely on the ground that the defendant company actually received the plaintiff as a passenger, and thereby undertook the duty of not exposing him to unreasonable peril in any matter incidental to the journey.

(c) Cases where A can sue B for a tort, though the misfeasance of B may be a breach of contract made by him with a third person, C.

MALFROOT v. NOXAL LTD., (1935) 51 T.L.R. 551. – The plaintiff, the owner of the motor-cycle to which the defendants had fitted a side-car, was driving the combination along a road. The side-car became detached from the motor-cycle, and the plaintiff and his wife, who were sitting in the side-car, sustained injuries.

The Court *held* that the defendants were liable to the plaintiff in contract and tort, and to the wife in *tort only.*

APPENDIX I

THE FATAL ACCIDENTS ACTS

The Fatal Accidents Acts, *in England and in India,* lay down exceptions to the otherwise well-established rule of law that *no person has any legally protected interest in the life of any other person.*

In England, the *Fatal Accidents Act, 1976,* provides for cases where *death* is caused by any *wrongful act, neglect or default,* which is such as to have entitled the injured person (had he not died) to maintain an action and recover damages. In such cases, the Act enables the executor or administrator to sue the tort-feasor, notwithstanding the death of the injured party.

Such a suit is to be filed *within three years* from the date of death *or* the date of knowledge of the person for whose benefit the suit is filed, *whichever is later.* If there is no executor *or* administrator, *or* if he does not commence an *action* within six months, any *"relative",* as defined in the Act, can sue in his own name, on behalf of himself and the others.

Moreover, after 1982, the *spouse* of the deceased *or* his *parents* (if he was an unmarried minor) are also *entitled* to a fixed sum of damages (£ 5,000) for *bereavement.* In *addition* to this, the dependants are *entitled* to damages for the injury suffered by them on account of the death of the deceased.

The right of *action* under this Act does *not* exist if the deceased himself could *not* have sued, had he been only injured and not killed. Thus, if the deceased had voluntarily agreed to take the risk of the accident on himself, the maxim, *volenti non fit injuria* would be a good answer to the claim. So also, if *the* deceased was himself guilty of *contributory negligence,* the damages to be awarded under the Fatal Accidents Act would be *reduced proportionately.*

In India, similar provisions are to be found in the *Fatal Accidents Act,* 1855. The Act provides that whenever death of a person is caused by the *wrongful act, neglect or default,* the person who would have been liable in an action for damages, if death had not ensued, becomes liable in an action for damages, and the Court can grant such damages as it may think proper. Such a suit can be filed by the *wife, husband, parent* (including grand-parents) *or child* (including grand-son, grand-daughter, step-son and step-daughter) of the deceased person.

Under S. 2 of the Act, *only one action* can be brought for, and in respect of, the same subject-matter of the complaint.

Provisions for recovering damages for *mere bereavement* (see above) do *not* however find place in the Indian Act.

THE MOTOR VEHICLES ACT, 1939

Under the Motor Vehicles Act, 1939, insurance against third-party risk has been made compulsory under S. 94 of the said Act.

S. 92-A of the Act has now introduced a new liability which may be termed *no-fault liability.* Under this provision, the owner of the vehicle involved in an accident (or his insurance company) is liable to pay a fixed sum of Rs. 25,000 in respect of the death of a person, and a fixed sum of Rs. 12,000 in respect of permanent disablement of any person.

For getting these *fixed amounts,* it is *not necessary* to prove any negligence or wrongful act on the part of the owner or the driver of the vehicle. This liability exists as a statutory liability and *is based on the no-fault principle.*

This claim for the "no fault" compensation is to be disposed of by the Motor Accidents Tribunal, as expeditiously as possible, and is in addition to the right of the claimant to claim further compensation from the erring vehicle on the *principle of fault.* Thus, if an injured person claims Rs. 50,000 as compensation in a case involving his permanent disablement, a sum of Rs. 15,000 is to be awarded to him expeditiously (even before his case is over), and if the Tribunal ultimately passes his claim of Rs. 50,000 (after the usual procedure of witness examination, arguments, etc.), the sum of Rs. 15,000 earlier paid to him is to be adjusted, and the balance of Rs. 35,000 will become payable to him.

As far as "hit-and-run" motor accidents are concerned, i.e., in those cases where the identity of the vehicle *cannot* be traced, despite reasonable efforts, fixed sums are to be paid to the injured party (under S. 109-A of the Act) from a *Solatium Fund,* especially established under the Act for this purpose.

THE BHOPAL GAS LEAK DISASTER ACT, 1985

The night between 2nd and 3rd December, 1984, witnessed what may perhaps be called *the most tragic industrial disaster of the past few centuries.* The tragedy occurred when MIC (Methyl Isocyanate), a highly toxic gas, allegedly leaked out of the plant of Union Carbide in Bhopal, killing nearly 4,000 persons and inflicting injuries on more than 2,00,000 others.

What the next few days witnessed was a hitherto unseen influx of "ambulance-chasers", followed by urgent and extensive claims filed on behalf of the unfortunate victims. The Indian Parliament reacted to the situation, and passed the *Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985,* conferring on the Central Government, the exclusive right to represent any person desirous of making any claim in the matter.

On April 8, 1985, the Union of India (under powers conferred on it by the said Act), filed a suit in the U.S. District Court of New York. The Indian Government's preference for an American Court was mainly due to (i) the chances of heavier damages being awarded by an American jury, (ii) the uncertainty about whether the American multinational giant, Union Carbide Corporation (UCC) would submit itself to the jurisdiction of the Indian Courts, and perhaps, (iii) a lack of confidence in the Indian judicial system. UCC sought to have the suits dismissed on the ground of *forum non conveniens* (inconvenient forum), pointing out that such suits could definitely be more conveniently tried in Indian Courts. The New York District Judge, JOHN F. KEENAN, accepted this plea, and on May 12, 1985, dismissed the suits on the grounds of *forum non conveniens,* imposing certain conditions in UCC, including (i) that it shall submit itself to the jurisdiction of the Indian Courts, and (ii) that it shall subject itself to discovery under the U.S. Rules.

UCC promptly filed an appeal to the U.S. Court of Appeals against the conditions imposed on UCC, and the Union of India filed a cross-appeal against the order of dismissal.

On January 14, 1987, the U.S. Court of Appeals *unanimously* ruled that United States was an inconvenient forum, and thus, the appeal of the Union of India was dismissed. UCC's appeal was, however, partly allowed insofar as it related to discovery.

Arguing the doctrine of *forum non conveniens,* the Union of India had submitted—

— "that the Courts of India are not up to the task of conducting the Bhopal litigation", *and*

— "that the Indian judiciary has yet to reach full maturity due to the restraints placed upon it by British Colonial rulers, who shaped the Indian legal system to meet their own ends."

Rejecting the above arguments, the American Court made poignant observations as under :

"The Union of India is a world power in 1986, and its Courts have the proven capacity to meet out fair and equal justice. To deprive the Indian judiciary of this *opportunity to stand tall before the world, and to pass judgment on behalf of its own people* would be to revive a history of subservience and subjugation from which India has emerged. India and its people can and must vindicate their claims before the independent and legitimate judiciary created there since the Independence of 1947."

So, nearly two years after the tragedy, the claim was tossed back to the District Court of Bhopal, where the Indian Government sued Carbide for 3 billion U.S. dollars in damages. District Judge Deo, passed an order awarding interim payment of U.S. $ 270 million to the victims. In April 1988, Carbide approached the Madhya Pradesh High Court, and on the basis of "more than a *prima facie* case having been made out" against the defendants, Justice Seth of the Madhya Pradesh High Court awarded U.S. $ 192 million by way of interim compensation. Both sides being dissatisfied, the Bhopal case found its way to the Supreme Court of India, through separate appeals filed by the Government of India and Carbide from the decision of the Madhya Pradesh High Court.

On February 14, 1989, the Supreme Court induced the Indian Government and Carbide to accept an overall settlement of all claims arising from the Bhopal disaster, which was accepted promptly by both the parties, *even without consulting their respective clients.* Under the terms of the settlement, UCC had to pay U.S. $ 470 million to the Indian Government on behalf of the Bhopal victims *in full and final settlement* of all past, present and future claims arising from the disaster.

The above settlement appeared to be no less than a raw deal struck by the Indian Government for and on behalf of its own people, thereby denying them justice in their own country. This settlement provoked criticism from various environmentalists, lawyers, and jurists as the judgment seems to have been passed behind the backs of the victims. Some victims of disaster then filed Review Petitions in The Supreme Court challenging the Settlement Order, and on October 3, 1991 the Supreme Court upheld the validity of the U.S. $ 470 million settlement. The Court, while upholding the civil portion of the settlement, quashed the criminal immunity granted to UCC and the Indian company, thus paving the way for revival of criminal proceedings related to the disaster.

APPENDIX II

SUMMARY

OF

THE LAW OF TORTS

INTRODUCTORY

A *"tort"* (French, for "wrong") is a civil wrong, independent of contract, for which the appropriate remedy is an action for damages.

According to one view (advocated by *Salmond* and *Sir Fredrick Pollock*), the law of torts consists of *specific rules* prohibiting certain harmful acts. This theory is also known as *"the pigeon-hole theory"*.

The other view (supported by *Sir Winfield*) is that *all injuries* to another person *are torts, unless* there is some justification recognised by the law.

Wrongs which are not torts

There are *four* classes of wrongs which are *not torts, viz.* —

(1) Wrongs which are exclusively criminal.

(2) Civil wrongs which are exclusively breaches of contract.

(3) Breaches of trust or other equitable obligations.

(4) Wrongs which are quasi-contractual.

Characteristics of a tort

The following are the *five characteristics of a tort :*

(a) It is a civil wrong.

(b) It involves the infringement of a right *in rem,* i.e. a right against the whole world, and *not* a right *in personam,* i.e. against a particular person or persons.

(c) The right which is infringed is fixed by the law, independent of the consent of the parties.

(d) In England, the remedy for violation of such a right is a "common law action".

(e) The remedy for the violation of the right is compensation in money, i.e. damages.

Tort and Crime distinguished

Tort	Crime
1. It is the infringement of a private right.	1. It is the invasion of a public right.
2. The wrong-doer must compensate the injured party.	2. The offender is punished by the State.
3. The suit is filed by the injured party.	3. Action is taken in the name of the State.

Tort and Breach of contract distinguished

Tort	Breach of contract
1. It is a violation of a right *in rem.*	1. It is a violation of a right *in personam.*
2. The duty is imposed by the law.	2. The duty is fixed by the parties to the contract.
3. A tort is inflicted against the will of the party.	3. The obligation is founded on the consent of the parties.
4. There is no privity between the parties.	4. There is privity of contract between the parties.
5. (a) The suit is for unliquidated damages.	5. (a) The suit is for liquidated damages.
(b) Liability may also arise for damages arising from circumstances unknown to the defendant.	(b) If special circumstances are unknown to the defendant, he is *not liable.*
(c) Exemplary damages can be awarded.	(c) Exemplary damages are normally *not awarded.*
6. For the purpose of limitation, time runs from the date on which the damage is suffered.	6. For purposes of limitation, time runs from the date of the breach.
7. Motive of the defendant is often (though not always) relevant.	7. Motive of the defendant is generally immaterial.

FELONIOUS TORTS

When an act amounts to both a tort and a crime (felony), it is called a *felonious tort.*

In England, prior to 1967, the *doctrine of merger of tort in felony* was applied. So, a suit under the law of torts could *not* be filed, unless the person was first prosecuted in a criminal court. In 1967, however, this rule was *abolished* in England.

In India, the rule of merger of tort in felony had never been accepted. So, a person can always be sued for a tort, although the act also amounts to a crime, without first instituting criminal proceedings against him.

CONSTITUENT ELEMENTS OF A TORT

The following are the *three* main ingredients of a tort :

1. A wrongful act, i.e. a violation of a legal right, by the defendant.
2. Such wrongful act must give rise to a legal remedy.
3. There must be legal damage (*injuria*) to the plaintiff.

When there is no legal damage to the plaintiff, it is a case of *damnum sine injuria,* i.e. damage without infringement of a legal right.

On the other hand, *injuria sine damnum* (i.e. a legal injury without actual damage) will give rise to a claim for damages.

Two kinds of torts

Torts may be :

(a) actionable *per se*, i.e., without proof of actual damage, e.g. trespass, libel, etc.

(b) actionable only on proof of actual damage, e.g. slander.

Ubi jus ibi remedium

This maxim lays down that whenever there is a legal right, there is also a legal remedy. In other words, *there is no legal wrong without a remedy.*

Ex turpi causa non oritur actio

This maxim means that if the damage is, in any manner, tainted with illegality, no suit can be filed. An action does *not* arise from an immoral cause.

Malice in fact

A lawful act does *not* become unlawful because it is done with a bad motive or with express malice (malice in fact). Likewise, a good motive is no justification for an act which is otherwise illegal.

There are, however, certain torts in which malice is an essential element, e.g. defamation, malicious prosecution, etc.

Malice in law

The term "malice in law" refers to implied malice. It connotes a wrongful act done intentionally, without just cause or excuse.

Motive

Motive is generally irrelevant in the law of torts. An act which is lawful *cannot* become unlawful merely because it is done with an evil motive, and *vice versa.*

Motive is, however, relevant in the case of some torts like malicious prosecution, defamation, etc.

Intention

When legal harm is caused, it is *not* open to the defendant to plead that he did not *intend* to cause the damage. Every person is presumed to intend the natural and ordinary consequences of his act.

Malfeasance, misfeasance and non-feasance

"Malfeasance" refers to the commission of an unlawful act.

"Misfeasance" implies the improper performance of a lawful act.

"Non-feasance" is the failure or omission to perform an obligatory act.

PERSONS WHO CANNOT SUE AND BE SUED

Persons who *cannot* sue

The following are *seven* categories of persons who cannot sue for a tort :

1. An alien enemy
2. Formerly, felons and convicts
3. Bankrupts
4. Formerly, husband and wife
5. A corporation, which cannot sue for personal wrongs.
6. A child in the womb.
7. Foreign states.

Persons who *cannot* be sued

There are *nine* classes of persons who cannot be sued in tort, namely, —

1. The Crown in exercise of its sovereign powers
2. Foreign sovereigns
3. Ambassadors
4. Public officials for acts done in their official capacity
5. Infants, when malice, knowledge, intention, etc. is essential
6. Lunatics and drunkards
7. Corporations for *ultra vires* acts
8. Trade unions
9. Formerly, married women in England.

FOREIGN TORTS

If a tort is committed with respect to *immovable property* outside England, *no suit can be filed in England, even if* the defendant is a British subject.

But if the tort is committed with respect to *movable property* outside England or against the *person* of the plaintiff, a suit *can* be filed in England, —

(a) if the act was not justifiable by the law of the place where it was committed; *and*

(b) if such act would have been actionable if committed in England.

DEFENCES IN THE LAW OF TORTS

The following *15 defences* are available when a suit is filed under the law of torts :

1. Acts of State

An act of State is a legal injury inflicted on an alien by a servant of the Crown, which is either previously authorised or is subsequently ratified by the Crown, and being done under State policy, such wrong is *not* congnizable by a court of law.

2. Judicial acts

No suit can be filed against a Judge for any act done or words spoken in his judicial capacity. This is to enable Judges to exercise their functions with independence and without fear of consequences.

3. Quasi-judicial acts

Various bodies like universities, colleges, clubs, etc. often exercise quasi-judicial authority with respect to their internal management. Such bodies will *not* be liable if they observe (i) the rules of natural justice, and (ii) their own statutory or conventional rules.

4. Executive acts

Executive acts, i.e. obedience to valid orders of a public authority are also protected. But, if a court's officer maliciously arrests a person or attaches his property, he will be *liable.*

5. Parental or quasi-parental authority

Parents as well as persons who take the place of parents, e.g. a school teacher, will *not* be liable for inflicting corporal punishment on the child, so long as such punishment is *moderate* and *reasonable* in the circumstances.

6. Authorities of necessity

An authority of necessity is also a good defence. Thus, a master of a ship on the high seas *can* exercise disciplinary powers not only on his crew, but also on the passengers, to preserve the discipline and safety of the ship.

7. Works of necessity

A person's property (or even his life or liberty) may sometimes be put into jeopardy for public good. Thus, a private house may have to be pulled down to stop a fire, *or* goods may have to be cast overboard to save a ship from drowning. In such cases, the welfare of the community is more important than the welfare of an individual.

8. Statutory authority

It is also a good defence to show that the legislature has authorised the doing of the act in question. If that is so, the person who is injured by the act can have no remedy, *except* the one provided by the statute itself.

9. Leave and licence (Volenti non fit injuria)

An act is *not actionable* as a tort at the instance of any person who has expressly or impliedly consented to it. If the plaintiff has freely and voluntarily taken a risk, he *cannot* later complain about it.

10. Inevitable accident

An inevitable accident, i.e. one which could not possibly be prevented by the exercise of ordinary care, caution and skill, is a good defence to an action in tort.

11. Mistake of fact

If *motive* is an essential ingredient of a tort, mistake of fact is a good defence.

12. Exercise of common right

The exercise of ordinary rights for a lawful purpose in a lawful manner is *not* a tort, even if it causes damage to another person.

13. Private defence

An act done in private defence of oneself, or of one's spouse, child, parent, master, servant, etc. is *not* actionable. However, the force employed in such defence should not be out of proportion.

14. Plaintiff, a wrong-doer

A person is *not* disabled from recovering damages for an injury caused to him, by reason of he himself being a wrong-doer, *unless* some unlawful act or conduct on his part is connected to the harm suffered by him, as part of the same transaction.

15. Acts causing slight harm

Acts causing slight harm are not to be taken notice of. *De minimis non curat lex* However, this is no defence when there is an injury to a legal right.

DISCHARGE OF TORTS

No remedy will lie for a tort, i.e. a tort is discharged, in the following *7 cases* :

1. Death of either party

A personal right of action dies with that person. *Actio personalis moritus cum persona.* However, there are important *exceptions* to this rule, both under English and Indian laws.

2. Waiver

If a person has more than one legal remedy for the same wrong, and he chooses one of them, and abandons the other or others, he *cannot* afterwards pursue the remedy waived by him. Such waiver may be *express* or *implied.*

3. Accord and satisfaction

When there is a mutual agreement between the parties to pay a specified amount as compensation, and such payment is made, it operates as a bar to the right of action.

4. Release

It is also open to the injured party to release the wrong-doer, i.e. to surrender the right of action against the wrong-doer.

However, a mere covenant not to sue one of two tort-feasors does *not* operate as a release of the other.

5. Acquiescence

When the injured person, with full knowledge of his right to sue the wrong-doer, neglects to do so for a considerable length of time, he may be said to have given his acquiescence, which would take away his right to sue.

6. Judgment recovered

When a suit for tort is filed, and a judgment is pronounced, the original right of action is merged therein, and a second suit for the same tort will be barred, applying the doctrine of *res judicata.*

The *four exceptions* to the above rule are as follows :

(a) Cases where two or more distinct rights are violated.

(b) Cases where a fresh cause of action arises every time the tort is committed, e.g. trespass.

(c) Cases where a fresh cause of action arises as often as fresh damage accrues, as for instance, in the case of nuisance.

(d) Cases where the injury is of a continuing nature.

7. Limitation

A suit for a tort will be barred, if it is *not* filed within the period prescribed by the Limitation Act, i.e. if it is *time-barred.*

VICARIOUS LIABILITY

Vicarious liability arises where one person becomes liable for a tort committed by another person, as for instance, the liability of a *master* for the tort of his *servant.*

This liability can arise in *three* ways :

A. By Ratification

Qui facit per alium facit per se. He who does an act through another, does it himself. When an act is done without another person's authority, but the latter ratifies it, i.e. assents to and approves such act subsequently, the person ratifying is bound by the act.

The *four* requisites of a valid ratification are :

1. The act should be done on behalf of the other person.
2. The person who ratifies the act must do so with full knowledge of its tortious nature.
3. Ratification can take place only when the person ratifying could himself have done that act.
4. An act which is illegal and void *cannot* be ratified.

MASTER AND SERVANT

The liability of a master for the wrongful acts and omissions of his servant is based on *two legal principles,* viz., —

(i) *Qui facit per alium, facit per se* : He who does an act through another, does it himself.

(ii) *Respondent superior* : Let the superior be responsible.

Master's liability to third persons

A master is liable for the torts committed by his servant in the course of his employment in the following *6 ways* :

1. The wrong may be the natural consequence of something done by the servant with ordinary care in executing the master's specific orders.
2. The wrong may be due to the servant's want of care or negligence in carrying out the work for which he is employed.
3. The servant's wrong may consist of excess or mistaken execution of a lawful authority.
4. The servant's wrong may be a willful wrong, done on his master's behalf, and with the intention of serving his purpose.
5. The wrong may be due to the servant's fraudulent act.
6. The wrong may be due to the servant's criminal act.

However, a master is *not liable* for the torts of his servant —

1. When he has temporarily lent his servant to another person.
2. When he is obliged by law to employ a particular person, as for instance, a compulsory pilot.
3. When the relation between the parties is that of a head of a Government department and an employee in that department.

Liability of Master to Servant

At Common Law

At common law, a master is *not liable* to the servant for injuries received from any risk which is ordinary or incidental to the employment. In such cases, the maxim, *Volenti non fit injuria,* applies.

However, the Common Law imposes the following *four duties* on a master :

1. He must provide proper and competent fellow-servants.
2. He must *not* be guilty of personal negligence.
3. He should provide proper appliances and maintain them in a proper condition.
4. He must take all reasonable precautions to secure the safety of his servants.

Under the Workmen's Compensation Act

Under the Workmen's Compensation Act, a master is liable to pay compensation to his workman for accidental injuries and death arising in the course of the employment. This obligation to compensate is independent of any negligence on the part of the employee himself or of his fellow-servants.

The Doctrine of Common Employment

Prior to 1948, a master was *not* responsible or liable for negligent harm to his servant by another servant engaged in common employment with him.

In order to successfully plead this defence, the master had to show :

(a) That the servant who is injured as well as the servant causing such injury were in the service of the same employer.

(b) The injured servant was engaged in a common employment in the sense that the safety of one servant would, in the ordinary and natural course of things, depend on the care and skill of the other servants.

However, *after 1948*, this defence of common employment has been taken away by the Law Reform (Personal Injuries) Act, 1948. Under this Act, it is *no defence* to an employer to contend that he is not liable because the injury was caused by the negligence of a fellow-employee. Any contract between the master and his servant, which excludes the master's liability on the ground of common employment is also declared to be *void.*

Servant's liability to master

A servant is liable to his master for the consequence of his wrongful acts and omissions. If a third party recovers damages from the master for the servant's negligence, the master can recover such damages from the servant.

OWNER AND INDEPENDENT CONTRACTOR

The *general rule* is that an employer is *not liable* for the acts and omissions of an independent contractor, *except* in the following *eight* cases:

1. Where the thing contracted to be done is itself unlawful.
2. Where the employer retains control over the independent contractor.
3. Where there is a legal duty on the employer to carry out a particular work efficiently.
4. Where the work agreed to be done is likely to damage the property of another person, unless preventive measures are taken, and such measures are not, in fact, taken.
5. If there is an implied warranty of the employer.
6. If an incompetent contractor is employed.
7. If the employer is liable for a wrong of absolute liability.
8. Under the provisions of the Workmen's Compensation Act.

PRINCIPAL AND AGENT

A principal is liable for the wrongful acts of his agent —

(a) if the act is committed by the agent in the course of his employment, — although it may not be authorised by the principal;

(b) if the fact is beyond the scope of agency, but has been authorised by the principal, *or* has been subsequently ratified by him.

COMPANY AND ITS DIRECTORS

A company is liable for the torts of their servants in the course of their employment. However, this liability attaches to *intra vires* (and *not ultra vires*) acts.

FIRM AND ITS PARTNERS

Every partner is liable to third parties for the negligence or fraud of his fellow-partner committed in the ordinary course of the partnership business.

GUARDIAN AND WARD

A guardian is *not* personally liable for a tort committed by his (minor) ward.

LIABILITY BY ABETMENT

A person who procures another to commit a tort is himself liable for the consequences, —

(i) if he knowingly induces such person to commit the tort; *or*

(ii) if the person inducing the act uses illegal means against a third party; *or*

(iii) if he procures a breach of contract between two other persons by illegal means or with a malicious intent.

REMEDIES AVAILABLE IN CASE OF TORTS

JUDICIAL REMEDIES

The *three* main judicial remedies (i.e. remedies granted by the court) in respect of a tort are the following :

1. Damages

General damage is the damage which is *presumed* by the law to flow from the tort. *Special damage,* on the other hand, is the *actual damage* or loss suffered by that party in that particular case.

The law requires special damage to be proved in suits for :

1. Seduction
2. Slander
3. Deceit
4. Conspiracy
5. Waste
6. *Distress damage feasant*
7. Nuisance consisting of damage to property.

As a man is presumed to intend only the natural and normal, and not the remote, consequences of his act, *remote damages will not be granted.* A man *cannot* be made liable for all possible consequences of his wrongful act, however, remote such consequences may be. *In jure non remota causa sed proxima spectatur*: In law, the immediate and proximate, and *not* the remote, cause must be considered.

According to one view, consequences of an act can be said to be remote if a reasonable person could *not* have foreseen them.

According to the other view, once a person is liable for a tort, he is liable for *all* its direct consequences, whether a reasonable person could have foreseen them or not.

Generally speaking, damages will be said to be *remote* in the following *four* cases :

(a) Where the damage is neither the necessary nor the probable result of the defendant's act.

(b) Where the damage is caused, wholly or mainly, by the act of the plaintiff himself.

(c) Where the damage occurred due to the wrongful act of a third party, and *not* the defendant (*novus actus*).

Damages are of the following *four* kinds :

1. *Contemptuous* (or *ignominious*) damages, — where technically, there is a wrong, but the court is of the view that, in the circumstances, no suit should have been filed.
2. *Nominal damages,* — which are awarded not by way of compensation, but by way of recognition of a legal right of the plaintiff.
3. *Substantial damages,* — which are awarded to compensate the plaintiff for the loss or damage suffered on account of the tort. (This is the commonest form of damages.)
4. *Exemplary damages* (also known as *vindictive, punitive,* or *retributive* damages), — where a large sum of money is awarded by the court on account of the aggravating circumstances accompanying the tort, as for instance, when defamation is committed on account of sheer spite or jealousy.

Damages can also be recovered for any illness caused by *nervous shock,* although there may be no physical impact or physical injury.

Formerly, no damages could be recovered for *mental shock,* i.e. for mere mental pain or sorrow or any injury to feelings and emotions. However, the current trend of judicial decisions is that such damages *can* be granted by the court.

2. Injunction

In an appropriate case, the defendant can be injuncted (i.e. restrained) from doing, continuing or repeating his wrongful act.

An injunction may be *mandatory* (i.e. requiring a person to do a particular thing), or *prohibitive* (i.e. prohibiting him from doing such a thing).

An injunction is called *interim* (or temporary) when it is only for a particular period of time; it is called a *permanent* injunction when it is to operate for all time to come.

3. Specific restitution of property

When the plaintiff has been wrongly dispossessed of his land or goods, the court can order the defendant to return such property to him.

EXTRA - JUDICIAL REMEDIES

Extra-judicial remedies are those which the injured party can himself adopt to redress the wrong, without going to a court of law, as for instance, the following :

1. Self defence
2. Expulsion and re-entry
3. Re-caption
4. Abatement of nuisance
5. *Distress damage feasant.*

JOINT TORT - FEASORS

When several persons join in committing a tort, they are called *joint tort-feasors.*

Circumstances under which joint liability arises

The *three* circumstances under which joint liability arises are :

1. Agency
2. Vicarious liability
3. Joint (or common) action.

Nature of joint tort-feasors' liability

The following *three principles* are to be noted in this connection :

(a) The liability is joint and several; in other words, *each* person can be made liable for the *whole* damage.

(b) A *release* of one of the tort-feasors releases all the others too.

(c) A judgment obtained against one joint tort-feasor operates as a bar to any suit against the other (or others).

Contribution between joint tort-feasors

At common law, there was *no contribution* among joint tort-feasors. So, if one of them was forced to pay the whole amount, he could *not* claim a proportionate share from the others. This rule was known as the *rule in Merryweather* v. *Nixon.*

There were, however, the following five *exceptions* to the above rule :

1. Cases of negligence or unintentional breach of the law.
2. Cases of indemnity.
3. Cases where one person induced another to do the act.
4. Admiralty actions involving collision of ships.
5. In the case of directors or promoters of a company, in connection with misrepresentation in the Prospectus.

In 1935, however, the *rule in Merryweather* v. *Nixon* was abolished by the Law Reform (Married Women and Tort-Feasors) Act, 1935.

ASSAULT

Definition

An *assault* is the unlawful laying of hands on another, or an attempt to do a corporeal hurt to another, coupled with present ability and intention to do the act.

Assault is also a *criminal offence* under S. 531 of the Indian Penal Code.

Ingredients

To succeed in an action for assault, the plaintiff must prove —

(a) that there was some gesture or preparation which constituted a threat of force;

(b) that such gesture or preparation was such as to cause a reasonable apprehension of force; *and*

(c) that there was a present ability on the defendant's part to carry out his threat immediately.

BATTERY

Definition

Battery is the actual striking of another person, or touching him in a rude, angry or insolent manner.

Battery is also a *criminal offence* under S. 350 of the Indian Penal Code.

Ingredients

To succeed in an action for battery, the plaintiff must prove —

(a) that force was used against his body directly, or by bringing an object in contact with his body; *and*

(b) that the use of such force was intentional.

Difference between assault and battery

The main difference between the two is that physical contact is an ingredient of battery, whereas mere fear of physical violence is enough to constitute assault.

Battery would include assault; but assault does not necessarily involve battery.

Assault is sometimes described as "inchoate battery".

Defences

The following *eight defences* are available for battery as well as for assault :

1. Self defence

Assaulting another to defend oneself (or one's spouse, children, etc.) is permissible. In such cases, the defence of "son assault demesne" (i.e. that the act complained of was the result of the plaintiff's own attack) is always available.

2. Defence of one's property

Likewise, if the plaintiff had entered the defendant's house with force or violence, the defendant would be justified in "assaulting" the plaintiff to defend his own property.

3. To prevent a forcible entry or seizure

The rightful owner can always use force to re-possess himself of his land or goods or to prevent forcible entry into his premises.

4. Exercise of parental or quasi-parental authority

Reasonable force may be used for the chastisement or correction of a child, pupil or apprentice.

5. Leave and licence

When a man has exposed himself voluntarily to some harm (as for instance, in a boxing bout) he *cannot* complain of assault.

6. Preservation of public peace

A person who disturbs a public meeting or a public worship may be removed physically, using reasonable force.

7. Legal process

An assault may be justified on the ground that it was committed in serving any legal process, as for instance, a search warrant.

8. Misadventure (Inevitable accident)

Inevitable accident is a good defence against a charge of assault or battery in cases where the act is lawful in itself, and is done in a reasonable manner.

MAYHEM

Definition

Mayhem (or *"maim"*) is said to be committed when a person is deprived of a *fighting limb,* as in the case of loss of a finger, hand or teeth. However, cutting off the nose or ears would amount to disfigurement, but *not* the loss of a fighting limb. It would, therefore, *not* be mayhem.

FALSE IMPRISONMENT

Definition

False imprisonment is the total restraint of liberty of a person, for however short a time, without lawful justification. It is the infliction of bodily restraint, which is *not* authorised by law.

Ingredients

In order to succeed in an action for false imprisonment, the plaintiff must prove :

(a) that he was completely deprived of his liberty; *and*

(b) that such detention was unlawful.

Defences

In order to successfully do such an action, the defendant must show :

(i) that he acted under a lawful warrant; *or*

(ii) that his act was justified even without a warrant.

DEFAMATION

Defamation is a tort affecting a man's reputation. It is called *libel,* when it is in a permanent form, and a *slander,* when it is in a transitory form.

Libel

A *libel* is a publication of a false and defamatory statement, in some permanent form, tending to injure the reputation of another person, without lawful justification or excuse.

In order to succeed in an action for libel, the following *three conditions* must be satisfied :

1. The statement must be false.
2. It must be in a permanent form.
3. It must be defamatory, i.e. it must :
   (a) expose the plaintiff to hatred, contempt, ridicule or obloquy; *or*
   (b) tend to injure him in his profession or trade; *or*
   (c) cause him to be shunned or avoided by his neighbours.

Libel is always *actionable per se,* i.e. without proof of actual damages.

Slander

Slander is a false and defamatory verbal or oral statement in a transitory form, which tends to injure the reputation of another person, without lawful justification or excuse.

The following are the *six ingredients* of slander :

1. The statement must be defamatory (- See above -)
2. It must be false.
3. It must refer to the plaintiff.
4. It must be published.
5. It must be published by the defendant.
6. There must be special, i.e. actual, damage to the plaintiff, *except in the following 5 cases, viz.*

(a) When there is an accusation of a criminal offence.
(b) When there is an accusation of a virulent disease.
(c) When there is imputation against an office, profession or trade.
(d) When there is imputation of unchastity in a girl or woman.
(e) When there is an aspersion on the caste of a person.

Libel and slander distinguished

Libel	Slander
1. Defamation in a *written* form.	1. Defamation in an *oral* form.
2. It is in a *permanent* form.	2. It is in a *transitory* form.
3. In England, libel is a *tort* as well as a *crime.*	3. In England, slander is a *tort,* but *not* a crime.
4. Libel is *actionable per se* (i.e. without proof of actual damage).	4. Slander is *not actionable per se, except in five cases* (above).
5. Libel raises a *suggestion of malice.*	5. Slander may be uttered in the *heat of the moment.*
6. The publisher of a libel may *not* be *liable.*	6. The publisher of a slander is *always liable.*
7. In England, a suit for libel gets time-barred after *6 years.*	7. In England, a suit for slander gets time-barred after *2 years.*

Defences

The *three defences* available to a defendant in an action for defamation are :

1. Justification or truth.
2. Fair and bona fide comment.
3. Privilege, — which is of two types :

A. Absolute : (a) Parliamentary proceedings
(b) Judicial proceedings
(c) Military and naval proceedings
(d) State proceedings.

B. Qualified : (a) Statement made in performance of duty
(b) Statement made in protection of common interest
(c) Fair and accurate reports.

Absolute and qualified privilege distinguished

Absolute privilege	Qualified privilege
1. Absolute privilege is *not* affected by express malice.	1. Qualified privilege can be rebutted by proof of express malice.
2. In absolute privilege, once the occasion is shown to be privileged, every communication is protected.	2. In qualified privilege, the interest or duty must be shown to exist in making the communication.
3. In absolute privilege, the person is exempt from inquiry.	3. In qualified privilege, the person is *not* altogether exempt from inquiry.
4. Absolute privilege is protected in all cases, independently of good or bad faith.	4. Qualified privilege is rebuttable by proof of express malice.

Aggravating and mitigating circumstances

Circumstances which are considered aggravating, i.e., where damages will be greater, are :

— Malice
— Gross recklessness
— Violence of language
— Neglect to retract or apologise, etc.

The following circumstances *mitigate* the damages :

— Absence of malice or gross negligence
— Innocent repetition of a libel
— Provocation by the plaintiff himself
— Apology by the defendant, etc.

TORTS TO MARITAL RIGHTS

Torts to marital rights are :

1. Abduction (or taking away a man's wife)
2. Adultery
3. Causing physical injuries to a man's wife.

TORTS TO A PARENTAL RIGHTS

In the case of *female servants,* the employer can sue for seduction, i.e. the debauching of the servant. In the case of *female children,* such a right rests with the father or the guardian.

To support an action for seduction of a child or servant, the plaintiff must show :

(a) Proof of actual service of some kind (however slight) at the date of seduction.

(b) That the child (or servant) was rendered ill and incapable of rendering service in consequence of the seduction.

TORTS TO A MASTER'S RIGHTS

At common law, a master cause sue any person who deprives him of the services of his servant by —

(i) injuring or imprisoning the servant; *or*

(ii) inducing the servant to leave the master's service wrongfully.

In order to sue for seduction of a female servant, it must be proved —

(a) that contractual service of some kind was rendered by the servant at the time of the seduction :

(b) that the servant was incapacitated from rendering such service in consequence of the seduction; *and*

(c) that the plaintiff suffered special damage by reason of the injury inflicted on the servant.

WRONGS AFFECTING STATUS

Wrongs affecting status are of *four types* :

1. Expulsion from membership of a club or association.
2. Expulsion from caste.
3. Invasion of right to an exclusive office or title.
4. Exclusion from worship.

TORTS RELATING TO IMMOVABLE PROPERTY

Trespass

Trespass to land is an unwarranted entry upon the land of another, or any direct and immediate act of interference with the possession of such land.

Trespass is *actionable per se,* i.e. without proof of actual damage.

It is a *continuing wrong,* which gives rise to actions *de die in diem,* i.e. from day to day.

Trespass to land can be committed in any of the following *three* ways :

(a) Trespass by wrongful entry.

(b) Trespass by remaining on the land (after lawful entry).

(c) Trespass by placing things on another's land.

To succeed in an action for trespass, the plaintiff must prove :

(a) that he was in actual and effective possession of the land at the time of the trespass; *and*

(b) that there was a direct interference with the possession of his land.

In the case of a trespass, the following *three remedies* are available to the plaintiff :

1. He can sue the wrong-doer.
2. He can forcibly defend his possession, or forcibly eject the trespasser.

The following *nine defences* are available to a defendant who is sued for trespass :

1. Prescription
2. Leave and licence
3. Authority of law, as for instance, —

(a) Execution of legal process
(b) Distress
(c) *Distress damage feasant*

4. Act of public authority
5. Self-defence
6. Re-entry on land
7. Re-taking of goods or chattels (re-caption)
8. Abatement of nuisance
9. Special property or easement.

Trespass *ab initio*

When a person enters the land of another under an authority of law, but is *subsequently guilty of an abuse of such authority* by an act of malfeasance, he is liable in damages for trespass *ab initio.* In such cases, the authority is not only terminated, but is treated by law as if it never existed.

The following *two conditions* must be satisfied in order to sue for this tort :

1. The authority which is abused must be given by the law, *not* by an individual.
2. The subsequent abuse of authority must be by a positive act of misfeasance, and *not* by mere omission or non-feasance.

Dispossession

Dispossession (or ouster) is wrongfully taking possession of land from its rightful owner.

In such cases, the injured person can bring a suit of ejectment to recover possession of his land.

The defence available to the defendant in such cases are :

(a) That the defendant has a better title than the plaintiff.
(b) That the defendant acquired a good title by prescription, i.e. by holding the property for 12 years or more.

Waste

When a person who is entitled to remain in possession of property does unlawful damage to it, to the detriment of the reversionary interest of the owner, he is said to commit waste.

Waste can be of *two types* :

(a) Voluntary waste.
(b) Permissive waste.

Damage to natural rights and easements

A person has the right, not only to remain in possession of his immovable property, but also to *enjoy* such property, which rights may be classified as follows :

1. Right to support
2. Right to water
3. Right to free access of light
4. Right to air
5. Right of way
6. Right of privacy
7. Right of prospect
8. Right of common
9. Profits a prendre

NUISANCE

Definition

Nuisance is anything done to the hurt or annoyance of the lands, tenements or hereditament of another person, and *not* amounting to trespass. It is of *two kinds : public* nuisance and *private* nuisance.

Public nuisance

Public nuisance is an act or omission which causes any common injury or annoyance to the public.

In England, the Attorney General, and *in India*, the Advocate General in a Presidency town (and the Collector, outside such towns) can sue in respect of a public nuisance.

A private individual can also sue for a public nuisance, provided the following *three conditions* are fulfilled :

1. The plaintiff must prove that he has suffered a particular injury himself, beyond that suffered by rest of the public.
2. Such injury must be direct, and not merely consequential.
3. Such injury must be of a substantial nature; it must *not* be fleeting or evanescent.

Private nuisance

A *private nuisance* is an unauthorised use of a man's own property, causing damage to the property of another, but *not* amounting to trespass. Such nuisance falls under *two broad heads* :

(a) those causing damage to property; and

(b) those causing physical discomfort.

Remedies

The following *three remedies* are available in case of a nuisance :

1. Abatement of the nuisance
2. Damages
3. Injunction

Public and private nuisance distinguished

Public nuisance	Private nuisance
1. It affects the *public at large.*	1. It affects an *individual.*
2. An *individual cannot* generally sue in his own name (except if the three conditions (above) are satisfied.	2. An *individual can* sue for a private nuisance.
3. *No length of time* can legitimize a public nuisance.	3. A right to create a private nuisance may be acquired *by prescription.*
4. A public nuisance *cannot be abated* by the injured person.	4. The *injured person can abate* a private nuisance.
5. The normal remedy for a public nuisance is a *suit for declaration and injunction.*	5. The normal remedy for a private nuisance is a *suit for damages.*

Defences

The *three defences* available in a suit for nuisance are :

1. Grant
2. Prescription
3. Statutory authority.

TORTS RELATING TO MOVABLE PROPERTY

Trespass to goods

Trespass to goods consists of the actual taking of, or direct and immediate damage to, the goods of another person.

The tort assumes one of the following *two forms* :

1. Taking a thing away from the plaintiff's possession (asportation).
2. Direct application of force.

To succeed in an action for trespass to goods, the plaintiff must prove :

(a) that he was in possession, actual or constructive, of the goods; *and*

(b) that his possession was wrongfully disturbed.

In England, the forms of action for recovering goods are :

1. Replevin
2. Trover
3. Detinue

The following *six defences* are available in an action for trespass to goods :

1. Self-defence (or defence of property)
2. Exercise of one's own rights
3. Obedience to a legal authority
4. Negligent or wrongful act of the plaintiff himself
5. Re-caption
6. *Jus tertii.*

Trespass *ab initio*

When a person lawfully takes a chattel, but subsequently abuses or wastes it, he becomes a trespasser *ab initio.*

In such an action, the plaintiff must show :

(a) that he was in possession of the goods; *and*

(b) that his possession was wrongfully disturbed by the defendant.

Detention (Detinue)

Detention (or detinue) is the adverse withholding of the goods of another person.

Conversion (Trover)

The tort of conversion (or trover) consists of the wrongful taking or using or destroying goods, or exercising dominion over them, inconsistent with the title of the owner.

The tort of conversion is committed :

1. when the property is wrongfully *taken.*
2. when the property is wrongfully *parted with.*
3. when the property is wrongfully *sold.*
4. when the property is wrongfully *detained.*
5. when the property is wrongfully *destroyed.*
6. when there is *denial of the lawful owner's right.*

The following *three remedies* are available to a person whose goods are wrongfully converted :

(a) Recaption
(b) Obtaining an order for restoration of property.
(c) Suit for damages.

The following *five defences* are open to a defendant in a suit for conversion :

1. Lien
2. Right of stoppage in transit
3. Denial of the plaintiff's right to property
4. Sale in market overt
5. Distress.

NEGLIGENCE

Negligence is the breach of a duty, caused by the omission to do something which a reasonable man *would do,* — or doing something which a prudent and reasonable man *would not do.*

The standard by which one can determine whether a person is guilty of negligence is the conduct of a prudent man in the particular situation.

In a suit for negligence, the plaintiff must prove the following *five* things :

1. That the defendant was under a legal duty to exercise due care and skill.
2. That such duty was towards the plaintiff.
3. That the defendant failed to perform that duty.
4. That the breach of duty was the direct and proximate cause (*causa causans*) of the damage complained of.
5. That the damage was caused on account of this breach of legal duty.

Res ipsa loquitur

The *general rule* that the plaintiff must affirmatively prove the defendant's negligence is relaxed in cases where the plaintiff can prove the accident, but *cannot* show how it happened, as that is solely within the defendant's knowledge. In such cases, it is enough if the plaintiff proves only the accident (and nothing more), as there would be a presumption of negligence under the maxim, *"Res ipsa loquitur"*, i.e., *the thing speaks for itself.*

Defences

The following *three defences* are open to a defendant when he is sued for negligence :

1. Vis major

Vis major is an act of God. It is a sudden, direct, violent and irresistible act of nature, which could *not* be foreseen, or even if foreseen, could *not* be prevented, e.g. storm, tempest, etc.

2. Inevitable accident

An inevitable accident, i.e. an accident which could *not* be prevented by the defendant, is also a good defence in cases of negligence.

3. Contributory negligence of the plaintiff

Contributory negligence is negligence of the plaintiff is *not* avoiding the consequence arising from the defendant's negligence, when means and opportunity were there to do so.

The *three principles* of contributory negligence are :

(a) If the immediate and proximate cause of the damage is the negligence of the plaintiff himself, and but for such negligence, the damage would not have been suffered, the plaintiff will *not* succeed.

(b) The plaintiff *cannot* succeed if it was last in his power to avert the disaster, and he failed to do so.

(c) If there is as much want of reasonable care on the part of the plaintiff, as on the part of the defendant, the plaintiff will *not* succeed.

Contributory negligence is, however, *not* a good defence in the following cases :

1. Where rightful acts are assumed.
2. Where the defendant had a later opportunity of avoiding the accident.
3. Under the doctrine of alternative danger.
4. Under maritime law.
5. When the contributory negligence is that of a child.

In England, the Law Reform (Contributory Negligence) Act, 1945, provides that if the plaintiff suffers injury partly due to his own fault, and partly due to the fault of the defendant, he is *not* totally disentitled from recovering damages (as was the position at common law), but *the damages to be recovered would be reduced* to such extent as the court thinks just and equitable.

MALICIOUS ABUSE OF LEGAL PROCESS

Malicious criminal prosecution

Malicious criminal prosecution involves the institution against an innocent person, of unsuccessful criminal or bankruptcy proceedings, without reasonable and probable cause, and in a malicious spirit.

To succeed in an action for this tort, the plaintiff has to prove :

1. That he was prosecuted by the defendant on a criminal charge or in bankruptcy proceedings.
2. That such proceedings terminated in favour of the plaintiff.
3. That, in so prosecuting, the defendant acted without reasonable and probable cause.
4. That such prosecution was instituted with a malicious intent.
5. That the plaintiff suffered damage as a result of such proceedings.

Malicious civil proceedings

Normally, no damages can be recovered for malicious civil proceedings, *except* in the following *three cases* :

(a) When *bankruptcy* proceedings are commenced against a person, and ultimately, such proceedings are dismissed.

(b) When *lunacy* proceedings are instituted against a person maliciously and without reasonable cause.

(c) When an application is made for *winding up* a company maliciously and without reasonable cause.

Malicious arrest

To succeed in recovering damages for malicious arrest, the plaintiff must prove :

1. That in the original action (i.e. the one in which the injury arose) was decided in his favour.
2. That the arrest was procured maliciously and without reasonable and probable cause.
3. That the damage or injury sustained was something other than an injury that has been compensated for by an award of the costs of the suit.

Maintenance and champerty

Maintenance is the officious intermeddling in an action (i.e. a suit) by supporting it with money, or otherwise, by a person who is not a party to the suit, and who has no interest in such suit. When such a person further bargains for a share of the result of the suit, it is called champerty.

The *English law* of champerty and maintenance is not followed *in India*. Such agreements are hit only if they are shown to be against public policy.

TORTS OF INJURIOUS FALSEHOOD

Fraud (or deceit)

Fraud is the false representation of a fact, made with the knowledge of its falsehood, *or* without belief in its truth, *or* a reckless statement, whether it is true or false, with intent to induce a person to act in reliance upon it, with the result that the person acts on it, and suffers damage.

In order to succeed in an action for fraud or deceit, the plaintiff must prove :

1. That a false representation was made by the defendant
2. That the defendant either knew that it was false, *or* made it without belief in its truth, *or* made it recklessly. (So, if the defendant honestly believed in truth of that (false) statement, the plaintiff will not succeed.)
3. That the plaintiff acted upon it.
4. That the plaintiff suffered damage in consequence of acting upon it.

Slander of title

Slander of title is a false, malicious statement injurious to any person's title to property, and causing special damage to such a person.

To succeed in a suit for this tort, the plaintiff must prove :

(a) That the statement was false.

(b) That the statement was published.

(c) That the statement was made *mala fide* and maliciously.

(d) That the statement had the effect of defeating his title to property.

(e) That special damage was suffered by him on account of such statement.

Slander of goods (Trade libel)

Slander of goods involves a false statement, disparaging a man's goods, published maliciously, and causing him special damage.

To maintain a suit for this tort, the plaintiff must prove :

1. That the defendant disparaged the plaintiff's goods.
2. That such disparagement was false.
3. That there was publication of such disparagement.
4. That the disparagement was made maliciously.
5. That special damage resulted thereby.

Passing off

Passing off consists of a false representation tending to deceive purchasers to believe that the goods which the defendant is selling are really made by the plaintiff.

The plaintiff's remedy in such cases is to ask for an *injunction*. Additionally, he can claim either damages or the amount of profits made by the defendant on such goods.

This tort can be committed in respect of the plaintiff's —

(a) trade-mark, *or*

(b) trade-name, *or*

(c) patent right, *or*

(d) copyright.

WRONGS OF ABSOLUTE LIABILITY

In cases of wrongs of absolute liability, a person can become liable *without proof of any negligence* on his part. The wrong arises, in such cases, from the breach of an *absolute duty*, i.e. a duty which renders a person liable without any fault on his part, and irrespective of any intention or negligence on his part.

Escape of dangerous things

Everyone must so use his own property, so as not to do damage to another. *Sic utere tuo at alienum non laedas.*

For any *natural use* of his own property, its owner is *not liable, unless* he is negligent. But for any *non-natural use*, he becomes *liable,* even if he is not negligent. This is known as the *Rule in Rylands* v. *Fletcher*, which rules applies in India also.

However, there are *five exceptions* to this rule, as follows :

1. *Vis major* or act of God.
2. Wrongful or malicious act of a stranger.
3. Plaintiff's own fault.
4. Common benefit.
5. Statutory authority.

Escape of animals

In case of a dangerous and savage animal (*animal feroe naturoe*), he who keeps such an animal is bound to keep it under control, and if the animal escapes and hurts any person, the owner is liable in damages.

As regards animals which are not of dangerous character (*animals monsuetoe naturoe*), the owner is liable for their trespass and consequent damage, but *not* for other injuries, unless the plaintiff proves that the owner had knowledge of the dangerous propensity of the animal.

Use of things which are naturally dangerous

A person is not liable for damage caused by *domestic fire*, provided it originated by accident and without negligence.

But a person who lights *fire for non-domestic purposes* does so at his peril, and is liable for the damage caused by it.

Loaded fire-arms are very dangerous things, and a person dealing with the same is answerable for the damage caused by such arms, even if he had taken apparently sufficient precautions.

Likewise, persons are bound to use the greatest care in the use of *fire-works* and other explosive materials.

So also, persons dealing with *poisonous drugs* are bound to use more than ordinary care, to prevent any injury to the public.

Similarly, all persons dealing with *gas* must use the greatest amount of care, as it is an explosive and poisonous substance.

Persons who employ *machinery* must also provide reasonable safe machines, and take proper and necessary precautions.

Dangerous premises

A person who enters the premises as of right, e.g. a court bailiff, is entitled to have the premises made safe for him, and not merely to be warned of the danger.

When a person enters the premises on an *express or implied invitation,* the occupier of the premises must warn such a person of the dangers known to him.

Generally, there is no duty of care towards a *trespasser,* as he enters wrongfully, and does so at his own risk. The occupier will be liable only if he inflicts any willful or deliberate harm on the trespasser. Even if the trespassers are children, the occupier's liability is only not to injure them intentionally, or put dangerous traps for them.

As far as a *licensee* is concerned, the occupier —

(a) must caution him against any known danger; *and*

(b) must *not* alter the character of the place, by placing any dangerous obstruction.

As regards a *passer-by,* i.e. a person who lawfully passes by the premises, the occupier must take reasonable care to guard against any injury to him.

The liability of an occupier is now codified in the *Occupier's Liability Act, 1957.*

Persons possessing skill

Directors of companies are required to show more than ordinary care and diligence towards the shareholders of the company.

An *inn-keeper* is bound to guard the goods of his guests with reasonable and proper diligence, but he does not insure the personal safety of his guests.

Solicitors are supposed to be skilled and knowledgeable, and a great degree of care is expected of them.

Bankers can become liable for paying forged cheques of their customers. But, if the forgery is due to the customer's neglect, the bank will *not* be liable.

A *common carrier* must carry the goods entrusted to him with utmost care. He will be answerable for all loss or damage, except if caused by an act of God, by the King's enemies or by any defect which is inherent in the goods carried by him.

A *doctor* must exercise such care and skill as is becoming of one who belongs to this learned profession.

A *manufacturer of a food item* is under a legal duty to the ultimate purchaser to take reasonable care to ensure that the article is free from any defects likely to injure the consumer.

Defences

The following defences are available in an action for a wrong of absolute liability :

1. Plaintiff's contributory negligence
2. Plaintiff, a trespasser
3. Plaintiff undertook risk
4. Act of a third party
5. Act of God.

TORTS AFFECTING CONTRACTUAL AND BUSINESS RELATIONS

Procuring a breach of contract

It is a tort to induce a person to commit a breach of contract which the latter has entered into with another person.

To succeed in a suit for this tort, the plaintiff must prove :

(a) that there was a valid and subsisting contract between himself and a third party; *and*

(b) that the defendant procured a breach of that contract knowingly and unjustifiably.

Since damage is presumed to arise in such cases, there is *no need to prove special damage.*

Conspiracy

When two or more persons, without lawful justification, combine for the purpose of wilfully causing damage to the plaintiff, and actual damage results therefrom, the tort of conspiracy is said to be committed.

This tort has the following *four ingredients* :

1. There must be a combination of two or more persons.
2. It must be without lawful justification.
3. It must be for the purpose of wilfully causing damage to the plaintiff.
4. Actual damage must be shown.

TORTS FOUNDED ON CONTRACT

A tort can arise out of contract in *two ways* :

(a) If a person who is under a contractual duty to do a particular act does that act negligently, thereby causing damage to the other party, the injured party can sue in tort.

(b) If a party to a contract commits a fraud in performing his duty under a contract, and the other party suffers damage, the latter can sue in tort.

When the same set of facts show a breach of contract as well as a tort, the injured party has a choice to sue in *tort or* in *contract.*

However, in the following *three cases,* there is a concurrent cause of action :

1. Cases where it is doubtful whether a contract has come into existence, although a tort has certainly been committed.
2. Cases where a person (*A*) can sue another (*B*) in tort, though the same facts can give a cause of action against another person (*C*) in contract.
3. Cases where *A* can sue *B* for a tort, though the act of *B* may be a breach of contract between *B* and *C*.

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